WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**3694/20**
Applicant:	**Kevin William Schneider**
Respondent:	**Central Coast Council**
Date of Determination:	**16 September 2020**
Citation:	**[2020] NSWWCC 328**

The Commission finds:

1. The applicant has suffered a consequential condition to his lumbar spine as a result of the subject injury of 1 November 2006.

2. The necessity for surgery results from the subject injury.

The Commission declares:

3. The respondent will pay for the cost of and incidental to the proposed instrumented fusion from L4 – S1 as described and recommended by A/Prof Papantoniou on 14 February 2020.

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

John Wynyard
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 JOHN WYNYARD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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

STATEMENT OF REASONS

BACKGROUND

1. Kevin William Schneider, the applicant, brings an action against Central Coast Council, the respondent for a declaration that the proposed surgery was reasonably necessary.

2. Dispute notices were issued and the Application to Resolve a Dispute and Reply were duly lodged.

ISSUES FOR DETERMINATION

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

    (a) was the proposed treatment appropriate;
    (b) was the appropriate treatment effective;
    (c) was the cost of the treatment appropriate, and
    (d) was the proposed treatment one that was accepted by medical practitioners.

PROCEDURE BEFORE THE COMMISSION

4. This matter was heard by telephone conciliation/arbitration on 12 August 2020. The applicant was represented by Mr Ty Hickey of counsel instructed by Ms Barbara Ventriglia from Law Partners. The respondent was represented by Mr Stephen Hickey of counsel instructed by Ms Sharni Monaghan of Greylings Lawyers. Ms Sammy Cartwright also appeared on behalf of the self-insurer. 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

Documentary Evidence

5. The following documents were in evidence before the Commission and taken into account in making this determination:

    (a) Application to Resolve a Dispute and attached documents,
    (b) Reply and attached documents.

Oral Evidence

6. No application was made in relation to oral evidence.

FINDINGS AND REASONS

7. Pursuant to regulation 44 of the Workers Compensation Regulation 2016, Mr Stephen Hickey said that he was not relying on the reports of Dr Sage, Dr Spitaler, or A/Prof Myers, but preferred to rely on the evidence of Dr Anthony Smith.

8. Mr Stephen Hickey submitted, as can be seen from the issues outlined above, that he was relying on the definition of reasonably necessary as defined by DP Roche in *Diab v NRMA Ltd*[1].

[1] [2014] NSWWCCPD 72 (*Diab*)

9. The proposed surgery is an L4/S1 laminectomy decompression instrumental fusion recommended by A/Prof Peter Papantoniou.

10. This is the second application for a declaration pursuant to s 60(5) of the *Workers Compensation Act 1987*. The first application was between the applicant and Wyong Shire Council, which is now the respondent, Central Coast Council.

11. The matter came before Arbitrator Jane Peacock who delivered a determination on 3 May 2018[2]. The learned Arbitrator's determination included a s 60(5) application.

12. The Commission determined, relevantly:

> "1. Award for the applicant pursuant to section 60 of the *Workers Compensation Act 1987* in respect of proposed surgery in the form of L4/5 and L5/S1 Nucleoplasty.

13. This followed the recommendation of A/Prof Papantoniou's of 14 May 2015[3]. At that time A/Prof Papantoniou advised:

> "I have recommended Mr Schneider have a nucleoplasty at L4/5 and at L5/S1. I would space these on two separate occasions about two months apart so that we can determine which of the two levels was the source of most of his pain. If the two procedures were successful, then Mr Schneider could look forward to, based on the international literature, around two years or more of decreased pain before further intervention would be required. The ultimate treatment that Mr Schneider will require is an L4-S1 instrumented fusion. Given his young age, the longer we can put this off the better."

14. Mr Schneider was born in 1978.

15. Mr Schneider first was referred to A/Prof Papantoniou on 25 November 2014. A/Prof Papantoniou recorded the following history, which is not in dispute:[4]

> "Mr Schneider is a 36-year-gentleman who works for Wyong Council as a labourer. He fractured his right ankle at work in 2006. He has had three operations on the ankle and he has re-injured it again. As a result of this, he has been advised not to walk on any uneven surfaces or any soft terrain. He therefore is on restrictions at work. The last ankle operation was from with Dr Limbers in 2009. This unfortunately has left him in chronic pain and he has seen Dr Marc Russo, which was of no benefit. In addition to the ankle, he presents with lower back pain and right sided sciatica. The lower back pain started after his ankle injuries and the chronic limp that he developed as a result of this. He had no back pain prior to this doing his normal duties without any issues. He continues to have a central and right-sided lower back pain, which radiates into the right buttock and right posterior thigh to just below the knee. The pain is present day and night and causes him sleep disturbance every night. If he sits in one spot of stands for 10 or 15 minutes, he gets pain. His pain is mostly central and bilateral lower back pain. He gets buttock pain and sciatica if he stands for long periods or if overexerts himself."

16. It is convenient to set out the various opinions given by A/Prof Papantoniou between 25 November 2014 and 16 August 2018, following Arbitrator Peacock's award.

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[2] Reply page 163
[3] ARD page 765
[4] ARD page 756

17. On 25 November 2014, A/Prof Papantoniou's findings on examination were:[5]

> "On examination today, Mr Schneider was tender in the bilateral L4/5 paraspinal muscle region. He could forward flexion with his fingertips to the proximal thigh with associated lower back pain.
>
> Lateral tilts were both very stiff and produced the lower back pain. Neurological examination of his lower limbs revealed decreased sensation in the right S1 and L5 distributions. His power was normal apart from his right ankle due to the ankle surgery. His reflexes were normal and he could straight leg raise to 50° on the right and 65° on the left. He had bilateral positive sciatic nerve stretch test."

18. At that stage, no investigations had been taken.

19. A/Prof Papantoniou adopted the practice of having the patient fill out a "back pain chart" in which the patient completed a five page questionnaire. Three such charts were located in the clinical notes and were dated 25 November 2014, 13 May 2015 and 16 August 2018.[6] A further chart also appeared but it was dated "18 – 8.78" (Mr Schneider's birthday) and its place in the chronology was difficult to ascertain.[7]

20. On 30 December 2014, A/Prof Papantoniou viewed MRI and CT scans of Mr Schneider's lumbar spine. He said:[8]

> "Mr Schneider presents with an MRI and CT scan of his lumbar spine. He demonstrates desiccated L4/5, L5/S1, and L2/3 discs. He has MODIC changes in the anterior and inferior L4 endplate."

21. The scans were lodged in the clinical notes of A/Prof Papantoniou. The radiologist was Dr Gordon Melville who reported on 4 December 2014:[9]

22. Dr Melville's conclusion regarding the CT scan was:

> "Right-sided lateral disco vertebral bar appearing to involve the right L3 nerve."

23. As regards the MRI scan, Dr Melville concluded:

> "Right-sided lateral disco vertebral bar noted appearing to involve the right L3 nerve. Desiccation of the L4/L5 and L5/S1 discs is noted but no large compressive disc herniation seen at these levels."

24. The next examination occurred on 1 June 2016, when Mr Schneider was re-referred after over a year had passed. In the meantime Mr Schneider had undergone a CT guided epidural steroid injection on 11 February 2015.

25. A/Prof Papantoniou's findings on examination on this occasion were:[10]

> "… He presents with ongoing lower back pain mostly around the L4/5 level with radiation bilaterally and into the buttock. He has pain with every step he takes and I know he is still walking with a chronic limp related to the right ankle surgery… He apparently has a case that has been scheduled to go to the Workers' Compensation Commission."

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[5] ARD pages 756 – 757
[6] ARD pages 794, 807 and 855 respectively
[7] ARD page 783
[8] ARD page 758
[9] ARD page 815
[10] ARD page 767

26. In his opinion, A/Prof Papantoniou said:

> "In terms of his lower back, he does have pathology at L2/3, L4/5, and L5 – S1, but I feel most of his pain is related to the L4/5 disc level. At this level, he has desiccation and more importantly an annual tear…..
> The imaging findings would be in keeping with pathology associated with his original ankle injury and ongoing chronic limp."

27. A/Prof Papantoniou relied on his notes of the 2014 CT and MRI scans. He did not make any follow-up appointment to see Mr Schneider, saying that should Mr Schneider have any problems, queries, or concerns, he should contact his rooms.

28. A/Prof Papantoniou did not see the applicant again until August 2018.

29. On 16 August 2018, A/Prof Papantoniou wrote to Mr Schneider's GP. He said[11]:

> "**History**
> Mr Schneider has had his lower back approved as part of his workers compensation claim. I note he has had three right ankle operations, which aggravated his lower back pain.
>
> Mr Schneider continues to complain of a central, bilateral lower back pain with radiation to the top of his pelvis. He has pain in the bilateral buttocks and posterior thighs."

30. Findings on examination were as follows:[12]

> "Examination of Mr Schneider's lumbar spine revealed tenderness in the bilateral paraspinal muscle region. He was able to forward flex with his fingertips to the patella with associated lower back pain and a right-sided sciatica. Lateral tilts were both stiff and reproduced the lower back pain. Neurological examination of his lower limbs revealed decreased sensation in the right L5 distribution. His power was normal as reflexes were normal and he could straight leg raise to 30° on the right and 90° on the left. He had a positive right-sided sciatic nerve stretch test."

31. A/Prof Papantoniou thought that Mr Schneider's pain was coming from the L4/5 and L5/S1 discs and ordered a new CT and MRI scan.

32. Mr Schneider completed a "back pain chart" at the same time.[13]

33. On 11 October 2018, A/Prof Papantoniou described the fresh investigations as follows:[14]

> "…. This demonstrates L4/5 disc desiccation, Modic changes, loss of height, a Post area disc bulge and an annular tear. At L5/S1 he has a loss of disc height, a Post area disc prolapse, disc desiccation, Modic changes and an annular tear."

[11] ARD page 769
[12] ARD page 769
[13] ARD page 855
[14] ARD page 771

34. He advised that an L4 – S1 instrumented fusion was the most appropriate form of treatment and was to write to the insurer seeking approval. He said[15]:

> "**Opinion**
> Mr Schneider has been so long since his injury that his L4/5 and L5/S1 disc have progressed to the point where I believe in L4-S1 instrumented fusion is the most appropriate form of treatment."

35. The radiologist was Dr Alexander Mitoff (my apologies if the name is not spelt correctly – the reports were poorly reproduced). Dr Mitoff reported to A/Prof Papantoniou on 24 August 2018. With regard to the CT scan, he said:[16]

> "L3 to L5: The intervertebral disc heights are preserved. No vertebral canal or neural exit foraminal narrowing. Mild bilateral facet joint degenerative change.
>
> L5/S1: There is moderate narrowing of the left neural exit foramen, with minimal flattening of the exiting left L5 nerve root. There is mild narrowing of the right foramen. There is a shallow generalised disc bulge only slightly narrowing the canal without compression of the traversing nerve roots. Unremarkable facet joints."

36. Dr Mitoff's impression was that there was "a moderate narrowing of the left L5/S1 neural exit foramen with enfacement of the flattening around the nerve root and slight flattening of the nerve root. His may or may not be a symptomatic lesion and clinical correlation for possible left L5 radiculopathy is advised".

37. As to the findings on the MRI scan, Dr Mitoff found relevantly[17]:

> "Normal spinal alignment……There is a 5mm long fissure in the mid posterior disc annulus at L4/5 with mild reduction in disc height and desiccation here. There is also a mild reduction of disc height at L2/3 and L5/S1 with minimal disc annular bulging, not causing any significant vertebral canal or neural exit foramenal narrowing. No evidence of nerve root impingement. Normal contour of the cauda equina.
>
> There is mild facet joint degenerative change in L4/5 and L5/S1. The remainder of the facet joints appear grossly unremarkable".

38. Dr Mitoff had taken a clinical history of LBP (low back pain) and left sciatica. His impression was:

> "**Impression**
>
> 1. The cause for the patient's left-sided sciatica is not determined on this study. No evidence of nerve root compression.
>
> 2 Intervertebral disc degeneration change at L2/3 and L4 to S1, with a small disc annular fissure at L4/5 level."

39. A/Prof Papantoniou again reported to Mr Schneider's GP on 14 February 2019. He said:[18]

> " …… Mr Schneider remains keen to proceed to the surgery so now he has the Workers Compensation Commission determination I will re-request the spinal fusion."

[15] ARD page 771
[16] ARD page 845
[17] ARD page 846
[18] ARD page 773

40. A/Prof Papantoniou repeated that Mr Schneider was very keen to proceed to surgery, and said that pre—operative blood tests and ECG investigations would be arranged.

41. A/Prof Papantoniou wrote a further report on 25 May 2020. He referred to his request for nucleoplasties in 2015. He said:[19]

> "In the intervening five years there is no doubt that Mr Schneider's pathology will have progressed."

42. He confirmed that he thought an instrumented fusion would eventually be necessary back in 2015. He noted that the Commission had found the respondent had been found liable for the back injury and stressed that the pathology identified by the earlier investigations would have justified the proposed surgery in any event. The 2018 investigations, which I have reproduced above, were set out again and were said to show pathology consistent with Mr Schneider's clinical symptoms.

43. A/Prof Papantoniou said that the prognosis was guarded, considering that Mr Schneider's original injury occurred in 2006, and he had been seeing him since 2014. Mr Schneider would probably not be completely pain free after surgery, but his functional capacity would be improved, and his pain would decrease.

44. In his statement of 14 October 2019, Mr Schneider said[20]:

> "2. After the Workers Compensation Commission made a determination with respect to my back, I consulted with my treating specialist Dr Papantoniou. It is my understanding that he wished to proceed with the nucleoplasty proceed which had previously been recommended and subject to a determination by the Workers Compensation Commission.
>
> 3. I consulted with Dr Papantoniou on 14 February 2019 he was concerned by what he felt was a continuing deterioration in my lumbar spine. He appears to have been working from a misunderstanding that the Commission had ordered a fusion surgery. In fact this was not the case, although it was something that he had been discussing with me in our more recent consultations. Dr Papantoniou suggested that the condition of my back had progressed beyond being treated by a nuclearplasty and that a fusion was not the appropriate procedure. We discussed in some detail what the procedure would involve and I had a series of questions about the risks and complications associated with this type of surgery.
>
> 4. Dr Papantoniou had me complete a pain chart which highlighted a range of ways the injury has impacted my life. We discussed the risks involved and I ultimately formed the view that I do wish to proceed with this surgery.
>
> 5. I am mindful of the risks involved however given my extremely poor quality of life I would be far better served to proceed with this surgery with a view to improving my function and quality of life"

45. Mr Schneider retained the services of Professor Y.A.E. Ghabrial, Orthopaedic Surgeon, as his medico-legal referee. On 29 June 2017, Dr Ghabrial took a consistent history and noted that investigations were carried out on 4 December 2014, and on 19 June 2017. The latter being described as suggesting an "L4/5 annular tear with internal disc disruption at the L5/S1 segment."[21]

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[19] ARD page 99
[20] ARD page 1
[21] ARD page 131

46. Dr Ghabrial noted that an L4/5 CT guided epidural injection had been unsuccessfully tried, and said:

> "It has been suggested to consider excision of both discs and instrumented fusion."

47. Dr Ghabrial thought that surgery should be considered because of the lack of improvement with conservative management, and the continuing deterioration of Mr Schneider's problem.

48. Although Dr Ghabrial thought that surgery in the form of fusion had been suggested, at the same time the matter was proceeding within the Workers Compensation Commission for approval of the nucleoplasty recommended by A/Prof Papantoniou. Dr Ghabrial made no comment on this recommendation.

49. The applicant also relied on reports from A/Prof Nigel Hope dated 8 November 2017 and 13 September 2019. On 8 November 2017, A/Prof Hope took a consistent history and had available the MRI scan of 19 June 2017. Mr Schneider's complaints consisted of "severe constant low lumbar pain and… Severe lumbar stiffness…"[22] A/Prof Hope agreed that there was a need for a "neuroplasty at L4/5 and L5/S1" as suggested by the retaining solicitors.

50. On 13 September 2019 A/Prof Hope noted the recommendation by A/Prof Papantoniou for an L4/5/S1 decompression and fusion. He also had available the imaging scans of 24 August 2018. He said:[23]

> "…. The previous L4/5/S1 discopathy has now progressed over the past several years to 4/5/S1 disc degeneration. This now requires decompression and fusion."

51. As indicated, the respondent relied only on the reports of Dr Anthony Smith, Orthopaedic Surgeon. Dr Smith supplied a number of reports between 2014 and 2020.

52. On 30 April 2019, Dr Smith said:[24]

> "I wrote a supplementary letter on 23 April 2015, another on 11 May 2015 and another on 22 June 2015. I refer to those letters.
>
> Since I last saw him his low back has become more of a problem and he has been referred to Dr Papantoniou. There was a letter in the correspondence from this doctor to his GP,Dr Fennanis, dated 13 May 2015, suggesting that he have nucleoplastys at L4-5 and L5-Sl and in the event that fails, the treatment option of instrumented lumbar fusion from L4 to S 1 was suggested as a possible outcome.
>
> His low back pain is now a great deal worse than the right ankle pain. There is pain in the low back, in the right buttock and down the lateral right leg to the back of the knee. The back pain is worse than the leg pain."

53. Dr Smith's opinion is no longer relevant, as Arbitrator Peacock found the respondent liable.

54. Dr Smith provided a further report on 12 June 2020.[25] In answer to a query from his retaining solicitors he explained that the 2018 imaging demonstrated the likely presence of Scheuermann's disease with degenerative changes superimposed on that. Facet joint arthritis was at every level of the lumbosacral spine, and Mr Schneider suffered bilateral and knee osteoarthritis as part of the normal ageing process.

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[22] ARD page 92
[23] ARD page 97
[24] Reply page 34
[25] Reply page 38

55. In an earlier report of 23 April 2015, Dr Smith said:[26]

> "Radiology reports of CAT scans and MRI scans are opinions, are not necessarily complete descriptions of all that can be seen in these investigations so there is not a great dissimilarity between experts discussing one red wine over another."

Submissions

56. Mr Stephen Hickey referred to A/Prof Papantoniou's report of 25 February 2020. He submitted that although A/Prof Papantoniou said that over the five years since the nucleoplasty had been recommended Mr Schneider's condition would have progressed, the objective facts demonstrated that there had been no significant deterioration since 2015 when Arbitrator Peacock declared that the proposed nucleoplasty was reasonably necessary.

57. On 14 May 2015, A/Prof Papantoniou recommended a conservative regime of physiotherapy, core stability exercises, hydrotherapy, a supervised structured exercise program and similar gym program together with a dietician-supervised diets to attain ideal body weight.[27]

58. The clinical notes of the GP contained a chart of Mr Schneider's weight fluctuations between January 2008 and 29 October 2018 which showed that Mr Schneider's weight had been 93kg in 2008 and had risen to 112.2kg by April 2015. It had since been constant at around 105-110kg.

59. Mr Hickey submitted I could infer that the recommendation as to body weight combined with the recommendation for nucleoplasties made by A/Prof Papantoniou was an effective alternative treatment to the instrumented fusion now proposed.

60. Mr Hickey submitted that the cost of the recommended surgery was said to be around $55,000. Mr Hickey submitted that there was no follow-up expense to the nucleoplasties, whereas follow-up expenses after the fusion would continue for up to three years.

61. A/Prof Papantoniou had said himself that Mr Schneider was too young in 2015 to undergo and instrumented fusion at L4/S1, and Arbitrator Peacock in 2018 had accordingly approved the procedure that was then recommended of the nucleoplasties.

62. Mr Hickey submitted that the pathology under consideration was shown by the 2018 investigations to be "on par" with the earlier investigations of 2014. Mr Hickey also noted that Mr Schneider was reluctant to take medication, as noted in A/Prof Papantoniou's report of 11 October 2018.

63. Mr Hickey submitted that there was insufficient evidence to satisfy the onus of proof that there had been a progression in Mr Schneider's condition that made the approved nucleoplasties obsolete. There was no explanation of any discal deterioration, and such a progression could not be inferred. To the contrary, on the evidence there might equally have been no progression.

64. The CT scan taken by Dr Mitoff showed the possibility of left-sided nerve root involvement at L5/S1, whereas Mr Schneider's complaint was of right-sided sciatica in August 2018 and indeed November 2014. Similarly, the MRI scan 2018 showed no evidence of nerve root impingement and the 2014 MRI scan suggested nerve root involvement, but of the L3 distribution, not L4/5 or L5/S1 disc spoken about by A/Prof Papantoniou.

[26] Reply page 23
[27] ARD page 765

65. Mr Hickey accordingly asked the question as to what progression had been shown to have occurred since 2018 when Arbitrator Peacock made a determination. He also submitted that there was no explanation why the nucleoplasties had been abandoned in favour of a more invasive and risky surgical treatment. Mr Hickey said that the main thrust of the respondent's denial was the significant questions that had not been answered as to why a different procedure was now being recommended. The Commission was being asked to make assumptions in the absence of any objective scan evidence or other factual material.

66. Mr Hickey also noted that although ECG testing had been ordered in February 2019, there had been no evidence as to the outcome of those tests.

67. Mr Hickey referred to the report of Prof Ghabrial but submitted that I would give it very little weight as he thought in 2017 the proposed surgery was the fusion when in fact it had been the nucleoplasties.

68. The opinions of A/Prof Hope were also of little weight Mr Hickey submitted, as they relied on A/Prof Papantoniou's assumption that there had been a deterioration since the original recommendation for nucleoplasty had been made.

69. Mr Hickey submitted that there was too much doubt as to whether the proposed fusion would give a better outcome than the already approved nucleoplasties, as there was too much doubt as to whether the progression relied upon by the treating surgeon had occurred. It was not enough, Mr Hickey said, for a treating surgeon to simply say that he knew better because he was the treater and his opinion should be accepted.

70. The applicant's evidence would leave the Commission wondering why the surgery that had been approved in 2018 had not been carried out. I would have no sense of persuasion that the applicant had discharged his onus of proof.

Mr Ty Hickey

71. Mr Hickey submitted that I would not be swayed by his opponent's analysis of the radiological reports. He referred to the respondent's expert's opinion in 2015 that a discussion of radiological reports by experts was not dissimilar to experts discussing the virtues of one red wine over another.

72. Mr Hickey agreed that *Diab* was the leading authority in cases of this kind, and stressed that D P Roche had observed that all treatment, especially surgery, carries a risk of a less than ideal outcome.

73. Mr Hickey submitted that there was no need to show any progression in Mr Schneider's condition, because in 2015 A/Prof Papantoniou had already found that the ultimate treatment for his pathological condition would have to be an instrumented fusion. The reason that the nucleoplasties had been suggested in 2015 was because Mr Schneider was then 38 years old and accordingly too young to be considering such an invasive procedure.

74. I would be comfortably satisfied, Mr Hickey submitted, that the effluxion of time had resulted in the reappraisal by the treating surgeon as to what is now the most effective treatment for Mr Schneider's condition. A/Prof Papantoniou's object in recommending the earlier treatment had been to delay the inevitable. The best treatment in 2015, when his opinion was given, was a stop-gap procedure that was not approved until 2018, three years later. By then, Mr Hickey said, "the horse had bolted".

75. Mr Hickey rejected his namesake's assertion that no adequate explanation had been given for the change of procedure. A/Prof Papantoniou's opinion had always been that the proposed surgery was inevitable. It was accordingly not surprising that the radiologists involved had similar views in 2014 and 2018.

76. It was not correct, Mr Hickey said, that A/Prof Hope was relying on the hearsay opinion of A/Prof Papantoniou to establish deterioration since 2015. A/Prof Hope examined Mr Schneider and took a history that 11 years after the original injury he was suffering from severe low back problem. Mr Schneider was bedridden for days at a time and the nature of his pain was chronic.

77. Mr Hickey submitted that the evidence was overwhelming. He submitted that the cost of the proposed fusion was never going to be avoided in view of A/Prof Papantoniou's opinion in 2015. The proposed surgery was appropriate and effective, within DP Roche's caveat that there were no guarantees that surgery would be completely successful.

Decision

78. Counsel referred me to the well- known case of *Diab*[28] in which DP Roche from [88] set out the following principles applicable to the question of whether a proposed treatment was reasonably necessary:

> "88. In the context of s 60, the relevant matters, according to the criteria of reasonableness, include, but are not necessarily limited to, the matters noted by Burke CCJ at point (5) in *Rose* (see [76] above), namely:
>
> (a) the appropriateness of the particular treatment;
>
> (b) the availability of alternative treatment, and its potential effectiveness;
>
> (c) the cost of the treatment;
>
> (d) the actual or potential effectiveness of the treatment, and
>
> (e) the acceptance by medical experts of the treatment as being appropriate and likely to be effective.
>
> 89. With respect to point (d), it should be noted that while the effectiveness of the treatment is relevant to whether the treatment was reasonably necessary, it is certainly not determinative. The evidence may show that the same outcome could be achieved by a different treatment, but at a much lower cost. Similarly, bearing in mind that all treatment, especially surgery, carries a risk of a less than ideal result, a poor outcome does not necessarily mean that the treatment was not reasonably necessary. As always, each case will depend on its facts."

79. There is some merit in the respondent's denial of this claim. In the first place the applicant had not taken advantage of the award in his favour by Arbitrator Peacock of 3 May 2018. There was accordingly no yardstick by which the effectiveness of that treatment could be judged.

80. Secondly, the applicant had not made clear in his evidence the reason why that treatment had been abandoned in favour of a more invasive and expensive surgical intervention.

[28] [2014] NSWWCCPD 72

81. It is of some relevance that A/Prof Papantoniou, whilst noting that there was a case pending within the Commission, nonetheless discharged the applicant from his care on 1 June 2016. He did not again see Mr Schneider until 16 August 2018, at which time there is something of a divergence in the evidence. Mr Schneider's recollection was that he and A/Prof Papantoniou were originally at cross purposes. Mr Schneider thought that the award in his favour meant that the nucleoplasty surgery could take place, whereas it became clear that A/Prof Papantoniou thought that the fusion, now the subject of this action, had been approved. I found Mr Schneider to be careful in his statement in saying that A/Prof Papantoniou was concerned by what "he felt" was a continuing deterioration in Mr Schneider's lumbar spine. I note that Mr Schneider himself did not confirm that assumption – he was simply silent on the subject.

82. The respondent may also well have suspected that the "pain chart" that Mr Schneider was asked to complete made him realise how the injury had impacted his life. There was some significance in Mr Schneider's expression that "I ultimately formed the view that I do wish to proceed with the surgery." It did not appear, on one view, that Mr Schneider did not come to that conclusion without some persuasion.

83. I have commented on the "pain charts "above as being part of A/Prof Papantoniou's procedure. The four charts that were within the evidence varied in their answers but could not be said that of themselves they showed a clear deterioration at the time each was taken that is to say, 25 November 2014, 13 May 2015 and 16 August 2018.

84. Whilst there may be a measure of truth in Dr Smith's view regarding experts and red wine, each case turns on its own facts. I have reproduced the findings of both radiologists who conducted the investigations firstly on 4 December 2014 (Dr Melville) and secondly on 24 August 2018 (Dr Mitcoff). To the untrained eye, there is certainly a similarity between both reports, but it is not thereby follow that Mr Schneider should be asked to undergo the nucleoplasties, which was said to be the most effective treatment. This is because it was the view expressed by A/Prof Papantoniou on 14 May 2015 that the appearance conveyed by the investigations justified an instrumented fusion from L4 to S1 at that time. It was simply that he thought that procedure should be put off for as long as possible in view of Mr Schneider's young age.

85. I have also reproduced findings on examination in November 2014, 1 June 2016 and 16 August 2018, which again have a certain amount of similarity. These too when viewed objectively are capable of being interpreted as showing no progression or deterioration in Mr Schneider's condition.

86. Thus, the basis for the complaints made by the respondent that the evidence did not satisfy the burden of proof can be seen.

87. It might have been helpful if A/Prof Papantoniou had given more detailed reasons for his current proposal in the face of his failure to act on the approval given by the Commission in 2018. However it needs to be borne in mind that A/Prof Papantoniou is a busy treating surgeon whose priority is to manage his patients' conditions using the best of his skill and expertise.

88. That is one of the reasons why it is common practice to retain the services of a medico-legal referee. I was not assisted by the report of Prof Ghabrial, who mistook the nature of the proposed surgery, but A/Prof Hope's report I found to be helpful. I do not agree that A/Prof Hope was relying on hearsay from A/Prof Papantoniou to reach his conclusion. A/Prof Hope examined Mr Schneider and had available to him the relevant investigations. His opinion that Mr Schneider's condition had progressed confirmed that of A/Prof Papantoniou, taking into account the complaints of Mr Schneider which were somewhat ambivalent in Mr Schneider's statement.

89. Dr Smith's view that Scheuermann's disease was shown in the investigations was not confirmed by any other medical expert, and even if it had, with the degenerative condition that he conceded was also present, and the osteoarthritis he also accept it was shown, he did not disagree that the proposed surgery was inappropriate. He referred back to his original theory that the condition of Mr Schneider's back was constitutional – an opinion that had been dismissed by Arbitrator Peacock.

90. I am accordingly satisfied that the proposed surgical treatment is reasonably necessary.

SUMMARY

91. Accordingly, I confirm that the applicant has suffered a consequential condition to his lumbar spine as a result of the subject injury of 1 November 2006.

92. I find that the necessity for surgery results from the subject injury.

93. The respondent will pay for the cost of and incidental to the proposed instrumented fusion from L4 – S1 as described and recommended by A/Prof Papantoniou on 14 February 2020.