WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **3525/19**
Applicant: **Vargha Mahdavi-Aghdam**
Respondent: **Imad's Locksmith and Shoe Repairs Pty Ltd**
Date of Determination: **19 November 2019**
Citation: **[2019] NSWWCC 371**

The Commission determines:

1. The applicant was at all material times a worker employed by the respondent as that term is defined in section 4 of the *Workplace Injury Management and Workers Compensation Act 1998*.

2. The applicant suffered an injury in the course of his employment with the respondent to both upper extremities (hands and fingers), right lower extremity and left lower extremity as a result of an injury which took place on 31 December 2010.

3. Award for the respondent on the claim for consequential condition to the lumbar spine.

4. The matter is remitted to the Registrar for referral to an Approved Medical Specialist for determination of the permanent impairment arising from the following:

    Date of injury – 31 December 2010
    Body systems referred – left lower extremity, right lower extremity, left upper extremity (hands and fingers), right upper extremity (hands and fingers), scarring (TEMSKI)
    Method of assessment – whole person impairment.

5. The documents to be referred to the Approved Medical Specialist to assist in their assessment are to include the following:

    (a) This Certificate of Determination and Statement of Reasons;
    (b) The Application to Resolve a Dispute together with attachments;
    (c) Reply together with attachments, and
    (d) Respondent's Application to Admit Late Documents together with attachments dated 24 September 2019.

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.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. These proceedings are brought by Mr Vargha Mahdavi-Aghdam (the applicant) against Imad's Locksmith and Shoe Repairs Pty Ltd (the respondent) in relation to an injury agreed to have been suffered by the applicant on 31 December 2010.

2. The claim was originally for past and future medical expenses, weekly benefits and permanent impairment compensation. The claims for medical expenses and weekly benefits were discontinued at the hearing, save the applicant seeking a general order for medical expenses pursuant to s 60 of the *Workers Compensation Act 1987* (the 1987 Act).

3. This is a matter in which the issue of worker is extremely contentious. The applicant alleges he worked on a part-time basis for the respondent while he was still at school and did so each Saturday and also during his school holidays. The respondent disputes this was the case and says the applicant was never an employee.

4. What is not in issue is the applicant suffered burns to his hands, fingers, and both legs as a result of solvent catching alight whilst he was in the respondent's shoe repair shop on New Year's Eve 2010.

5. The applicant also claims a consequential condition to his lumbar spine as a result of limping and altered gait because of the burns to his legs. The respondent places that alleged consequential condition in issue.

6. The applicant states in June 2009 he was enrolled in Year 10 at school and was required to carry out work experience. He said his brother had worked for Mr Imad Rizk, the owner of the respondent in the past, so the applicant asked Mr Rizk if he could complete his work experience at the shop. He says did work experience at the store, where Mr Rizk showed him how to cut keys, resole shoes and set up the engraving machine.

7. The applicant alleges (and the respondent denies) that Mr Rizk asked him if he wanted to work part-time on weekends and public holidays. The applicant says he continued to work for the respondent each Saturday from 9.00 am to 5.00 pm until the date of injury on 31 December 2010. He says he was initially paid $30 per day for six months, then $50 per day thereafter. He says he worked extra days during school holidays, earning up to $300 per week. He says he never completed a tax return, as the amount of income which he gained from working with the respondent was under the tax-free threshold.

8. The applicant sets out the alleged duties which he undertook at paragraph 21 of his statement. He also indicated he was required to wear a t-shirt bearing the respondent's livery. Photos of the t-shirt are attached to the Application to Resolve a Dispute (the Application).

9. The applicant states that on 31 December 2010, he went to work after being requested to do so by Mr Rizk, who called him and asked him to attend the shop. At some point, Mr Rizk went to run an errand, and the applicant set about preparing solvent for resoling a shoe. He says he was distracted from that task by a customer in the store, and as he was talking with her, he noticed flames were emanating from the solvent bottle near the back of the shop. In his own words, he panicked and pushed the bottle of solvent onto the floor, which caused both the solvent and flames to spread. The applicant's right leg caught alight and he used his hands to put out the fire, causing burns to both of his hands and legs.

10. At this point, the applicant states Mr Rizk returned, and the applicant then attended the shopping centre concierge desk to request medical attention. He was triaged by concierge staff then taken by ambulance to Royal North Shore Hospital where he was admitted and later operated upon. The applicant remained in hospital until 10 January 2011, when he was discharged home on crutches and with bandages applied to his wounds.

11. For his part, Mr Rizk denies the respondent ever employed the applicant. He states the applicant used to come to his shop and ask for money to go to McDonalds. He said that from 2010, the applicant would come to his shop for a couple of hours on a Saturday and sit at the computer and doze off. Occasionally, Mr Rizk said the applicant would clean a bench or tidy the floor. He admitted showing the applicant how to go about cutting a key.

12. Mr Rizk stated he never paid the applicant a wage but would occasionally give him "pocket money". He said that on 31 December 2010, he called the applicant and asked him to come into the store after having him collect something for Mr Rizk from Hornsby. Mr Rizk then went to conduct an errand and left the applicant alone in the shop. When he came back, there was a fire.

13. It is common ground the applicant never attended the respondent's premises again after the incident at issue.

14. The applicant completed a claim form on 12 November 2012. On 31 December 2012, the respondent's insurer issued a s 74 notice denying liability on the basis the applicant was not a worker employed by the respondent as that term is defined in s 4 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).

15. On 2 May 2017, the applicant's solicitors made a permanent impairment claim and on 3 July 2017 a further s 74 notice was issued which again denied the existence of an employment relationship and also placed in issue whether the applicant suffered burns to his fingers and also whether he had any lumbar spine injury.

16. On 22 August 2018, the applicant's solicitors made a claim for weekly compensation. On 9 November 2018, a third s 74 was issued. It denied injury to the left hand and lumbar spine and also maintained the denial of any employment relationship. Additionally, the notice disputed any entitlement to personal injury compensation on the basis the applicant did not exceed the whole person impairment threshold.

17. On 15 July 2019, the applicant's solicitors commenced these proceedings.

ISSUES FOR DETERMINATION

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

    (a) Whether the applicant was a worker as that term is defined pursuant to s 4 of the 1998 Act, and
    (b) Whether the applicant suffered a consequential condition to his lumbar spine as a result of the injury on 31 December 2010.

PROCEDURE BEFORE THE COMMISSION

19. The parties attended a hearing on 2 October 2019. 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.

20. At the hearing of the matter, the applicant was represented by Mr R Petrie of counsel and the respondent by Mr A Combe of counsel.

EVIDENCE

Documentary evidence

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

    (a) The Application and attached documents;
    (b) Reply and attached documents, and
    (c) Respondent's Application to Admit Late Documents (AALD) and attached documents dated 24 September 2019.

Oral evidence

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

SUBMISSIONS

The applicant's submissions

23. Mr Petrie noted the fact of the applicant having undertaken work experience with the respondent in 2009 was admitted in Mr Rizk's second statement. He said among the indicators the applicant was an employee was provision of the respondent's t-shirt, his contention he had a key to the shop, attending an off-premises task on the day of the injury and being called in by the respondent to work.

24. Mr Petrie took the Commission to the shopping centre's report of injury found at page 13 of the Reply. That report recounts the applicant's version of events as follows:

> "He was using solvent which caught on fire and caused severe burns to his legs below the knees and his hands from putting out the flames."

The same report records the applicant's occupation as "shoe repairer" and that the incident took place in the respondent's premises at 10.15 am. The additional details of the incident as follows:

> "He was using solvent in the shop which caught on fire and as he was trying to put the fire out it splashed on his leg causing burns. He used his hands to pat the flames on his legs causing burns to his hands. He came to centre management and sat on the bench which his legs in the sink as we poured water over his legs and put his hands in a bucket of cold water. Water was poured over him until the ambulance arrived, they treated him, gave him morphine for the pain and took him to RNS Hospital.
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> It is not known how the solvent caught on fire as he was in the shop by himself and was in shock."

25. The Commission was next referred by Mr Petrie to other contemporaneous records including the ambulance report at page 87 of the Application which noted the applicant had been "working in his boot repair shop" and the Royal North Shore Hospital triage notes at page 15 of the Application which state "was using a chemical at work that caught fire" together with further progress notes at page 21 of the Application which record the applicant as being "at work – using a solvent."

26. Mr Petrie next took the Commission to the statements of Mr Rizk. He noted Mr Rizk's admission at page 8 of the Reply that the applicant came to the shop every Saturday for a few hours. He initially said the applicant was the son of a family friend, however, he contradicted that alleged fact in his later statement at paragraph 55 where he said, "I would not say he is a family friend." Mr Petrie rhetorically asked, if that is the case, why is the applicant at the shop unless he is carrying out employment?

27. Mr Petrie also noted the respondent's version of the applicant's duties in the shop varied between his two statements. In the first statement, Mr Rizk says the applicant attended and occasionally cleaned a bench or tidied the floor. By the time of his second statement dated 26 August 2019, Mr Rizk says:

> "20 … when he is in the shop he watched me and what I am doing, he sees I put the glue on the shoe, and he can do that, but he does know how to finish the job. He takes the shoe and he would clean it and that is what he would do.
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> 21. He never used the sewing machine.
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> 22. He would serve the front counter, and people come into the shop to buy something, and they ask how much it is, he comes and asks me how much it is, and I tell him, and it takes the money from the customer.
>
> 23. All he is doing is doing the cleaning."

28. The applicant submitted that even on the admissions of Mr Rizk alone, it is apparent the applicant is a worker. He was told what to do by Mr Rizk, was paid for doing jobs, did what he was told and did so when he was told to do it.

29. In relation to the low back consequential condition, Mr Petrie took the Commission to the applicant's statement at page 115 of the Application. He noted at paragraph 68, the applicant said:

> "Within six months after the incident the subject of this claim, I started to feel pain in my back. Since the incident, I have not been able to walk properly without tilting my body to the left and limping, favouring my right leg. My back pain has become worse over the years and I have continued with the change in gait and walking."

30. Mr Petrie also referred to the opinion of Dr Sun which referenced lower back pain associated with an altered gait on the part of the applicant.

THE RESPONDENT'S SUBMISSIONS

31. Mr Combe submitted that as the applicant was raising the lumbar spine as a consequential condition, the Commission would need to be satisfied on a common-sense basis of symptoms in the back being linked to the original event in 2010.

32. Mr Combe noted that although the applicant says his back symptoms started within six months, there is no contemporaneous evidence of any back problems. Rather, he submitted the clinical notes suggests there was some event in approximately of April 2015, by way of a fall, which is suggestive of a break in any causal chain between the incident on New Year's Eve 2010 and any lumbar spine condition.

33. The Commission was taken by Mr Combe to the clinical records at page 95 of the Application which refer to a fall with an injury to the left buttock on 27 April 2015 serious enough to warrant CT scan of the lumbar spine being taken. He submitted the lumbar spine condition was plainly not linked to the incident at the respondent's premises on 31 December 2010.

34. The fall in April 2015 was so significant, Mr Combe submitted, that it led to the applicant being hospitalised, as confirmed by the clinical records at page 99 of the Application. Mr Combe submitted that was extremely important, as there was no contemporaneous medical evidence which supports the applicant's statement his back symptoms started within six months of the injury on New Year's Eve 2010.

35. Mr Combe noted there is a question and answer report at page 97 of the Application which was completed by Dr Sidhu, general practitioner. That report mentions the applicant's gait was affected by his burns, but that aside there is no reference to any complaint of back pain by the applicant at or around that time.

36. In summary, Mr Combe submitted that no aetiology for the back pain was identified, but the supervening event of the fall in April 2015 is sufficient to raise doubt in the Commission's mind to any causal link between the injury at issue and lumbar spine consequential condition.

37. Mr Combe noted there was no report from the general practitioner linking the lumbar spine condition to the incident at issue or any complaint of symptoms six months after the injury, as was alleged by the applicant. Accordingly, Mr Combe submitted the lumbar spine claim would fail, and there will be an award for the respondent on that body part in the event the Commission found the applicant to be a worker. He said there was plainly pathology present by way of disc protrusion in the CT scan of 2015, but the nature of that pathology is such that it could be caused by anything.

38. In relation to the issue to worker, Mr Combe submitted the applicant has the onus of proving he was a worker, and the Commission should not be persuaded to feel any actual persuasion of that relationship. In particular, there was no evidence that the applicant was paid $50 every day that he worked, and the fact that he did not submit a tax return because he was under the threshold is no excuse.

39. Mr Combe submitted that absent any corroborative evidence as to the nature of the relationship, the Commission would not be satisfied the applicant was a worker. He compared the applicant's evidence to that of Mr Rizk, who had consistently said there was no employment relationship from the outset.

40. In summary, Mr Combe said this was a matter where there was one person's word against another. The applicant bears the onus, and because there is nothing to corroborate the applicant's statement the Commission cannot be satisfied there is an employment relationship. He said to the extent there is any corroborative documentation, it falls within the parameters of being based on self-reporting and would therefore be treated with circumspection.

41. Mr Combe submitted there is not sufficient evidence to rely on self-reporting forms to prove essential aspects of a contract for services.

THE APPLICANT'S SUBMISSIONS IN REPLY

42. Concerning the fall on 21 April 2015, Mr Petrie noted the applicant in fact attended upon his general practitioner on 23 February 2015 complaining of pain in his lower back, and was referred for the CT scan on 14 April 2015, that is a week before the fall relied on by the respondent as an event sufficient to break any causal chain.

43. Mr Petrie submitted in summary that the Commission would accept the applicant's version of events, but even if one accepted merely the respondent's concessions that the applicant worked every Saturday for two years, was doing various tasks as directed and being paid, that there would be sufficient evidence to find an employment relationship.

DISCUSSION

44. The workers' compensation legislation provides that a "worker" is entitled to benefits. The entitlement is contained in s 9 of the *Workers Compensation Act 1987* (1987 Act), which provides:

> "A worker who has received an injury … shall receive compensation from the worker's employer …"

45. The first step then is to establish whether the injured person was a "worker". "Worker" is defined in s 4 of the 1998 Act as follows:

> "worker means a person who has entered into or works under a contract of service or a training contract with an employer (whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, and whether the contract is oral or in writing) …"

46. The essential feature of the definition in s 4 is the "contract of service" between the "employer" and the "worker". This relationship must be distinguished from that of the "contract for services", which is generally referred to as the rendering of services by an independent contractor. Put simply, the difference is between a person who serves his employer in the employer's business and a person who carries on a trade or business of his own. The onus is on the worker to prove the employment contract.

47. Establishing a contract of service involves principles of contract law such as offer and acceptance, consideration and mutual obligation. A contract of service requires a mutuality of obligation in the formation of the contract with the intention to create legal relations: *Dietrich v Dare* (1980) 30 ALR 407. If there is clear evidence that a person offered services for reward, and the proposed employer accepted the offer on the basis that payment for those services would be made, there will be an intention to enter into legal relations, and a contract of employment will exist.

48. There are four essential features of a contract of employment, which may be summarised as follows:

    (a) There can be no employment without a contract (*Lister v Romford Ice & Cold Storage Co Ltd* [1956] UKHL 6; [1957] AC 555 at 587);

    (b) The contract must involve work done by a person in performance of a contractual obligation to a second person (*Abdalla v Viewdaze* (2003) 122 IR 215 at [23]). That is because the essence of a contract of service is the supply of the work and skill of the worker;

    (c) There must be a wage or other remuneration, otherwise there will be no consideration (*Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515);

    (d) There must be an obligation on one party to provide, and on the other party to undertake, work. The obligation required to constitute a contract of employment is that:

        "… the putative employer be obliged to pay the putative employee in accordance with the terms of the contract for services reasonably demanded under it, and that the putative employee be obliged to perform such services. That is as much so where the service consists of standing and waiting as where it is active" (*Forstaff Pty Ltd v Chief Commissioner of State Revenue* [2004] NSWSC 573;

(2004) 144 IR 1 at [91]; see also *Wilton v Coal & Allied Operations Pty Ltd* [2007] FCA 725; (2007) 161 FCR 300 at [162]).

49. It is often unclear whether a relationship is one of employment. There exists however a number of criteria, or indicia, by which to gauge whether an employment relationship exists. The facts in each case must be carefully considered in order to balance the indicia both for and against a contract of employment.

50. The principal criterion remains the employer's right of control of the person engaged but it is not the sole determinant. In more recent times, the courts have favoured looking at a variety of criteria. As Ipp JA said in *Boylan Nominees Pty Ltd t/as Quirks Refrigeration v Sweeney* [2005] NSWCA 8:

> "The control test remains important and it is appropriate, in the first instance, to have regard to it (albeit that it is by no means conclusive) because, as Wilson and Dawson JJ said in *Stevens v Brodribb Sawmilling Company Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 (at 36):
>
> '[I]t remains the surest guide to whether a person is contracting independently or serving as an employee.'" (at [54])

51. In the leading case of *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 (*Stevens*), the High Court set out a number of relevant indicia. These include, but are not limited to, the following:

    (a) The mode of remuneration;
    (b) The provision and maintenance of equipment;
    (c) The obligation to work;
    (d) The timetable of work and provision for holidays;
    (e) The deduction of income tax;
    (f) The right to delegate work;
    (g) The right to dismiss the person;
    (h) The right to dictate the hours of work, place of work and the like, and
    (i) The right to the exclusive services of the person engaged.

52. It is important to remember that it is the "totality" of the relationship that must be considered. The factors set out in *Stevens* are merely a guide to establishing the nature of the relationship.

53. I accept Mr Petrie's submission that the respondent's evidence altered in material aspects between the two statements of Mr Rizk. In the first, he said the applicant would attend the shop for a couple of hours of a Saturday, do occasional cleaning and fall asleep at the computer. By the second statement, Mr Rizk said the applicant would do the cleaning of the shop, clean shoes, serve customers, run off-site errands and receive some rudimentary instruction in shoe repair. Mr Rizk did, however, maintain his denial of paying the applicant the sum of $50 per day. He does, however, admit he gave the applicant money. At paragraph 14 of his second statement, Mr Rizk said "One day he is there for a couple of hours, one day he is there for five hours, it all varies. I never give him the same amount of money each week." It is therefore apparent the applicant was paid weekly by the respondent, and that he was carrying out duties while in the shop.

54. I find it unlikely that a young man of the applicant's age would choose to spend his time at a shoe repair store of a weekend without there being an obligation for him to attend in exchange for reward. Mr Rizk's second statement that he paid the applicant each week for doing certain jobs is, in my opinion, consistent with an employment relationship.

55. When dealing with diametrically opposed positions in a matter such as this, one looks for corroborative evidence to determine the nature of the parties' relationship. That evidence is found in this instance by Mr Rizk's second statement in which he admits the applicant carried out a number of duties at the respondent's premises and to paying the applicant each week, albeit on a different basis to that asserted by the applicant. Moreover, when the accident took place, the applicant presented to the shopping centre concierge for treatment. The centre's report lists his occupation as "shoe repairer." The ambulance report records the applicant "working in his boot repair shop" while as noted by Mr Petrie, the clinical records from Royal North Shore Hospital at page 15 of the Application state "was using a chemical at work that caught fire" together with further progress notes at page 21 of the Application which record the applicant as being "at work – using a solvent."

56. Mr Combe submitted the Commission should place little weight on this evidence, as they all arise from self-reporting by the applicant after the injurious event. That is so. However, I reject the submission the documents should be given little weight. They are contemporaneous noted which record a history provided by a seriously injured 17-year-old who was described by the shopping centre concierge report as being in shock. To suggest someone in the applicant's position – 17 years old, burned, in shock and no doubt in great pain, would have the wherewithal to provide histories to the shopping centre and to medical professionals with a view to establish an employment relationship with the respondent which otherwise did not exist, beggar's belief.

57. Any suggestion that a 17-year-old school student in the position of the applicant had the presence of mind to embellish the nature of his relationship with the respondent while reporting what happened when he is in shock and in pain having suffered severe burns to much of his limbs is rejected out of hand. The applicant was not cross examined at all, let alone about the circumstances of the injury or the reports he provided to medical staff on the day.

58. Mr Combe also submitted the applicant had an obligation to declare income, regardless of whether he was under the tax-free threshold. I accept that is the case, however, it is not determinative of the nature of the relationship between the applicant and respondent.

59. On balance, having regard to the relevant indicia of the relationship between the applicant and respondent, I find the applicant was a worker employed by the respondent at the time of the injury on 31 December 2010.

60. In making this finding, I have taken into account the evidence of both the applicant and Mr Rizk. Each of them says the respondent paid the applicant, though the amount varies. They both state the applicant carried out duties at the shop. There is no question the applicant was called into the shop and to carry out an off-site errand by Mr Rizk for the respondent on the date of his injury. Likewise, there is no issue Mr Rizk left the applicant alone in the shop while he ran an errand.

61. Moreover, as I have noted, there are contemporaneous reports by way of the incident report to the centre management, to Royal North Shore Hospital and the ambulance service in which the applicant refers consistently to being at work. In my view, a 17 year old child who has suffered severe burns to his legs and hands is unlikely to have been making up the nature of what he was doing at the time of that incident, given he would have been both in shock and in severe pain at the time he was recounting the incident to people who asked him about it. The applicant's version of the relationship between he and the respondent has a ring of truth to it, and to the extent there is a dispute between his version and that of Mr Rizk, I prefer the version of the applicant.

62. Accordingly, the Commission will make orders to the effect the applicant suffered an injury in the course of his employment with the respondent on 31 December 2010.

Consequential condition to the lumbar spine

63. It is important at the outset to establish the relevant test for establishing the presence of a consequential condition. This is particularly so where the respondent seeks to rely on an absence of established pathology in the left knee as a basis for a finding that no consequential injury has taken place.

64. In *Kumar v Royal Comfort Bedding Pty Ltd* [2012] NSWWCCPD 8 (*Kumar*), Deputy President Roche dealt with the issue of whether the injured worker's shoulder condition resulted from mobilising whilst recuperating from accepted back surgery. At paragraph 35 and following, Roche DP stated:

> "35. By asking if Mr Kumar has suffered a s 4 injury to his right shoulder, the Arbitrator erred in his approach and asked the wrong question. This error affected his approach to the medical evidence and his conclusion. Mr Kumar's claim was always, as the respondent has conceded on appeal, that the right shoulder condition, and the need for surgery, resulted from the accepted back injury. It was not necessary for him to prove that he suffered a s 4 injury to his right shoulder.
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> 36.The Commission has considered claims of this kind in several decisions (*Cadbury Schweppes Pty Ltd v Davis* [2011] NSWWCCPD 4 (Davis); *Vivaldo*; *Moon v Conmah Pty Ltd* [2009] NSWWCCPD 134; *Australian Traineeship System v Turner* [2012] NSWWCCPD 4 (Turner)) and has consistently applied the principles in *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 (Kooragang)."

65. The Deputy President then referred to the facts of *Kooragang* and to the judgement of Kirby P (as he then was) at paragraph 462E:

> "Kirby P (as his Honour then was) said (at 461G) (Sheller and Powell JJA agreeing) that "[f]rom the earliest days of compensation legislation, it has been recognised that causation is not always direct and immediate". After referring to earlier English authorities, his Honour added (at 462E):
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> 'Since that time, it has been well recognised in this jurisdiction that an injury can set in train a series of events. If the chain is unbroken and provides the relevant causative explanation of the incapacity or death from which the claim comes, it will be open to the Compensation Court to award compensation under the Act.'
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> His Honour said at 463–464:
> "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. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase 'results from', is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is a common-sense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation.
> In each case, the question whether the incapacity or death 'results from' the impugned work injury (or in the event of a disease, the relevant aggravation of the disease), is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions. Applying the second principle which

Hart and Honoré identify, a point will sometimes be reached where the link in the chain of causation becomes so attenuated that, for legal purposes, it will be held that the causative connection has been snapped. This may be explained in terms of the happening of a novus actus. Or it may be explained in terms of want of sufficient connection. But in each case, the judge deciding the matter, will do well to return, as McHugh JA advised, to the statutory formula and to ask the question whether the disputed incapacity or death 'resulted from' the work injury which is impugned."

His Honour concluded that the Court was left with "an unbroken chain of undisputed evidence". In combination, the facts went "beyond mere predisposing circumstances". They combined to make it "proper to reach the conclusion that the death of the worker 'resulted from' his original injury and all of the consequences which it set in train". His Honour did not find that the heart attack was a s 4 injury, but confirmed the trial judge's finding that the heart attack on 8 June 1992 resulted from the accepted back injury in 1981."

66. Likewise, the decision of Deputy President Snell in *Trustees of the Roman Catholic Church for the Diocese of Parramatta v Brennan* [2016] NSWWCCPD 23 (*Brennan*) dealt with the question of a consequential injury. In that matter, a school teacher made a claim for consequential conditions to her cervical spine and shoulders following an accepted initial injury involving an injury to her power of speech.

At paragraph 100 and following in Brennan, Snell DP summarised a number of Presidential decisions concerning consequential injury, including *Kumar*, as follows:

"100. There have been a number of Presidential decisions dealing with the nature of claims in respect of consequential conditions. The principles are described in a number of these decisions, for example *Moon v Conmah Pty Limited* [2009] NSWWCCPD 134 (Moon) and *Kumar v Royal Comfort Bedding* [2012] NSWWCCPD 8 (Kumar). It is unnecessary for a worker alleging such a condition to establish that it is an 'injury' (including 'injury' based on the 'disease' provisions) within the meaning of s 4 of the 1987 Act.

101. In Moon (involving a compensable injury to the right shoulder, allegedly resulting in a consequential condition of the left shoulder) Roche DP at [44]–[46] described what is required:

'44. The evidence in support of this allegation is brief but clear. It is obvious that Mr Moon has experienced significant restrictions in the use of his right arm and shoulder for several years. It is not disputed that that restriction has resulted from his employment with Conmah. As a result, he has used his left arm and shoulder to compensate for his right shoulder condition. Therefore, Mr Moon is claiming compensation for a consequential loss. That is, a loss or impairment that he alleges has resulted from his previous compensable injury to his right shoulder (see *Roads & Traffic Authority (NSW) v Malcolm* (1996) 13 NSWCCR 272).

45. It is therefore not necessary for Mr Moon to establish that he suffered an 'injury' to his left shoulder within the meaning of that term in section 4 of the 1987 Act. All he has to establish is that the symptoms and restrictions in his left shoulder have resulted from his right shoulder injury. Therefore, to the extent that the Arbitrator and Dr Huntsdale approached the matter on the basis that Mr Moon had to establish that he sustained an 'injury' to his left shoulder in the course of his employment with Conmah they asked the wrong question.

> 46. The test of causation in a claim for lump sum compensation is the same as it is in a claim for weekly compensation, namely, has the loss 'resulted from' the relevant work injury (see *Sidiropoulos v Able Placements Pty Limited* [1998] NSWCC 7; (1998) 16 NSWCCR 123; *Rail Services Australia v Dimovski & Anor* [2004] NSWCA 267; (2004) 1 DDCR 648).'
>
> 102. In Kumar, one of the qualified medical witnesses approached the issue of whether there was a consequential condition of the right shoulder, by asking whether the worker had suffered a "work related injury" to that shoulder and whether employment was a substantial contributing factor to the condition of that shoulder. Roche DP at [57] said of the evidence of that medical witness:
>
> 'Even assuming, as the respondent has urged, that Dr Wallace rejected the totality of the claim for 'consequential loss' in respect of the right shoulder, his failure to address the correct issue, and his focus on whether Mr Kumar suffered a work-related injury to his right shoulder, means that his report is fundamentally flawed. For these reasons, the Arbitrator should have rejected Dr Wallace's conclusion.'"

67. As Mr Combe submitted, the Commission must be satisfied on the balance of probabilities by using a common-sense approach that the applicant's claimed consequential lumbar spine condition relates to the injury on 31 December 2010.

68. The evidence relating to the alleged consequential condition to the lumbar spine is limited. In his statement at page 115 of the Application, the applicant says:

> "Within 6 months after the incident the subject of this claim, I started to feel pain in my back. Since the incident, I have not been able to walk properly without tilting my body to the left and limping, favouring my right leg. My back pain has become worse over the years and I have continued with the change in gait and walking."

69. In his report dated 30 August 2016, Dr Sun IME recorded under "Present Complaints" that the applicant "developed low back pain from the change in his gait pattern." On examination, Dr Sun noted the applicant walked with a limp, and "lumbar movements were restricted in flexion and extension. Straight leg raising test was negative." His opinion, set out at page seven of the Application, was as follows:

> "The clinical picture is consistent with:
> • Full thickness burns to right leg
> • Partial thickness burns to left shin
> • Partial thickness burns to left hand fingers
> • Partial thickness burns to right hand fingers
> • Secondary lumbar spine soft tissue injury
>
> There was no previous injury or pre-existing condition to account for his presentation and I believe the injuries at work in December 20 l 0 as described was the cause of his ongoing impairment."

70. In his second report dated 21 May 2018, Dr Sun recorded the applicant complaining of worsening low back pain from altered gait and continued restriction of lumbar spine movements. He diagnosed the applicant as suffering from a "secondary lumbar spine soft tissue injury."

71. Professor Ehrlich, IME for the respondent, recorded in his report dated 20 June 2017 that the applicant was complaining of "some discomfort in his right leg and his back." No assessment was made regarding the applicant's lumbar spine, and Professor Ehrlich stated, "In contrast to Dr Sun's observations I was unable to identify any other abnormalities." It is unclear whether Professor Ehrlich was asked to examine the applicant's lumbar spine, however, his examination appears to have been limited to the applicant's burns.

72. Dr Ditton, pain management specialist IME for the respondent, also provided a report dated 18 October 2018. He recorded under "Current Status" the following:

> "Mr Mahdavi-Aghdam said that he experiences discomfort around the right ankle and over the dorsum of the right foot. He described the pain as a tingling like pins and needles but said that if he bumps the area, he experiences severe pain that lasts for two or three minutes. He said that the pain is not affected by the weather. He said that there is no colour change or abnormal swelling or sweating associated with the injury. He said that the most discomfort was experienced just distal to the skin graft at the lateral aspect of the dorsum of the foot. He said that he finds it hard to walk properly when he first gets up in the morning. He said that he still feels that his gait is not perfect.
>
> Mr Mahdavi-Aghdam did not complain of pain in any other region.
>
> Mr Mahdavi-Aghdam said that the medial aspect of his lower leg over the skin graft feels numb.
>
> Mr Mahdavi-Aghdam said that his appetite is normal, and his weight is stable. Bowel and bladder function are normal. He said that he often wakes up two or three times at night because the leg is uncomfortable."

73. Under the heading "Subsequent Injuries", Dr Ditton recorded the applicant as stating, "he understood that he had a 2 mm disc protrusion in his lumbar spine." Dr Ditton carried out an examination in which he recorded:

> "Mr Mahdavi-Aghdam attended the consultation alone. He entered the rooms with a normal gait. He was wearing shorts and shoes. He sat during the consultation without any indication of discomfort. He related in a normal and forthright manner. He removed his shoes for the examination and put them back on without apparent difficulty. He did not give any indication of exaggeration or embellishment of his condition…
>
> There was a full range of movement of both ankles. Mr Mahdavi-Aghdam was able to stand on his heels and toes and squat and rise in a normal manner. There was a full range of movement of both knees.
>
> There was a full range of movement of the lumbar spine. There was no indication of radiculopathy in the lower limbs. There was no specific tenderness over the lumbar spine."

74. Dr Ditton noted the observations of Dr Sun regarding altered gait and the lumbar spine and had access to Dr Sun's reports. He was specifically asked to comment on the matters raised by Dr Sun. Having taken into account the material before him and the applicant's presentation and complaints, Dr Ditton concluded:

> "Mr Mahdavi-Aghdam did not complain of back pain. He stated that scans had shown a small disc bulge. There was no indication of a gait abnormality that would have adversely affected the lumbar spine…

There is no indication of ongoing functional disability relating to the spine, the knees or the ankles…

In relation to the assessment by Dr Sun:
Dr Sun listed the following impairments:
Loss of sensation in the right leg and pain in the right calf
Low back pain and left leg pain
Tingling in the lower body with loss of sweating and temperature control,
Sleep walking
Reduced sitting and standing tolerance
Assistance required dressing.
Self-conscious and wears long pants.

I note my assessment in relation to the loss of sensation and pain in the right leg.

There is no impairment for the lumbar spine. It is my opinion that the gait abnormality is not sufficient to be a cause of back pain. Even if this association was accepted there is no radiculopathy and no indication of muscle spasm and hence the DRE rating would be I. This represents a WPI of 0%."

75. Mr Combe placed reliance on the fall in late April 2015 as a cause of the applicant's lumbar spine issues. That may well be so, however, it is apparent the applicant was suffering from pain in his low back before that fall, as evidenced by his having attended upon his general practitioner Dr Singh regarding low back pain before the fall took place. Attached to the application are two clinical note entries from 2015. They record the applicant as attending Dr Singh for low back treatment in February 20015 and April 2015 before the unrelated fall. The complaints recorded in the clinical records are of lumbar spine pain. There is no mention of a cause of that pain, as is often the case in the clinical records of treating doctors. There is also a question and answer report completed by Dr Singh on 27 November 2012 which makes no mention of any altered gait or low back pain.

76. On balance, I am not satisfied of the presence of a consequential condition in the applicant's lumbar spine as a result of the injury at issue. There is no evidence of complaint surrounding the low back until 2015, some five years after the accident. There is no evidence to support the applicant's claim that he began to suffer low back pain within six months of the injury. In contrast, the only relevant treating doctor evidence for that period is the question and answer report by Dr Singh from 2012, at which point there is no complaint of low back pain.

77. Notwithstanding Dr Sun's report and his diagnosis of secondary lumbar spine condition consequent upon limping, I note he is alone in making that diagnosis. The lack of contemporaneous complaint and treating doctor material to corroborate the applicant's assertions regarding the onset of his lumbar spine condition in my view means he has failed to satisfy the onus of proof regarding the alleged consequential conditions, and there will accordingly be an award for the respondent on that part of the claim.

SUMMARY

78. In light of the above reasons, the Commission will make the following findings and orders:

    (a) The applicant was at all material times a worker employed by the respondent as that term is defined in section 4 of the 1998 Act.

    (b) The applicant suffered an injury in the course of his employment with the respondent to both upper extremities (hands and fingers), right lower extremity and left lower extremity as a result of an injury which took place on 31 December 2010.

(c) Award for the respondent on the claim for consequential condition to the lumbar spine.

(d) The matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for determination of the permanent impairment arising from the following:

Date of injury –	31 December 2010
Body systems referred –	left lower extremity, right lower extremity, left upper extremity (hands and fingers), right upper extremity (hands and fingers), scarring (TEMSKI)
Method of assessment –	whole person impairment.

(e) The documents to be referred to the AMS to assist in their assessment are to include the following:

(i) This Certificate of Determination and Statement of Reasons;
(ii) The Application together with attachments;
(iii) Reply together with attachments, and
(iv) Respondent's Application to Admit Late Documents together with attachments dated 24 September 2019.