

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 1157/20
Applicant: HEATHER JAMES
Respondent: MACKELLAR CARE SERVICES LIMITED
Date of Determination: 7 MAY 2020
Citation: [2020] NSWCC 143

The Commission determines:

1. On 21 September 2010, in the course of her employment with the respondent, the applicant suffered injury to her right upper extremity, namely right shoulder, right elbow, right wrist and right thumb.
2. Award for the respondent in respect of the allegation of injury to the applicant's cervical spine.
3. The matter is remitted to the Registrar for referral to an Approved Medical Specialist, Orthopaedic Surgeon (AMS) to determine the extent of the applicant's whole person impairment, if any, which results from injury to the applicant's right upper extremity.
4. The respondent's solicitor is directed to file with the Commission via the portal a copy of the referral by Dr Gittoes to Dr Sharp dated on or about 6 October 2010 within fourteen (14) days.
5. The Registrar is requested to place before the AMS a copy of the Application to Resolve a Dispute registered 2 March 2020 (Application), a copy of the Reply and attachments registered 23 March 2020 (Reply), a copy of Dr Gittoes referral to Dr Sharp and a copy of this Certificate of Determination.

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

PHILIP YOUNG
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 PHILIP YOUNG, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Heather James (the applicant) is a 63 year old lady who was employed by Mackellar Care Services Limited (the respondent) as an Assistant in Nursing. She alleges that on 21 September 2010 in the course of her employment she suffered injuries to her cervical spine and right upper extremity (shoulder, elbow, wrist and thumb) when a patient collapsed whilst the applicant was moving her in a lifter.
2. The applicant's claim is for compensation pursuant to section 66 of the *Workers Compensation Act 1987* (the 1987 Act) and the matter has not yet been referred to an Approved Medical Specialist (AMS) for determination of quantum because liability in respect of alleged cervical spine injury is disputed.

ISSUES FOR DETERMINATION

3. The sole issue for determination is whether or not the applicant sustained injury to her cervical spine in the course of her employment on 21 September 2010.

PROCEDURE BEFORE THE COMMISSION

4. The matter came for conciliation and arbitration via teleconference on 23 April 2020. Mr D Adhikary of counsel instructed by Ms De Freitas appeared for and with the applicant. Mr C Robertson of counsel instructed by Mr Lee appeared for the respondent.
5. I was satisfied that the parties to the dispute had ample opportunity to resolve their differences but were unable to achieve settlement. I used my best endeavours to encourage resolution, however, resolution was not possible and the matter therefore proceeded to arbitration hearing.

PRELIMINARY MATTERS

6. A number of preliminary matters arose for consideration. The first was that the pleadings did not include a referral letter sent by Dr Gittoes, general practitioner, to Dr R Sharp, orthopaedic surgeon dated on or about 6 October 2010. Ultimately Mr Robertson tendered that document without objection.
7. The next issue concerned application of clause 44 of the *Workers Compensation Regulation 2016*. Mr Adhikary objected to a number of the respondent's orthopaedic reports, pointing out that the applicant has been seen by Dr Doig, Professor Ehrlich, Professor Kleinman, Dr Machart (qualified by the applicant) and Dr Harrington. In response, Mr Robertson advised that Professor Ehrlich had passed away in November 2017 and his role in terms of updating the claim was assumed by Professor Kleinman in 2019. Mr Robertson would only seek to rely upon Dr Doig in terms of the history given by the applicant to Dr Doig. He withdrew Dr Harrington's reports but pressed the report of Dr Machart.
8. Ultimately, having considered the matter and obtained Mr Adhikary's concession that Professor Ehrlich did pass away in November 2017, I allowed Professor Kleinman's report. I allowed Dr Doig's report in terms of the history only. I rejected the respondent's reliance upon Dr Machart's report.

EVIDENCE

Documentary evidence

9. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application,
 - (b) Reply, and
 - (c) Referral from Dr Gittoes to Dr Sharp dated on or about 6 October 2010.

Oral evidence

10. No oral evidence was given.

SUBMISSIONS

11. It is unnecessary to summarise in detail the oral submissions provided in this matter as a sound recording is available. I am grateful to both Counsel for their extensive submissions.

FINDINGS AND REASONS

12. It is clear from the applicant's statement that she experienced no prior neck injuries. The applicant's original statement of 31 January 2011 similarly does not refer to any neck symptoms or pain.
13. The applicant's general practitioner Dr Gittoes completed a referral form to Dr Sharp on or about 6 October 2010 which made reference to the applicant having injured her right thumb and having undergone an x-ray to the right thumb on 29 September 2010 which revealed no fracture. The applicant also on 6 October 2010 reported right wrist pain and tenderness. This referral was tendered on the arbitration hearing by consent and is to be filed by the respondent's solicitor via the portal.
14. It is in the applicant's second statement dated 14 December 2012, that she explains the mechanism of injury more fully. This is over two years after the original injury. The applicant notes that when she took the weight of the female patient who collapsed her neck was at full stretch and her shoulder was in the back of the patient's shoulder. The applicant had earlier on 11 March 2011 undergone nerve conduction studies and on 20 May 2011 pain specialist Dr S Tame suggested injections to the applicant's neck, forearm and hand.
15. On 13 September 2012, the applicant saw neurosurgeon Dr Ferch who suggested right shoulder surgery. Ultimately Dr Ferch performed neck surgery, namely C5/6 anterior discectomy and fusion.
16. The applicant's explanation for not earlier insisting on the doctors recording neck pain is essentially that the applicant hoped that her only problem was her right thumb. She says she was concentrating on her thumb even though over the week or so following 21 September 2010 she developed pain in her neck, shoulder and whole of her right arm. She says that when she did mention her neck pain, the doctors were dismissive of it. Against this statement is Dr Sharp's record on 7 October 2010, 16 days after the incident, where he records pain in the applicant's right arm and forearm and comments that there is "no pain anywhere else" except that the applicant gets a bit of an ache in the arm at the end of the day.

17. The applicant attended Gunnedah Hospital on 29 September 2010 and a Workcover Certificate was issued which referred only to the right thumb. The applicant's second statement of 14 December 2012 claims that it was over the next week or so after 21 September 2010 that she had pain in her entire arm, neck and right shoulder together with pins and needles. This level of disability is not referred to in the Gunnedah Hospital Workcover Certificate, the referral by Dr Gittoes to Dr Sharp nor the applicant's first statement dated 19 January 2011. The applicant saw Dr Doig on 21 December 2010, yet there is no mention of neck injury. The neck is first implicated in Dr Tame's records of 20 May 2011, some eight months after her injury at work the subject of this claim.
18. Many of the applicant's submissions refer to the stated mechanism of injury as being plausibly supportive of cervical spine injury. However, this must not be confused in my view with a conclusion that cervical spine injury must necessarily have occurred (because of the mechanism) for the reasons which follow.
19. Many of the doctors including Dr Herald, Dr Ferch and Dr Millons rely upon the applicant's history of reasonably contemporaneous neck pain. Dr Herald took a history of immediate pain in the neck, not the onset of pain a week or so later. It is significant to my mind that there was no mention of cervical symptoms when the applicant was seen by Dr Doig on 21 December 2010. Dr Millons, very cautiously in my view, opines that the applicant "could have" aggravated degenerative changes in her neck and says that the applicant "appears to have" possible aggravation of degenerative changes "on historical grounds". It is clear to my mind that Dr Millons could only raise a "possibility" of aggravation of the cervical spine and was not prepared to regard it as a probability even in the context of the history given by the applicant. Dr Millon's reference to "historical grounds" is a direct reference in my view to the history given to him by the applicant.
20. Professor Ehrlich in his report of 14 December 2011 mentions that it is difficult to visualise the mechanism of injury. One would have thought that Professor Ehrlich would in that event more closely question the applicant concerning precisely what occurred. In his later report of 15 June 2012 Professor Ehrlich appears to accept that the applicant had upper limb pain in particular pins and needles, but he seems to attribute this to the applicant's underlying spondylosis. The difficulty with many of the doctor's reports is that they involve the applicant's condition and history as given after Dr Tame's reference to the neck in May 2011. The opinions are predicated upon a recounting by the applicant of cervical spine pain/symptoms when there is no contemporaneous corroboration, whether by medical record or other evidence. I do not place too much credence on Professor Ehrlich's rationale concerning mechanism of injury.
21. In terms of the consideration just mentioned, I am of course mindful of the fact that corroboration is not necessarily required in a civil case. It can, however, be generally said that corroborative evidence may have been useful in supporting the weight of the applicant's evidence in this particular matter because before Dr Tame's observation in May 2011: -
 - (a) There are no recorded neck pain or symptoms by the applicant's general practitioners;
 - (b) The same in relation to Dr R Sharp¹;
 - (c) The same in relation to Dr Doig;
 - (d) The same in relation to the nerve conduction studies of 11 March 2011;
 - (e) The same in relation to lay witness statements by Virginia Cliff and Kathleen Woodhead;
 - (f) The same in relation to the Gunnedah Hospital attendance;

¹ Application p79

- (g) The applicant's statement of 31 January 2011 does not mention neck pain or symptoms and specifically² says that apart from the right thumb and forearm there is "no pain anywhere else"³, and
- (h) There is evidence⁴ that the applicant received physiotherapy in January 2011 but no detail in evidence of what that treatment involved.
22. Dr Russo, in his report of 18 October 2018, suggested that the respondent accept liability for the proposed implant procedure, however, at page 92 of the Application notes pain in the right arm but not in the cervical spine. In a very detailed report⁵ Dr Kleinman concludes that the applicant came to surgery because of degenerative changes in the cervical spine.
23. It is correct to say, as was advanced by counsel for the applicant, that doctors' notes should be considered with some caution.⁶ However, there were a number of opportunities for the applicant to have the presence of neck pain recorded and the most telling opportunity arose when she gave her statement of 31 January 2011, a little over four months after her accident. Similarly, it is not clear that the nerve conduction studies of 11 March 2011 had anything to do with the applicant's neck and also unclear from the physiotherapy treatment report of Ms McEvoy of 10 October 2011 that there was any neck treatment at all in early 2011.
24. In the circumstances the applicant has not discharged the onus of proof and there will be an award for the respondent in respect of the allegation of cervical spine injury.

ORDERS

25. On 21 September 2010, in the course of her employment with the respondent, the applicant suffered injury to her right upper extremity, namely right shoulder, right elbow, right wrist and right thumb.
26. Award for the respondent in respect of the allegation of injury to the applicant's cervical spine.
27. The matter is remitted to the Registrar for referral to an AMS to determine the extent of the applicant's whole person impairment, if any, which results from injury to the applicant's right upper extremity.
28. The respondent's solicitor is directed to file with the Commission via the portal a copy of the referral by Dr Gittoes to Dr Sharp dated on or about 6 October 2010 within fourteen (14) days.
29. The Registrar is requested to place before the AMS a copy of the Application, a copy of the Reply, a copy of Dr Gittoes referral to Dr Sharp and a copy of this Certificate of Determination.



² Applicant's statement 31 January 2011 at paragraphs 45 and 46.

³ Applicant's statement *ibid* at paragraph 46.

⁴ Report Ms B McEvoy 10 October 2011.

⁵ Reply page 141.

⁶ *Mason v Demasi* [2009] NSWCA 227 per Basten JA; *Palise v ANZ Banking Group Limited* [2018] NSWCCPD 13 per Keating P.