WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **3022/19**
Applicant: **Bozo Mioc**
Respondent: **Boldway Pty Ltd (t/as Boldway Painting Services)**
Date of Determination: **23 September 2019**
Citation: **[2019] NSWWCC 309**

The Commission determines:

1. The applicant sustained consequential conditions affecting his right wrist and upper gastrointestinal tract as a result of the injury to his left foot on 1 May 2004 (deemed).

The Commission orders:

1. The matter is remitted to the Registrar for referral to an Approved Medical Specialist for further assessment as follows:

    Date of injury: 1 May 2004 (deemed)

    Body parts: Lumbar spine
    Right upper extremity (wrist)
    Upper gastrointestinal tract

    Method: Whole Person Impairment

2. The material to be referred to the Approved Medical Specialist is to include the Application to Resolve a Dispute and all attachments; and the Reply and all attachments apart from the reports of Dr Silva, Dr Muratore, Dr Antoun and Dr Panjratan which are admitted only in respect of the histories recorded.

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

Rachel Homan
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 RACHEL HOMAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mr Bozo Mioc (the applicant) was employed by Boldway Pty Ltd t/as Boldway Painting Services (the respondent) as a painter. The applicant claims to have suffered an injury to his left foot due to the nature and conditions of his employment with the respondent.

2. The applicant made a claim for compensation in respect of his injury, which was disputed and came before the Commission in WCC 9646-2005. On 7 November 2005, Arbitrator Grotte issued a Certificate of Determination and Statement of Reasons in which it was found that the applicant sustained a Lisfranc injury to his left foot with stress fractures of the left second and third cuneiform bones and left cuboid bone, with secondary sympathetic dystrophy, arising out of and in the course of employment on 1 May 2004. The respondent was ordered to pay weekly benefits and medical expenses pursuant to s 60 of the *Workers Compensation Act 1987* (the 1987 Act).

3. The applicant later made a claim for lump sum compensation pursuant to s 66 of the 1987 Act, which came before the Commission in WCC 5598-2007. On 3 October 2007, Dr James Bodel issued a Medical Assessment Certificate assessing Whole Person Impairment (WPI) of the "left lower extremity, lumbar spine" on 1 May 2004. Dr Bodel assessed the applicant as having 7% WPI of the left lower extremity and 0%WPI of the lumbar spine.

4. On 25 January 2019, the applicant made a further claim for lump sum compensation pursuant to s 66 of the 1987 Act, in respect of 18% WPI resulting from consequential conditions to the applicant's lumbar spine, right upper extremity (wrist) and upper gastrointestinal tract. It was noted that the applicant did not claim any further impairment of his left lower extremity. The date of injury specified was 27 July 2004. That date was amended by subsequent correspondence to "nature and conditions from 28 January 2004 to 27 July 2004 (including nominated date of 1 May 2004)".

5. On 15 May 2019, the respondent issued a dispute notice pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act). Amongst other things, the respondent disputed that the applicant had sustained injury as a result of the nature and conditions of employment from 28 January 2004 to 27 July 2004, noting that the applicant had only ever lodged a claim with a date of injury of 1 May 2004 in relation to his left foot. The respondent further disputed that that applicant had sustained consequential conditions affecting his lumbar spine, right wrist or gastrointestinal tract as a result of the accepted injury to the applicant's left foot on 1 May 2004.

6. The present proceedings were commenced by an Application to Resolve a Dispute (ARD) filed in the Commission on 20 June 2019. The applicant seeks lump sum compensation in respect of his lumbar spine, right upper extremity (wrist) ang upper gastrointestinal tract. The date of injury pleaded at Part 4 of the ARD was "nature and conditions from 28 January 2004 to 27 July 2004 (nominated dated 1 May 2004)".

PROCEDURE BEFORE THE COMMISSION

7. The parties attended a conciliation conference and arbitration hearing on 21 August 2019. The applicant was represented by Mr Gregory Young of counsel, instructed by Mr Zacharia Gabriel. The respondent was represented by Mr Jak Callaway of counsel.

8. During the conciliation conference, leave was granted to the applicant to amend the date of injury pleaded at Part 4 to "1 May 2004" to bring it into line with that previously accepted.

9. The respondent conceded that the applicant had sustained a consequential condition affecting his lumbar spine as a result of the accepted injury to the applicant's left foot, consistently with the previous referral to an Approved Medical Specialist (AMS) in 2007.

10. 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.

ISSUES FOR DETERMINATION

11. The parties agreed that the following issues remained in dispute:

    (a) Whether the applicant had sustained consequential conditions affecting his right wrist and upper gastrointestinal tract as a result of the injury to his left foot.

    (b) The quantum of any entitlement to further lump sum compensation.

EVIDENCE

Documentary Evidence

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

    (a) ARD and attached documents;

    (b) Reply and attached documents apart from the reports of Dr Silva, Dr Muratore, Dr Antoun and Dr Panjratan, which are excluded pursuant to cl 44 of the *Workers Compensation Regulations 2016* apart from the histories recorded.

13. An Application to Admit Late Documents filed by the applicant on 9 August 2019 was withdrawn at conciliation after objection to its admission was raised by the respondent.

Applicant's evidence

14. The applicant's evidence is set out in written statements made by him on 11 March 2005 and 19 March 2019.

15. In his first statement, the applicant gave evidence that his work for the respondent involved working on scaffolding, painting the exterior of a building in Parramatta. The building was 15 storeys high and the applicant would need to make his way from floor to floor by descending and ascending scaffolding.

16. Towards the end of April 2004, the applicant began to experience pain and discomfort in his left leg, primarily in the calf and left foot. The applicant mentioned the pain to his foreman who assigned him to painting duties inside the building for approximately two weeks. After the two-week period, the applicant was required to return to the exterior of the building as they were understaffed.

17. The applicant's pain deteriorated to the point that he sought medical attention from his family practitioner, Dr Tomasevic on 3 May 2004. The applicant was issued with a medical certificate for one day. The applicant returned to employment but because of the continuing pain and discomfort was guarded in the way he performed his work. The applicant slowed down and, on 27 July 2004, the applicant's employment was terminated.

18. The applicant stated that he was referred by Dr Tomasevic to orthopaedic surgeon, Dr Roderick Kuo. The applicant said he had constant pain and discomfort in his left leg and the toes of his left foot. The applicant could not walk without the aid of a walking stick and favoured his right leg. The applicant said he had intermittent pain radiating down the back of his left leg.

19. The applicant gave a similar account of his employment with the respondent and the onset of his left foot injury in his second written statement. The applicant said he was referred for a scan in August 2004, which showed fractures in his left foot. The applicant began experiencing symptoms in his lower back in 2005/2006 due to ongoing pain and limping. Dr Tomasevic referred the applicant to Dr Needham at Bankstown, who sent the applicant for a CT scan and recommended conservative treatment.

20. The applicant said that as a result of his injury, his left ankle/leg was giving way, resulting in falls. As a result of one of those falls, in July/August 2013, the applicant sustained a fracture to his right wrist. The applicant attended Liverpool Hospital where a plaster was applied. The applicant subsequently attended Dr Dave at Campbelltown for check-ups.

21. The applicant said that as a result of the use of medication following his injury, he started to have stomach symptoms in the form of reflux, acid and pain. Dr Tomasevic referred the applicant to Dr Simring who performed a colonoscopy and gastroscopy on 22 February 2018. The applicant said his medications included Panadol Osteo, Diabex for diabetes, Losec for stomach symptoms and Panadeine Forte when required. The applicant said he previously took Celebrex and Tramal but had stopped taking it.

Dr Tomasevic

22. The clinical records of the applicant's general practitioner, Dr Predrag Tomasevic, are in evidence. Those records show consultations in relation to the applicant's left calf and foot commencing from 3 May 2004. The applicant is recorded as complaining of persistent pains in his left calf, left leg and left foot, left foot paraesthesia and walking with a walking stick due to pains. These symptoms are repeated throughout the clinical notes with additional symptoms later added.

23. In June 2005, the applicant was prescribed Losec tablets and referred to a Dr Edwards and for gastroscopy. There is reference to a repeat gastroscopy on 22 September 2005 at Liverpool Hospital. On 21 October 2005, the notes record:

> "18/10/05 NORMAL GASTROSCOPY AND? NO NEED FOR OT STOMACH ACCORDNG TO GASTROSCOPY"

24. In January 2009, the applicant complained of gastro-oesophageal reflux. The clinical notes state,

> "TOLERATING MEDS WELL
> TAKING MEDS REGS
> GOR SX NO GIT ALARM SX"

25. On 6 August 2010 and 22 October 2010, the applicant again complained of occasional "GOR" symptoms.

26. On 28 February 2013, the clinical notes refer to a right wrist injury as follows:

> "10/2/13 DUE TO LEFT LEG GIVNG WAY PATIENT PUT HIS RIGHT HAND ON CONCRETE GROUND AND THEN R WRIST PAINS

11/2/13 PRESENTED TO LVPOOL HOS

? FRACTURE R RADIUS I R WRIST

11/2/13 IN LVPOOL HOS A&E- POP APPLIED, MANAGED CONSERVATIVELY DC HOME 11/2/13"

27. On 12 March 2013, the applicant was referred by Dr Tomasevic to Dr Chandra Dave.

28. On 12 August 2013, the notes refer to a further fall as follows:

> "11/7/13 WALKING IN LIVERPOOL ON FOOT PATH AND DUE TO LEFT LOWER LIMB PAINS AND WEAKNESS FROM RPEVIOUS WORK INJURY PATIENT FELL ON FOOTPATH AND HIT RIGHT WRIST ON FOOT PATH
>
> 12/7/13 PRESENTED TO A&E LVPOOL- DC HOME ON BACK SLAB"

29. Gastro-oesophageal symptoms were again reported on 19 May 2017. On 4 September 2017 and on an ongoing basis thereafter, the notes refer to:

> "UPPER ABDO PAIN ON OCCASIONS
>
> GORSX
>
> NO PR BLEEDING NO HAEMATEMESIS"

30. The applicant was referred to Dr Alexander Simring and correspondence from Dr Simring was discussed on 6 October 2017. The notes indicate that on 22 February 2018, Dr Simring performed a gastroscopy and colonoscopy.

Dr Simring

31. A gastroscopy report prepared by Dr Alexander Simring, dated 22 February 2018 indicated:

> "Moderate erythematous gastritis involving the lower stomach was evident.
> Mild flat erosive gastritis involving the antrum was found.
> …
>
> Moderate patchy erythematous bulbar and post bulbar duodenitis was apparent."

32. A diagnosis of gastritis and duodenitis was made. It was recommended that the applicant cease all NSAIDs and continue Losec.

Dr Mastroianni

33. The applicant relies on a medicolegal report prepared by Dr T Mastroianni, consultant occupational physician, dated 20 December 2018.

34. Dr Mastroianni took a history of the injury to the applicant's left foot. It was noted that in 2009 the applicant injured his right ankle in a fall off a balcony. The applicant injured his right knee in a motor vehicle accident in 2011. The right ankle fracture needed stabilisation with screws whilst the right knee fracture was treated conservatively. Dr Mastroianni recorded that the applicant complained that his left ankle gave way and he had two falls injuring his right wrist. His right wrist fractures were treated with plaster immobilisation. Dr Mastroianni gave an opinion that, after the left foot injury and whilst favouring the left leg, the applicant aggravated a disc lesion causing back pain and sciatica. Dr Mastroianni considered the back injury to be a consequential condition.

35. With regard to the right wrist, Dr Mastroianni stated:

> "He also sustained fracture to the right wrist as a result of the left foot giving way. He now has chronic discomfort in the wrist and restricted wrist movements. This, in my Opinion, is also a consequential injury."

36. Dr Mastroianni assessed the applicant as having 12% WPI for the lumbar spine and 6% WPI for the right upper extremity (wrist) due to restricted wrist movements. Dr Mastroianni assigned 0% WPI to the left lower extremity and noted that Dr Greenburg had assessed the applicant as having 1% WPI for the upper gastrointestinal tract, leading to a combined table value of 18% WPI.

Dr Greenburg

37. The applicant also relies on a medicolegal report prepared by general and gastrointestinal surgeon, Dr Anthony Greenburg, dated 3 April 2018.

38. Dr Greenburg noted that the applicant's current medications included Panadol Osteo, Losec and intermittent Panadeine Forte, although there were periods when the applicant took Panadeine Forte daily. The applicant previously took Celebrex (NSAIDs) but ceased five years ago.

39. Dr Greenburg reviewed the reports of the gastroscopy and colonoscopy performed by Dr Simring on 22 February 2018.

40. Dr Greenburg gave the opinion that the applicant had symptoms consistent with gastritis and gastro-oesophageal reflux. It was noted that Panadeine Forte was known to cause a disturbance of gastrointestinal motility and would almost certainly aggravate any existing gastro-oesophageal reflux. Dr Greenburg expressed the view that as a result of his orthopaedic injuries, the applicant required long-term analgesia to obtain pain relief. Despite taking Panadeine Forte intermittently, Dr Greenburg considered it possible that this would explain the endoscopy findings.

41. Dr Greenburg assessed the applicant as having 1% WPI of the upper gastrointestinal tract.

Dr Chase

42. The respondent relies on medicolegal reports prepared by occupational physician, Dr Robin Chase.

43. In a report dated 9 February 2017, Dr Chase noted that physical examinations of the applicant in 2015 and on 9 February 2017 were notable for high levels of pain behaviour. Dr Chase assigned 0% WPI to the lumbar spine and 3% WPI to the left foot. Dr Chase did not consider the applicant's right wrist or gastrointestinal symptoms on that occasion.

44. In a report dated 28 March 2019, Dr Chase again reported that tests for abnormal illness behaviour were strongly positive. Dr Chase said diagnosis of the applicant was difficult in view of the very significant overlaid pain behaviours. Dr Chase could arrive at no specific diagnosis with regard to the right wrist saying the history was unclear and there was little corroboration in the supplied documentation. Dr Chase recorded that the applicant reported having broken his right hand twice but could not remember when. The applicant said it was because of his left leg that he fell over. In 2017, the applicant had ignored a question about his right hand injury but did say it was "no good".

45. Dr Chase did not consider it appropriate to attempt any assessment of permanent impairment of the applicant's low back or right upper limb as a result of the alleged work injury in 2004.

Dr Garvey

46. The respondent additionally relies on a medicolegal report prepared by Dr John F W Garvey, general and diagnostic surgeon, dated 15 March 2019.

47. Dr Garvey noted that the applicant reported that if he ate hot food he would get a pain in the stomach but this was not an issue now. The applicant denied any lower digestive problems. The applicant's present treatment included Panadol Osteo, Losec, Panadeine Forte, diabetes medication and Celebrex which was ceased six to seven years ago. The applicant reported occasional problems with acid reflux. The applicant did report a bleeding peptic ulcer when he lived in Berlin 20 years ago which required upper gastrointestinal endoscopy and triple therapy. Further endoscopy was performed at Liverpool Hospital seven to eight years ago for the bleeding peptic ulcer.

48. Dr Garvey reviewed the endoscopy and colonoscopy reports prepared by Dr Simring and said they showed no evidence of chemical gastropathy. Dr Garvey said that in order to satisfy the criteria in the Guides for the effects of analgesics and the digestive tract there must be clinical signs or other objective evidence of upper digestive tract disease. There was no histological proof of chemical gastropathy, analgesic gastropathy, reactive gastropathy or NSAIDs gastropathy in the biopsy reports.

49. Dr Garvey diagnosed dyspepsia and said this was not related by way of cause, aggravation, exacerbation or acceleration due to the accident at work. Dr Garvey assessed the applicant as having 0% WPI.

Applicant's submissions

50. Mr Young noted that the applicant's left foot injury was not in dispute, taking me to the findings in Arbitrator Grotte's Statement of Reasons.

51. Mr Young noted that applicant's statements described the circumstances in which the consequential conditions in his right wrist and upper gastrointestinal tract developed. Mr Young also took me through the reports of Dr Mastroianni and Dr Greenburg and said they supported the applicant's case.

52. Mr Young took me through Dr Tomasevic's clinical notes and submitted that the entry on 18 October 2005 indicated a normal gastroscopy. Mr Young said this could be contrasted with the abnormal gastroscopy reviewed by Dr Greenburg in 2018 after years of analgesic use due to the left foot injury. Mr Young also noted the entries showing gastro-oesophageal complaints from 2010 onwards.

53. Mr Young submitted that the clinical notes also contained contemporaneous records of the two falls in which the applicant injured his right wrist and recorded the cause of those falls as being the applicant's left foot giving way.

54. Mr Young said the clinical notes demonstrated medication being consistently taken and the consistent treatment of the applicant's left lower limb. The recorded symptoms appeared to worsen over time to include complex regional pain, reduced range of motion, altered gait and instability. These same symptoms were responsible for the applicant's falls, causing fractures to the applicant's right wrist.

55. Mr Young submitted that Dr Chase applied an incorrect test in concluding that simply because conditions arose after the work injury they could not be work related.

56. It was submitted that Dr Garvey had conceded that there was gastritis but not a rateable loss. Mr Young submitted that this was a matter for an AMS not an Arbitrator.

57. Mr Young submitted that a *Jones v Dunkel* inference should not be drawn from the absence of clinical notes from Liverpool Hospital in relation to the falls. An x-ray from the Hospital was available and less than three weeks after the events the applicant presented to Dr Tomasevic. Mr Young said the respondent was aware of the history and could have sought the notes through a Direction for Production or otherwise. Mr Young submitted that the absence of those notes should receive neutral treatment.

Respondent's submissions

58. Mr Callaway said Dr Tomasevic's clinical notes simply recorded the same thing over and over again in the context of requests for certificates. Mr Callaway said the notes gave little insight into what the applicant's situation was from time to time and there was little other evidence to assist in determining the progression of the applicant's symptoms.

59. Mr Callaway said I was being asked to accept that the applicant's leg gave way causing him to fall. Mr Callaway conceded that that history had been reported to Dr Tomasevic but noted the applicant did not complain of this symptom in his first statement. The evidence did not satisfactorily explain what may have caused the applicant's leg to give way. There was no satisfactory explanation for why the applicant required the use of a walking stick.

60. Mr Callaway noted that the applicant had attended Liverpool Hospital but no records from the hospital had been placed in evidence. Mr Callaway submitted that one might expect something more in the way of evidence than had been submitted by the applicant. Dr Tomasevic's notes were taken some three weeks after the event. The attendances on Dr Tomasevic could not be regarded as contemporaneous in these circumstances. Although the applicant had given a vague history to Dr Tomasevic of his leg giving way there was no evidence of this having occurred previously.

61. Mr Callaway noted that the applicant bore the onus of proof and queried how a common sense approach to the question of causation would lead to a conclusion that the applicant's leg had given way.

62. Mr Callaway noted that Dr Chase had provided multiple reports over which he maintained a consistent view. Dr Chase found significant overlayed pain behaviour and said the diagnosis in relation to the applicant's left foot was unclear. The imaging did not reveal facture and the MRI scan showed no abnormality. Mr Callaway accepted that he was estopped from disputing the injury to the applicant's left foot but said the ongoing effects of any injury remained in dispute.

63. Mr Callaway said the recorded "giving way" events appeared isolated and were not recorded in the general history given to Dr Mastroianni. Dr Mastroianni noted that the applicant had walked without a crutch and then ineffectively used the crutch. Dr Mastroianni noted that the applicant tended to wobble but found no obvious limp. Mr Callaway submitted that Dr Mastroianni had given no explanation for his opinion that the falls were due to the applicant's left leg giving way.

64. With regard to the upper gastrointestinal tract, Mr Callaway noted that Dr Garvey found no histological proof of chemical gastropathy, analgesic gastropathy, reactive gastropathy or NSAIDs gastropathy in the biopsy reports. Those features had not been reported in the applicant. Mr Callaway said I would prefer Dr Garvey's opinion over that of Dr Greenburg, who had given the applicant the benefit of the doubt.

FINDINGS AND REASONS

65. It is accepted by the respondent that the applicant sustained "injury" to his left foot pursuant to s 4 of the 1987 Act. It has further been conceded that as a result of that injury, the applicant sustained a consequential condition affecting his lumbar spine. What remains for determination is whether the applicant sustained consequential conditions affecting his right wrist and upper gastrointestinal tract as claimed.

66. It is not necessary for the applicant to establish that any conditions in his right wrist or upper gastrointestinal tract are in themselves 'injuries' pursuant to s 4 of the 1987 Act. Deputy President Roche in *Moon v Conmah*[1] observed at [45]-[46]:

> "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."

67. In *Bouchmouni v Bakhos Matta t/as Western Red Services*[2], Roche DP noted,

> "The Commission has considered and explained the difference between an 'injury' and a condition that has resulted from an injury in several recent decisions (*Moon v Conmah Pty Ltd* [2009] NSWWCCPD 134 at [43], [45] and [50] (*Moon*); *Superior Formwork Pty Ltd v Livaja* [2009] NSWWCCPD 158 at [122]; *Cadbury Schweppes Pty Ltd v Davis* [2011] NSWWCCPD 4 at [28]–[32] and [39]–[42] (*Davis*); *North Coast Area Health Service v Felstead* [2011] NSWWCCPD 51 at [84]; *Australian Traineeship System v Turner* [2012] NSWWCCPD 4 at [28] and [29] (*Turner*); *Kumar v Royal Comfort Bedding Pty Ltd* [2012] NSWWCCPD 8 at [35]–[49] and [61]).
>
> …
>
> The injury to Mr Bouchmouni's right knee caused him to seek treatment in the form of surgery and physiotherapy. The evidence suggests that it was in the course of receiving that treatment, and/or as a result of an altered gait because of his knee symptoms, Mr Bouchmouni developed back symptoms. If that is accepted, and no reason has been advanced why it should not be, it is clear beyond doubt that his back condition has resulted from the treatment he received for his accepted knee injury and his altered gait. That does not, however, make the back condition an 'injury'."

68. A commonsense evaluation of the causal chain to determine whether any condition in the applicant's right wrist and gastrointestinal tract resulted from the accepted injury to his left foot is required. In *Kooragang*, Kirby P said,

> "The result of the cases is that each case where causation is in issue in a workers compensation claim, must be determined on its own facts. 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 death or injury or death, will not, of itself, be sufficient to establish that such incapacity or death

[1] [2009] NSWWCCPD 134.
[2] *Bouchmouni v Bakhos Matta t/as Western Red Services* [2013] NSWWCCPD 4; (2013) 14 DDCR 223; BC201319259.

> 'results from' a work injury. What is required is a commonsense 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."[3]

69. With regard to the standard of proof, Roche DP in *JB Metropolitan Distributors Pty Ltd v Kitanoski (Kitanoski)*[4], referring to the decision in *EMI (Aust) Ltd v Bes*[5], said,

> "*Bes* only becomes relevant in a case where medical science says that there is a 'possible' connection between the incident and the relevant condition for which compensation is claimed. In that situation, if medical science does not say that there is 'no possible connection', a judge after examining the evidence may decide that it is 'probable'. This statement is consistent with the decision of Spigelman CJ in *Seltsam Pty Ltd v McGuiness* [2000] NSWCA 29; 49 NSWLR 262 at [93], where his Honour explained that, in some cases, medical science cannot determine the existence of a causal relationship. As his Honour explained, such a state of affairs is not necessarily determinative of the existence or non-existence of a causal relationship for the purposes of attributing legal responsibility. The commonsense approach to causation at common law (which applies in workers' compensation cases) is quite different from a scientist's approach to causation."

Right wrist

70. There is relatively little in the way of evidence from treating practitioners to support the applicant's claim that he sustained fractures in his right wrist as a result of falling when the injury to his left foot caused his left leg to give way.

71. Apart from x-rays performed on 25 February 2013 and 1 August 2013 at the request of doctors from Liverpool Hospital, which confirm fractures of the distal radius, the treating medical evidence related to the wrist is limited to the clinical notes of Dr Tomasevic.

72. Dr Tomasevic's clinical notes are entirely consistent with the applicant's lay evidence in that in entries on 28 February 2013 and 12 August 2013 they record falls due to the left leg giving way or left lower limb pains and weakness.

73. Mr Callaway questioned the reliability of these notes on the basis that they were not strictly contemporaneous to the falls. The first entry appears 18 days after the first fall on 10 February 2013 and the second entry was recorded just over a month after the second fall on 11 July 2013. The delay in the recording of the events by Dr Tomasevic is explained by the fact that the applicant sought treatment at Liverpool Hospital rather than from Dr Tomasevic at first instance. To the extent that it is suggested that the delay casts doubt over the reliability of the applicant's recollections, I am not satisfied that either delay was sufficiently lengthy as to have materially obscured the applicant's memory of what transpired.

74. It is unfortunate that neither the applicant nor the respondent have sought to place into evidence the clinical records of Liverpool Hospital or Dr Chandra Dave, the orthopaedic surgeon to whom the applicant was referred after the first fall. Those records would presumably elucidate the circumstances in which the applicant's wrist was fractured. I am not prepared with draw any adverse inference from the absence of such material. It does, however, leave me with a consistent and uncontradicted account of what transpired in the applicant's evidence and Dr Tomasevic's clinical notes.

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[3] (1994) 10 NSWCCR 796 at [810].
[4] [2016] NSWWCCPD 17; BC201601437 at [94].
[5] [1970] 2 NSWR 238.

75. In considering whether the applicant's account should be accepted I have given consideration to Mr Callaway's submission that the evidence does not explain how or why his leg would have given way. I accept that Dr Mastroianni's report provides little assistance in this regard. Dr Mastroianni appears to have accepted at face value the applicant's assertion that the falls were due to his left leg giving way and does not explain the mechanism of fall by reference to the clinical evidence. Mr Callaway also submitted that the clinical notes of Dr Tomasevic give little insight as to the applicant's true condition at any given point.

76. Dr Tomasevic's records are notable for the fact that the same description of symptoms appears to have been replicated or "cut and pasted" at each WorkCover consultation with the applicant. Occasionally additional symptoms are added or removed. I do not accept, however, that this repetition necessarily means that the notes are not an accurate reflection of the applicant's condition at each presentation.

77. The notes are not inconsistent with the applicant's claims and in fact tend to support them. In the lead up to the falls in 2013, Dr Tomasevic was recording persisting pains in the left calf, lower limb and foot, paraesthesia of the left lower limb, complex regional pain syndrome of the left lower limb, reduced range of motion of the left foot and inability to move the left toes. These symptoms were consistently and progressively reported from the time of the left foot injury. As a matter of commonsense, it is not difficult to imagine how these symptoms could have caused a fall.

78. The reports of Dr Chase do not cause me to hold any serious concerns with regard to the applicant's evidence. Dr Chase was unable to obtain a coherent history of the injury to the applicant's right wrist, there was little corroboration in the documentation supplied to him and he was ultimately unable to arrive at a diagnosis. Dr Chase appears to have concluded that as the right wrist injury occurred at a much later date it could not be related to a foot injury in 2004. Dr Chase does not consider whether the condition in the applicant's right wrist has, as a matter of commonsense, "resulted from" the left foot injury.

79. I have given weight to Dr Chase's view that the applicant's presentation was significantly overlaid with abnormal pain behaviour and the nature of the left foot injury was unclear. Although the ongoing effect of any injury is still relevant to the issues now in dispute, there is no dispute before me that the applicant sustained an injury as found by Arbitrator Grotte in 2005. In 2007, Dr Bodel was satisfied that there was permanent impairment resulting from the injury to the applicant's left foot. As already indicated, the clinical notes of Dr Tomasevic record ongoing symptoms on the left lower limb up until the time of the falls capable of potentially causing a fall.

80. Considering the evidence as a whole, and while the matter is not beyond doubt, I am satisfied on the balance of probabilities that the applicant continued to experience symptoms in his left lower limb as result of the injury to his left foot up until 2013. I am satisfied in the absence of any evidence to the contrary that the applicant's right wrist was fractured in falls in 2013, which were caused by the applicant's left leg giving way or by pains and weakness in the applicant's left leg experienced as a result of the injury. For this reason, I am satisfied that the applicant sustained a condition in his right wrist as a result of the injury to his left foot deemed to have occurred on 1 May 2004.

Upper gastrointestinal tract

81. Consideration of the alleged consequential condition in the applicant's upper gastrointestinal tract is affected by the same evidentiary challenges as the right wrist. There is minimal evidence from treating practitioners other than Dr Tomasevic and the gastroscopy report prepared by Dr Simring. That evidence does, however, tend to support the applicant's case.

82. There was apparently a normal gastroscopy report performed around a year after the accepted injury, as recorded in Dr Tomasevic's notes. Dr Tomasevic's notes show regular complaints of gastro-oesophageal symptoms from about the beginning of 2009. The notes also confirm the applicant was taking Panadol, Panadol Osteo, Panadeine Forte and, until around 2013, Celebrex and Tramal.

83. The gastroscopy report by Dr Simring recorded mild to moderate gastritis. Although no other report from Dr Simring is in evidence, Dr Greenburg, considered this report and expressed the view that the long term taking of analgesics, particularly Panadeine Forte, albeit on an intermittent basis "would almost certainly" aggravate any existing gastro-oesophageal reflux. Dr Greenburg considered it "possible" that this could explain the findings on the gastroscopy.

84. Dr Garvey's report lacks sufficient reasoning or engagement with the clinical notes, history provided to him or the gastroscopy reports to cause me to doubt Dr Greenburg's opinion. While he did not accept that there was a rateable impairment under the Guides, this is a different question as to whether the injury in 2004 has, as a matter of commonsense, caused a condition in the applicant's upper gastrointestinal tract.

85. There is no medical evidence before me to indicate that there is "no possible connection" between the applicant's upper gastrointestinal symptoms and his long-term use of analgesics. I am satisfied that the applicant has in fact used analgesics over a period of more than 15 years as a result of the left foot injury. In the circumstances, I am prepared to accept Dr Greenburg's opinion and am satisfied that the condition in the applicant's upper gastrointestinal tract as shown on the gastroscopy report by Dr Simring has resulted from the left foot injury deemed to have occurred on 1 May 2004. Whether that condition has resulted in a rateable impairment will be a matter for an AMS to decide.

Entitlement to lump sum compensation

86. In view of my findings above and the concessions made by the respondent, I consider it appropriate to remit this matter to the Registrar for referral to an AMS for assessment of the degree of permanent impairment to the applicant's lumbar spine, right upper extremity (wrist) and upper gastrointestinal tract resulting from the injury to the applicant's left lower extremity deemed to have occurred on 1 May 2004. Given the wide discrepancy between the clinical findings and assessments of permanent impairment made by the parties' independent medical examiners, I am not satisfied that this an appropriate case for me to determine as Arbitrator.

SUMMARY

87. The applicant sustained consequential conditions affecting his right wrist and upper gastrointestinal tract as a result of the injury to his left foot on 1 May 2004 (deemed).

88. The matter is remitted to the Registrar for referral to an AMS for assessment as follows:

Date of injury:	1 May 2004 (deemed)
Body parts:	Lumbar spine Right upper extremity (wrist) Upper gastrointestinal tract
Method:	Whole Person Impairment

89. The material to be referred to the AMS is to include the ARD and all attachments; the Reply and all attachments apart from the reports of Dr Silva, Dr Muratore, Dr Antoun and Dr Panjratan which are admitted only in respect of the histories recorded.