

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 1011/19  
**Applicant:** Mario Mebrek  
**Respondent:** Canterbury Leagues Club Limited  
**Date of Determination:** 09 October 2019  
**Citation:** [2019] NSWCC 327

The Commission determines:

1. I find that Mr Mebrek suffered injury to his lumbar spine on 3 August 2014.
2. I find that alternative modes of treatment have failed to alleviate Mr Mebrek's condition.
3. Accordingly, the respondent will pay the costs of and associated with the surgery recommended by A/Prof Papantoniou in his report of 28 March 2013.

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

John Wynyard  
**Arbitrator**

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF JOHN WYNYARD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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**Sarojini Naiker**  
**Senior Dispute Services Officer**  
As delegate of the Registrar



## STATEMENT OF REASONS

### BACKGROUND

1. Mario Mebrek, the applicant, brings an action against Canterbury Leagues Club Limited (the respondent) in an action pursuant to s 60 of the *Workers Compensation Act 1987* (the 1987 Act) for a declaration that the proposed surgery in its amended form, is reasonably necessary.
2. Section 74 notices were issued on 28 September 2018 and 5 November 2018. The Application to Resolve a Dispute (ARD) was lodged on 4 March 2019 and the Reply on 25 March 2019.

### ISSUES FOR DETERMINATION

3. The parties agree that the following issues remain in dispute:
  - (a) Is the applicant a witness of credit;
  - (b) Was employment the main contributing factor to the subject injury;
  - (c) Is the proposed surgery reasonably necessary?

### PROCEDURE BEFORE THE COMMISSION

4. This matter was heard on 21 May 2019 and 5 July 2019 in Wyong. Mr Greg Young appeared on both occasions for the applicant and Ms Lyn Goodman on both occasions for the respondent. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

### EVIDENCE

#### Documentary Evidence

5. The following documents were in evidence before the Commission and taken into account in making this determination:
  - (a) ARD and attached documents;
  - (b) Application to Admit Late Documents (ALD) dated 16 April 2019;
  - (c) ALD dated 28 June 2019;
  - (d) Reply;
  - (e) ALD dated 28 May 2019;
  - (f) ALD dated 13 May 2019;
  - (g) ALD dated 26 June 2019;
  - (h) Pursuant to Direction issued on 5 July 2019 written submissions were received from the respondent dated 5 August 2019.

## Oral Evidence

6. No application was made regarding oral evidence.

## FINDINGS AND REASONS

7. The applicant was employed as a Chef at the respondent's Club on 3 August 2014. He was lowering a basket of wood weighing 50 - 60 kg for the pizza oven. Mr Mebrek said as he did so he heard a loud crack in his back and experienced severe symptomology.
8. He was off work for about three months, then returned on light duties which he managed to tolerate until an increase in his symptomatology caused him to cease work on 18 December 2014. He has not been able to work since. He has continued to suffer significant and incapacitating symptoms in his back, in respect of which he has not been able to find any effective treatment.<sup>1</sup>
9. Mr Mebrek relied upon the opinions of Professor (Prof) Ghabrial and Associate Professor (A/Prof) Papantoniou to establish that the proposed surgery was reasonably necessary.
10. Mr Mebrek asserted within his statements that he had continued to suffer severe symptomology in his back since he ceased work, and as a result has not been able to work. The respondent maintained that assertion should be disbelieved, because I would not accept that Mr Mebrek was a witness of credit.
11. This submission was based upon the fact that in the clinical notes of his GP, Dr Dank, Mr Mebrek had complained often prior to the subject injury about pain in his back<sup>2</sup>.
12. Mr Mebrek's credit was accordingly severely compromised because, it was alleged, the reports of the medico-legal experts - and that of the treating surgeon, A/Prof Papantoniou - recorded that Mr Mebrek had not recorded any complaints about his back prior to the subject incident.
13. Mr Mebrek put on a supplementary statement to the effect that that he had not regarded those symptoms as being of major concern and had not thought to consider their relevance when seeking medical treatment because of the significant symptoms the subject injury had caused to his back. Nonetheless, the respondent submitted I would not be satisfied that Mr Mebrek's evidence can be accepted.
14. I note in passing that it is highly unlikely that a person would dissemble to that extent in order to fraudulently obtain approval to undergo a significant surgical procedure whose outcome is not without risk and danger. One would expect that other evidence would be before me that would support such an allegation. Indeed, the respondent carried out two periods of surveillance on Mr Mebrek in April 2016 and April 2017. In both sets of observation Mr Mebrek was seen to act consistently, usually if not always using his walking stick and walking with a limp. On 29 November 2018 Prof Ghabrial reported that Mr Mebrek was on crutches.<sup>3</sup>

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<sup>1</sup> See eg: ALD 10 April 2019 - report of Dr Kadavil dated 17 July 2017

ARD 101- report of A/ Prof Papantoniou dated 9 April 2018

Reply 20 - Dr Stening dated 30 October 2018

ALD 13 May 2019 - A/Prof Kleinman dated 10 March 2015

Reply nine - A/Prof Kleinman dated 19 April 2016

L3/S1 laminectomy, discectomy neurolysis, instrumented plus posterior fusion, PLIF, paravertebral nerve block and fat-fascia graft

<sup>2</sup> ALD 28 June 2019 – see clinical notes

<sup>3</sup> ARD 131

15. I accept that Mr Mebrek has not experienced any reduction in the level of his symptomology in the time since he ceased work on 18 December 2014. Such was the opinion of his medicolegal referee, Prof Ghabrial and his treating surgeon A/Prof Papantoniou. A /Prof Papantoniou has recommended surgical intervention in the form of a L3/S1 laminectomy, discectomy neurolysis, instrumented plus posterior fusion, PLIF, paravertebral nerve block and fat-fascia graft.
16. The respondent relied on the opinion of A/Prof Kleinman, who found that the applicant was suffering from pre-existing generative changes. A/Prof Kleinman said that whilst Mr Mebrek suffered an aggravation in the subject injury, that aggravation would since have ceased and the underlying degenerative changes were now responsible for Mr Mebrek's continuing back condition.<sup>4</sup>
17. Ms Goodman also relied on a somewhat technical argument which was based on the various opinions given about the various investigations that were carried out. Although the first imaging on 3 May 2018 demonstrated there was an extruded fragment, a further MRI on 16 July 2018 suggested that the fragment was no longer there. It followed, according to the respondent's argument, that therefore the cause of the back pain, the extruded fragment, had re-absorbed and that therefore Mr Mebrek had no scientific basis for his complaints. Prof Ghabrial in his report of 14 December 2018 therefore suggested that a multi-positional MRI be undertaken.
18. Dr Ghabrial's suggestion led to fresh imaging on 21 March 2019, which did not show any sign of the extruded fragment, but which nonetheless demonstrated an *anterolisthesis* which had not been identified on the earlier scans taken when Mr Mebrek had been lying prone<sup>5</sup>. The conclusion reached by the radiographer was of multilevel degenerative change, changes most marked right L5/S1 and bilaterally at L4/5, with features accentuated by a neutral standing and extension standing.
19. The respondent also submitted that because of the presence of the undoubted degenerative condition, it could not be said that the employment was the main contributing factor to the injury. As discussed in conciliation with Ms Goodman, I do not accept that submission. That Mr Mebrek had a grumbling back was clear from the occasional entries in Dr Dank's notes, and a report on 19 January 2015 recorded by A/Prof Kleinman in his report of 19 April 2016 of previous episodes in 2009 that settled after lasting three weeks.
20. However, I reject any suggestion that the present condition of Mr Mebrek's back was inevitable because of the presence of the degenerative changes, and that accordingly the subject injury was not the main contributing factor, or a substantial contributing factor. The evidence militates against that proposition.
21. The applicant had been performing his usual duties, which were arduous, as a pizza chef. The work involved constant lifting and bending, and Mr Mebrek had been doing that work for some considerable time. On this instance, when he was lowering a basket of wood weighing 50 – 60 kg for the pizza oven, the injury was accompanied by an audible crack in his back, which is an indication that some aspect of the pre-existing pathology had been aggravated. It may be that the incident caused the extruded disc, which it would appear later reabsorbed, but in any event, I accept Mr Mebrek's evidence that he was never the same thereafter.

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<sup>4</sup> Reply 13, 23

<sup>5</sup> ALD 10 April 2019

22. Although he attempted to return to light duties, I also accept that even doing the light duties of chopping up vegetables when he returned to full hours, caused severe pain in his lower back and cramping and numbing pains in his right leg. I accept Mr Mebrek's evidence that he has suffered debilitating symptoms, and has been unable to function without restriction and pain. The contrast between his present position and the condition he enjoyed before he lowered the basket wood is stark, and leads to the conclusion that that the lifting incident was the main contributing factor to the onset of his present state, and therefore also a substantial contributing factor.
23. The defence that the surgery proposed is not reasonably necessary was based really upon an argument that the employment was not the main contributing factor and that all that happened has been an aggravation which subsequently resolved. A/Prof Kleinman counselled against surgery, as he was of the opinion that Mr Mebrek was suffering from non-specific back pain superimposed on some lumbar spondylosis, but on top of which Mr Mebrek was exhibiting significant signs of illness behaviour. The walking stick Mr Mebrek was using when he saw A/ Prof Kleinman was just for dramatic effect, A/Prof Kleinman thought.
24. I reject that opinion, if thereby A/Prof Kleinman had been suggesting that Mr Mebrek's presentation was contrived for the purposes of misleading the medical specialists who examined him. I have already referred to the surveillance evidence of 2016 and 2017, which demonstrated that Mr Mebrek's restrictions were constant, and that he used his walking stick during both series of observations.
25. Ms Goodman kindly lodged written submissions as time did not permit her to complete her arguments after some time elapsed during the hearing, which I interrupted to discuss the question of conciliation.
26. Ms Goodman repeated her submissions that I would not accept the applicant as being witness of credit in view of the evidence of his prior back problems. I accept Mr Mebrek's explanation in his supplementary statement that he had not regarded those symptoms as being connected.<sup>6</sup> I accept his evidence that although he had soreness in his back from time to time, it did not interrupt his normal life. I accept that his back pain caused him to have the occasional time off work, and that treatment at the time consisted only of pain medication. I accept his evidence that he had never considered his back condition to be in effect of any moment, and the contrast between the pre-existing condition and the condition following the injurious event was of such significance that he did not regard it as being important, as I understood his evidence.
27. In her written submissions Ms Goodman also argued that the surgery was not reasonably necessary. This submission was based also upon the history of previous back and leg symptoms recorded in the clinical notes of Dr Dang. A/Prof Papantoniou, it was asserted, was unaware when he first recommended surgery of that previous history. Although, once he was made aware, he continued to recommend the surgery, he did not make a "proper analysis" of that prior history.
28. Ms Goodman submitted that I would prefer the opinion of A/Prof Kleinman that any aggravation had ceased. I decline to do so, as there is no evidence that the symptoms provoked by the injurious event have ever ceased. I accept the opinions of A/Prof Papantoniou and Prof Ghabrial that such surgery is reasonably necessary. In particular, A/Prof Papantoniou set out in his report of 9 April 2018 the long history of his involvement with Mr Mebrek, which stretched back to 10 February 2015 during which time Mr Mebrek attempted many different types of treatment, without success. Medication, psychology, pain management, physiotherapy and hydrotherapy have all been tried without showing any improvement.<sup>7</sup>

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<sup>6</sup> ALD (applicant) 28 June 2019

<sup>7</sup> ARD 101

29. Ms Goodman also submitted that the surgery was not reasonably necessary as A/Prof Kleinman was of the view that Mr Mebrek suffered a major psychological component to his illness and that the signs of illness behaviour detected by A/Prof Kleinman meant that in any event surgery would be futile. Such an opinion was, with respect, not within the expertise of the witness. I accept the majority of opinions, including that of Dr Stening, that Mr Mebrek has suffered an aggravation of his pre-existing degenerative condition in the incident of 3 August 2014. Dr Stening, like A/Prof Kleinman, thought that the aggravation has ceased, but again like A/Prof Kleinman, failed to adequately explain the facts and circumstances upon which that opinion was based.

## **SUMMARY**

30. I find that Mr Mebrek suffered injury to his lumbar spine on 3 August 2014.
31. I find that alternative modes of treatment have failed to alleviate Mr Mebrek's condition.
32. Accordingly, the respondent will pay the costs of and associated with the surgery recommended by A/Prof Papantoniou in his report of 28 March 2013.