WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **6736/19**
Applicant: **Michael William Hayes**
Respondent: **The Wrigley Company Pty Ltd**
Date of Determination: **21 April 2020**
Citation: **[2020] NSWWCC 125**

The Commission determines:

1. The applicant sustained an injury to his cervical spine as claimed on 25 November 2018.

2. The anterior cervical discectomy and fusion of the C6/7 level proposed by Dr Andrew Kam is reasonably necessary as a result of the injury.

The Commission orders:

1. The respondent to pay the costs of and incidental to the anterior cervical discectomy and fusion of the C6/7 level proposed by Dr Kam pursuant to s 60 of the *Workers Compensation Act 1987*.

2. The respondent to pay the applicant's other reasonably necessary medical expenses arising as a result of the injury to his cervical spine in accordance with s 60 of the *Workers Compensation Act 1987*, upon production of accounts, receipts and/or valid Medicare notice of charge.

3. The Commission declines to make an order in respect of the claim for ongoing weekly benefits.

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 Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mr Michael John Wrigley (the applicant) worked as a maintenance electrician for The Wrigley Company Pty Ltd (the respondent). On 25 November 2018, during the applicant's usual night shift, there was an explosion in a pulverised sugar silo on the respondent's premises. The applicant claims that whilst investigating the explosion, he struck his head and neck against a pipe in a confined space causing injury to his cervical spine.

2. The applicant made a claim for compensation in respect of the alleged cervical spine injury, which was declined under a dispute notice issued pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) on 4 November 2019. A further dispute notice maintaining the declinature was issued pursuant to s 287A of the 1998 Act on 25 November 2019.

3. The applicant lodged an Application to Resolve a Dispute (ARD) in the Commission on 20 December 2019. The applicant sought weekly benefits from 27 November 2019 to date and continuing and medical expenses pursuant to s 60 of the *Workers Compensation Act 1987* (the 1987 Act) including, the costs of and incidental to an anterior cervical discectomy and fusion at the C6/7 level as proposed by his treating specialist, Dr Andrew Kam.

PROCEDURE BEFORE THE COMMISSION

4. The parties appeared for teleconference on 31 January 2020. On that date, orders were made discontinuing the claim for weekly benefits "to date" on the basis that the applicant was then already in receipt of weekly benefits in respect of a primary psychological injury.

5. A conciliation conference and arbitration hearing were conducted by telephone on 23 March 2020. The applicant was represented by Mr Greg Horan of counsel, instructed by Mr Les Feher. The respondent was represented by Ms Lyn Goodman of counsel, instructed by Ms Robyn Hickie.

6. During the conciliation conference, the applicant argued that the discontinuance of the claim for weekly compensation to date at the initial teleconference did not affect his claim for ongoing weekly benefits. It was agreed that the extent of any entitlement to weekly payments on an ongoing basis from the date of hearing remained in dispute.

7. A dispute as to whether the applicant was barred from recovering compensation for the alleged injury by ss 254 or 261 of the 1998 Act was withdrawn by the respondent.

8. 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

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

   (a) Whether the applicant sustained an injury to his cervical spine on 25 November 2018 as claimed;

   (b) Whether the anterior cervical discectomy and fusion of the C6/7 level proposed by Dr Kam is reasonably necessary as a result of the injury;

(c) The applicant's entitlement to s 60 expenses; and

(d) The applicant's entitlement to ongoing weekly benefits.

EVIDENCE

Documentary Evidence

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

    (a) The ARD and attached documents;

    (b) Reply and attached documents; and

    (c) Documents attached to an Application to Admit Late Documents filed by the respondent on 17 March 2020.

11. Neither party applied to adduce oral evidence or cross-examine any witness.

Applicant's evidence

12. The applicant's evidence in relation to this claim is set out in written statements made by him on 3 June 2019 and 11 December 2019.

13. The applicant said he was working his normal Sunday night shift with a colleague, Ken Rae, when he was told by another worker that the sugar supply to the Skittles production line was not working. An alarm was flashing on the sugar supply operator touchscreen indicating "explosion valve". The applicant had not seen the alarm before.

14. The applicant went to investigate and noticed sugar was everywhere. The applicant had an eerie feeling that something was wrong. The applicant realised that sugar was coming out of the wall through an explosion vent that was opened up "like an exploded coke can".

15. Realising that the situation was dangerous, the applicant said to his colleague Mr Rae that they needed to call higher management. An explosion vent was blown out and air pressure had been turned off to filter bags with the possibility of a static charge due to the amount of pulverised sugar dust built up inside the silo. The applicant did not want to touch anything as he felt there could be another explosion.

16. Mr Rae called a manager who instructed him to replace the explosion vent. About an hour later, Mr Rae told the applicant that he had replaced the damaged vent but the system would not reset. The applicant thought something was really wrong for this to occur.

17. The applicant and Mr Rae then discovered that an explosion safety switch had been damaged. Mr Rae told the applicant that the manager had instructed him to bypass the switch so that they could run production.

18. The applicant initially thought Mr Rae had misunderstood the manager but then Mr Rae received an SMS from the manager confirming his instructions. Mr Rae told the applicant he was on his last written warning and could not afford to say no to the manager's request. The applicant said Mr Rae carried a resignation letter in his top pocket in case he needed to resign before being terminated in order to keep his defined benefits.

19. The applicant felt sick and like a 40 kg weight was on his chest. The applicant could not believe that no one from management was coming to investigate. The applicant thought the fire brigade should be called as this was potentially a high-risk situation.

20. Mr Rae showed the applicant where he had seen the safety switch. The applicant and Mr Rae followed the wiring from the safety switch and could see that it went under the explosion vent to the side of the silo. To get to the junction box of the switch, the applicant had to crawl under pipework and control boxes on an uneven floor. In this awkward position, it was difficult to get to the junction box.

21. The applicant said:

> "Trying to get comfortable due to the restricted access I went to get up to manoeuvre myself into a better position as one leg was on one level of the floor and the other up on the higher level I raised up and hit my head on the above pipework. I made a loud scream due to feeling a large jolted feeling at my neck and feeling like a drowning sensation in my throat as well as an electric shock feeling in both elbows and wrists like my funny bone was hit although I didn't hit my elbows or wrists on anything. Ken Rae immediately assisted asking if I was ok. I was dazed and thought I would pass out feeling startled. I stood up on the left side of the pipework and Ken Rae asked again are you sure your ok. I said I think so.
>
> We located the wire numbers on the junction box and on my way out of the pipework I hit the back of my neck on the pipework. Again, feeling weird sensation, I just wanted to get out of this area my head started to pound, and I was feeling very scared of the while situation."

22. The applicant and Mr Rae still could not get the switch to work. The applicant had to return to the junction box under the pipework to disconnect the switch. The applicant said he was not feeling very well and struggled to get in and out of this area, crawling with pain in his neck and arms. The applicant's head had started to pound. The applicant thought that he could be killed and felt uncomfortable being told to bypass the switch.

23. The applicant was not in a good state physically or mentally and felt extremely concerned about the situation. Whilst driving home, the applicant felt extremely stressed and physically numb. About 10 minutes from home, the applicant had to pull over and vomit.

24. When he returned home, the applicant went to the kitchen and took a Dispirin as his head was pounding. The applicant recalled dropping the glass into the sink although it didn't break. The applicant laid down but could not sleep straightaway as his head was "killing" him and his thoughts were racing so fast it felt like his brain was going to explode.

25. When the applicant awoke, he felt very agitated and confused. He had a numb sensation and feeling like he was carrying a backpack on his back and front chest. The applicant's head was still pounding and he took a Panadol and Dispirin.

26. After returning from work the following day, the applicant noticed his right hand was shaking while driving and he was struggling to keep his hands on the steering wheel for more than a few minutes. The applicant was not breathing well.

27. The applicant continued to work but was physically and mentally struggling and not completing full shifts. The applicant took planned annual leave before Christmas. Over Christmas, the applicant had a difficult time with his hands shaking, dropping and smashing plates. The applicant's head would not stop pounding.

28. The applicant went to his doctor after Christmas and saw Dr Aung. Dr Aung measured the applicant's blood pressure and gave him a prescription for blood pressure tablets. The applicant's blood pressure did not come down and the dosage was increased. Dr Aung referred the applicant for a CT angiogram of his head, following which, the applicant had an adverse reaction. This required an admission to Liverpool Hospital and the applicant was prescribed antihistamines. It took five weeks for those symptoms to settle down.

29. The applicant then went to a different medical practice where he consulted Dr Godfrey. The applicant then saw Dr Samir Michael. The applicant was referred to a neurologist, Dr Ho Choong, who referred the applicant for an MRI of his head and neck as well as nerve conduction studies. Based on the MRI results, Dr Choong referred the applicant to a neurosurgeon, Dr Balsam Darwish who was unable to see him. The applicant was then referred to Dr Andrew Kam.

30. The applicant consulted Dr Kam on 6 June 2019. Dr Kam advised the applicant to have injections which were performed on 24 July 2019 and 26 July 2019. The applicant consulted Dr Kam again on 8 August 2019 and he recommended the applicant proceed to surgery by way of anterior cervical discectomy and fusion at the C6/7 level.

31. The applicant said he continued to experience ongoing pain, tenderness and restricted movement in his neck, together with pain involving his left and right arms but mainly affecting his right side. The injury was affecting the applicant's ability to fully extend his elbow and triceps muscle in his right arm and strength in his right arm was weak.

32. The applicant said he had not been able to resume employment since leaving work on 15 December 2018 due to his psychological and physical injuries. The applicant remained under the care of a psychiatrist and psychologist as a result of the incident on 25 November 2018.

33. The applicant confirmed that he had reported his injury to Mr Rae and that he was the first aid officer, so responsible for reporting the applicant's injury in the injury book. The applicant understood that this had not been done.

34. The applicant said he provided the respondent with a WorkCover certificate of capacity on 30 April 2019 which indicated incapacity for work by reason of the applicant's post-traumatic stress disorder as well as head and neck injuries. The applicant said that the connection between his symptoms and the neck injury was not confirmed until he consulted Dr Choong. Up until then, it was not clear whether the applicant symptoms were related to his psychological injury.

Statement dated 20 February 2019

35. The applicant signed an earlier written statement, prepared by an investigator, on 20 February 2019.

36. In that statement, the applicant described injuring his back during a night shift when there was a major breakdown. There was metal found on the sugar-free gum line and the applicant had to pull the whole conveyor out using a forklift and then pull it apart. The conveyor was later repaired and had to be put back together. A forklift was used to return the conveyor to the factory where it was put back in place with a bit of pushing and pulling. At one stage, the applicant had to stretch over a guard for a couple of minutes with his arms out in front of him and his feet almost off the ground. The applicant was sore from the whole night. The applicant went and saw his doctor and was referred for physiotherapy. The applicant made a claim for compensation but his back was feeling better by early December.

37. The applicant described the events on 25 November 2018. The applicant described experiencing some pain in his back when he accessed the hatch area where the broken switch was but did not mention hitting his head or neck or experiencing any neck pain or other symptoms following this event. The applicant did describe seeking medical advice for his blood pressure.

38. The applicant said he had received two written warnings and was later suspended, which the applicant felt was due to him being targeted by a couple of individuals in the workplace as result of his compensation claim for his back and complaints he had made about safety.

Mr Ken Rae

39. An unsigned written statement prepared by an investigator for Mr Ken Rae is attached to both the ARD and Reply.

40. Mr Rae indicated in that statement that he recalled reassembling a conveyor with the applicant on 21 October 2018. Mr Rae said the conveyor was not heavy and he did not recall the applicant having to perform any heavy lifting at the time. Mr Rae said he did not witness the applicant sustaining any sort of physical injury during the shift and the applicant did not say anything to him to indicate that he was injured or in pain.

41. Mr Rae indicated that he could recall working alongside the applicant on 25 November 2018 when the control system screen indicated that the explosion vent had come off the pulverised sugar system. Mr Rae said the vent could come off quite easily without a great deal of pressure.

42. Mr Rae confirmed that he and the applicant inspected the vent and there were replacements in the workshop is it had come off before. As the vent came off, it broke off the explosion switch. As there was not a replacement switch on site, the manager wanted Mr Rae and the applicant to run the system and bypass the switch.

43. Mr Rae denied telling the applicant that he was on a final warning at work and didn't want to question the manager. Mr Rae said the manager had the ultimate decision about whether or not the system should be turned back on. Mr Rae said,

> "I do not recall Michael hitting his head on any pipework during that shift. I do not recall observing Michael to appear injured or hurt or unwell during that shift. I do not recall asking Michael if he was okay as a result of any such observations.
>
> For a number of months leading to the shift of 25 November 2018, I observed, on several occasions, that Michael was looking at other jobs on a computer at work. He would make comments to me suggesting that Wrigley's had promised him career opportunities and that he was not happy that this had not occurred."

44. A brief signed statement from Mr Rae, dated 15 July 2019, states,

> "On the 25th November 2018 I replaced a rupture disc on the SC Pulverized Sugar receival hopper.
>
> I completed the installation of the disc with the assistance of Kevin Dick, production associate and then handed over the electrical aspects of the job to Michael Hayes.
>
> During my 12hr shift I do not recall observing any associate I worked with injuring themselves or any associate bringing an incident/injury to my attention."

Evidence from the applicant's treating practitioners

45. The clinical records of the Primary Medical Centre Narellan, dating from 23 October 2012, are in evidence. There are no consultations with regard to cervical symptoms prior to the date of injury.

46. The first consultation following the events on 25 November 2018 appears on 8 January 2019, recorded as follows,

> "**Tuesday January 8 2019 17:44:54**
> Dr Myo Thuzar Aung
> presents ongoing headache since he came here last time
> not as bad as before and dizziness has improved with medication

now 5 /10 , before 10 /10 - 2 days ago , gradual onset when waking up on the first day
taking aspirin tab 4 hourly
no nausea or vomiting , but headache worse when lying down
…
BP- 164/96 , HR- 89/min
pupils- equal and react on both sides
no nastagmus or diplopia , no photophobia or neck stiffness, no skin rash no focal neurological deficits

Reason for contact:
Headache"

47. On 10 January 2019, the applicant is recorded to have been feeling better. There were no focal neurological deficits on exam.

48. The applicant reported doing better every day on 15 January 2019.

49. On 12 April 2019, Neurologist, Dr Ho Choong wrote to Dr Otutu Godfrey indicating that the applicant had reported the following symptoms:

> "He complained of intermittent 'rising of pressure' sensation from the neck up to the top of his head and the temporal region. It was associated with nausea. He also complained of his tongue getting in the way when he speaks. He has some mild speech disturbance. He complained of intermittent tremor, paraesthesia and numbness in his hands since Christmas last year. There was also sudden onset of lightheadedness and unsteadiness that last for a second or two. He also complained of intermittent palpitations."

50. Dr Choong concluded:

> "Michael presents with various non-specific symptoms and there is no obvious focal neurological deficit on examination today. I have arranged MRI scan of the brain and cervical spine and intracranial MR angiogram to exclude central demyelination, structural and vascular lesion, and cord pathology."

51. The report of an MRI of the applicant's cervical spine performed on 16 April 2019 recorded degenerative change visible at multiple levels but most marked at C6/7 where there was a potential impingement of the right C7 nerve root.

52. On 17 April 2019, the applicant presented to Dr Samir Michael. The record of that consultation simply states:

> **"Wednesday April 17 2019 11:42:31**
> Dr Samir Michael
>
> **Reason for contact:**
> PTSD (post-traumatic stress disorder)"

53. A consultation on 18 April 2019 is recorded in the same way.

54. On 30 April 2019, Dr Michael recorded that he had explained radiology results to the applicant and given him a specialist referral. Dr Michael issued a WorkCover certificate on the same day giving a diagnosis of "PTSD / Head & Neck Injury" with a patient stated date of injury of 24 November 2018. The same diagnosis of injury appeared in the WorkCover certificates that followed.

55. On 10 May 2019, Dr Choong wrote to Dr Godfrey again, recording that the applicant complained of numbness and paraesthesia in his hands with intermittent electric shock like pain from the elbows down to his hands worse on the right side. Dr Choong noted the results of the MRI scan of the cervical spine. Dr Choong said clinically there was no right C7 myotome weakness and conduction studies were unremarkable. The applicant was reluctant to have EMG study to further evaluate the right C7 nerve root. Dr Choong referred the applicant to Dr Balsam Darwish, neurosurgeon, for opinion in regard to the cervical spine changes.

56. A referral to Dr Kam dated 16 May 2019 prepared by Dr Raymond Yean indicated:

> "Michael suffered a work injury on 24th November 2018, exposed to an explosion at work. He has ongoing neck pain since. EMG with neurologist Dr Ho Choong on 10th May 2019 was normal. His C-spine MRI on 16th April 2019 showed mild wedge compression of c5 and c6, C6/7 disc bulge with right C7 nerve root impingement. I have referred him to you for review of his potential right C7 nerve root impingement."

57. On 15 July 2019, Dr Michael recorded that the reason for contact was a "C6/7 lesion". Treatment options were explained to the applicant. A similar consultation is recorded on 16 July 2019. There are a number of consultations recorded by Dr Michael making reference to neck symptoms including radiculopathy and restriction of movement thereafter.

58. The report of an MRI of the applicant cervical spine performed on 26 November 2019 indicated:

> "At the C6/7 level there is a right posterolateral disc protrusion associated with endplate osteophytes causing mild canal stenosis. This is causing mild narrowing of the entry zone into the right intervertebral foramen. The left intervertebral foramen is of reasonable size."

Dr Kam

59. The applicant's neurosurgeon, Dr Andrew Kam prepared a report for Dr Michael dated 7 June 2019. Dr Kam took a history of the applicant colliding the back of his head with a hardhat onto a cross pipe whilst investigating an explosion in one of the sugar silos. The applicant felt a bit stunned and had some difficulty breathing for a short period of time. There was then a second event when the applicant hit his scapular region against a crossbeam. The applicant described having ongoing issues involving his neck, shoulder and upper extremity affecting his right side more than his left with stabbing pain down towards the wrist. The applicant did not describe any clumsiness or weakness but had difficulty sleeping.

60. Dr Kam said the MRI of the applicant cervical spine showed a right-sided C6/7 disc herniation and left-sided C5/6 foraminal osteophyte. There was some reversal of lordosis at the C5/6 level.

61. Dr Kam initially recommended that the applicant adopt a conservative, nonsurgical approach. Dr Kam referred the applicant for a right-sided C6/7 and left-sided C5/6 foraminal block to try to improve his symptoms and potentially postpone any consideration for surgery.

62. On 19 June 2019, Dr Kam prepared a report for the insurer indicating that he had made a diagnosis of neck pain, shoulder pain, arm pain on the right side related to a right-sided C6/7 disc herniation. Dr Kam said the applicant also had some pre-existing left-sided C5/6 foraminal osteophyte, secondary to degeneration. Dr Kim considered the symptoms on the right-hand side were related more to the C6/7 level.

63. Dr Kam said the injury that occurred on 24 November 2018 was consistent with the disc herniation. The applicant had impacted his head on several occasions quite heavily against a structure suspended across him Dr Kam said,

> "It is not unreasonable that the significant impact of the incident could have caused a hyperflexion injury of his cervical spine resulting in the C6/7 disc herniation, impacting on the right C7 nerve root. 3. It is my opinion that the diagnosis of a right-sided C6/7 disc herniation is consistent with the reported mechanism injury."

64. Dr Kam said the pathology at C6/7 was not purely degenerative disease of osteophytes but a soft disc herniation causing contact with the right C7 nerve root. Dr Kam considered the condition was not an aggravation of pre-existing degenerative change unlike at the C5/6 level. Dr Kim considered the C6/7 soft disc component was related to the work incident and employment and that incident with the main contributor to the disc herniation at C6/7. Dr Kam said he had asked the applicant to undergo a right-sided C6/7 steroid injection to alleviate the symptoms which he believed were the direct result of the work incident.

65. On 8 August 2019, Dr Kam reported that the steroid injection had not given the applicant relief. He was still struggling with severe pain involving his right upper extremity. On examination, the applicant had weakness involving his finger extension and elbow extension.

66. Given the severity of the applicant's pain and lack of improvement, the applicant was now prepared to proceed with surgery entailing an anterior cervical discectomy and fusion of the C6/7 level. Dr Kam considered the degenerative osteophytic spurring at C5/6 was not symptomatic. A request for the surgery was sent to the insurer same day.

67. Dr Kam prepared a comprehensive report for the applicant's solicitors on 21 November 2019. Dr Kam recited a history consistent with the evidence referred to above. Dr Kam considered the applicant was restricted in his capacity to work due to ongoing pain, restriction of movement and weakness involving his right upper extremity. Dr Kam said the applicant was incapacitated for work as a direct result of the accident that occurred.

68. Dr Kam said the applicant's prognosis was guarded and the longer he waited to treat the weakness involving his upper extremity, the less chance he would obtain recovery.

69. Dr Kim considered the report of the respondent's independent medical examiner, Dr Casikar, and said,

> "On review of the medical report prepared by Dr Casikar, he did agree that surgery was reasonable and necessary for Mr Hayes. His main caution was the issue of his psychiatric disorders with anxiety and bipolar. These psychiatric issues have been ongoing and should not delay the definitive surgery for his cervical spine. The surgical issue of his cervical spine and the psychiatric issues can be treated concurrently to maximise Mr Hayes' overall recovery and improve his chances of returning to full pre-injury duties."

70. In a report for the insurer dated 7 January 2020, Dr Kam reiterated his previously expressed opinions. Dr Kam said the applicant continued to have ongoing symptoms and had deteriorated with the onset of weakness in his finger extension and elbow extension.

71. Dr Kam said there was no relationship between the lower back injury and the injury to the applicant cervical spine. Dr Kam said to the best of his knowledge there were no other factors that could be attributed to the applicant's pain except for the identified disc herniation.

72. Dr Kam said,

> "Mr Hayes continues to have ongoing arm pain and most importantly weakness involving his upper extremity. For this reason, the recommendation was for him to proceed with surgery especially because of the presence of weakness. Left untreated, the weakness may become permanent and he will be no longer able to return to any form of work which requires the use of his arm. It is most important for him to have surgery as soon as possible."

Dr Casikar

73. The respondent relies on medicolegal reports prepared by neurosurgeon, Dr Vidyasagar Casikar, dated 8 and 23 October 2019.

74. Dr Casikar took a history of the events on 25 November 2018 consistent with the applicant's evidence although he used a date of injury of 24 November 2018. The applicant reported that after the incident he noticed pain on the sides of his head, his eyesight was a little blurry, the applicant vomited once on the way home and his neck was stiff. The next morning, the applicant was not feeling right.

75. After Christmas, the applicant consulted his doctor who noticed that he had high blood pressure. At the same, the applicant was noted to have pins and needles in both hands, the right more than the left. About two months after the injury, the applicant developed tremors in both hands and sensation was reduced.

76. Dr Casikar's neurological examination of the upper limbs suggested hypoaesthesia over the right C5/6 and C7 dermatomes. Dr Casikar considered the MRI of the cervical spine dated 16 April 2019 and made a diagnosis of constitutional degenerative disease of the cervical spine with a workplace aggravation.

77. Dr Casikar concluded:

> "Mr Hayes appears to have had a simple injury to the neck when he was crawling out of the silos. He did not have any immediate neurological symptoms. His immediate post-injury symptoms seem to indicate significant anxiety related issues.
>
> The neurological examination suggests evidence of C5/C6/C7 nerve roots on the right side. This is consistent with his symptoms and the radiological findings. …It is possible that Mr Hayes has aggravated the pre-existing degenerative disease following the incident at work.
>
> I am not very convinced that the kind of injury he had on 24/11/18 would have produced such significant neurological symptoms. The degenerative changes and osteophyte compressions are not due to the workplace injury. The degenerative disease Is a constitutional genetically determined medical problem."

78. Dr Casikar, then went on to say:

> "The surgery suggested by Dr Kam is reasonable to address the neurological problems in the cervical spine. However, I am not sure if the extent of the injuries he had would produce such significant neurological problems. However, on balance of probability perhaps the surgery should be accepted as a compensable condition."

79. Dr Casikar said that work had been a contributing factor to the diagnosis because the applicant did not have any neurological symptoms before the incident on 24 November 2018 although Dr Casikar said he would be "constrained to indicate that employment is a substantial contributing factor to his diagnosis". Dr Casikar remained of the view:

> "On a balance of probability, I believe the surgery is reasonably necessary and related to the workplace injury."

80. Dr Casikar did express concern over the applicant's anxiety and other symptoms, suggesting:

> "I therefore believe a complete investigation of his anxiety related issues and exclusion of thyroid dysfunction should be considered before the surgery suggested by Dr Kam."

81. In his supplementary report dated 23 October 2019, Dr Casikar appeared to resile from his previously expressed views. Dr Casikar said the probable aggravation was "extremely minor" and had ceased. Dr Casikar said:

> "It is very likely that he would have required the surgery at about this time in his life regardless of this work- place injury. Considering the circumstances of the injury and the clinical findings, one can only speculate on the probability, however, Mr Hayes has significant neurological problems and the surgery is necessary for medical reasons. Whether it is a work place injury or not, it is controversial, in my opinion, the injury was not severe enough to produce degenerative disease with such significant neurological problems. The need for the surgery is likely to have been required at this stage in his life."

Applicant's submissions

82. Mr Horan described the primary issue as being whether or not, on the balance of probabilities, the applicant had struck his head on an overhead pipe or beam during his shift on 25 November 2018.

83. Mr Horan said the applicant had given a detailed description of the event in his statement dated 3 June 2019. Mr Horan noted that the event described by the applicant was an unusual, emergency situation with an element of chaos as a result of the shutdown of the sugar silo.

84. Mr Horan noted that the applicant had sought compensation for both a physical injury and a primary psychological injury arising from the events during that shift. Mr Horan noted that the applicant had a serious psychological injury and said this provided relevant context to the factual dispute as to whether or not the applicant struck his head during the shift.

85. Mr Horan conceded that the written statement given to a factual investigator on 20 February 2019 did not mention the applicant hitting his head during the shift. Mr Horan said that statement was prepared in relation to a lower back injury which had previously been claimed and the psychological injury. No claim had been made in relation to the applicant's neck injury at the time the statement was prepared. It was a few months after this statement was prepared that the applicant was first referred to the neurologist, Dr Choong.

86. Mr Horan said the applicant's written statement of 3 June 2019 gave a full and proper account of the work injury. The applicant described striking his head twice. Mr Horan noted that the applicant's evidence indicated that Mr Rae waited outside the confined space while the applicant crawled under the pipework. Mr Rae did not deny the incident occurred but merely stated that he did not recall the applicant injuring himself.

87. Mr Horan said the applicant's evidence indicated a chaotic, emergency situation unfolding over a period of time. The applicant striking his head was one of a number of events that occurred that night. The applicant's initial focus was on the stress and psychological symptoms he was experiencing rather than his neck pain. The applicant did not go to see a doctor immediately but did see a doctor at the Narellan practice in January 2019. Mr Horan conceded that no record of the applicant striking his head appeared in the clinical notes on that occasion but said this could be explained by the applicant's focus on his psychological symptoms.

88. Mr Horan noted that the first reference to neck pain appeared in the medical certificate issued by Dr Michael on 30 April 2019. Mr Horan said it must be inferred that the applicant gave a proper history of the head collision as it was included on the certificate despite no description of such appearing in the clinical notes.

89. Mr Horan noted that Dr Kam took a history consistent with the applicant's evidence. The radiological investigations were consistent with Dr Kam's expressed opinions. Mr Horan said Dr Kam's evidence, coming from a treating neurosurgeon of standing, was persuasive and consistent. Dr Kam's reasoning process was well set out in his reports and made logical sense. Mr Horan said I would prefer Dr Kam's opinions over those of Dr Casikar.

90. Mr Horan said Dr Casikar's reports were not persuasive. Dr Casikar took the view that the applicant had aggravated degenerative changes and that the aggravation had ceased. Mr Horan said Dr Casikar gleaned over the evidence of a disc herniation. Mr Horan described Dr Casikar's reports as inconsistent and indecisive. Dr Casikar seemed to "have a bit each way". In the first report, Dr Casikar suggested liability should be accepted and the surgery was reasonably necessary. Mr Horan submitted that it remained unclear what Dr Casikar's views were. The supplementary report was described as of no further assistance when read together with the original report.

91. Mr Horan accepted that there was an issue with regard to the lack of contemporaneous evidence. The applicant did not seek medical attention for five or six weeks but this was due to his focus on blood pressure, a racing heart and psychological symptoms at the time. Mr Horan said there was a reasonable explanation for the failure of the investigator to deal with a neck injury in the first written statement. The statement had been prepared for a different injury. Mr Horan reiterated that the applicant's statement was very detailed.

92. Mr Horan submitted that the applicant sought an award for the costs of and incidental to the proposed surgery and a general order for incurred medical expenses in accordance with the Commission' routine practice.

93. With regard to the claim for weekly benefits, Mr Horan noted that Dr Kam gave an opinion that the applicant was incapacitated. Mr Horan noted that the applicant was receiving weekly benefits for the time being and there was no suggestion that the applicant had any capacity at least until such time as he had undergone and recovered from surgery.

Respondent's submissions

94. Ms Goodman for the respondent submitted that the Commission lacked power to make an award *in futura*. The applicant was receiving weekly compensation at the maximum statutory rate and there was no room for the applicant to receive further compensation arising out of the same circumstances. Ms Goodman said the applicant was seeking an award now for some potential future entitlement. The Commission lacked power to make any order that the applicant should receive weekly benefits for a neck injury in the event that he ceased to be paid weekly benefits for his primary psychological injury. Ms Goodman said it would be open to the applicant to apply for weekly benefits in such an event and bring any dispute to the Commission should one arise in the future.

95. Ms Goodman noted also that the only incurred medical expenses claimed were $2,000 for a Medicare notice of charge, which was only a deemed charge. The applicant had not identified any expenses incurred which had not already been paid by the insurer.

96. Ms Goodman said there was no dispute in relation to incurred medical expenses and accordingly the Commission lacked any jurisdiction to make an award in respect of any incurred expenses. Ms Goodman referred me in this regard to the decision of Snell DP in *Pidcock Panel Beating Pty Ltd v Nicolia*[1].

97. Ms Goodman said the purpose of the applicant's written statement dated 20 February 2019 was not clear. Ms Goodman said it was not apparent whether the statement was prepared in respect of the back claim or for some other purpose. Ms Goodman said it was significant that the statement omitted any mention of injury to the neck, despite being the statement most contemporaneous to the events.

98. Ms Goodman said the first statement dealing with a neck injury was dated in June 2019, some seven to eight months after the incident. Ms Goodman said the applicant had given a florid description of the incident and yet there was no contemporaneous reporting of it. Ms Goodman noted a degree of inconsistency in the reporting of the events noting that Dr Kam reported the applicant striking his shoulder after the initial strike to the head.

99. Ms Goodman noted that the applicant failed to obtain his own clinical records. No clinical records were in evidence from Dr Godfrey. Ms Goodman submitted that a *Jones v Dunkel* inference was available in relation to the absence of notes from Dr Godfrey.

100. Dr Aung first saw the applicant on 8 January 2019, on which occasion the applicant described a range of symptoms but nothing in relation to his neck. Ms Goodman noted that the applicant continued to work for the respondent until 15 December 2018 before being suspended from employment. The applicant did not return to work thereafter.

101. Ms Goodman noted that Dr Michael did not record much in his clinical notes. There was no record of the incident in his notes from early April 2019. Reference to the applicant's neck injury first appeared in the medical certificate dated 30 April 2019.

102. Ms Goodman noted that the applicant first saw Dr Choong on 12 April 2019 but gave no history of an injury to his head or neck. There was no record that the applicant told Dr Choong that he had hit his head or neck. Dr Choong's examination on that occasion was unremarkable. After reviewing the MRI of the cervical spine, Dr Choong concluded that there was no obvious neurological cause for the applicant's various non-specific symptoms.

103. Ms Goodman submitted that, on balance, I would not be satisfied that the applicant sustained an injury to his head or neck. There was no contemporaneous complaint of symptoms or injury to the applicant's general practitioner and Dr Choong took no history of injury. Dr Choong found nothing on examination to explain the applicant's non-specific symptoms.

104. Ms Goodman noted the difference of opinion between Dr Kam and Dr Choong but submitted that in the absence of contemporaneous evidence of a physical injury on 25 November 2018, I would not be satisfied that the applicant's symptoms were caused by a work-related injury.

105. Ms Goodman submitted that I was required to feel an actual persuasion that the applicant sustained an injury and said I would not feel an actual persuasion on the evidence in this case. Ms Goodman submitted that the applicant's case rose or fell on the evidence as to the incident. There was a gap in the evidence that could have been filled by a report from Dr Godfrey.

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[1] [2017] NSWWCCPD 32 (25 July 2017).

106. Ms Goodman conceded that Dr Kam had provided a very clear opinion but submitted that his opinion was based on an acceptance that there was an incident on 25 November 2018. Ms Goodman submitted that there was a factual dispute to be determined before getting to the medical evidence.

107. Ms Goodman noted that Mr Rae had provided written statements that were consistent in that he recalled working with the applicant but did not recall him sustaining an injury.

Applicant's submissions in reply

108. Mr Horan submitted that the applicant's claim for weekly benefits had only been discontinued "to date". The applicant sought an award of weekly benefits from the present time and continuing on the basis of Dr Kam's evidence as to incapacity.

109. Mr Horan submitted that it was evident that the first written statement from the applicant was prepared for the purposes of his back injury and psychological injury. The applicant had only just gone to see Dr Aung and the current claim was in its infancy.

110. Mr Horan noted that Dr Michael had issued a WorkCover certificate of capacity indicating that the applicant had a head and neck injury on 30 April 2019. Mr Horan said it was not conceivable that the applicant had made no complaint of head or neck injury to Dr Michael in the context of that certificate.

111. Mr Horan submitted that no inference should be drawn from the absence of clinical notes from Dr Godfrey. Mr Horan said the notes had been sought but Dr Godfrey had simply not made them available.

112. Mr Horan noted that Dr Choong considered an investigation of the applicant's cervical spine was warranted. The MRI revealed a matter that led to the referral to Dr Kam.

FINDINGS AND REASONS

Injury

113. Section 9 of the 1987 Act provides that a worker who has received an "injury" shall receive compensation from the worker's employer. The term "injury" is defined in s 4 of the 1987 Act as follows:

> **"4 Definition of 'injury'**
>
> In this Act:
> **injury:**
>
> (a) means personal injury arising out of or in the course of employment,
>
> (b) includes a disease injury, which means:
>
> (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and
>
> (ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease, and

(c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the *Workers' Compensation (Dust Diseases) Act 1942*, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined."

114. The Court of Appeal in *Nguyen v Cosmopolitan Homes*[2] has found that a tribunal of fact must be actually persuaded of the occurrence or existence of the fact before it can be found, summarising the position as follows:

"(1) A finding that a fact exists (or existed) requires that the evidence induce, in the mind of the fact-finder, an actual persuasion that the fact does (or at the relevant time did) exist;

(2) Where on the whole of the evidence such a feeling of actual persuasion is induced, so that the fact-finder finds that the probabilities of the fact's existence are greater than the possibilities of its non-existence, the burden of proof on the balance of probabilities may be satisfied;

(3) Where circumstantial evidence is relied upon, it is not in general necessary that all reasonable hypotheses consistent with the non-existence of a fact, or inconsistent with its existence, be excluded before the fact can be found, and

(4) A rational choice between competing hypotheses, informed by a sense of actual persuasion in favour of the choice made, will support a finding, on the balance of probabilities, as to the existence of the fact in issue."

115. The primary issue for determination in this case is whether, as a question of fact, the applicant struck his head and neck, injuring his cervical spine during his shift on 25 November 2018.

116. I accept Mr Horan's submission that the applicant has provided a detailed account of the events of 25 November 2018 including, a detailed description of the manner in which he claims to have struck his head and then the back of his neck whilst crawling in an awkward space. The applicant has described in some detail the symptoms he experienced immediately following this event and in the period thereafter. Read in isolation, the applicant's written evidence is compelling.

117. There is, however, no corroboration of the applicant's claims in the evidence before me until at least April 2019.

118. The applicant has indicated that his colleague, Mr Rae, was present at the time of the injury. The applicant described having screamed out due to a large jolting feeling at his neck when he first struck his head. The applicant described an interaction during which Mr Rae asked him if he was okay. The applicant's response was that he "thought so".

119. The applicant's account of this interaction is not corroborated by Mr Rae. Mr Rae's evidence is not, however particularly, persuasive. There is an unsigned and undated written statement purportedly prepared for or on behalf of Mr Rae. There is no evidence before me that the matters set out in that statement relating to the applicant being generally unhappy in the employ of the respondent were formally adopted by Mr Rae and I have placed little weight upon that aspect of the evidence.

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[2] [2008] NSWCA 246.

120. The only signed evidence from Mr Rae is a brief statement indicating that he did not recall any of his associates injuring themselves or bringing an injury or incident to his attention during the 12-hour shift on 25 November 2018.

121. Mr Horan's submissions suggested that Mr Rae's failure to recall the interaction described by the applicant would not be surprising given the unusual and chaotic events which took place during that shift. The applicant's evidence was not that Mr Rae in fact witnessed him hitting his head or neck. The applicant was by himself in a confined space at the time of the event. The applicant's evidence indicated that he reassured Mr Rae that he was okay. In those circumstances, it is reasonable to infer that the incident may not have been memorable from Mr Rae's perspective. I draw no adverse inference from Mr Rae's evidence other than to note simply that it does not corroborate the applicant's claim.

122. Ms Goodman's submissions suggested that an adverse inference would be drawn by the failure of the applicant to mention any neck injury or striking of his head in the first written statement given by him on 20 February 2019. The written statement of that date provides a description of the events on 25 November 2018 that is for the most part consistent with the applicant's later statements. The applicant described crawling into a confined space to investigate the damaged explosion switch. It is notable that the applicant described a sensation of pain in his lumbar spine whilst in this awkward position. The statement is, however, silent in relation to the applicant striking his head or neck on pipework, screaming out, experiencing a jolting feeling at his neck or electric shock sensation in his arms. The applicant did not describe any interaction whereby he was assisted by Mr Rae and asked if he was okay.

123. I accept that the applicant did not, at the time the first statement was prepared, have a claim in relation to a neck injury. He was yet to have a neck injury investigated. I accept also that the statement was probably prepared in relation to another workers compensation claim. Given the severity of the symptoms described in his later evidence, and the significance later attributed to the event, I do, however, find it surprising that the applicant would have omitted any reference to the head and neck strikes in his earlier, detailed description of crawling under the pipework. I find this omission is significant and weighs against an acceptance of the applicant's current claims.

124. There is also no contemporaneous corroboration of the applicant's claims in the medical evidence. The applicant does not claim to have consulted his general practitioner until after the Christmas period on 8 January 2019 when he consulted Dr Aung. It is possible to explain the failure to seek immediate medical assistance by reference to the psychological symptoms the applicant was experiencing, turmoil at work and the coincidence of the holiday period. The applicant also described the onset of unusual symptoms involving headache and his upper limbs which I accept a lay person may not have immediately attributed to a neck injury in circumstances where he was also experiencing significant psychological symptoms.

125. There is reference to headache and dizziness in the clinical record made by Dr Aung on 8 January 2019. The onset of symptoms is not attributed in the clinical records to any head or neck injury. The clinical records from the Narellan medical centre are, however, notable for their brevity.

126. It is well-established that consideration of clinical notes must be approached with caution, consistently with the observations of Basten JA in *Mason v Demasi*[3]:

> "First, the trial judge was invited to discount the appellant's oral testimony on the basis of accounts given to various health professionals, which appeared inconsistent either with each other, or with her oral testimony, or both. The difficulties attending this kind of

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[3] [2009] NSWCCA 227 at [2].

exercise should be well-understood; as explained in the *Container Terminals Australia Ltd v Huseyin* [2008] NSWCA 320 at [8], such apparent inconsistencies may, and often should, be approached with caution for the following reasons, amongst others:

(a) the health professional who took the history has not been cross-examined about:
(i) the circumstances of the consultation;
(ii) the manner in which the history was obtained;
(iii) the period of time devoted to that exercise, and
(iv) the accuracy of the recording;

(b) the fact that the history was probably taken in furtherance of a purpose which differed from the forensic exercise in the course of which it was being deployed in the proceedings;

(c) the record did not identify any questions which may have elucidated replies;

(d) the record is likely to be a summary prepared by the health professional, rather than a verbatim recording, and

(e) a range of factors, including fluency in English, the professional's knowledge of the background circumstances of the incident and the patient's understanding of the purpose of the questioning, which will each affect the content of the history."

127. The clinical notes recorded by Dr Michael are particularly uninformative. I accept that the applicant must have disclosed a head and neck injury on 25 November 2018 to Dr Michael on or before 30 April 2019, given that it was included in the WorkCover certificate issued by Dr Michael on that date. The clinical record of that date, however, gives no indication of this disclosure. It does refer to radiology results being explained, which suggests that Dr Michael may have discussed the MRI which had been arranged by neurologist Dr Choong. There is also reference to a specialist referral but it is not apparent which specialist the applicant was referred to. Whilst the notes up until 30 April 2019 do not corroborate the applicant's claims, I would not, in the circumstances, be willing to infer that the applicant had not disclosed a head and neck injury to his general practitioners in the consultations prior to 30 April 2019.

128. There is also a significant gap in the clinical records. The evidence that is before me indicates that the applicant consulted another general practitioner, Dr Otutu Godfrey, around this time. It appears that it was Dr Godfrey who first considered a referral to a neurologist necessary as Dr Choong's reports are addressed to Dr Godfrey. I also note that the initial referral to Dr Kam was from a Dr Raymond Yean although I cannot locate any clinical notes from Dr Yean in the evidence.

129. Ms Goodman has submitted that a *Jones v Dunkel* inference is available having regard to the failure to put into evidence the clinical records of Dr Godfrey. In response, Mr Horan submitted that the applicant attempted unsuccessfully to obtain such records. Leave was also granted to the respondent at the teleconference to issue a direction for production to Dr Godfrey for his clinical notes. It would appear that the direction was not complied with. Whilst the lack of evidence from Dr Godfrey renders it more difficult for the applicant to discharge the relevant onus, I am not satisfied that it is appropriate to draw an adverse inference from the failure to produce them.

130. The initial correspondence between Dr Choong and Dr Godfrey lacks reference to an initiating event in the nature of a head or neck strike on 25 November 2018. On 12 April 2019, Dr Choong described the applicant complaining of a sensation of pressure rising from his neck to his head. Dr Choong also referred to intermittent tremors, paraesthesia and numbness since Christmas 2018. There was also a sudden onset of light-headedness and unsteadiness. Although Dr Choong omitted any reference to an incident on 25 November 2018, his reports suggest an onset of symptoms soon after that date. The symptoms were non-specific and not, to a layperson, obviously originating from the applicant's cervical spine. The symptoms were, however, of a nature as to prompt Dr Choong, from his position of expertise, to order an MRI of the cervical spine. It was the results of that MRI which led to the referral to a neurosurgeon. In this regard, I find the evidence of Dr Choong to be broadly consistent with the applicant's claim.

131. It is also relevant to note that there is nothing in the medical evidence to indicate that the applicant had experienced any symptoms of this nature or any other kind relating to his cervical spine prior to 25 November 2018. This is was noted by Dr Casikar and is consistent with the clinical notes of Primary Medical Centre Narellan, which date from 2012.

132. There is evidence from two neurosurgeons before me. Dr Kam, the applicant's treating neurosurgeon has provided a series of detailed reports that, in a consistent and logical fashion, set out the opinion that the applicant had degenerative pathology at his cervical spine in addition to a soft disc herniation at C6/7 causing contact with the right C7 nerve root. Dr Kam considered that the incident described to him on 25 November 2018 was the main contributing factor to the pathology at C6/7 and it was this pathology which was primarily responsible for the applicant's symptoms. Dr Kam's opinion was maintained over the course of several examinations and, after conservative treatment failed to alleviate the applicant's symptoms, led him to recommend the surgery now sought.

133. The respondent relies on the medicolegal opinion of Dr Casikar. As noted by Mr Horan in his submissions, Dr Casikar's reports are remarkable for the uncertainty with which Dr Casikar's views are expressed. In his first report, Dr Casikar accepted on the balance of probabilities that there was a compensable injury on 25 November 2018 and that the surgery proposed by Dr Kam was reasonably necessary and related to the workplace injury. Dr Casikar did express considerable hesitation in giving that opinion by reference to the severity of the applicant's symptoms in the context of what appeared to be a simple or relatively minor neck injury. Dr Casikar also expressed some concern regarding the impact of the applicant's psychological symptoms. I note in this regard that Dr Kam's reports indicated that he was aware of the applicant's psychological condition but did not consider that those issues should delay surgery.

134. Dr Casikar resiled from his initial opinion that the surgery was compensable in his supplementary report. On that occasion, Dr Casikar expressed the view that there was a minor aggravation of degenerative pathology which had now ceased. Dr Casikar gave no explanation for the change in his opinion and did not set out reasons why he had reached the view that the aggravation had ceased. The inconsistencies and uncertainties in Dr Casikar's reports render them less persuasive than the opinions expressed by Dr Kam.

135. The evidence in this case is certainly not clear. There are significant omissions in the evidence, delays in reporting and a lack of contemporaneous evidence. There is a lack of corroboration from Mr Rae, and an expert opinion from Dr Casikar that the pathology in the applicant's spine is degenerative and it is likely he would have required the proposed surgery at this time in his life regardless of the alleged injury. It was open to the insurer in these circumstances to decline liability for the applicant's alleged neck injury. My own careful review of the evidence now available, however, has left me with a sense of actual persuasion that the applicant did in fact strike his head and neck, injuring his cervical spine, on 25 November 2018.

136. In particular, I find that the nature of the symptoms initially described by the applicant and the context in which he experienced them provides a reasonable explanation for the delay in seeking medical attention and attribution of the symptoms to the head strike on 25 November 2018. The applicant's evidence is detailed and appears credible. The clinical notes are of little assistance but I accept that at least by some time in April 2019 the applicant's symptoms were reported to his general practitioners prompting a referral initially to a neurologist. The neurologist, Dr Choong took a history of symptoms commencing from around the time of the alleged injury albeit without reference to an initiating event. The symptoms were of a nature as to prompt a referral for an MRI of the cervical spine. Although the MRI showed degenerative changes in his cervical spine there is nothing to suggest that they were symptomatic prior to 25 November 2018 and there is no evidence of any other event which could have rendered them symptomatic. By late April 2019, after these investigations had been performed, the applicant disclosed an event on 25 November 2018 to his doctors that he considered responsible for the symptoms. That event has been consistently described in the histories given to the doctors involved in the applicant's case subsequently. Whilst Dr Kam described the second strike as being to the scapular region, and the applicant described it as affecting his neck, I am not satisfied this is a material inconsistency given the proximity of the body parts to one another. Dr Kam has consistently and clearly given the opinion that there is pathology in the applicant's cervical spine at C6/7, caused by a traumatic event consistent with that described by the applicant. The surgery proposed by him is intended to treat that pathology. Dr Casikar agreed with Dr Kam that there was pathology requiring the surgery proposed. I have noted that Dr Casikar initially, also thought there was a compensable injury as a result of which the surgery was reasonably necessary.

137. After weighing all the evidence, I am satisfied on the balance of probabilities that the applicant sustained an injury to his cervical spine as alleged on 25 November 2018. I am satisfied that the injury satisfies the definition of injury in ss 4(a) and 9A of the 1987 Act. Having accepted that there is a compensable injury, there is no dispute between the parties that the surgery proposed by Dr Kam is reasonably necessary as a result of that injury for the purposes of s 60 of the 1987 Act. There will be an award for the applicant in respect of the claim for surgery.

138. The applicant's entitlement to an award for incurred medical expenses was the subject of submissions at hearing. Ms Goodman made submissions that there was no dispute as to any incurred medical expenses. That submission overlooks, however, the notified dispute in relation to the respondent's liability to pay compensation generally. I accept that the applicant has not provided particulars of any incurred medical expenses related to his cervical spine injury that have not already been paid by the insurer. Having found a compensable injury, I accept, however, that the applicant will be entitled to compensation for any medical or related treatment expenses which are reasonably necessary as a result of that injury. I will make a general order to that effect, although such order is of limited assistance to the applicant. The applicant will still be required to produce accounts, receipts and/or a valid Medicare notice of charge to the insurer. In the event of any dispute as to a particular expense claimed, the applicant will be entitled to bring that dispute to the Commission.

139. The position with respect to the claim for weekly benefits is also contentious. At the time of the arbitration hearing, the applicant continued to be in receipt of weekly payments at the maximum statutory rate in respect of the injurious event. The applicant quite properly discontinued the claim for past weekly benefits. The applicant argued that he remained entitled to an award for weekly benefits from the date of the hearing and continuing.

140. In view of the findings above, the respondent will be liable to pay the applicant weekly payments of compensation if the injury results in incapacity for work in accordance with the 1987 Act. Section 46 of the 1987 Act makes provision for the Commission to order that weekly payments be reduced to avoid benefits of the same kind being payable by the employer during and in respect of the incapacity for work.

141. At the time of this decision, I accept the evidence of Dr Michael and Dr Kam that the applicant is incapacitated for work as a result of the injury. I am not satisfied, however, that it is appropriate to order the respondent to pay the applicant weekly payments given that at the present time and for the foreseeable future, the applicant remains in receipt of weekly benefits at the maximum statutory rate. It is not possible to be satisfied that at some unknown point in time in the future the applicant would be incapacitated for work as a result of the injury. In the circumstances, and consistently with s 46, I decline to make an award for weekly payments of compensation in respect of the injury at the present time. That is not to say that the applicant would not be entitled to such, if at some point in the future he ceased to be in receipt of weekly benefits for his psychological injury and remained incapacitated for work as a result of his cervical spine injury. Any dispute with regard to the applicant's entitlements at that time may be brought to the Commission in separate proceedings.

SUMMARY

142. The applicant sustained an injury to his cervical spine as claimed on 25 November 2018.

143. The anterior cervical discectomy and fusion of the C6/7 level proposed by Dr Kam is reasonably necessary as a result of the injury.

144. The respondent to pay the costs of and incidental to the proposed surgery.

145. The respondent to pay the applicant's reasonably necessary medical expenses arising as a result of the injury to his cervical spine in accordance with s 60 of the 1987 Act upon production of accounts, receipts and/or valid Medicare notice of charge.

146. I decline to make an order in respect of the claim for ongoing weekly benefits.