

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 1703/20
Applicant: Brock Frankland
Respondent: Orbital Constructions Pty Ltd
Date of Determination: 19 June 2020
Citation: [2020] NSWCC 205

The Commission determines:

1. On the evidence available, the Commission is not satisfied that the treatment proposed by Dr McEntee namely L4/5 disc replacement is reasonably necessary in accordance with section 60 of the *Workers Compensation Act 1987*.

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

Paul Sweeney
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 PAUL SWEENEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Brock Frankland (the applicant) is 22 years of age. On 21 August 2018, he was employed by Orbital Constructions Pty Ltd (the respondent) as an apprentice carpenter on a building site at Tweed Heads. In the course of this work, he injured his back when he fell from roof trusses to the ground landing on his lower back.
2. On 12 July 2019, Dr Laurence McEntee, an orthopaedic spinal surgeon of Southport, recommended that the applicant undergo a total disc replacement at L4/L5 to alleviate his back pain.
3. The respondent's workers compensation insurer denied liability for the cost of the surgery. Underlying the insurer's denial was the report of Rhiarna Myatt, a physiotherapist who treated the applicant, dated 30 October 2019. Ms Myatt recorded the range of spinal movement she observed on examination of the applicant in her report. She also recorded that the applicant was "happy to return to a full capacity pre-injury workload in the near future".
4. The insurer asked Dr Journeaux, an orthopaedic surgeon, who had previously reviewed the applicant at its request to consider Ms Myatt's report and provide a supplementary opinion. He expressed the opinion that surgery was not reasonably necessary.
5. By these proceedings the applicant claims the cost of the surgery proposed by Dr McEntee pursuant to section 60 of the *Workers Compensation Act 1987*.

PROCEDURE BEFORE THE COMMISSION

6. When the matter came on for conciliation and arbitration on 9 June 2020 over the telephone, Mr Baran, of Counsel, represented the applicant and Mr Moore, solicitor represented the respondent. I was informed that the parties were unable to agree on whether the surgery proposed by Dr McEntee was reasonably necessary in the circumstances of the case. I am satisfied that the parties, who were represented by experienced lawyers, had ample opportunity to consider settlement but were unable to reach a mutually satisfactory resolution.

EVIDENCE

7. The following documents were in evidence in the matter;
 - (a) the Application to Resolve a Dispute (the Application) and the documents attached;
 - (b) the Reply and the documents attached, and
 - (c) an Application to Admit Late Documents lodged by the applicant.
8. There was no objection to any of the material referred to above. Neither side sought to adduce oral or further written evidence at the arbitration.

SUBMISSIONS

9. The submissions of the parties are recorded and I do not propose to reiterate each of the arguments of counsel in these short reasons. I will however address the primary thrust of the arguments of the parties in resolving the issues in dispute.
10. I record, however, that Mr Baran submitted that I should treat the applicant's social media material relied on by the respondent with some caution in accordance with the reservations expressed by Robb J in *Hellessey v Metlife Insurance Ltd* 2017 NSWSC 1284 and by Slattery J in *Sandstrom v FSS Trustee Corporation and Anor* [2020] NSWSC 200 (9 March 2020). Both those cases involved allegation of psychological injury, but I accept that Facebook entries and similar material, particularly still photographs, may be misleading and must be viewed with considerable caution.
11. Mr Baran also stressed that the uncontradicted evidence of his client was that he performed the physical activities depicted in the social media material after ingesting medication. He submitted, correctly, that of the three specialist medical practitioners who had initially expressed the opinion that surgery was reasonably necessary only Dr Journeaux had recanted from that view.
12. Before attempting to resolve the issues, it is necessary to briefly set out the evidence of the applicant, the contemporaneous medical evidence, the opinions of the medical practitioners whose reports are relied on by the parties and the report of Ms Myatt, physiotherapist, which in many respects is at the heart of the dispute between the parties. What follows is not a comprehensive survey of the evidence, but a summary of the salient points so that the way in which the Commission has resolved the dispute can be understood by the parties.

THE APPLICANT

13. The applicant's evidence is in writing. He signed an initial statement on 22 March 2020 and a longer supplementary statement on 16 April 2020. The latter deals with a document described as a "Desktop Investigation Report" from Pro-Care Investigations dated 27 May 2020, which largely consists of a review of the applicant's postings on social media.
14. By his initial statement, the applicant described the system of work adopted by the respondent and the mechanism of his injury in some detail. He records that following the injury he experienced increasing back pain. He saw Dr Cameron Williams, a general practitioner of Murwillumbah who referred him to Dr Anna Chang, a neurosurgeon at Southport. He also underwent an MRI scan of his lumbar spine on 21 January 2019.
15. The applicant states that he was unhappy with Dr Chang's advice that he should be treated conservatively and confined to a sedentary job and sought a further specialist referral. He was referred by Dr Williams to Dr Laurence McEntee who at a consultation on 12 July 2019 advised that disc replacement surgery was an appropriate form of treatment.
16. The applicant says:

"Throughout 2019, my back condition had been slowly deteriorating. I found it difficult to sit or stand in one spot for any length of time and if I lifted anything heavy, if I bent over or twisted, I suffered a [sic] exacerbation of my symptoms."
17. The applicant recounts that he secured part-time work sanding furniture in Darwin for Tiger Contracting later in the year. He stated that the work was "not as heavy as doing carpentry work." He remains in that employment. The applicant continues:

“Presently, on a good day the pain level gets down to about 4 to 5 out of 10 but most recently, the pain level has gone up to 6 out of 10. On a bad day, pain level can get up to 9 out of 10.

If I overdo it at work or I strain myself doing lifting or long hours at work, then the pain becomes more severe. I have to frequently resort to lying down or resting my back, in order to try and alleviate some of the pain.”

18. The applicant recounts that he takes anti-inflammatories and pain killers. He says that successful disc replacement surgery may allow him to return to meaningful work as a carpenter rather than the unskilled work which he is performing at present.
19. By his supplementary statement, the applicant addresses the issues raised in the Desktop Investigation Report. He denies that he spoke to Ms Myatt, the physiotherapist, “about a monetary payout for my injuries” as stated in her report. He says that the photos depicted from Face Book “show me on a good day after I have dosed up on pain killers and anti-inflammatories”. He states that on a bad day he can “barely sit or stand and cannot get out of bed”. He continues:

“I have tried to get on with my life as best I could and wanted to make sure that my new girlfriend did not think that I was suffering from some type of disability or an inability to work and therefore, I was more active than usual.”
20. In respect of work he states that the work he is performing in the Northern Territory is much lighter than the carpentry work he performed pre-injury. Nonetheless, he can only work three days a week in that employment whereas he was previously employed five to six days each week as a carpenter. He states that the surgery recommended by Dr McEntee is “my best chance to try and get back to carpentry work”.

Dr Williams

21. There is no report from Dr Williams, but the notes of the Main Street Medical Centre are in evidence. They record an initial consultation of 12 September 2018, where the applicant complained of back pain and the doctor recorded that he was in “obvious discomfort”. He was referred to physiotherapy for core strengthening and stretches. He was certified as unfit for work.
22. At consultations on 24 September 2018, 5 October 2018 and 19 October 2018, Dr Williams recorded that there had been no real improvement in the applicant's back pain, although on 2 November 2018, he recorded that the applicant was “slowly on the mend”. On some days he was “fine other days not”.
23. The applicant continued to complain of back pain. He was referred initially to Dr Chang and then to Dr McEntee. On 15 July 2019, the applicant advised Dr Williams that Dr McEntee had recommended disc replacement and that he was working 25 hours a week. This “was manageable - perhaps not long term takes weekend to recover.” During this consultation, Dr Williams recorded that the applicant had a good range of flexion, but extension was “about 3/4 increased pain”.

Dr Chang

24. Dr Chang saw the applicant on 3 April 2019. She found some restriction of extension and lateral flexion but no neurological signs. She stated that the MRI scan of 21 January 2019:

“Shows fairly benign findings with slight L4/5 disc height reduction. There appears to be a shallow breach in the anterosuperior aspect of the L5 vertebral end plate which may be related to the fall.”

25. Dr Chang recommended that the applicant restrict his work to supervisory or sedentary roles to avoid movements which would aggravate his pain. She stated that she would review the applicant in two months to “make sure he is on the right track”.

26. The MRI scan to which the doctor referred is reported as showing:

“At L4/5 mild disc desiccation with a small posterior annular bulge. This does not cause spinal canal or foraminal stenosis. The remaining lumbar intervertebral discs define normally. No significant lumbar facet joint arthropathy. No prevertebral or epidural collection.”

Dr McEntee

27. Dr McEntee saw the applicant on 12 July 2019. He recorded a history of “constant central low back ache” since the injury. There were no clinical signs on examination, but the applicant complained of tenderness at L4/5.

28. Dr McEntee expressed the opinion that the MRI scan showed a broad based disc bulge at L4/5. He thought that the MRI confirmed loss of disc height at that level and hydration “with probable central annular tear”. Given the “chronicity and severity” of the applicant's symptoms, the doctor opined that surgical intervention by way of L4/5 total disc replacement was appropriate.

Dr Journeaux

29. Dr Journeaux saw the applicant at the request of EML on 25 September 2019 and recorded that the applicant had experienced lumbar spine pain since the injury, which had initially improved, but had “not changed over the last nine months”. The doctor recorded that the applicant was able to perform self-care and personal hygiene tasks. He required assistance with household chores and was “unable to do any vigorous physical activity”.

30. On examination, Dr Journeaux found some flattening of lumbar lordosis and some restriction of the range of spinal movement. He expressed the following opinion:

“It would appear since that time he has had chronic unrelenting back pain. I note an abnormal disc at the L4/5 level and in the absence of any other pathology and given the input from both the neurosurgeon and orthopaedic spine surgeon, it is reasonable to opine that this disc is potentially causative in terms of current symptoms.

Although there is some conjecture about the use of discography I note discography has not been used in this situation and that would be a possibility to definitively opine as to whether this disc is the cause of his pain. It is a possibility that the abnormal disc is an incidental finding.”

31. Dr Journeaux thought that the surgery proposed by Dr McEntee was “a reasonable option” but expressed a view that evidence suggested that spinal fusion was more advantageous. He expressed the opinion that if the applicant did not have surgery:

“There is a very high likelihood of chronic pain and disability on a permanent basis.”

Rhiarna Myatt

32. Ms Myatt saw the applicant in Darwin, possibly at the request of Dr Hasan of the Arafura Medical Clinic. On 26 September 2019, she requested Dr Hasan review the applicant. She considered that the applicant would be capable of returning to full-time work. She asked Dr Hasan for his:

“Assessment of Brock’s current condition and review of his RTW status. I believe Brock, depending on his compliance with exercise will be capable of returning to full pre-injury work capacity in 6 weeks.”

33. On 30 October 2019, Ms Myatt wrote to Dr Hasan stating that the applicant had “progressed well through conservative management” over the last two months. She recorded that the applicant was able to engage in a range of physical exercises without pain, although he still reported moderate disability in a questionnaire.

34. The physiotherapist reported that the patient had informed her that he was able to fish for three hours, drive 14 hours to Uluru and able to run up Uluru. She continued thus:

“Brock has made significant physical progress in the past two months and I believe he is now capable of undertaking his pre-injury work duties and hours (8 hours a day/5days a week). I have thus discharged Brock from my care and supplied him with a progressive gym-based exercise program to continue for the purposes of maintaining his conditioning.

Unfortunately, considering the disparity between Brock’s observed physical capabilities and reported levels of pain I believe the sincerity of his symptoms and function reporting is questionable, bordering on malingering. Brock has reported throughout several appointments his desire to take legal action for the purposes of obtaining a financial settlement of his claim and I believe that this is now the major factor impacting Brock’s reported levels of pain and disability.”

35. Dr Hasan’s views on these are a matter not known. However, both Dr Journeaux and Dr McEntee on reviewing Ms Myatt’s report expressed the opinion that surgery may not be “appropriate at this stage.” In a report of 5 November 2019, Dr McEntee said this:

“If he is able to rehabilitate effectively and get back towards his pre-injury duties at work then this would be the best way forward for Mr Frankland in the near future keeping in mind that surgery may potentially still be required in the future if, on returning to his pre-injury duties at work, he has a further exacerbation/aggravation of the underlying injury.”

Dr McKee

36. Dr McKee, a general surgeon, saw the applicant at the request of his solicitors on 7 November 2019. The history of restrictions of the applicant’s activities obtained by the doctor were in distinct contrast to those recorded by Ms Myatt, only days previously. The applicant said that he required assistance or avoided the heavier household chores and had been forced to discontinue his recreational activities of hiking, climbing and bushwalking.

37. On examination, Dr McKee found restriction of back movement but no neurological signs. Dr McKee accepted that the applicant had significant ongoing back pain. This was possibly explicable on the basis of the MRI finding at L4/5. He thought that the applicant was restricted to light duties. While he did not agree with Dr Journeaux's assessment, he thought "that discography is a necessary step before proceeding to lumbar spine disc replacement surgery". Nonetheless, he expressed the opinion that disc replacement surgery was reasonably necessary, and preferable to an L4/5 fusion given the applicant's age.

Dr McEntee's response

38. On 22 May 2020, Dr McEntee reported that he last saw the applicant on 17 January 2020. He responded to the applicant's solicitor's request to consider the supplementary report of Dr Journeaux. He records the following:

"Once again, I am not sure why anyone would over-embellish the amount of low back pain they are in with a view to proceeding to a surgical intervention would be ongoing pain not significant. I would certainly be happy to meet with Mr Frankland again to discuss the various associated media images that have been made available and discuss with him his ongoing level of pain as well as function."

39. Dr McEntee expressed the opinion that whether further treatment was required "comes down to whether he continues to experience significant low back pain or not." He continued:

"He appears to have regained good function. Ultimately he is ongoing levels of pain can only be reported by him. If he has minimal pain now then I would agree that no further treatment is required. If he has significant ongoing pain then it would be reasonable for him to have ongoing treatment including potentially L4/5 disc replacement as previously requested."

DISCUSSION AND FINDINGS

40. Mr Baran referred me to the discussion of the phrase "reasonably necessary" in *Rose v Health Commission (NSW)* (1986 2 NSWCCR 32) (*Rose*), the subsequent decisions of Judge Burke addressing the same matter and the decision of Deputy President Roche in *Diab v NRMA Ltd* [2014] NSWCCPD 72 (10 November 2014) (*Diab*).
41. In *Diab*, Roche DP emphasised that in a disputed claim for the cost of medical treatment, the quintessential question remained whether the treatment was "reasonably necessary", rather than weighing the criteria of reasonableness enumerated by Judge Burke in *Rose*. These were helpful, but not determinative of the issue. He applied the reasoning of the Court of Appeal in *Clampett v WorkCover Authority (NSW)* (2003) NSWCCR 8 where it was held that the word "reasonably" was a diminutive which attenuated the effect of the word "necessary".
42. In determining the issues in this matter, I apply the principles enunciated in *Diab*. However, it was not suggested that those principles provided a ready answer to whether surgery was reasonably necessary in the circumstances of this case.
43. The thrust of the respondent's case is that the breath of the physical activity observed by Ms Myatt on 30 October 2019, corroborated in some instances by social media posts, is inconsistent with the need for an immediate radical surgical solution to the applicant's low back pain. Ms Myatt recorded that the applicant had a full range of movement on clinical examination and no pain throughout or at the end of the range of these movements. She states that she observed the applicant to demonstrate:

"Excellent movement control and functional stability with many simulated pre-injury workplace duties."

44. Her record of the applicant's subjected tolerances is more ambiguous as the applicant complained of difficulties in carrying out the tasks of daily life. Nonetheless, he reported that he was able to walk 3 km, fish, drive 14 hours to Uluru and "run up Uluru".
45. The respondent also relied on activities depicted in the Pro-Care Desktop Investigation Report. With one exception, my impression is that the physical activities of the applicant revealed in that report do not take the matter further than the activities and history recorded in the report of Ms Myatt. By his supplementary statement of 16 April 2020, the applicant says that the social media entries recorded in the Pro-Care report only show him on a good day when he has taken pain killers and anti-inflammatories. He says:

"They do not show me when I am on a bad day when I can barely sit or stand and cannot get out of bed. The pain is variable and comes and goes."

46. By and large, I accept that physical activity described or depicted in the Pro-Care report is not necessarily inconsistent with the existence of significant back pain. On the other hand, there are aspects of the applicant's trip to Central Australia in October 2019, which appear inconsistent with the physical activities of a patient awaiting back surgery. Once again, the applicant says that he took medication prior to travelling to, and climbing or running up, Uluru. He says that this and other activities on his trip in October 2019, were undertaken to demonstrate to his girlfriend that he was not "an invalid carrying a severe back injury". He states:

"I wanted to prove to her that I can enjoy outdoor activities and still have fun, notwithstanding that I was carrying such a severe back injury."

This motivated other reported or depicted incidents, including climbing up a tree and jumping off rocks.

47. A photograph in the material demonstrates the applicant in a position he describes as "strung around a veranda post and leaning backwards." The applicant specifically addresses this activity in his supplementary statement. By his statement, he says that:

"I did that manoeuvre only once to prove I could do it and at that time I had also dosed up on Panadeine Forte and Naprosyn."

Nonetheless, it is a feat demonstrating striking agility even for a young man.

48. These activities are difficult to reconcile with the complaints recorded by Dr McKee at his examination of the applicant on 7 November 2019. Mr Moore did not raise the applicant's credit and it would be inappropriate to utilise it to determine the case. I accept that the applicant has experienced significant back pain. It is difficult, however, on the evidence before the Commission to accept that his account to doctors of his recreational activities is entirely accurate. It is also difficult to accept that there has been a deterioration over the second half of 20019, as he says in his initial statement
49. The real issue is what to make of Ms Myatt's finding and opinion and the response to it by other medical practitioners, most importantly Dr McEntee. Certainly, the record of recreational activity recorded by her on the 30 October 2019 is borne out by those aspects of the ProCare report which I have referred to above. While her findings are not completely consistent with other medical examinations in the matter, she carried out tests which went well beyond a routine physical examination. I am, therefore, reluctant to dismiss her finding and opinion as having little or no weight.

50. Certainly, Dr Journeaux thought that weight should be given to the physiotherapist's findings. He stated:

"There would appear to have been an element of over statement and embellishment in respect of Mr Frankland's alleged functional incapacity at the time I assessed him on 20 September 2019. Giving him the benefit of the doubt, it would appear that with Ms Myatt's intervention he has significantly improved."

On the basis of Ms Myatt's observations, Dr Journeaux amended his previous opinion and expressed the view that surgery was not reasonably necessary "at the current time."

51. In his report of 22 May 2020, Dr McEntee recorded that when he last saw the applicant on 17 January 2020 he reported:

"That his back pain had not improved at all, that he still had chronic severe back pain and hence I requested surgery through Workcover."

52. While Dr McEntee was provided with a copy of the material attached to the Reply for the purposes of preparing his report of 22 May 2020, he does not specifically comment on Ms Myatt's report. However, he does note that the applicant "appears to have regained good function", which may be a reference to her findings. After stating that he was at a loss to understand the reason why anyone would embellish back pain to have an operation, he stated that he would be happy to meet with the applicant again to discuss the media images and his ongoing level of pain as well as function.
53. I share Dr McEntee's view that patient's do not undergo surgery unless they experience significant levels of pain. I also unreservedly accept that the opinion of an orthopaedic surgeon on the issues of the applicant's prognosis, capacity for work and need for treatment comprehensively outweighs the opinion of a physiotherapist.
54. I suspect, however, from the tenor of his recent report that Dr McEntee has some reservations about the appropriate treatment at this time. He has not seen the applicant for several months. He has not had the opportunity to discuss with him the findings of Ms Myatt, the opinion of Dr Hasan or the social media images that he has been forwarded by the applicant's solicitor. He describes future treatment as including "*potentially* L4/5 disc replacement as previously requested." (My italics.)
55. In both his statements and in his discussions with medical practitioners the applicant has given a very powerful reason as to why he wishes to undergo surgery. He believes that would provide the prospect of him returning to carpentry work rather than continuing to perform menial work. As I understand the evidence, that was the reason why he decided not to continue with the regime of conservative treatment proposed by Dr Chang and sought an opinion in respect of surgery from Dr McEntee. The applicant has not returned to his pre-injury work and, contrary to the opinion expressed by Ms Myatt in her letter to Dr Hasan, states that he is unable to perform full-time carpentry work which is undoubtedly heavy.
56. Weighed against this, however, the remedy proposed by Dr McEntee's is major surgery and is not without significant risk both in the short and long term. It is not a case where there are clinical signs of disability. There remains some doubt in the medical evidence as to the site of the pain. Thus, the applicant's reporting of his level of pain and function are critical matters in the opinions given by doctors and the conclusions of the Commission.
57. In these circumstances, I am not persuaded that the evidence presently before the Commission establishes on the balance of probabilities that the treatment posed is reasonably necessary. In addition to the understandable hesitancy in Dr McEntee's evidence, his reports do not contain a full account of clinical examination of the applicant

after the date of Ms Myatt's report. That may be because the doctor did not think it necessary to examine the applicant on the only occasion that he saw him this year. The absence of such evidence from the treating doctor in the context of this case is troubling.

58. It is best, in my opinion if final decisions in respect of surgery are made after the treating surgeon can carefully consider all the evidence and provide a confident opinion on the need for surgery, after re-examining the applicant. The findings of Ms Myatt, the opinion of Dr Hasan and the social media material may be relevant for this purpose. I appreciate that this may involve inconvenience to both doctor and patient and, possibly, delay. These are matters I have taken into account.
59. Finally, I note that both Dr Journeaux and Dr McKee state that surgery should be preceded by discogram to establish that the L4/5 disc is pathological. Dr McEntee does not address this, and I take his silence to indicate that he does not intend to carry out this procedure. Dr McEntee is a spinal surgeon and, all things being equal, his view on treatment should be preferred to either Dr Journeaux or Dr McKee. The absence of evidence from him on the point, however, also militates against a determination that surgery is reasonably necessary at present.

