

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 1970/20  
**Applicant:** JOHN HENRY WILLIAM BLAND  
**Respondent:** NORTHERN CO-OPERATIVE MEAT COMPANY LIMITED  
**Date of Determination:** 15 June 2020  
**Citation:** [2020] NSWCC 197

The Commission determines:

1. The Application to Resolve a Dispute is amended to include a claim for section 60 of the *Workers Compensation Act 1987* expenses.
2. The need for the applicant's lumbar spine surgery proposed by Dr McEntee, comprising circumferential fusion at L5/S1 and disc replacement at L4/5, results from the work injury in the course of the applicant's employment with the respondent of aggravation, acceleration, exacerbation or deterioration of degenerative changes in the lumbar spine.
3. The respondent is to pay the applicant's section 60 of the *Workers Compensation Act 1987* expenses including the above surgery proposed by Dr McEntee and associated costs.

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

Ross Bell  
**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 ROSS BELL, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

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



## STATEMENT OF REASONS

### BACKGROUND

1. On leaving school in 1979, Mr Bland (applicant) commenced an apprenticeship as a baker, and continued in baking for approximately 30 years, apart from a couple of years break working on a chicken farm. He then left baking and worked at Sunnybrand Chickens as a labourer and leading hand, before commencing with the Northern Co-Operative Meat Company Limited (respondent) as a labourer and team leader in the offal room at Booyong.
2. Mr Bland's duties involved weighing cartons of offal of up to 26 kg and loading the cartons onto a wheeled trolley and then moving the cartons weighing up to one ton with a pallet jack into a freezer. He also moved trolleys of water into the freezer for overnight freezing, and the water often spilled, making the offal room and freezer floor slippery and uneven. The freezer was small and sometimes Mr Bland and a colleague would be working in the confined space. Mr Bland says he would sometimes slip on the freezer floor, landing heavily on his buttocks.
3. One of these occasions was in November 2016 when carrying a 20 kg tub of ice. His lower back was sore after this and he hoped it would get better, but unfortunately it worsened, with developing pain down the right leg. The pain was worse at work performing his heavy duties and he felt the work was making it worse. He attended his general practitioner Dr Lee in January 2017 and was referred for a CT scan. He was advised to rest, but he was required to continue with the heavy duties at work. After a few months with the pain continuing to intensify, Mr Bland reported it to his supervisor and lodged a workers compensation claim.
4. After an MRI in April 2017 showing nerve root compression and other damage Mr Bland was put on suitable duties. He was sent to Dr Jabbour in late June 2017 after which his workers compensation claim was denied, and the suitable duties withdrawn. He left the respondent in July 2017.
5. The respondent insurer denied the claim in a Notice issued under section 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act) dated 21 November 2019. This Application to Resolve a Dispute (Application) is dated 8 April 2020 and is for section 60 of the *Workers Compensation Act 1987* (1987 Act) medical expenses in respect of the lumbar surgery proposed by Dr McEntee.

### ISSUES FOR DETERMINATION

6. The following issues remain in dispute:
  - (a) Does the need for lumbar surgery as proposed by Dr McEntee result from the injury on 7 April 2017 (deemed)?
  - (b) Is the proposed surgery reasonably necessary for the compensable injury?

### PROCEDURE BEFORE THE COMMISSION

7. The parties attended a conciliation conference and arbitration hearing on 20 May 2020. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

## EVIDENCE

### Oral evidence

8. There was no oral evidence adduced.

### Documentary evidence

9. The following documents were in evidence before the Commission and I have taken them into account in making this determination:
  - (a) Application with annexed documents.
  - (b) Reply with annexed documents.
  - (c) Application to Admit Late Documents with supplementary statement of Mr Bland 29 April 2020.

## SUBMISSIONS

10. The representatives made oral submissions at the arbitration hearing. I have taken the submissions into account, and they are referred to in the discussion below.

### **Does the need for the lumbar surgery proposed by Dr McEntee result from the work injury (deemed date 7 April 2017)?**

11. In the familiar case of *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 the Court said, “The result of the cases is that each case where causation is in issue in a workers compensation claim, must be determined on its own facts. ... What is required is a commonsense evaluation of the causal chain.”
12. As has since been indicated by the High Court the “commonsense” concept does not operate at large. All the evidence must be considered, with the onus of proof on the applicant throughout.<sup>1</sup>
13. Roche DP in *Murphy v Allity Management Services Pty Ltd* [2015] NSWCCPD 49 (*Murphy*), noted the established authority<sup>2</sup> that there may be multiple causes of an injury, and also emphasised that the test with medical expenses is whether the injury was a “material contribution” to the need for the claimed treatment.
14. That Mr Bland suffered aggravation to his pre-existing condition of spondylolisthesis in his employment with the respondent is not in dispute, whether caused by the duties over the period of employment or by the fall in November 2016 set out above. The respondent’s central submission is that the aggravation caused with the respondent ceased in the period from late 2017 to the beginning of 2019. It is submitted that this is shown by the gap in mention of the back in the medical records of some 15 months from 20 November 2017 to 28 February 2019.
15. The applicant does not dispute the absence in the records of reference to the back in the above period, but points to what Mr Bland says in his supplementary statement of 29 April 2020 about this. Mr Bland says that his symptoms never resolved after November 2016, although he managed by working hard to maintain his spinal strength, and continuing to take pain medication. He says if he pushed himself too hard he would suffer for it. He says he has a high pain threshold and did not go to the doctor every time his back hurt or he had right sided leg pain. He was told in 2017 he would probably have to be sent for an opinion

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<sup>1</sup> *March v Stramare (E & M H) Pty Limited* [1991] HCA 12; (1991) 171 CLR 506; *Flounders v Millar* [2007] NSWCA 238.

<sup>2</sup> See *Comcare v Martin* [2016] HCA 43.

about surgery, but he wanted to stave that off for as long as he could. However, by February 2019 he felt the need to seek stronger painkillers and consulted his GP.

16. As the applicant submits, there is nothing to contradict Mr Bland's statement on this, and it is relevant that Mr Bland's first statement was completed on 27 August 2018 and this includes his report of the symptoms at that time which are consistent with the symptoms at the end of 2017 and also in February/March 2019.
17. For example, the notes of Dr Langham for 28 February 2019 are consistent with Mr Bland's account of the continuation of symptoms, recording, "Moderate, Chronic Right Sciatica – Usually sees doctor in alstonville about this – long standing – worse at the moment ... taking ibuprofen no effect ...".
18. Dr Lembke's notes for 15 March and 5 April 2019 also support uninterrupted progression of the work aggravation from the time of the serious symptoms recorded including right leg pain in the notes of November and December 2017. On 15 March 2019 Dr Lembke records the back and leg issues and notes, "Problems have progressed since I last saw John in December 2017". On 5 April 2019 Dr Lembke referred Mr Bland to Dr McEntee.
19. The respondent submits that the referral to Dr McEntee must have been needed due to a serious incident. Dr McEntee records the history in his report of 28 June 2019 of continuing symptoms that did not resolve. Dr McEntee says in his report of 2 July 2019, "Mr Bland injured his back at work in 2016 and since that time he has had ongoing right sided sciatica and low back pain."
20. Dr Oates in his report of 21 November 2017, notes the aggravation of asymptomatic pre-existing L5/S1 spondylolisthesis and was of the opinion that Mr Bland would remain unfit for his pre-injury work. He noted Mr Bland was by then in lighter employment with restrictions that were working satisfactorily.
21. In the report of 17 January 2020, Dr Oates updates the history of the work at the Byron Bay Superfoods factory and after that the bakery at Ballina, the nature of the duties and the restrictions applied. He notes that Mr Bland was able to cope with the work at the Superfoods factory with some minor discomfort on occasions, and the work with the bakery saw his lifting limited. Dr Oates was of the view,

"There has been a thread of continuing symptomatology, predominantly right leg sciatica (radiculopathy), since the injury which occurred in November 2016 but was not formally reported as a worker's compensation injury until April 2017, because the worker waited to see whether the condition would settle spontaneously as he had had previous similar falls at work which had not resulted in any continuing symptoms. On this occasion the symptoms of aggravation continued."
22. Dr Oates also refers to the fact that Mr Bland did not recall any specific incident before the referral to Dr McEntee, and notes the subsequent work at Superfoods and the examples of carrying groceries and a heavy item from his car in early 2019 as a "flare up", which does not represent permanent aggravation.
23. The respondent submits that because Dr Oates noted that the symptoms abated after Mr Bland ceased work and is of the view that he would be at risk if he resumed the same work is the same as saying the aggravation had ceased. I do not accept this submission because Dr Oates is very clear in his history and opinion in both reports that the symptoms continued and the condition is likely to continue to deteriorate due to the aggravation in the work with the respondent.

24. Dr Robinson, in the report of 18 November 2019, says there is “no evidence of any radicular pathology - symptoms and/or clinical signs at this stage.” This is “according to the WorkCover Guides”. This is a reference to the criteria for the assessment of permanent impairment. However, it is abundantly clear that Mr Bland has had right leg symptoms referred from the back since the incident in November 2016. In fact, as Dr Oates points out, the symptoms recorded by Dr Robinson in his report under “History of injury” are consistent with radiculopathy.
25. Dr Robinson, when asked to comment on the conflicting opinions of Dr Jabbour and Dr Oates, says,

“I would believe that the accuracy of the diagnosis is that Mr Bland did have pre-existing problems which were exacerbated by the incidents occurring in the course of his employments, but which have not produced any disc extrusion or compression of the adjacent nerve roots. He now suffers with the natural history of the underlying degenerative problems, which will be aggravated by a return to any heavy lifting or bending.”
26. Dr Robinson was asked whether the work-related injuries had resolved and says, “I believe that the work-related injuries have materially decreased, but there has been some aggravation of the underlying pathology.” This suggests that Dr Robinson allows that at least some of the aggravation remains, yet he does plainly say elsewhere in the report that the current symptoms relate to the pre-existing condition, so the report is somewhat unclear.
27. In his supplementary report Dr Robinson again refers to the “WorkCover Guides” and the criteria in a whole person impairment assessment regarding radiculopathy. Dr Robinson disagrees with Dr Oates apparently at least partly due to these criteria. Dr Robinson says that the condition was aggravated by the employment at Superfoods, in carrying groceries and when Mr Bland carried a smoker from his car.
28. In my view this conclusion is not supported by the evidence, including Mr Bland’s supplementary statement in which he addresses these activities. He says that he has told each doctor that there was no specific incident that caused the back and leg pain, and he believed it to be the gradual deterioration of his work injury. He says he mentioned the incidents as examples of activity when he felt back and leg pain, and that they were not isolated incidents. He noted that he also felt back pain when sleeping on his back. This is consistent with the examples relied on by the respondent being, as the appellant submits, only a manifestation of symptoms resulting from the original aggravation, and not new aggravations.
29. Dr Jabbour, in his report of 5 June 2017, says the symptoms resolved after two days, which is not consistent with the other evidence. Mr Bland confirms this inaccuracy in his statement. Dr Jabbour was asked about causation and says there was no aggravation of a pre-existing condition, and the symptoms are the progression of the underlying condition. He says that Mr Bland was “a vague historian” and could not identify specific incidents at work bringing on the symptoms so felt that Mr Bland’s symptoms were due only to the progression of the underlying condition.
30. Dr Jabbour says that such conditions can suffer aggravations or exacerbations, and that Mr Bland would be at “increased risk” of such aggravations if he returned to his pre-injury employment. This begs the question as to whether Mr Bland did suffer such aggravations or exacerbations in the work, which continued through to July 2017 following the onset of symptoms.
31. Mr Bland states that the back pain was present after the fall in November 2016, especially when lifting, and the leg symptoms began soon after. This is consistent with the history taken by Dr Oates of the nature of the work duties and the fall in November 2016 with the onset of symptoms resulting in Mr Bland seeking the assistance of Dr Lee in January 2017.

32. I accept Mr Bland's account in the absence of any contrary evidence. As submitted for Mr Bland, in the circumstances of this matter a lack of medical records for a period does not mean a resolution of symptoms.
33. Dr Jabbour's opinion does not sit comfortably with the other evidence of the onset of symptoms and the nature of the work. and I prefer Dr Oates and Dr McEntee to Dr Jabbour.
34. Apart from the apparent confusion within the report discussed above, Dr Robinson's opinion does not accord with the evidence of the continuation of symptoms from November 2016, and I prefer Dr Oates and Dr McEntee to Dr Robinson on this issue.
35. The evidence is clear that that the aggravation from the work continued and progressed. There is no evidence the incidents referred to in Dr Robinson's report of carrying groceries and a heavy item, or the subsequent employment, involved new incidents of injury, and I reject this submission. I find that there was no resolution of symptoms from the time of the fall in November 2016 and no further permanent aggravation in early 2019 requiring referral to Dr McEntee. There was no intervening event to break the chain of causation from the end of the employment with the respondent.
36. From this it must be concluded that the evidence establishes, in terms of *Murphy*, that the employment is a material contribution to the need for the proposed surgery; the need for the surgery results from the work injury.
37. For these reasons I find that the surgery proposed by Dr McEntee of circumferential fusion at L5/S1 and disc replacement at L4/5 is reasonably necessary for the compensable injury of the aggravation, acceleration, exacerbation or deterioration of degenerative changes in the lumbar spine.

**Is the surgery proposed by Dr McEntee reasonably necessary?**

38. I also prefer Dr Oates and Dr McEntee on this issue to the opinion of Dr Robinson, whose opinion relies on there being no radiculopathy, and he therefore is of the view that the proposed surgery would be "excessive". He does say however that if radicular symptoms or signs were to appear then his opinion would change.
39. In terms of the relevant authorities<sup>3</sup> the proposed treatment is appropriate, as it is directed at the source of back and leg pain and associated symptoms present since November 2016, which have gradually worsened. Conservative treatment has been trialled over two years but failed. Dr McEntee in his report of 8 October 2019 as treating surgeon refers to the L5 nerve block which also failed to alleviate the symptoms, and he explains the problems that require surgical attention, and the elements of that surgery. Dr Oates explains the specific objective of each part of the surgery proposed by Dr McEntee and the purpose of reducing the sciatic symptoms in the right leg and stabilising the spondylolisthesis at L5/S1.
40. The procedure is one well known and accepted by the medical profession, and its cost does not outweigh the potential benefits. As to effectiveness, the objective is to reduce pain, increase mobility and prevent deterioration. It is surgery that, in terms of *Rose*, should not be forborne by Mr Bland.
41. It follows from the above findings that Mr Bland is entitled to section 60 of the 1987 Act expenses associated with the surgery proposed by Dr McEntee.

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<sup>3</sup> *Rose v Health Commission (NSW)* [1986] NSWCC 2 (*Rose*); *Diab v NRMA Ltd* [2014] NSWCCPD 72; and *Pelama Pty Ltd v Blake* [1988] NSWCC 6.

## **SUMMARY**

42. The need for the surgery proposed by Dr McEntee results from the injury in the course of Mr Bland's employment with the respondent; and the surgery proposed is reasonably necessary for the compensable injury.