

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 1951/20
Applicant: Lube Cepigovski
Respondent: Qantas Ground Services Pty Limited
Date of Determination: 20 August 2020
Citation: [2020] NSWCC 282

The Commission determines:

1. The applicant sustained injury to the lumbar spine on 13 June 2016 arising out of or in the course of his employment with the respondent.
2. The injury is in the form of aggravation, acceleration, exacerbation or deterioration of a pre-existing degenerative condition of the lumbar spine.
3. The applicant's employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the pre-existing degenerative condition of the lumbar spine.
4. Award for the respondent in respect of the applicant's claim for injury to the lumbar spine in April 2015 or in the period from 4 February 2015 to 6 October 2016.
5. The surgery carried out by Dr G Rosenberg on 14 December 2016 was reasonably necessary as a result of injury on 13 June 2016.
6. The respondent is to pay the applicant's costs and expenses pursuant to s 60 of the *Workers Compensation Act 1987* including the costs of and incidental to the surgery on 14 December 2016.
7. The respondent is to pay the applicant weekly benefits pursuant to the *Workers Compensation Act 1987* as follows:
 - (a) \$908.35 per week from 13 June 2016 to 12 September 2016 pursuant to s 36, and
 - (b) \$765.08 per week from 13 September 2016 to 1 February 2017 pursuant to s 37.
8. The respondent is to have credit for monies paid to the applicant during the period from 13 June 2016 to 1 February 2017 apart from payment of annual leave.
9. The matter is remitted to the Registrar for referral to an Approved Medical Specialist for assessment of whole person impairment as a result of injury to the lumbar spine on 13 June 2016.
10. The documents to be forwarded to the Approved Medical Specialist are:
 - (a) the Application to Resolve a Dispute and attachments;
 - (b) Reply and attachments;

- (c) the Amended Application to Resolve a Dispute;
- (d) Application to Admit Late Documents dated 6 July 2020 lodged by the respondent with clinical records of St George Hospital attached;
- (e) Application to Admit Late Documents dated 6 August 2020 lodged by the applicant with the following attachments:
 - (i) letter Santone Lawyers to Dr Patrick dated 22 July 2020;
 - (ii) supplementary report of Dr Patrick dated 23 July 2020, and
 - (iii) clinical notes of St George Hospital, various dates.

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

Brett Batchelor
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 BRETT BATCHELOR, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Lube Cepigovski (the applicant/Mr Cepigovski) seeks compensation for weekly benefits, medical expenses and for permanent impairment as a result of injury arising out of or in the course of his employment as an aircraft cleaner with Qantas Ground Services Pty Ltd (the respondent) over the period from 4 February 2015 to 6 October 2016. He also claims injury to the lumbar spine in April 2015 and on 13 June 2016.
2. The sections of the *Workers Compensation Act 1987* (the 1987 Act) relied upon in support of the claim are:
 - (a) personal injury s 4(a);
 - (b) disease as a result of the nature and conditions of employment, s 4(b)(i), and
 - (c) aggravation, acceleration, exacerbation or deterioration of a disease in the course of employment, s 4(b)(ii).
3. Mr Cepigovski commenced working for the respondent on 4 February 2015 initially as a casual cleaner, then as a permanent casual after 12 months. He worked part-time, and estimates that he would clean approximately six planes per shift, taking about 45 minutes to clean each plane.
4. In April 2015 the applicant claims that he was performing his usual duties over a few days when his back pain increased. Prior to that he says that his back would ache but it was not severe enough for him to stop working or seek medical advice. By 5 April 2015 the back pain was unbearable, with pain down his left leg. He was at home, found it difficult to move and was transported to St George Hospital by ambulance where he received treatment and was discharged the following day.
5. The applicant continued to work for the respondent until a second incident on 22 April 2015 when he lost his balance as he was trying to get out of a row of seats, twisted his ankle and claims that he also experienced pain in his back. He was off work for a few days and returned on light duties. He kept working and consulted his general practitioner, Dr Tan on 20 May 2015, who referred him to an orthopaedic surgeon, Dr G Rosenberg. Dr Rosenberg treated the applicant in 2015 and 2016. On 9 November 2015 the doctor sent Mr Cepigovski for an MRI scan of his back and suggested that surgery might be the best option for him.
6. On 19 April 2016, the applicant obtained a second opinion on his back condition from Mr Tamer Kahil, consultant orthopaedic surgeon (Dr Kahil), who advised that Mr Cepigovski was a surgical candidate for disc decompression plus or minus L5-S1 fusion. Injection in the left L5-S1 foramin was also suggested as a temporary benefit measure.
7. On 13 June 2016, the applicant was performing his usual duties cleaning in between three seats on a plane when he experienced severe pain in his lower back and stopped work immediately. He was conveyed to St George Hospital by ambulance where he remained for four days. He lodged a workers compensation claim, and on 20 June 2016 consulted Dr Tan who completed a WorkCover certificate. The applicant underwent physiotherapy treatment and returned to work about a week later for five hours a day five days a week performing light duties and some security work. This continued until 6 October 2016 when he was sent home by the respondent. The respondent's insurer, Allianz Australia Workers Compensation (NSW) Limited (Allianz) declined liability for the applicant's claim on 20 September 2016 in a notice issued to him under s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).

8. On 14 December 2106, the applicant underwent decompression and neurolysis surgery on his lumbar spine at St George Hospital under the hand of Dr Rosenberg. This was self-funded in view of the declinature of liability by Allianz. Mr Cepigovski was off work for about three months, after which he returned to work on full duties.
9. The foregoing summary is taken from the applicant's statement dated 23 August 2017¹. The particulars of the applicant's claim are taken from Part 4 of the Amended Application to Resolve a Dispute dated 1 June 2020 (the Amended Application), lodged pursuant to a direction made at the telephone conference in the proceedings on 6 May 2020.
10. The matter was originally listed for conciliation/arbitration on 22 June 2020. On that day, the parties could not agree on the pre-injury average weekly earnings (PIAWE), and also the admissibility of records produced by St George Hospital. Following argument, a determination was made that the PIAWE of the applicant were \$956.35. The respondent sought leave to tender the clinical records of the applicant from St George Hospital, which had only recently been produced to the Commission in response to a direction for production order issued at the telephone conference. This was opposed by counsel for the applicant as it was the first time that he had been put on notice that the respondent would be seeking to rely on such records, and he wished to have the independent medical examiner qualified by the applicant comment on those records.
11. Following further submissions the respondent was successful in obtaining an adjournment of the proceedings to enable the St George Hospital clinical records to be put into evidence. The matter was stood over part heard until 12 August 2020. A transcript of the hearing on 22 June 2020 (T1) is available on request.

ISSUES FOR DETERMINATION

12. The parties agree that the following issues remain in dispute:
 - (a) Did the applicant sustain injury in accordance within the meaning of s 4(a) and/or (4)(b)(i) or (ii) of the 1987 Act?
 - (b) Was the surgery carried out by Dr Rosenberg reasonably necessary as a result of any such injury sustained by the applicant, that is, did any such injury materially contribute to the need for surgery?
 - (c) If there is a finding in favour of the applicant on the issue of injury and the reasonable necessity for surgery, was the applicant totally or partially incapacitated for the period during which he claims weekly benefits?

PROCEDURE BEFORE THE COMMISSION

13. The parties attended a hearing by telephone conference on 22 June 2020 and 12 August 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.
14. Mr L Robison of counsel appeared for the applicant briefed by Mr A Byrne. The applicant attended on a separate telephone line. Mr J Beran of counsel appeared for the respondent briefed by Ms B Walsh. A representative of icare attended on a separate line.

¹ Application to Resolve a Dispute (the Application) p 2.

EVIDENCE

Documentary evidence

15. The following documents were in evidence before the Commission and taken into account in making this determination:
- (a) the Application and attached documents;
 - (b) Reply and attachments;
 - (c) the Amended Application;
 - (d) Wages Schedule dated 1 June 2020 lodged by the applicant;
 - (e) Application to Admit Late Documents (AALD) dated 6 July 2020 lodged by the respondent with clinical records of Sr George Hospital attached;
 - (f) Application to Admit Late Documents dated 6 August 2020 lodged by the applicant with the following attachments:
 - (i) letter Santone Lawyers to Dr Patrick dated 22 July 2020;
 - (ii) supplementary medicolegal report of Dr Patrick dated 23 July 2020, and
 - (iii) clinical notes of St George Hospital, various dates.

Oral evidence

16. There was no application to adduce oral evidence or to cross-examine the applicant.

SUBMISSIONS

17. The submissions of the parties are recorded in the transcript of the hearing on 12 August 2020 (T2), a copy of which can be obtained on request. I will not repeat them in full, but in summary they are as follows.

Applicant

18. The applicant relies on his statement dated 23 August 2017 and puts his credit very much in issue, noting that he has been quite open about his previous back injury in the 1990s while working for ETA at its Marrickville factory, and that this was to a different area of the back to that which he has now injured. He stresses the detailed nature of his duties with the respondent, and that these involved much bending and twisting of his back, and reaching under and into the pockets of airplane seats rather than any heavy lifting.
19. The applicant explains his failure to report his back pain on 5 April 2015 when his pain became unbearable whilst at home and he had to be transported to St George Hospital by ambulance. At that time he was a casual employee and did not want to jeopardise his prospect of becoming a permanent employee.
20. The applicant notes the left ankle injury on 22 April 2020 whilst trying to get out of a row of seats on a plane, and the pain he says he experienced as he was trying to stop his fall. The subsequent treatment by Dr Tan and Dr Rosenberg, and the second opinion obtained from Dr Kahil are noted.

21. In respect of the report of Dr Rowe, who he saw on 17 August 2016 at the request of Allianz and who produced a report of that date², the applicant says that the doctor is in error when he records no history of any back pain prior to June 2016.
22. The applicant notes the report of his general practitioner, Dr Daisy Tan, dated 25 July 2016 addressed to Allianz³, and in particular the answers to questions [3] and [4] posed by the insurer, but also notes answer [5] wherein Dr Tan excludes any non-work factors as being causative of his back condition.
23. The applicant submits that although Dr W G D Patrick records him as being a poor historian in the principal report dated 16 May 2017⁴, this does not suggest dishonesty on his part; again he has been completely frank to Dr Patrick about his previous back problem. The applicant submits that Dr Patrick records a full history of his background, the nature of his duties with the respondent, the two incidents in April 2015 and the further significant incident of 13 June 2016, his treatment following the incidents and also a critique of the opinion of Dr Rowe. Dr Rowe has not taken account of the nature and conditions of the applicant's employment with the respondent and having regard to this, the applicant submits that Dr Patrick is operating in a fairer climate within which to express his opinion on causation of the back injury.
24. Again the applicant stresses that the presentation of his case is not one of continuous heavy lifting involving his back, but one of bending, twisting and reaching. Dr Rowe seems to have regard to lifting involving the back when he comments in his report that the rubbish for which the applicant was reaching under the aircraft seats was "only plastic bottles." The applicant submits that it is "bizarre" that Dr Rowe would record, as he does, that currently there is no pain in the lower back. This "defies belief" according to the applicant. The recording of this factor highlights an internal inconsistency in Dr Rowe's report when the doctor then records activity that aggravates his pain⁵.
25. The applicant submits that Dr Rowe's report does not, in accordance with the principle set out in *Makita (Aust) Pty Ltd v Sprowles*⁶, set out the material on which he bases his opinion on causation of the back injury, including the nature and conditions of employment. Essentially, according to the applicant, Dr Rowe misunderstands the case on which he is being asked to comment.
26. The applicant notes the clinical material available from St George Hospital, lodged as late documents, and the reports of the radiological investigations attached to the Application⁷. The applicant notes that Dr Patrick, when asked for his supplementary report on 22 July 2020⁸, was supplied with the complete file from St George Hospital regarding the admission on 5 April 2015, and that the doctor did not change his previously expressed opinion in his supplementary report dated 23 July 2020⁹.
27. The applicant emphasises the temporal connection between that commencement of his employment with the respondent in February 2015 and the onset of back pain in April of that year. He submits that his previous back injury is not of great relevance to the current claim. The applicant also emphasises his relative lack of education and the fact that English is his second language, and also that there is no evidence from the respondent to gainsay the nature and conditions of the employment that he describes.

² Reply p 19.

³ Reply p 17.

⁴ Application p 21.

⁵ Reply p 22.

⁶ (2001) NSWCA 705.

⁷ Application from p 30.

⁸ AALD 6 August 2020 p 2.

⁹ AALD 6 August 2020 p 3.

28. The applicant submits that, having regard to the circumstances of the work related incidents in the course of his employment with the respondent when he alleges he injured his back, it is quite clear that employment was a substantial contributing factor to the incidents described, or alternatively the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of a disease condition in his lumbar spine.

Respondent

29. The respondent points to the s 74 notice dated 20 September 2016¹⁰, which it submits squarely puts in issue the reasonable necessity for the treatment of the applicant's claimed injury. This is acknowledged by the applicant.
30. The respondent's takes issue with the applicant's credit, pointing out that to prior to Mr Cepigovski commencing work with the respondent there are recordings in clinical notes of him seeing his doctor for sciatica on 13 August 2001¹¹, and complaints of back and loin pain on 9 July, 14 July and 23 July 2014¹². This damages Mr Cepigovski's credit when he says that his only previous back problem was in a different area of the back.
31. The respondent accepts that applicant's description of the nature and conditions of his employment, but questions why he did not give details to St George Hospital as to the cause of his pain when he attended on 5 April 2015¹³. In this regard the presenting symptoms on 5 April 2015 were recorded as "atraumatic". The applicant also informed the ambulance officers who transported him to hospital the it was an "atraumatic" incident¹⁴. The respondent refers to the "General Exam Adult Note"¹⁵ of St George Hospital which sets out in detail the applicant's presenting symptoms and history in respect of the attendance on 5 April 2015 when Mr Cepigovski attended on Dr Tan on 20 May 2015, this incident was described as "...pinched nerve at Easter"¹⁶.
32. The respondent questions why the applicant did not make a claim in respect of this incident or tell his general practitioner, Dr Tan, about it. It is noted that the applicant made a workers compensation claim in respect of an incident on 22 April 2015 when he twisted his left ankle and states that he also had pain in his back as a result of trying to stop a fall. Although injury to the back is mentioned in the Worker's Injury Claim Form dated 13 October 2016 that the applicant lodged in respect of this incident¹⁷, the respondent notes that there was no mention of a back injury when the applicant attended on Dr G. Yuen at Sydney Airport Medical on 23 April 2015¹⁸. The lodgement of the claim in respect of the left ankle was at a time when the applicant says that he did not want make a claim in respect of his back because he wanted to get a full time job.
33. The respondent submits that, as early as 29 May 2015 when the applicant saw Dr Rosenberg on referral from Dr Tan¹⁹, Dr Rosenberg took a history of the development of significant low back and left sided leg pain radiating down the back to the heel several weeks previously. When Dr Rosenberg saw the applicant again on 9 November 2015²⁰, the doctor sent for an MRI scan and said that it seems that surgery might be the applicant's best option. On 4 December 2015 Dr Rosenberg recommended discectomy surgery if the applicant's symptoms did not remain manageable²¹. The respondent also draws attention to the

¹⁰ Reply p 9.

¹¹ Application p 171.

¹² Application pp 103-100 (reverse date order in notes).

¹³ AALD 6 August 2020 pp 18 and 212-217.

¹⁴ AALD 6 July 2020 p 214 and AALD 6 August 2020 p 5.

¹⁵ AALD 6 July 2020 p 230.

¹⁶ Application p 95.

¹⁷ Application p 7.

¹⁸ Application p 178.

¹⁹ Application p 49.

²⁰ Application p 48.

²¹ Application p 47.

management recommendation of Dr Kahil on 19 April 2016²² that the applicant was a candidate for disc decompression plus or minus L5-S1 fusion. These two advices for surgery were well before the incident of 13 June 2016.

34. The respondent also relies on the reports of the radiological investigation of the applicant's lumbar spine²³ which reveal bone marrow oedema at a level in the spine different to that at which the applicant is experiencing problems; at the sacroiliac level as opposed to the lumbo-sacral level.
35. The applicant submits that the report of Dr Rowe dated 17 August 2016²⁴ must be looked at in light of the reason it was commissioned. It was in response to the claim for the frank incident on 13 June 2016 and the report is the one most contemporaneous to that incident. The reason why Dr Rowe did not deal with the nature and conditions of the applicant's employment is that it was not pleaded by the applicant until 2020. Dr Rowe's comment that the 13 June 2016 incident was simply another manifestation of the applicant's chronic underlying pathology is borne out when one looks at Dr Rosenberg's operation report dated 16 December 2016²⁵ in which he reports finding a calcified and quite degenerate disc.
36. The respondent submits that the history on which Dr Patrick bases his assessment as to the causation of the applicant's injury is simply not proven on the evidence. The applicant did not injure his back in 2015, and it is also evident that the applicant was significantly disabled prior to 13 June 2016. If it is accepted that the applicant's claim is in respect of the aggravation, acceleration, exacerbation or deterioration of a disease of gradual process, this incident of 13 June 2016 is the only one which could potentially cause such aggravation. However Dr Rowe does not accept this; he says that it is simply a manifestation of an underlying condition.
37. In the alternative the respondent submits that if the applicant is found to have suffered injury to his lumbar spine as a result of the nature and conditions of his employment with the respondent, pleaded for the period from 4 February 2015 to 6 October 2016 in the Amended Application, such injury did not contribute to the need for surgery. That need arose in December 2015, six months before the incident of 13 June 2016.
38. In respect of the weekly benefits for the period of incapacity alleged by the applicant, the respondent submits that in the last two months of that period of incapacity, the applicant would have had at least a 50% capacity for work as opposed to no capacity for work.
39. In the event of an award of weekly benefits in favour of the applicant, the respondent seeks credit for monies paid to Mr Cepigovski during the period of any such award apart from payment of annual leave. Otherwise the respondent accepts the applicant's mathematical calculations of any entitlement²⁶.

Applicant in response

40. The applicant submits that the one thing that emerges from the recent material produced by St George Hospital is that the applicant was not injured because of the light cleaning work as such, rather it was all of the bending and twisting required of the applicant in the course of that work. The applicant points out that when he attended St George Hospital on 5 April 2015 the record shows that the symptoms came on at home, but the applicant said that his back had been sore for about five days, and in those five days the applicant had been carrying out his work.

²² Application p 29.

²³ Application pp 31–32.

²⁴ Reply p 19.

²⁵ Application p 39.

²⁶ T2 p 41.25.

41. In respect of Dr Rowe's report, the applicant submits that the fact that it came into existence before the claim was amended to plead the nature and conditions of employment is not to the point; one would have thought that the doctor, as a medicolegal expert, would have looked at the totality of the medical evidence and relevant factual circumstances. In this regard the applicant notes that the respondent was originally put on notice of the applicant's nature and conditions claim when the report of Dr Patrick dated 16 May 2017 was served on Allianz on 27 June 2017²⁷.
42. Finally, the applicant rejects the respondent's submission that for the last two months of the applicant's period of claimed incapacity there should be a finding of partial incapacity. There is no evidence to support such a finding.

FIINDINGS AND REASONS

Injury

43. The applicant's principal submission is that he suffered injury as a result of the so called nature and conditions of his employment over the period from February 2015 to 6 October 2016, the date on which he last worked for the respondent before undergoing surgery on 14 December 2016. The applicant submits that the two frank incidents referred to in Part 4 of the Amended Application in April 2015 and on 13 June 2016 "... are just two occasions in the course of the overall nature of the employment where symptoms came to life in a particularly severe way..."²⁸, but also submits that he is not abandoning "...the frank injury alternative."
44. The term 'nature and conditions of employment' has often been referred to and commented upon both in the former Compensation Court of NSW and in the Commission. In *Mirkovic v Davids Holdings Pty Ltd*²⁹ Neilson CCJ said at 667:

"The phrase 'nature and conditions of employment' is not a term of art, although many who practise in this jurisdiction seem to think so. One Judge of Appeal recently referred to it as 'quaint.' My colleague Burke J has repeatedly referred to it as a 'meaningless concept'. It is used in this place as a shorthand way of alleging that, although no frank incident is relied upon, there was some aspect of the work carried out by a worker over a period of time, e.g. repeated lifting or bending, which caused some pathological condition or acted upon some underlying pathological condition to cause incapacity. Some classify such a period of work as a series of traumata or microtraumata, others classify it as causing a disease of gradual process within section 15 of the Act (where the pathology was caused by such work) or as the aggravation, acceleration, exacerbation or a deterioration of a disease within section 16. The 'microtraumata' contention was that advanced by the worker on review."
45. This description of the term was referred to with approval by Roche DP in *Toplis v Coles Group Ltd t/as Coles Logistics*³⁰ and *Raulston v Toll Pty Ltd*³¹. At [10] in *Raulston* the Deputy President described the expression 'nature and conditions' as meaningless and that it should not be used. Practitioners were again directed to cease using the expression without properly explaining the nature of the claim and the cause of the injury.

²⁷ Application p 16.

²⁸ T2 p 40.20-40.25.

²⁹ (1995) 11 NSWCCR 656.

³⁰ [2009] NSWCCPD 70.

³¹ [2011] NSWCCPD 25 (*Raulston*).

46. In the original Application Form 2 dated 7 April 2020, the injury description/cause of injury is in the following terms:

“The applicant sustained injury to his lumbar spine due to the nature and conditions of his employment from 4 February 2015 to 6 October 2016 (deemed date: 13 June 2016), which included significant bending and twisting in awkward areas, such as the aircraft interior, in addition to incidents in April 2015, March 2016 and on 13 June 2016.”

47. At the telephone conference on 6 May 2020 the following direction was issued:

“The applicant is to lodge and serve by 13 May 2020 an Amended Application to Resolve a Dispute specifying ‘Injury Description/Cause of Injury’ relied upon with reference to s 4(a) and/or (b) of the *Workers Compensation Act 1987*.”

48. Part 4 of the Amended Application contains the following injury description:

“The applicant sustained injury to his lumbar spine due to the nature and conditions of his employment from 4 February 2015 to 6 October 2016 (deemed date: 13 June 2016), which included significant bending and twisting in awkward positions in the aircraft interior, in addition to incidents in April 2015 and 13 June 2016.”

The three dates, or range of dates, of injury relied upon are “April 2015”, “13/06/2016” and “4 February 2015 to 6 October 2016”. The type of injury is described as:

“Personal injury (4)(a)
or
Disease as a result of the nature and conditions of employment (4)(b)(i)
or
Aggravation, acceleration, exacerbation or deterioration in the course of employment of a disease (4)(b)(ii)”

49. As submitted by the respondent, (see [30] above) applicant had complained to his general practitioner on 13 August 2001 of sciatica. The note on that day includes “lower back pain settled nil weakness/paraesthesias”. The respondent acknowledges that this complaint was some time ago, but submits that the applicant’s credit is diminished by his failure to mention this complaint in his statement. Having regard to the age of the complaint and what is recorded therein, I do not accept this submission.
50. Of more relevance however are the complaints of back pain that Mr Cepigovski made to his general practitioner during the 12 months leading up to the first claimed work incident in April 2015. On 9 July 2014 Dr Tan recorded the applicant as suffering from bilateral loin pains but recorded “sharp pains diff to back pains”. It appears from the entry on 14 July 2014 that the doctor investigated the applicant for kidney problems, found incidental gall stones as asymptomatic, queried muscular pains, referred to physiotherapy and “further analgesia try neurofen plus”, and listed the reason for the visit as “Back pain”.
51. On 15 July 2015,³² Dr Calvin M Ling recorded that the applicant had seen Dr Tan for “lbp” (which I interpret as low back pain) and:

“NO RADICUALR FERATURE
PARAVERTEBRAL MUSCLES ONLY BOTH SIDE
ct SCAN DID NOT SHOW ANY Renal stone
Still
Likely Mechanical back pain” [sic]

³² Application p 101.

52. On 23 July 2014, Dr Tan recorded “pain improved PT aware CT normal” and then made reference to medication for cholesterol. The CT itself is not in evidence; it seems that it may have been obtained in respect of Dr Tan’s investigation of the applicant’s kidneys, referred to in the consultation notes of 14 and 15 July 2014.
53. The next consultation with Dr Tan occurred on 1 December 2014³³ in which there is no reference to back problems. The following consultation with the doctor is recorded on 14 January 2015³⁴ in which the doctor noted that the applicant needed a medical certificate as he was going for a job medical test the following day.
54. I do not find that the applicant’s credit is damaged by these entries in the general practitioner’s clinical notes that I have summarised. I do find that Dr Tan was investigating Mr Cepigovski for low back pain, but that this was thought at one stage to have been related to kidney problems or gall stones, and it is not clear from the clinical notes if the applicant was ever given a clear reason for his complaint of low back pain.
55. There is a report from Dr Tan dated 27 July 2016 addressed to Allianz in evidence (referred to above at [22]). This report is clearly in response to the applicant’s claim for injury on 13 June 2016 when “...he was bending over getting rubbish from underneath a row of seats at work as a cleaner with QANTAS fleet services when he felt sudden pain in his back and had difficulty getting up.” At [3] in that report Dr Tan says that:
- “Mr Cepigovski claims the episode of pain he suffered in April 2015 followed a work related incident/injury for which I understand he saw another doctor, through work.
- It is difficult say whether Mr Cepigovski would or would not have suffered from the symptoms caused by reaching down for rubbish on 13 June 2016 if he had not had previous occurrences of injuries to the same body part.”
56. At [4], Dr Tan says that it is her understanding that Mr Cepigovski did not suffer from ongoing pain and symptoms at the time of the work related incident/injury on 13 June 2016, but that he developed symptoms following the incident. She therefore says that “...thus his employment has been a substantial contributing factor to the current work related diagnosis and presentation.” At [5] Dr Tan notes the applicant’s claim that the injury he suffered in April 2015 was work related. She said that she did not believe that his current presentation had been caused by factors outside his employment with the respondent, as she understood that the symptoms developed from a particular incident at work.
57. At [6], Dr Tan then refers to the MRI scan following the current injury. This is a reference to the scan dated 16 June 2016³⁵ which shows marrow oedema and annular fissures. Her understanding is that these changes are more acute in nature, and she was not aware of the applicant having had those findings on previous scans. She believes that the degenerative changes are essentially unchanged from previous scans and the disc protrusion does not appear to be any worse than previously. Some of the changes noted on Mr Cepigovski’s MRI and CT scans she says could be attributable to a degenerative disease process. Others however are more of an acute nature, for example annular fissures and marrow oedema. Dr Tan concludes that, from the information, she believes that work is the main contributing factor to aggravation of the applicant’s underlying degenerative disease.
58. The respondent submits that the marrow oedema identified by Dr Tan is at a different level to the level at which the applicant claims he is injured (see [35] above). I cannot see any support in the reports of the treating or qualified medical specialists to support this submission, which appears to be at odds with what Dr Tan is saying.

³³ Application p 99.

³⁴ Application p 97.

³⁵ Application p 32.

59. Dr Tan did not see the applicant following the claimed injury in April 2015 when the applicant attended St George Hospital, until 20 May 2015, when Mr Cepigovski reported to her that he had a “pinched nerve at Easter” and went to St George Hospital. The only other attendance at the same practice after 14 January 2015, when the applicant requested a medical certificate for his job medical test the following day from Dr Tan, was with Dr Calvin M Ling on 17 March 2015 at which time there was no mention of any problem with a sore back; the consultation was for three days of aching and pain, headache, sore throat, nasal congestion and cough.
60. I do not think that Dr Tan’s evidence is of any assistance to the applicant in linking whatever happened to the applicant at work leading up to his admittance to St George Hospital on 5 April 2015 to the causation of aggravation of a degenerative condition in the lumbar spine. I conclude from an examination of the clinical notes of Dr Tan, and her report to Allianz dated 25 July 2016, that she is of the opinion that it was the incident of 13 June 2016 that was causative of the aggravation of the underlying degenerative disease in the applicant’s lumbar spine.
61. When the applicant was taken by ambulance to St George Hospital on 5 April 2015, the Hospital records show that the applicant was suffering from acute onset of left sided sciatica. The photocopy of the ambulance record is partly obscured by another document referring to the 13 June 2016 incident (the Airport Rescue & Fire Fighting Casualty Report), but it does record “...pain atraumatic....down the left leg.”
62. The applicant was kept overnight in hospital and discharged the next day after receiving Morphine, Endone, Mobic and Lyrica. He says that at the time he was only a casual employee and was hoping to become a permanent full time employee. He did not want to jeopardise his prospects of becoming permanent “because back injuries can become serious”, so he did not complain to his employer, took analgesics, underwent some physiotherapy and returned to work. He says that he continued to work with back pain and found that his back pain would increase when he was performing his usual duties, but he persevered.
63. Mr Cepigovski may, in his mind, have regarded back injuries as different from other work related injuries but it is difficult to reconcile his reluctance to report his back condition to his employer in April 2015 with his reporting of the left ankle injury which occurred on 22 April 2015. For that injury the applicant attended on Dr Yuen at Sydney Airport Medical on 23 April 2015 and made no mention of a back injury. The applicant says at [16] of his statement that he was off work for a few days, following which he returned to work on light duties such as sitting on a plane and doing whatever tasks he could manage, for example putting pillow covers on pillows. Thereafter he slowly increased his duties and returned to pre-injury duties. The inference from this evidence is that the light duties at that time were as a result of the ankle injury.
64. The applicant lodged a claim form in respect of this injury, dated 13 October 2016³⁶, in which he stated that:
- (a) he injured himself at 10.00 am on 22 April 2015 and stopped work at that time;
 - (b) he reported the injury to Leading Hand, Lisa on that day;
 - (c) he injured his back and left leg when he:

“TWISTED & LOST BALANCE
WHEN TRYING TO GET OUT OF
A ROW, GRABBED ONTO A
SEAT TO STOP FALL”

³⁶ Application p 7.

- (d) he gave his employer the first WorkCover Certificate of Capacity on 23 April 2015;
- (e) he returned to work on 24 April 2015, and
- (f) he gave his employer the claim form on 13 October 2016.

I note that this last date is a short time after Allianz denied liability for the applicant's claim in respect of date of injury on 13 June 2016 in the s 74 notice dated 20 September 2016, referred to above at [29] above. The WorkCover Certificate of Capacity is not in evidence.

- 65. The applicant attended Dr Yuen at Sydney Airport Medical on 1 May 2015³⁷ in respect of the ankle injury and the x-ray thereof (which is in evidence, dated 28 April 2015³⁸). There is no mention of a back problem on that day.
- 66. The applicant saw Dr Rosenberg on 29 May 2015 when he recorded the following history:

“Several weeks ago, he developed significant low back and left sided leg pain radiating down the back of his leg to his heel.” [sic]

This appears to be a reference to the incident in early April when Mr Cepigovski attended St George Hospital.

- 67. From this evidence, I find that the applicant did not experience symptoms in his lower back in April 2015 as a result of the ‘nature and conditions’ of his work with the respondent leading up to the attendance at St George Hospital on 5 April 2015. There was no frank incident, a matter conceded by the applicant who says that the pain came on at home from where he was transported to hospital. The back condition is noted in the hospital and ambulance records as atraumatic, and there is no reference to the conditions at work. Dr Tan notes on 20 May 2015 that the applicant had pinched his nerve at Easter, that it was worse on the left side, that the applicant was limping due to weakness in the left leg, that there was numbness in the left foot and that he was still going to work. Dr Tan referred the applicant to Dr Rosenberg on that day.
- 68. This lack of recording by Dr Tan of any work causation of the applicant's back condition in April of 2015 is consistent with what she says in her report dated 25 July 2016 to Allianz. She records the applicant's claim of the episode of pain he suffered in April 2015 following a work related incident/injury for which she understands he saw another doctor, through work. On the evidence, that was Dr Yuen, to whom he made no complaint of back injury. Then Dr Tan states her understanding that Mr Cepigovski did not suffer from any ongoing pain or symptoms at the time of the work related incident/injury on 13 June 2016. The doctor at [5] in the report notes again the claim of the applicant that the injury he suffered in April 2015 was work related, then says that she does not believe the current presentation has been caused by factors outside the applicant's employment with Qantas Ground Services, as she understands that his symptoms developed from a particular incident at work. It is the incident of 13 June 2016 to which she is referring.
- 69. The applicant continued to see Dr Tan in 2015 and 2016. On 15 July 2015 he saw her for a prostate check, when the doctor recorded back pain as being no better and advised him to have an MRI, apparently as also advised by Dr Rosenberg. The applicant saw Dr Rosenberg on 9 November 2015 who sent him for an MRI and said that it seemed that surgery might be the applicant's best option. Dr Tan referred the applicant for a second opinion to Dr Kahil in April 2016, who also recommended surgery. Neither Dr Rosenberg nor Dr Kahil record any complaint from the applicant as to the nature and conditions of his work.

³⁷ Application p 179.

³⁸ Application p 35.

70. Similarly I do not find that the applicant injured his back, or suffered symptoms therein, as a result of the incident on 22 April 2014 when he suffered the undisputed left ankle injury. The applicant only claimed that he suffered a back injury in his claim form dated 13 October 2016, after Allianz had declined liability for injury to the back on 13 June 2016 in its s 74 notice dated 20 September 2016. I cannot find any reference in the medical notes or reports to support a claim that the applicant injured his back on 22 April 2015.
71. There is a Casualty Report from Aviation Rescue & Fire Fighting in evidence in respect of the episode on 13 June 2016³⁹ when applicant suffered sharp pain in his back and down his left leg. It records a pain scale of 8/10 and that the applicant "Twisted back rising from floor". Mr Cepigovski was conveyed to St George Hospital on that day where he remained for four days. He underwent an MRI scan on 15 June 2016 and saw Dr Tan on 20 June 2016⁴⁰. Dr Tan took a history consistent with the applicant's evidence, noting that he was unable to get up after bending down to clear rubbish from beneath a row of three seats. She noted that although the applicant was worried he may need surgery, she advised that "...scans not consistent with need for surgery". The applicant continued to see Dr Tan in respect of his back.
72. The applicant had physiotherapy treatment and returned to work about a week later performing light duties five hours per day, five days a week. These continued until 6 October 2016 when the applicant was sent home after being told that there were no more light duties. He did not get back to work, on full duties, until about two months after the surgery referred to hereunder on 16 December 2016. The applicant says that his symptoms were not being alleviated by conservative treatment and that he was therefore left with no choice but to undergo the surgery offered by Dr Rosenberg.
73. On 9 December 2016, Dr Rosenberg wrote to Dr Ling⁴¹ noting that he had not seen the applicant for a year, that a left L5 nerve root block and subsequent left S1 nerve root block had not helped him a great deal and that he continued to struggle with leg pain, worse with standing and walking. Mr Cepigovski only had leg pain, no back pain and was offered surgery by way of discectomy and neurolysis of the exiting nerve root, an offer which was accepted. This was carried out on 16 December 2016, a lumbosacral decompression and neurolysis. Dr Rosenberg found the disc to be calcified and quite degenerate.
74. The applicant says that since the surgery he has experienced an improvement in his lower back pain although he continues to experience pain and numbness down his left leg and into his left heel. As at the date of his statement, 23 August 2017, Mr Cepigovski was currently working full hours and pre-injury duties. He finds that his employment sometimes aggravates his back symptoms, but that there is a significant improvement since surgery.
75. I think that it is significant that the applicant did not ever get back to full time unrestricted work duties after the incident of 13 June 2016. He had done that after his admission to St George Hospital on 5 and 6 April 2015 and after he injured his ankle on 22 April 2015. Notwithstanding the recommendations by Dr Rosenberg in December 2015 and Dr Kahil in April 2016 for surgery, this was not taken up by the applicant until after the incident on 13 June 2016. Dr Kahil had recommended in April 2016 that the applicant may get some benefit from injecting the left L5-S1 foramina as a temporary measure, and it is evident that any benefit to the applicant was indeed temporary only.
76. In my view the incident at work on 13 June 2016 was significant, and one which in effect caused the applicant to be capable of only light duties thereafter until he was put off work in October 2016. In December 2016 he accepted the inevitability of surgical intervention if he wanted to get back to work.

³⁹ AALD 6 August 2020 p 5.

⁴⁰ Application p 84.

⁴¹ Application p 42.

77. There is no doubt that the applicant was suffering from degenerative disease in his lumbar spine which pre-dated the commencement of his employment with the respondent. This is evident from the consultations with his general practitioner in the 12 months leading to the commencement of his employment in February 2015, although there are no radiological investigations in evidence dating from that time. I have found that there is insufficient evidence to find that the applicant suffered injury as a result of the 'nature and conditions' of his work prior to 13 June 2016. The applicant only experienced short periods of total or partial incapacity for work prior to that time, and one frank incident when he injured his left ankle but not his back. I think that it was the frank incident on 13 June 2016 that aggravated the degenerative condition in the applicant's lumbar spine.
78. In this regard this finding is consistent with what the High Court stated in *Federal Broom Co v Semlitch*⁴² that a worsening of symptoms of an underlying disorder will be an aggravation, acceleration, exacerbation or deterioration of the disorder, although it is only temporary and even though there is no worsening of the disorder in a medical sense.
79. For the applicant to succeed, he must also show in accordance with s 4(b)(ii) of the 1987 Act that his employment with the respondent was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the pre-existing disease.
80. I have not accepted Dr Patrick's opinion that the applicant sustained a significant lumbar spinal injury as a consequence of the nature and conditions of his work between 4 February 2015 and 6 October 2016. Dr Patrick bases that opinion, in part at least, on the fact that the only previous history of back problems experienced by the applicant dated back to when he was employed with the ETA factory at Marrickville. According to the applicant, this was in the 1990s. Dr Patrick does not have a history of the complaints of back pain in the 12 months before the applicant started work with the respondent. Dr Patrick's opinion is consistent with a s 4(b)(i) injury to the lumbar spine, that is, that a disease was contracted by a worker in the course of his employment. I do not find that to be the case.
81. Further Dr Patrick relies on the incidents in early April 2015 and on 22 April 2015 to be part of the nature and conditions of employment causative of injury. I have found this not to be the case.
82. Dr Rowe correctly finds that the applicant had significant pre-existing sciatica from around April 2015, contrary to what he records the applicant telling him on 17 August 2016 that he had never had any previous lower back or sciatic pain. In this regard the applicant submits that Dr Rowe has here simply got a wrong history, and I accept this submission. I think it unlikely that the applicant would have overlooked telling Dr Rowe about the April 2015 hospitalisation. He says as much at [42] in his statement. Dr Rowe refers to the treatment at St George Hospital on 5 April 2015 later in his report.
83. Be that as it may, Dr Rowe finds that the incident at work on 13 June 2016 was simply another manifestation of the applicant's chronic underlying degenerative pathology. I do not agree; it was a significant incident, sufficient to put the applicant off normal full time work until after he had recovered from the surgery which he decided to undergo in December 2016, to enable him to eventually return to full duties about two months thereafter.
84. It follows that I find that, notwithstanding the applicant's documented pre-existing degenerative condition of his lumbar spine, the applicant's employment on 13 June 2016 was the main contributing factor the aggravation, acceleration, exacerbation or deterioration of the disease in his lumbar spine.

⁴²110 CLR 626 per Kitto J at [7].

Surgery

85. I think that the surgery carried out by Dr Rosenberg on 14 December 2016 was reasonably necessary as a result of the injury sustained by the applicant on 13 June 2016, that is, it did materially contribute to the need for the surgery.
86. Using a common sense approach to the appraisal of evidence set out by the Court of Appeal in *Kooragang Cement Pty Ltd v Bates*⁴³ and consistent with my finding that the injury of 13 June 2013 was a significant one, it was this injury that finally meant that surgery was inevitable if the applicant was to obtain a permanent reduction in his symptoms and get himself back to work. This was after Dr Rosenberg had, on 4 December 2015, recommended surgery if the applicant's symptoms did not remain manageable and took a turn for the worse, and after Dr Kahil said in April 2016 that the applicant was a candidate for surgery, but was given advice about injecting the left L5-S1 foramin as a temporary measure to give Mr Cepigovski relief.
87. In *Diab v NRMA Ltd*⁴⁴ Roche DP set out at [88] the relevant matters in the context of s 60 of the 1987 Act, according to the criteria of reasonableness. They include, but are not necessarily limited to:
- “(a) the appropriateness of the particular treatment;
 - (b) the availability of alternative treatment, and its potential effectiveness;
 - (c) the cost of the treatment;
 - (d) the actual or potential effectiveness of the treatment, and
 - (e) the acceptance by medical experts of the treatment as being appropriate and likely to be effective.”
88. The treating specialists Dr Rosenberg and Dr Kahil, and the independent medical examiner Dr Patrick, endorse the surgery that was carried out by Dr Rosenberg as appropriate. Dr Rowe in his report dated 17 August 2016 said that there was a chance that Mr Cepigovski would require decompressive surgery if his symptoms were to become severe or he became intolerant of his symptoms. On my finding, that became the case. Dr Tran in her clinical note dated 20 June said that the scans were not consistent with the need for surgery, and in her report to Allianz dated 27 July 2016 expressed the hope that the applicant would not require surgery. Quite clearly, the specialist medical opinion is in favour of surgery.
89. The applicant tried alternative treatment and obtained only limited relief of his symptoms. The cost of the surgery is not an issue. Accepting what the applicant says about his condition post-surgery, it has been effective to a degree such that that applicant was able to get back to full time work.
90. I find that the surgery carried out by Dr Rosenberg on 14 December 2016 was reasonably necessary as a result of injury on 13 June 2016.

Incapacity

91. Although the respondent suggested that the applicant was not totally incapacitated for work during the last two months of the period during which weekly benefits are claimed, there is no evidence that this is the case. The applicant underwent surgery on 14 December 2016 and claims weekly benefits to 1 February 2017. Dr Rosenberg reviewed the applicant on

⁴³ (1994) 35 NSWLR 452.

⁴⁴ [2014] NSWCCPD 72.

20 January 2017⁴⁵, over a month since the surgery. He was happy for the applicant to return to work "...in a fortnights time". I think that the applicant is entitled to an award in his favour pursuant to ss 36 and 37 of the 1987 Act for the full period claimed from 13 June 2016 to 1 February 2017 at the rates submitted by the applicant at the hearing. These are:

- (a) 13 June 2016 to 12 September 2016: \$908.35 per week (95% of PIAWE of \$956.35) pursuant to s 36, and
- (b) 13 September 2016 to 1 February 2017: \$765.08 per week (80% of PIAWE of \$956.35) pursuant to s 37.

Permanent impairment compensation

- 92. The matter will be remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for assessment of whole person impairment as a result to injury to the lumbar spine on 13 June 2016.
- 93. The documents to be referred to the AMS will be those listed in [15] above with the exception of the wages schedule dated 1 June 2020.

SUMMARY

- 94. The applicant sustained injury to the lumbar spine on 13 June 2016 arising out of or in the course of his employment with the respondent.
- 95. The injury is in the form of aggravation, acceleration, exacerbation or deterioration of a pre-existing degenerative condition of the lumbar spine.
- 96. The applicant's employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the pre-existing degenerative condition of the lumbar spine.
- 97. Award for the respondent in respect of the applicant's claim for injury to the lumbar spine in April 2015 or in the period from 4 February 2015 to 6 October 2016.
- 98. The surgery carried out by Dr G Rosenberg on 14 December 2016 was reasonably necessary as a result of injury on 13 June 2016.
- 99. The respondent is to pay the applicant's costs and expenses pursuant to s 60 of the 1987 Act including the costs of and incidental to the surgery on 14 December 2016.
- 100. The respondent is to pay the applicant weekly benefits pursuant to the 1987 Act as follows:
 - (a) \$908.35 per week from 13 June 2016 to 12 September 2016 pursuant to s 36, and
 - (b) \$765.08 per week from 13 September 2016 to 1 February 2017 pursuant to s 37.
- 101. The respondent is to have credit for monies paid to the applicant during the period from 13 June 2016 to 1 February 2017 apart from payment of annual leave.
- 102. The matter is remitted to the Registrar for referral to an AMS for assessment of whole person impairment as a result of injury to the lumbar spine on 13 June 2016.

⁴⁵ Application p 38.

103. The documents to be forwarded to the AMS are:

- (a) the Application and attached documents;
- (b) Reply and attachments;
- (c) the Amended Application;
- (d) Application to Admit Late Documents dated 6 July 2020 lodged by the respondent with clinical records of Sr George Hospital attached;
- (e) Application to Admit Late Documents dated 6 August 2020 lodged by the applicant with the following attachments:
 - (i) letter Santone Lawyers to Dr Patrick dated 22 July 2020;
 - (ii) supplementary medicolegal report of Dr Patrick dated 23 July 2020,
and
 - (iii) clinical notes of St George Hospital, various dates.