

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 6010/19  
**Applicant:** Hui (Wendy) Zheng  
**Respondents:** Xin Xun Feng and Siachang Goh  
**Date of Determination:** 11 March 2020  
**Citation:** [2020] NSWCC 74

The Commission determines:

1. The applicant suffered an aggravation to underlying degenerative changes in her cervical spine, to which the nature and conditions of her employment were the main contributing factor.
2. The aggravation referred to in (1) above gives rise to the need for an anterior cervical discectomy and fusion as proposed by Dr Kohan.
3. The surgery proposed by Dr Kohan is reasonably necessary.
4. The respondent is to pay for the costs of the surgery proposed by Dr Kohan and associated expenses.

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

Cameron Burge  
**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 CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

*A MacLeod*

Ann MacLeod  
Acting Senior Dispute Services Officer  
**As delegate of the Registrar**



## **STATEMENT OF REASONS**

### **BACKGROUND**

1. Wendy Zheng (the applicant) brings proceedings for the payment by Xin Xun Feng and Siachang Goh (the respondents) for the cost of an anterior cervical discectomy and fusion together with associated expenses, as recommended by her treating surgeon Dr Saeed Kohan. The applicant claims the need for surgery arises from a work-related aggravation of degenerative changes to her cervical spine.
2. The respondents oppose the claim and dispute whether the applicant suffers an ongoing cervical spine aggravation. They do so despite consenting to the alleged cervical spine injury being referred to an Approved Medical Specialist (AMS) by consent Certificate of Determination in matter number 156/19 dated 5 March 2019.
3. The respondents' case is that any aggravation of underlying conditions in the cervical spine has resolved, or alternatively is not sufficiently serious to warrant the contemplated surgery. The respondents also assert the surgery contemplated by Dr Kohan is not warranted at all.

### **ISSUES FOR DETERMINATION**

4. The parties agree that the following issues remain in dispute:
  - (a) Whether the applicant suffered an aggravation of degenerative changes in her neck to which her employment was the main contributing factor?
  - (b) If the answer to (a) above is yes, does that aggravation persist?
  - (c) If the answer to (b) above is yes, is the proposed surgery reasonably necessary as a result of that ongoing aggravation?

### **PROCEDURE BEFORE THE COMMISSION**

5. The parties attended a hearing on 7 February 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.
6. At the hearing, Ms N Compton of counsel appeared for the applicant and Mr C Robertson of counsel appeared for the respondent.

### **EVIDENCE**

#### **Documentary evidence**

7. The following documents were in evidence before the Commission and taken into account in making this determination:
  - (a) Application to Resolve a Dispute (the Application) and attached documents;
  - (b) Reply and attached documents, and
  - (c) applicant's Application to Admit Late Documents (AALD) dated 20 November 2019.

## Oral evidence

8. There was no oral evidence called at the hearing.

## FINDINGS AND REASONS

### **Did the applicant suffer a work-related aggravation to degenerative changes in her cervical spine?**

9. In my view, the preponderance of the medical evidence is suggestive of the applicant having suffered an aggravation to pre-existing degenerative changes in her cervical spine. It is also my view that the applicant's employment with the respondent was the major contributing factor to that aggravation.
10. For the respondent, Mr Robertson placed great emphasis on the first recorded complaint in relation to the applicant's neck occurring on 26 February 2015, some six months after she ceased work. He submitted that even if the applicant was suffering from neck symptoms whilst employed with the respondent, she did not complain to her general practitioner about them until many months after she ceased work with the respondents.
11. Mr Robertson noted the vast majority of the contemporaneous records show complaints in relation to the applicant's arms and hands rather than her cervical spine. Whilst this may be the case, in my view the absence of complaint in circumstances where the applicant suffered quite serious injury to her arms and hands does not of itself preclude the applicant satisfying the onus of proof and a finding of an aggravation to the cervical spine.
12. As Ms Compton noted, the applicant stated she had severe issues with her upper extremities, such that her cervical spine problems were by comparison minor and not at the forefront of her mind. The applicant also stated she was of the view the symptoms related to the problems with her arms. I accept that evidence. Mr Robertson submitted such an explanation is irrelevant, because the absence of complaint itself is the important factor, rather than what the applicant believes is the cause of any symptomology.
13. Whilst that submission has some superficial attraction, I accept the evidence of the applicant as to her beliefs initially regarding the cause of her neck pain. Given the applicant thought her neck pain had been caused by her arms, it is reasonable in my view that her focus initially was in relation to her arms and hands rather than her cervical spine.
14. Mr Robertson noted the applicant's credit was in issue, and in particular referred to the reports of the respondents' independent medical examiners (IMEs) Drs Casikar and Bruce. Those reports contained mentions by both doctors of exaggeration and pain-behaviour on the part of the applicant during their respective examinations.
15. I note, however, that no mention of exaggeration on the part of the applicant is found in any of the treating doctors' material nor in the opinion of the applicant's IME, Associate Prof Wong.
16. Ms Compton noted the applicant comes from a non-English speaking background and submitted an absence of complaint of pain concerning one body part is not unusual when a patient is pre-occupied with another. Moreover, Ms Compton raised the well-known principle that tribunals of fact should be careful in taking at face value the histories recorded by both treating and medicolegal practitioners. I accept those submissions.
17. Ms Compton also submitted that the applicant had complained of problems in her neck in a consultation with her general practitioner on 13 August 2009, the record of which is found at page 163 of the Reply. I accept Mr Robertson's submission in relation to this complaint that it was an isolated one in 2009, some three years before the applicant first indicates that she suffered an onset of symptoms, and as such is of little weight in determining this dispute.

18. As Deputy President Roche noted in *Kelly v Western Institute NSW TAFE Commission* [2010] NSW WCC PD 71, an aggravation or exacerbation of a disease process occurs where the experience of the disease by the patient is increased or intensified by an increase or intensifying of symptoms (see also *Federal Broom Code Pty Ltd v Semlitch* (1964) (110 CLR 626)). There is no issue in this matter that the applicant suffers from extensive degenerative changes in her cervical spine. The question is whether the applicant's employment with the respondent was the main contributing factor to an aggravation of that condition. It is the aggravation of the disease process which must be the focus of the factual enquiry, not the cause of the underlying pathology (see *Mitic v Rail Corporation of NSW* (WCC matter number 8497/13 – per Arbitrator Harris). It can therefore be said that the proper test is whether the aggravation impacted the individual concerned.
19. The applicant bears the onus of proving that any aggravation to her cervical spine is work-related. In determining the cause of an injury, the Commission must apply a common-sense test of causation (see *Kooragang Cement Pty Ltd v Bates* (1994) 10 NSW CCR 796 (*Kooragang*)).
20. Ms Compton noted the heavy and repetitive nature of the applicant's duties with the respondent is not an issue and are set out in her unchallenged evidence.
21. Mr Robertson noted the applicant had not provided an accurate history to either Dr Kohan or Dr Wong, as she made no mention of the lack of complaint surrounding her cervical spine from 2012 onwards. I disagree with that submission, because the applicant's case is not predicated on her having complained to her doctors at that time, but rather on her having believed her neck symptoms related to the pathology in her arms and the difficulties with her upper limbs being her primary area of concern. Notwithstanding the respondents raising the applicant's credit as an issue, her evidence as to the reason why she did not complain to her doctors earlier about her neck symptoms is not contradicted.
22. That evidence by the applicant is consistent with the history provided to Dr Kohan at page 33 of the Application where he says:

“Mrs Zheng reports she has had one-and-a-half-year history of severe neck pain and bilateral arm symptoms which radiates from her neck to medial scapular region and down the arm and forearm on the outer aspects to the index and middle finger especially... Her neck pain has been quite severe leading to significant stiffness and reduction of neck movement. Her symptoms are exacerbated by neck extension so much so that it causes her nausea and vomiting and light headedness.

She reportedly has been working as a chef in a restaurant since 2007 but although does not report any specific incident that may have brought this on she does report, however, that there has been gradually worsening of her symptoms over a couple of years with repeated heavy lifting that she had to do as part of her job.”

23. This history was consistent with that provided to Dr Wong in his report of 23 August 2019. Both Dr Brown and Dr Kohan were of the view the applicant's aggravation was caused by her employment. In his report dated 25 September 2019, Dr Kohan specifically states that the applicant's employment was a significant contributory factor to “accelerated degeneration in her cervical spine.” In the same report, Dr Kohan says:

“I had explained to Mrs Zheng that the radiological findings on MRI scan in particular was suggestive of chronic changes and while there was no acute injury her description of several years of repeated lifting and heavy manual activity it was plausible for accelerating otherwise normal degeneration in the cervical spine particularly at C5/6. Having said that, the degree of degeneration was significant for her age. This could be attributed to repeated chronic overload with her manual work.”

24. For his part, Dr Wong noted the applicant stopped work in August 2014 “due to her various symptoms.” He described the applicant experiencing constant severe pain from the neck to right shoulder and right upper extremity, with stiffness of the neck, shoulder and wrist and all digits. Dr Wong diagnosed the applicant with cervical spine soft tissue injury and discogenic condition “aggravated by nature and conditions of her employment as an assistant chef from 26 June 2007 to August 2014.”
25. Dr Wong addressed the report of Dr Casikar, IME for the respondents. He noted Dr Casikar’s diagnosis of constitutional degenerative disease of the cervical spine. He refuted Dr Casikar’s findings that repetitive movements of the neck and hands had not produced the degenerative disease.
26. In my view, the difficulty with Dr Casikar’s finding is that he fundamentally misdirected himself as to the relevant issue. The question for determination is the main contributing factor to the *aggravation*, not to the underlying degenerative pathology. Dr Wong also noted the respondents’ other IME, Dr Bruce conceded the applicant’s work duties might have caused some symptoms in her neck, however, he expected the aggravation to cease within 12 months of her ceasing work.
27. For his part, Dr Bruce described the applicant as having an angry and frustrated demeanour, with dramatic symptoms not supported by findings on examination. In his report dated 15 February 2017, Dr Bruce says it is probable the applicant has genuine neck pain in view of the severity of the degenerative changes, quite possibly with referred symptoms into her upper limbs. He says, however, this is a naturally occurring pathology and not work-related. He also said there was no relationship between her work duties and the naturally occurring cervical spondylosis.
28. As with Dr Casikar, Dr Bruce has addressed the wrong issue. The question is not whether there is any relationship between the applicant’s employment and the cervical spondylosis/degenerative changes. The question is whether any *aggravation* to those degenerative changes was predominantly caused by her employment. To the extent he deals with the correct question, Dr Bruce is actually supportive of the applicant in stating her work duties may have caused an aggravation. Dr Bruce says, however, that the effects of any such aggravation would have passed.
29. Later in his report, Dr Bruce indicates the applicant is not fit for her pre-injury employment because of cervical disc degeneration. I note this disc degeneration was asymptomatic before her employment with the respondents. Accepting the applicant as I do regarding the onset of her symptoms and the nature and extent of her duties, I have little difficulty rejecting the views of Dr Casikar and Dr Bruce as to the cause of any ongoing incapacity and symptoms in the applicant’s cervical spine. Having done so, I prefer the views of Dr Kohan and Associate Professor Wong, each of whom correctly addresses the question of the cause of the aggravation, not the underlying condition. Each of them attributes that aggravation to the applicant’s employment with the respondents. Accordingly, I find the applicant suffered an aggravation to her pre-existing degenerative condition in her cervical spine. The main contributing factor to that aggravation was her employment with the respondents.

#### **Does the workplace aggravation persist?**

30. As noted above, the IMEs for the respondents both state any work-related aggravation suffered by the applicant has ceased. They provide no basis for that finding. Rather, Dr Casikar’s view is that because the applicant stopped work, any symptoms by way of aggravation which arose from that work must have ceased and been overtaken by the underlying condition. With respect to Dr Casikar, there is no basis given for that opinion and I reject it.

31. In his second report dated 17 July 2019 (at page 105 of the Reply), Dr Casikar provides a classic *ipse dixit* comment to the effect that any aggravation will have passed:

“It is possible that she had a soft tissue injury in the course of her work on pre-existing degenerative disease. She has not worked for nearly 5 years. Her present complaints are not due to any possible soft tissue injury at work. Her present complaints are mainly due to a combination of constitutional degenerative disease of the cervical spine and more significantly to her major pain-focused personality.”
32. Dr Casikar provides no basis for his comment that the effects of any aggravation have passed. Moreover, he does not deal with the important issue that the applicant’s degenerative changes were asymptomatic before her employment with the respondent. As for Dr Casikar’s contention that the applicant has a pain-focused personality, he is alone in that view, and provides no basis for it other than a sweeping statement to the effect that the applicant’s problems are, at least to an extent, without physical basis.
33. Likewise, I reject the view of Dr Bruce who also misdirected himself as to the crucial question by addressing the cause of the applicant’s degenerative condition, rather than the cause of any aggravation to it. He also provides no basis for the contention that the effect of any aggravation must have passed, and consequently that the applicant’s current problems are caused by the degenerative changes in her neck rather than the effect of any work-related aggravation.
34. The argument that the effects of an aggravation have ceased within a comparatively short time frame of an injured employee stopping work is one commonly seen in this jurisdiction. Without a sound basis for such an assertion, it is not of itself persuasive. Common sense tells one that if an activity aggravates an underlying condition, the mere cessation of that activity does not necessarily lead to a cessation of the effects of the aggravation. More is required than a simple assertion that this is the case. Each matter must be considered on its individual facts.
35. I accept the opinion of treating surgeon Dr Kohan and Associate Prof Wong, IME, who are each of the view that the applicant’s employment aggravated her underlying degenerative condition. All of the doctors were provided a consistent history by the applicant as to the nature and extent of her duties, and it is not in issue that those duties were both repetitive and at times heavy. The applicant’s uncontradicted evidence is her aggravation has not ceased, and I accept that evidence, consistent as it is with the radiological findings and the views of her treating surgeon.
36. In my view, the balance of the medical evidence establishes that the applicant has satisfied the onus of proof. I therefore find her work-related aggravation has persisted and is the cause of her ongoing symptoms.

**Is the proposed surgery reasonably necessary?**

37. Dr Casikar indicates his clinical examination did not support any verifiable evidence of nerve compression in the C5/6 segment of the applicant’s spine. Therefore, he could not support the surgery suggested by Dr Kohan.
38. I reject that opinion, as it is contradicted by the CT scan of the applicant’s cervical spine taken on 30 March 2015, which confirmed widespread degenerative changes with intervertebral disc narrowing and possible nerve root involvement. That finding was confirmed by an MRI of the cervical spine taken on 13 July 2015. Those scans are not definitive; however, they provide a plausible basis for the applicant’s ongoing symptoms in that they do not rule out nerve root involvement.

39. For his part, Dr Bruce acknowledges the radiological examinations of the cervical spine, however, goes on to say the chances of surgical success are limited and that it may lead to an aggravation of the applicant's symptoms. Dr Bruce provides no explanation as to why this is the case. Rather, he simply says that despite there being radiological evidence suggestive of nerve root impingement, the surgery to relieve that impingement is likely to be unsuccessful and cause aggravation. In my view, that contention is not sufficiently explained for me to accept it.
40. I prefer the view of Associate Prof Wong, who indicated the surgery is necessary having taken into account the relevant factors as set out in the decision of the *Diab v NRMA* [2014] NSWCCPD 72. Taking those well-known matters into account, together with the indicia discussed by his Honour Judge Burke in *Bartolo v Western Sydney Area Health Service* [1997] 14 NSWCCR 233, I am of the view the proposed surgery is a course of treatment which is reasonably necessary in that it is preferable the worker should have it than it be forborne.
41. For his part, Dr Kohan, whose opinion in my view carries extra weight as the surgeon proposing the procedure and who is prepared to accept the risk of carrying it out, states the applicant has a 90% chance of a resolution of the symptoms and a return to normal activities. He noted the applicant had been suffering with chronic pain for several years and had undergone unsuccessful conservative treatment.
42. On balance, I am of the view for the above reasons that the surgery is reasonably necessary.

#### **SUMMARY**

43. For the above reasons, the Commission will make the orders set forth on page 1 of the Certificate of Determination.