

WORKERS COMPENSATION COMMISSION



CERTIFICATE OF DETERMINATION

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

MATTER NO: 004910/10
APPLICANT: Michelle Therese Anderson
RESPONDENT: Ambulance Service of New South Wales

DATE OF DETERMINATION: 5 October 2010

The Commission determines:

Findings

1. The injury in August 2000 and the nature and conditions of the applicant's employment caused a long standing discal disease to the applicant's spine at L4/5 and L5/S1 levels which was on the balance of probabilities aggravated in 2009 resulting in an acute herniation at L5/S1.
2. The injury in August 2009 is an injury under section 4 b) 1) of the *Workers Compensation Act 1987* and the applicant's work injury of 22 August 2000 and her employment with the respondent is a substantial contributing factor to her injury.

Orders.

1. That the respondent pay the applicant's costs as agreed or assessed

Certification

I certify that this was a complex matter in that it involved a long history and complex medical questions and the maximum payable for both the applicant's and the respondent's costs under table 1 is increased by 15%.

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

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 MARGARET DALLEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

FOR REGISTRAR

Darren Moore
Senior Dispute Services Officer
By Delegation of the Registrar

STATEMENT OF REASONS

BACKGROUND

- 1) Michelle Anderson was employed by the Respondent from 1989 as a Paramedic. On the 22/08/2000 she injured her lumbar spine when lifting a comatose patient. She said she experienced back pain radiating into her right leg. She had about a month off work, was treated with physiotherapy and returned to full duties until going on maternity leave from the 3/03/07 until 8/06/08. This leave was extended to leave without pay until 9/10/08.
- 2) On the 10/10/08 she returned to work as a part time employee working 19 hours per week. About a week later she became psychologically distressed at work and was unable to continue. She later attempted suicide and was diagnosed with post-traumatic stress syndrome. A workers compensation claim was made on the 17/10/08 and she has been off work since this time. The respondent has made voluntary weekly compensation payments for the psychological injury claim since this date.
- 3) On the 7/04/09 she experienced cramping and pain radiating into her left leg and foot. The next day she woke up with severe left leg pain. The pain persisted and she attended Milton hospital and was treated with a morphine injection. She went to her general practitioner, Dr Thomson, on the 24 April 2009 and he ordered an MRI. She was referred to Dr Al-Khawaja who ordered a MRI and then performed a lumbar disectomy at the L5-S1 levels, (according to his report of the 26/08/11), on the 12/05/10. On the 18/05/10 Dr Thomson filled out an initial Workcover Certificate alleging the low back strain and disc prolapse was a work injury, with a date of 22/08/00, and declaring her unfit to work from the 12/05/10. A claim for worker's compensation was made on the 6/05/10

ISSUES FOR DETERMINATION

- 4) The parties agree that the following issues remain in dispute:
 - a) Is the 2009 pathology and need for surgery in the Applicant's lumbar spine causally related to the injury of the 22/08/00 and the nature and conditions of the Applicant's employment with the respondent since August 2000.

The parties agreed that the claim for medical expenses would follow the outcome of the determination of this issue and there was no dispute as to the treatment and expenses being reasonably necessary.

The Applicant did not proceed with the claim for weekly compensation at this determination.

PROCEDURE BEFORE THE COMMISSION

- 5) The parties attended a hearing on 21/09/10. 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

Documentary Evidence

- 6) The following documents were in evidence before the Commission and taken into account in making this determination:
 - a) Amended Application to Resolve a Dispute and attached documents; The date of the injury pleaded was amended to 22/08/00 at the teleconference.
 - b) The late document filed by the applicant on the 31/08/10 being an updated report of Dr Al-Khawaja
 - c) The Reply and the amended Reply and all attached documents
 - d) The late documents served on the 22/07/10 being the documents relating to the August 2000 injury
 - e) The late documents filed on the 27/08/10 being the notes produced by Dr Thomson

FINDINGS AND REASONS

Is the 2009 pathology and need for surgery in the Applicant's lumbar spine causally related to the injury of the 22/08/00 and the nature and conditions of the Applicant's employment with the respondent since August 2000?

- 7) To determine this question the nature of the 2000 injury has to be examined. A claim form was filled out by the applicant on the 24/08/10 in which she states that she, "injured lower back whilst lifting heavy patient." A witness statement, by M Mastronadi, states that the applicant was lifting a patient, he noticed she was favouring her back after the incident and she complained of back pain shortly after the lift and several times during the shift. She was said to have completed the shift. Dr Chee, her treating doctor ordered an x-ray which showed, "The disc spaces were well preserved. There is no evidence of spondylosis. The bony pedicles are intact. The sacroiliac joints are normal." No other investigations were undertaken. Dr Chee filled out a workers compensation medical certificate diagnosing acute back strain and declaring the applicant unfit for work.
- 8) The applicant made two statements. In her earlier statement dated 16/06/09, the Applicant says of her back condition prior to April 2009, at paragraph 37, " I had some back pain in the lower back over the years but not enough to have to go to the doctor. I would just have a tablet." In her second statement dated the 15 November 2010 at paragraph 5 and 6 she says, "Following this injury I suffered from intermittent lower back pain and sciatica. I self managed this pain with anti-inflammatory medication and analgesics. She also says, "Over time my pain increased. In particular I noticed that I was unable to sit for extended periods without pain in my back and down my leg. My back felt increasingly stiff, especially after sitting for any period of time. The pain was more evident when I was driving the ambulance, particularly down my leg. The pain was also worse when I bent over or lifted heavy items or patients."
- 9) Mrs Anderson goes on to describe her duties as an ambulance officer including lifting patients from varying heights, from chairs, motor vehicles beds etc, lifting heavy equipment oxy-vivas, drug boxes and stretchers. She was required to reach patients in difficult locations such as overturned cars requiring her to twist her body in awkward positions, bend for extended periods to treat patients for example when giving cardiac massage and then drive the ambulance for extended periods during her shifts which were of 14 hours duration.

- 10) In his statement of 24/06/2009, Michael Mastronardi, now the station manager for NSW Ambulance – Ulladulla, who was the witness to the injury in 2000 when he was working with the applicant, says at paragraph 13, “I am aware that in August 2000 Michelle Anderson suffered a back injury but I can’t remember how it happened. She was off work for about a month and then I heard nothing more about it until just recently when I heard from one of the other staff, it could have been her husband Greg said she was going in to have a back operation.” He knows nothing more of the 2000 back injury and does not recall any complaints of pain or days off work and his observations were that she did an excellent job. He was also unaware of her psychological problems. He attributed this to Michelle being a , “Very sensitive person but she was working in a male environment and possibly felt she may have been seen as weak if she were to express her feelings.”
- 11) Dr Thomson was not the treating doctor at the time of the 2000 injury but has been treating the applicant for her psychological condition and is her General practitioner. His notes were obtained by the applicant but no notes re the treatment of any back pain prior to April 2009 have been filed. The first treating notes date after the acute onset of back pain in 2009.
- 12) In her statement of the 16/06/09 The Applicant says at paragraph 38, “Prior to my back operation I was physically active and I went to “Curves” gym in Ulladulla. I started going to get myself back into condition before going back to work. She continued after the psychological claim as it, “Helped with the depression.” She also says at paragraph 43. I was able to carry out my normal family routines, going to the gym to get fit to assist my return to work and looking after my house and kids etc I was just not able to handle the emotional side of my ambulance duties.”
- 13) In summary, in August 2000 the diagnosis of the applicant’s injury was back strain. There is no mention in the early documents of any radiation of pain into the right leg. The x-ray at the time does not show any loss of height between the vertebra or any other signs of disc injury. There is no record of any time off work or consultation with the doctor re the applicant’s back after August 2000. The applicant in her later affidavit claims a continuing and worsening back pain radiating into her right leg but goes on to describe heavy duties at work including prolonged bending, twisting, heavy lifting and long periods of driving which she was able to carry out without any complaint to her fellow workers. At the same time she describes attending gym and dealing with her household and mothering duties for her three children with no trouble prior to April 2009. There is therefore no supporting evidence of her history of continuing and worsening back pain since 2000, and some of the applicant’s assertions about her lifestyle before April 2009 indicate no restrictions at all due to any back condition.

The medical evidence.

- 14) The MRI Scan taken on the 7/05/09 comments, “At L4/5 there is a left para-medium herniation which compresses the left L5 and to a lesser extent the left S1 nerves, this extends for a few millimetres down the L5 lateral recess. The L4/5 exit foramina appear intact and the facet joints are unremarkable. There is a small central protrusion at T12/L1 with no compression of nerve or spinal chord. There are no other comments which relate to degenerative disc disease but she does have a segmentation anomaly with rudimentary disc at L5/S1.
- 15) The applicant’s treating doctor Dr Thomson, in his referral of the 30/04/09, to Dr Al-Khawaja says, “Although employed as an ambulance officer, Michelle has been on extended leave so this is not related to an acute-work related injury. It is possible that she has injured her back in the past. At this stage we would not anticipate this to be a workers compensation injury”. There are no treating notes prior to the 24/04/09 only later ones which say, “Leg pain for over two weeks. No weakness and loss of sensation, able to walk. Dr Thomson’s first Workcover Certificate attributing the injury to the 22 August 2000 is on 30/06/09. Dr Thomson also includes correspondence commenting on the return to work plans (which he says just keep on

coming sic) re the applicant's psychological injury. He now sees a return to work as being, "After this incident probably inappropriate".

- 16) Dr Dowda, the applicant's forensic specialist, occupational physician, in his report of the 9/03/10 takes a history from the applicant of, "Intermittent low back pain and sciatica involving the right leg," after the incident in August 2000. He says she put up with it, "Utilising analgesics or anti-inflammatory medications but not seeking further medical attention". She was sitting on her lounge at home when she experienced unusual cramping sensations in her left foot on 7 April 2009. She attended hospital on the 12/04/09 because the symptoms were unremitting and was referred by Dr Thomson for a lumbar laminectomy. In the absence of the operative report by Dr Al-Khawaja he relies on the applicant's report that Dr Al-Khawaja said, "That two large sequestered fragments of disc material were removed from the spinal canal at the operation." Dr Dowda comments on the fact that the operative report of Dr Al-Khawaja is not available in the documentation presented. He says, "It would be helpful to ascertain the exact nature of the disc and the disc material that was apparently sequestered and pressing upon her left L5 nerve roots.' He later says it would be "Helpful in determining the "old" nature of the degenerative disc material that has been sequestered."
- 17) He concludes, "It is possible that Ms Anderson had disc damage in the initial injury of August 2000. It is possible (though not to be confirmed in the absence of imaging studies) that there was an L4/5 disc abnormality occasioned by the accident of August 2000. He finds in the absence of any acute injury to the lower back in April 2009 that the injury, "May well represent the ultimate sequestration of a degenerate disc which had its origin in the injury of August 2000." He and goes on to say, "Thus, I believe that although separated in time by almost nine years, in the absence of any other identified trauma to the lumbar spine and in the presence of a clearly identified injury in August 2000 with a history suggesting ongoing irritation of the L4 disc causing right sided disc irritation, it is not unreasonable that a sequestered fragment dislodged and impacted upon the left L5 nerve root."
- 18) It is unfortunate that Dr Dowda was not given the chance to see the operative report he called for twice in his report. He is left only with the applicant's interpretation of what Dr Al Khawaja is said to have told her.
- 19) The late report of Dr Al-Khawaja, dated 26 August 2010, states that the diagnosis, "Is acute L5/S1 herniation with discogenic disease at L4/5 and L5/S1 levels." He says, "In my opinion Mrs Anderson's acute disc herniation was related to her onset of symptomatology in 2009 but her discogenic disorder at the levels I mentioned earlier is a long standing problem which may have been aggravated in 2009. As to the nature and conditions of her employment as an ambulance driver he says it would have a major impact on her pathology, mainly if she used to drive for a long time without stretching her back and moving her body". He does not allege that the injury in 2000 and her employment is a contributing factor to the acute disc herniation at L5/S1 but does think that it contributed to her discogenic disease at L4/5 and L5/S1.
- 20) The Applicant's council suggested that there was a typographical error in the above statement and that Dr Al-Khawaja meant to say her acute disc herniation was related to the onset of her symptomology in 2000 not in 2009 however there is no clear indication of this and he does go on the speak of her discogenic disorder as being long standing. It seems to me that Dr Al-Khawaja is clear that there is discal disease to the L4/L5 and L5/S1 levels which is, "A long standing problem which may have been aggravated in 2009." Causing the acute herniation. I also note that the symptomology in 2009 was of a different nature than that of 2000. Then there was back pain which came on during the shift after lifting and, although there is no corroborative evidence of numbness and pain in the leg, it was said to be present by the applicant but in the right leg in 2000. There is no objective evidence of discal injury in 2000 and De Chee's report talks of acute lumbo- sacral strain and pain which apparently abated enough for Ms Anderson to return to the rigorous work conditions described by her in her statement for the next seven years without any further time off. However this could be the beginning of the discal disease at L4/5 and L5/S1.

- 21) The respondent's consultant neurologist, Dr O'Neill after pointing out that Mrs Anderson was on leave from 3/03/07 till 10/10/08 and that she then only worked until 17/11/08 finds, "Work is clearly not responsible for the sudden acute onset of severe low back and left leg pain (with associated neurological deficits) which occurred on or about 7 April 2009. He then goes on to say , "Mrs Anderson has been prone to episodic low back and right leg pain since the work incident of 22 August 2000, so that there would be a pre-existing contribution of at least 10% to the development of the sudden acute disc prolapse at L4/5 on or about 7 April 2009. In other words there is a proportion of liability to the current situation as a consequence of the original work incident on 22 August 2000."
- 22) The injury did not occur at or in the course of employment, section 4 (b) (i) of the *Workers Compensation Act 1987* (the 1987 Act) however section 4 also defines a work injury as including a disease which is contracted by a worker in the course of employment and to which the employment was a contributing factor, Section 4(b) (i). Dr Al- Khawaja is clear that the sudden collapse of the disc in April 2009 is on the background of a long standing problem which may have been aggravated in 2009. In other words what happened in 2009 is contributed to by the pathology present in her lumbar spine to which the nature and conditions of her employment as an ambulance driver had a major impact. This seems to be a clear affirmation that the 2000 injury and the nature and conditions of the applicant's employment contributed, in a substantial way, to the discal disease which was the long standing problem aggravated in 2009.
- 23) Dr Al-Khawaja does not mention the injury in 2000 Dr O'Neill does and says, "Mrs Anderson has been prone to episodic low back and right leg pain since the work incident of 22 August 2000, so that there would be a pre-existing contribution of at least 10% to the development of the sudden acute disc prolapse at L4/5 on or about 7 April 2009. At least 10% must be seen as a substantial contributing factor to the acute injury in 2009.
- 24) If I accept that Mrs Anderson did continue to suffer ongoing symptoms of back and (right) leg pain after the incident in 2000 then I must draw the conclusion that she was suffering an ongoing discal disease which had its onset in this earlier injury and which therefore can be seen as a contributing factor to the acute herniation in 2009. This is in accordance with the opinion of both Dr Breit and Dr Al-Khawaja. Dr Dowda goes further and accepts that the acute incident in 2009 is the direct result of the injury in 2000 but both of the other doctors attribute at least part of the problem to the ongoing discal disease which started as the work injury of 2000.
- 25) The problem in this case is that there is no corroborative evidence of absences from work or medical attendances in regards to continuing symptoms which would indicate the progression of the disease. However I have no grounds on which to find that the applicant is not a truthful witness and I accept her claim that the back pain which commenced in 2000 worsened and that she, as a trained paramedic self- medicated and was therefore able to continue with her onerous duties. I also accept that the injury in 2009 came on spontaneously as described in detail by the applicant to Dr O'Neill and the other practitioners. Mrs Anderson did not put her mind to making a workers compensation claim in the early days after her injury as shown by the referral of Dr Thomson and her payment of the cost of the surgery on her health insurance and I find no reason to doubt her description of the incident.
- 26) I therefore find that the injury in August 2000 on the balance of probabilities caused the onset of a discal disease and that the nature and conditions of the applicant's employment contributed substantially to her ongoing deterioration culminating in the acute disc herniation of April 2009

SUMMARY

- 27) The injury in August 2000 and the nature and conditions of the applicant's employment caused a long standing discal disease to the applicant's spine at L4/5 and L5/S1 levels which was on the balance of probabilities aggravated in 2009 resulting in an acute herniation at L5/S1.
- 28) The injury in August 2009 is therefore an injury under section 4 b) 1) of the *Workers Compensation Act 1987* and the applicant's employment is a substantial contributing factor to her injury.

COSTS

An application was made for an uplift of costs on the basis of complexity by the applicant's solicitor. I certify that this was a complex matter in that it involved a long history and complex medical questions and the maximum payable for both the applicant's and the respondent's costs under table 1 is increased by 15%.