

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 6793/20
Applicant: Mary Coombs
Respondent: Baptistcare NSW & ACT
Date of Determination: 23 February 2021
Citation No: [2021] NSWCC 57

The Commission determines:

1. The Application to Resolve a Dispute is amended to plead deemed date of injury of 4, 5 and/or 13 May 2020.
2. The applicant sustained injury in the nature of an aggravation, acceleration, exacerbation or deterioration of her bilateral carpal tunnel condition, with deemed date of injury of 4 May 2020. The applicant's employment with the respondent was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of her bilateral carpal tunnel condition.
3. The pre-injury average weekly of the applicant is agreed to be \$867.85. The applicant has had no current work capacity since 13 May 2020 due to the aggravation, acceleration, exacerbation or deterioration she has sustained to her bilateral carpal tunnel condition. The respondent is to make payments of weekly benefits to the applicant in accordance with s 36(1)(a) of the *Workers Compensation Act 1987* from 13 May 2020 to 12 August 2020 (13 weeks) at the rate of \$824.46. The respondent is to make payments of weekly benefits to the applicant in accordance with s 37(1)(a) of the *Workers Compensation Act 1987* from 13 August 2020 ongoing at the rate of \$694.28. The applicant's entitlement to weekly benefits is to be indexed in accordance with s 82A of the *Workers Compensation Act 1987*. The respondent is to receive credit for payments made during the period of the applicant's entitlement to weekly compensation.
4. The applicant requires medical treatment and services as a consequence of the aggravation, acceleration, exacerbation or deterioration she has sustained to her bilateral carpal tunnel condition. The bilateral carpal tunnel release surgical treatment proposed by Dr Rae is reasonably necessary treatment resulting from the aggravation, acceleration, exacerbation or deterioration the applicant has sustained to her bilateral carpal tunnel condition. The respondent is to pay the applicant's medical and related treatment, including the cost of the bilateral carpal tunnel release surgical treatment proposed by Dr Rae, in accordance with s 59 and s 60 of the *Workers Compensation Act 1987*.

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

Jacqueline Snell
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 JACQUELINE SNELL, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

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



STATEMENT OF REASONS

BACKGROUND

1. Mary Coombs (the applicant) commenced working with BaptistCare NSW & ACT (the respondent) in 2015. Her work duties involved the provision of personal and domestic care to elderly and disabled persons in their homes. The applicant alleged that during the course of her employment with the respondent she sustained injury in the nature of bilateral carpal tunnel injury. She alleged gradual onset of such injury or in the alternative an aggravation, acceleration, exacerbation or deterioration of such injury, with her employment with the respondent being the main contributing factor to the gradual onset of injury or alternatively the aggravation, acceleration, exacerbation or deterioration of injury.
2. While the applicant pleaded a deemed date of injury of 20 March 2020, at the Arbitration Hearing the applicant sought leave to amend the deemed date of injury to 4, 5 and/or 13 May 2020, which was opposed by the respondent. For reasons discussed below, leave was allowed for the applicant to amend the deemed date of injury to 4, 5 and/or 13 May 2020.
3. The claim for compensation in these proceedings involves the following:
 - (a) Weekly benefits payable under s 36 and s 37 of the *Workers Compensation Act 1987* (the 1987 Act) from 13 May 2020 ongoing on the basis of a total incapacity for work, and
 - (b) Medical or related treatment payable under s 60 of the 1987 Act, including surgical treatment in the nature of bilateral carpal tunnel decompression under the specialist care of Dr Rae.
4. The insurer issued notice in accordance with s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) on 9 September 2020¹. Following request for review of the decision to decline the applicant's claim, the insurer issued a review outcome notice on 17 November 2020² with the applicant advised that the decision to decline her claim was maintained. While injury, incapacity and "reasonably necessary" treatment were placed in issue, when these proceedings came before the Commission for teleconference on 17 December 2020, the respondent conceded the recommended bilateral carpal tunnel decompression was reasonably necessary treatment for the injury the applicant had sustained in the nature of bilateral carpal tunnel.
5. The matter proceeded to Arbitration hearing on 1 February 2020, conducted by telephone. Stephen Hickey of counsel appeared for the applicant, instructed by Peter Li, solicitor. Paul Stockley of counsel appeared for the respondent, and while his instructing solicitor Christopher Michael and Jenny Mitchell of iCare were present during conciliation, both Mr Michael and Ms Mitchell were excused from attending the Arbitration Hearing.

ISSUES FOR DETERMINATION

6. The parties agree that the following issues are not in dispute:
 - (a) The applicant's pre-injury average weekly earnings (PIAWE) is agreed at \$867.85.
 - (b) Surgical treatment in the nature of bilateral carpal tunnel decompression, is reasonably necessary treatment for the injury the applicant had sustained in the nature of bilateral carpal tunnel syndrome.

¹ Application to Resolve a Dispute (ARD) at page 4

² ARD at page 20

7. The parties agree that the following issues remain in dispute:

- (a) Injury,
- (b) Deemed date of injury, and
- (c) Capacity.

PROCEDURE BEFORE THE COMMISSION

8. 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

9. The following documents were in evidence before the Commission and taken into account in making this determination:
- (a) Application to Resolve a Dispute (ARD) and attached documents;
 - (b) Reply and attached documents, and
 - (c) Application to Admit Late Documents lodged by the Respondent at the Arbitration hearing and attached report of Dr Rae dated 22 July 2020 (AALD).

Oral Evidence

10. Neither party sought leave to adduce oral evidence or cross examine any witnesses. Both counsel made oral submissions, and a copy of the recording is available to both parties.

FINDINGS AND REASONS

Review of evidence

11. A brief review of the evidence follows.

The applicant's statement

12. In her statement dated 12 November 2020³, the applicant said she commenced employment with the respondent in 2015 with her duties involving the care of elderly and disabled persons in their homes. She worked on a full time basis. She worked on a roster and worked every second weekend. She did overtime when it was required of her. The applicant said she provided personal and domestic duties. She described personal care as having involved assisting with dressing and undressing, toileting, showering and application of compression stockings. She described domestic duties as having involved cleaning, food preparation, cooking vacuuming, sweeping, wiping, scrubbing, and "the use of equipment". She described her duties as having involved "the use of both of my hands and prolonged, forceful and repetitive gripping".

13. The applicant denied any problems with her hands prior to her having commenced employment with the respondent and described the onset of symptoms in both wrists and hands "in the first half of 2019" which intensified in about March 2020 "left more than right".

³ ARD at page 1

14. The applicant said she consulted with her general practitioner on 5 May 2020 relevant to her symptoms and “took a day off using a medical certificate because of those symptoms”. The applicant had a fall at home during the night of 13 May 2020. She said she had to get up constantly during the night to take analgesic medication to help with her symptoms. She took time off work, but said at the time of making her statement she had fully recovered from the fall. She had physiotherapy treatment relevant to her symptoms, without long lasting benefit. On 2 June 2020, the applicant again consulted with her general practitioner and was referred for specialist review by Dr Rae. On 6 June 2020 she was issued with a WorkCover NSW Medical Certificate, and she reported injury to the respondent. On 19 June 2020, the applicant consulted with Dr Rae, who recommended the use of nocturnal night splints and left carpal tunnel release surgical treatment “as soon as possible”. The recommended surgical treatment was not approved by the respondent.
15. The applicant said she continued to use a splint at night and continued to take analgesic medication. She remained symptomatic “left worse than right”. She was restricted with the use of her hands in that she could not peel vegetables, she could not open jars, she limited her domestic duties and she limited her driving.

Treating medical evidence

Goulburn Medical Centre

16. Relevant to her bilateral carpal tunnel symptoms, it is evident from the clinical records provided by Goulburn Medical Centre ⁴ the applicant initially consulted with Dr Haddad on 5 May 2020 with a history of an onset of symptoms in the previous six weeks, which had intensified in the previous fortnight. Dr Haddad provided her with a medical certificate certifying her unfit for work the day before. It appears Dr Haddad also suggested pain killing medication could provide her with relief from her symptoms. On 15 May 2020, Dr Haddad prescribed the applicant with Panadeine Forte and referred her to Goulburn Physiotherapy Centre for treatment. On 2 June 2020 Dr Godfrey referred the applicant for specialist review with Dr Rae, with Dr Rae’s report following review recorded by Dr Haddad on 3 July 2020.
17. Relevant to her capacity for work resulting from her bilateral carpal symptoms, the doctors at Goulburn Medical Centre initially issued the applicant with certification of a total incapacity for work for 4 May 2020. She was subsequently issued with certification of a total incapacity for work from 15 May 2020.
18. While the applicant was also certified totally incapacitated for work between 13 May 2020 and 15 May 2020, such certification may have been relevant to the injury sustained in her fall during the night of 12 May 2020 as opposed to her bilateral carpal tunnel symptoms, there being no mention of her bilateral carpal tunnel symptoms in the clinical records relevant to her consultation on 12 May 2020.

Goulburn Physiotherapy Centre

19. Relevant to her bilateral carpal tunnel symptoms, the applicant was referred by Dr Haddad to Goulburn Physiotherapy Centre for treatment. In his report dated 21 May 2020 ⁵, Matthew Austen, physiotherapist, reported the applicant as having had an eight week history of symptoms that had not been relieved with pain killing medication. At the time of initial consultation, Mr Austen reported the applicant to be having time off work to recover from a fractured left rib but said “I don’t think it would be suitable for Mary to return to work until we see an improvement in her left arm symptoms”. He provided opinion if conservative treatment did not provide significant relief, a nerve conduction study and neurologist review is appropriate.

⁴ ARD at page 36

⁵ ARD at page 74

Dr Rae

20. The applicant consulted with Dr Rae on 19 June 2020. In his report dated the same day ⁶ Dr Rae reported a history of the applicant being “involved in nursing assistance and domestic duties which is very hands on”, with an onset of “severe nocturnal wrist and hand pain and mechanical pain at the base of her thumb that started in her right hand” over the previous few months. Dr Rae reported that while the applicant said there was no specific traumatic event which triggered her symptoms, she felt “she went through a period of a high (increased) workload at the time when her symptoms developed”. Dr Rae described the applicant’s work duties involved “frequent domestic tasks with her hands that are quite demanding”. Following clinical examination and review of ultrasound scans, Dr Rae provided opinion the applicant had signs and symptoms of bilateral carpal tunnel syndrome, more severe in the left with permanent altered sensation and weakness of the APB, and recommended nocturnal night splints and bilateral carpal tunnel releases, with the left carpal tunnel to be depressed as soon as possible.
21. In his report dated 22 July 2020 ⁷, in response to specific questioning relevant to the bilateral carpal tunnel release recommended, Dr Rae described the applicant as having signs and symptoms of severe carpal tunnel syndrome and said that while the expected outcome from the procedure relevant to her right hand would be relieve all symptoms, relevant to her left hand as there are some permanent symptoms and some symptoms may remain, the procedure would prevent any further deterioration of the nerve. Dr Rae accepted it likely the applicant had underlying carpal tunnel syndrome that would require treatment within the next few years, but said this underlying condition had been “triggered to be acute by her work-related increase in activity”. He cautioned “[S]he certainly has now developed severe signs and symptoms of carpal tunnel compression requiring urgent release and there is no alternative”.

Independent medical evidence

Dr Richard Powell

22. The applicant was assessed by Dr Powell, independent medical examiner, on 28 August 2020 ⁸. He described the applicant’s presentation at assessment as consistent with bilateral carpal tunnel syndrome, more severe on the left than the right. He considered the recommended sequential carpal tunnel decompression surgical treatment as reasonable. He considered the applicant only fit to work her normal hours on suitable duties. Dr Powell however expressed opinion the applicant was suffering from idiopathic bilateral carpal tunnel syndrome, which he said was a condition common in women of the applicant’s age. He did not consider there was sufficient evidence to conclude the applicant’s employment with the respondent was the main contributing factor to the development of carpal tunnel syndrome, and said “it is likely she would have experienced these symptoms irrespective of her duties as a care worker with Baptist Care”.

Dr P Endrey-Walder

23. The applicant was assessed by Dr Endrey-Walder, independent medical examiner, on 21 October 2020 ⁹. He reported that as a consequence of the nature and conditions of her employment with the respondent, performing both personal care and domestic duties over a period of four to five years, the applicant developed symptoms of paraesthesia in her hands, which was initially more troubling on the left than the right. Dr Endrey-Walder accepted Dr Rae’s diagnosis and assessment of the applicant to be correct, and accepted that the applicant required bilateral carpal tunnel release. While Dr Endrey-Walder provided no

⁶ ARD at page 28

⁷ AALD

⁸ Reply at page 12

⁹ ARD at page 30

comment as to the applicant's capacity for work he took a detailed history of complaint that is perhaps suggestive of a total incapacity for the work duties of the applicant, being duties in the nature of personal and domestic care of elderly and disabled persons in their homes. Dr Endrey-Walder relevantly noted too that prior to the applicant becoming involved in aged care, she had worked as a teacher's aide for 14 years.

Applicant's application for leave to amend deemed date of injury

24. Through Mr Hickey of counsel, the applicant made an application to amend the pleaded deemed date of injury of 20 March 2020 to 4, 5 and/or 13 May 2020.
25. In making such application, Mr Hickey noted in essence that the applicant claimed injury in the nature of a disease injury and that the disease injury was either contracted by a gradual process during the course of her employment with the respondent, or alternatively there was an aggravation, acceleration, exacerbation or deterioration of the disease injury as a result of the nature and conditions of her employment with the respondent. Mr Hickey noted that s 15 and s 16 of the 1987 Act relevantly provided that where an injury is a disease injury, the injury shall be deemed to have happened at the time of the applicant's incapacity.
26. Mr Hickey said that the report of Dr Rae dated 22 July 2020 that had only been served on the applicant on the day of the Arbitration Hearing, in which Dr Rae accepted it likely the applicant had underlying carpal tunnel syndrome that would require treatment within the next few years but said this underlying condition had been "triggered to be acute by her work-related increase in activity", was significant evidence in that it highlighted a requirement to focus on the applicant's last period of work. Mr Hickey said the earlier report of Dr Rae, which is also dated July 2020, did not quite express acuteness on the onset of symptoms in the same manner.
27. With medical certification before the Commission which demonstrated the applicant was off work on 4 May 2020 and ceased work on 13 May 2020 because of the injury the subject of her proceedings, and with 5 May 2020 being the date the applicant consulted with Dr Haddad and obtained certification for 4 May 2020, Mr Hickey said the applicant's incapacity for work bit at this time, rather than 20 March 2020.
28. With the respondent only serving Dr Rae's report dated 22 July 2020 on the day of the Arbitration Hearing, Mr Hickey said there was no prejudice to the respondent resulting from the sought amendment, and if there was prejudice to the respondent, greater prejudice lay with the applicant as all the evidence pointed to an essential need for the recommended surgical treatment as soon as possible.

Respondent's objection to the applicant's application for leave to amend the deemed date of injury

29. Through Mr Stockley of counsel, the respondent objected to the applicant's application to amend the deemed date of injury.
30. The respondent objected to such amendment because the respondent had previously proceeded on the basis of the date of injury recited by the applicant as 20 March 2020, had made payments on that basis and prepared response to the applicant's claim on this basis.
31. On enquiry, Mr Stockley confirmed the wage reimbursement schedule demonstrated the applicant had received weekly compensation up to 24 June 2020 ¹⁰.

¹⁰ Reply at page 24

Determination of application to amend deemed date of injury

32. Rule 4.2 (1) of the Workers Compensation Commission Rules 2011 (NSW) (the Rules) relevantly provides the Commission may, on the application of the applicant, give her leave to amend the ARD in these proceedings if the Commission considers the amendment to be necessary for the avoidance of injustice. Rule 4.2 (2) relevantly provides that where an applicant seeks leave to amend the ARD and the amendment would have the effect of substantially altering the parties to the proceedings or the nature of the proceedings, the Commission must not give the leave unless the Commission considers the amendment to be necessary in the interests of justice. Rule 4.2 (6) also provides that where an amendment for which leave is sought is of a minor nature and will not have any substantive effect on the case to be put by the applicant and respondent, the Commission may give the applicant leave to make the amendment without complying with prescribed formalities relevant to such application.
33. In her ARD, the applicant has pleaded a deemed date of injury as 20 March 2020, being a date in time when her symptoms appeared to have intensified. Despite being quite symptomatic, the applicant did not take any time off work until 4 May 2020, with her general practitioner providing her with a medical certificate the following day, 5 May 2020. As the injury the subject of the claimant's claim before the Commission is injury in the nature of a disease injury, s 15 and s 16 of the 1987 Act prescribes her injury shall be deemed to have happened at the time of the applicant's incapacity, which on the evidence before the Commission appeared to be 4 May 2020.
34. At the Arbitration Hearing, the respondent made application to admit the report of Dr Rae dated 22 July 2020 that was served on the applicant the same morning, to which there was no objection by the applicant. The applicant made submission this late evidence highlighted a requirement to focus on the applicant's last period of work, which had perhaps not previously been the case, and while the respondent objected to the applicant's application for leave to amend the deemed date of injury, such objection appeared to be grounded in the case management of the applicant's claim. Having regard to the provisions of s 15 and s 16 of the 1987 Act, I consider it necessary the pleaded deemed date of injury be amended for the avoidance of injustice. It is evident the proposed amendment does not alter the parties to the proceedings and neither does it substantially alter the nature of the proceedings. I do believe it will have any substantive effect on the case to be put by the applicant or the respondent. While I do not consider there to be prejudice to the respondent resulting from the proposed amendment, should there be any prejudice to the respondent, I am of the view the greater prejudice of delay lies with the applicant in that it is evident she requires left carpal tunnel release at the earliest opportunity. In such circumstances amendment to the deemed date of injury pleaded which was sought by the applicant was granted.

Respondent's submissions

35. Through Mr Stockley of counsel, the respondent referred first to the applicant's account of the onset of symptoms in her statement in the early part of 2019. There were no medical consultations relevant to these symptoms at that time, which accords with the clinical records that indicate attendances for other conditions throughout 2019 and early 2020 without complaint of bilateral carpal tunnel symptoms. There was however an attendance on the applicant's general medical practitioner, Dr Haddad in May 2020 relevant to such symptoms.
36. Mr Stockley made reference to the description in the applicant's statement of her work with the respondent. It is evident the applicant provided homecare to elderly and disabled persons. Her duties included an array of domestic work and personal care required by such persons, together with travel to and from their residences.

37. Mr Stockley said the applicant's best case on causation was the opinion expressed by Dr Rae in his report dated 22 July 2020, being opinion it was likely the applicant was going to need treatment for her underlying condition but this was triggered to be acute by a work-related increase in activity. This was a medical hypothesis advanced by Dr Rae which was not supported by the applicant's statement in that the applicant doesn't report any particular change in her activity level in her statement, and neither does the applicant report any increase in work-related activity at the time of attendance on her general practitioners. The clinical notes confirm the attendances recited but none of them mention any particular precipitating event or any particular change in her normal activities. There is a telephone consultation on 5 May 2020 between Dr Haddad and the applicant where reference is made to right index thumb numbness at night and chronic left hand numbness, and there is a consultation on the same day with complaint of right hand pain with no injury. There is no mention made by the applicant at that time to her treating doctor of any work connection, nor did she mention this at any later attendances upon him.
38. The first medical certificate issued contained no more information than the clinical notes relevant to the consultation that day other than the stated date of injury. No diagnosis was offered but ultrasound and physiotherapy were recommended.
39. The respondent's medical case is that presented by Dr Powell. Dr Powell concluded the diagnosis was bilateral carpal tunnel syndrome, more severe on the left side. He recorded an insidious onset of symptoms over a 12 month period without any specific precipitating event. He concluded the available evidence indicated the applicant was suffering from idiopathic bilateral carpal tunnel syndrome, which is common in women of the applicant's age. He did not believe there was sufficient evidence to conclude the applicant's employment with the respondent was the main contributing factor in the development of her bilateral carpal tunnel syndrome. He considered the applicant would have experienced her symptoms irrespective of her employment with the respondent. To some extent Dr Powell's opinion is confirmed by Dr Rae in his report dated 22 July 2020 in that Dr Rae concluded she had an underlying carpal tunnel syndrome and would need treatment in the next few years in any event. The point of departure from Dr Powell's opinion and that of Dr Rae is that the applicant's condition had been triggered to be acute by a work-related increase in activity, which is not supported by the applicant in her statement or the history provided by her to her general practitioners.
40. The applicant's best case is one of an aggravation of a disease injury, but Dr Rae's assumption of fact relating to the circumstances of the aggravation is not made out, and is certainly not made out to the requisite legal standard that employment was the main contributing factor as required by s 4(b)(ii) of the 1987 Act.
41. While there is a report from Dr Endrey-Walder, Mr Stockley said Dr Endrey-Walder's medical theory appeared to be relevant to a disease of gradual onset, which is not confirmed by Dr Rae and is rebutted by Dr Powell. Examination of Dr Endrey-Walder's report demonstrated a history of an insidious onset of symptoms and a history of work as a homecare worker with the respondent. Dr Endrey-Walder provided opinion that as a consequence of the nature and conditions of her employment with the respondent, the applicant began experiencing symptoms of paraesthesia in her hands, without him giving any insight as to why the symptoms result from her work. Dr Endrey-Walder provided no insight into any causal connection between the applicant's bilateral carpal tunnel condition and her work with the respondent. Dr Endrey-Walder canvassed the opinions of Dr Rae and Dr Powell, and said while he agreed with that of Dr Rae, he disagreed with that of Dr Powell. Dr Endrey-Walder explained that when the aetiology of carpal tunnel syndrome is considered there is hardly ever any evidence of particular injury precipitating the condition, and accordingly he criticised Dr Powell's opinion because Dr Powell said he couldn't find any particular precipitating incident. Mr Stockley said this was a completely illogical assessment by Dr Endrey-Walder of the opinion of Dr Powell.

42. The applicant's PIAWE is agreed. In so far as the applicant's capacity is concerned, while it is accepted the applicant cannot perform her preinjury duties as a care worker, Dr Powell said she was fit to perform suitable duties and those she should avoid would be those involving repetitive use of her hands. He said she should also alternate her tasks where possible and take breaks. He considered she could work her normal hours. Mr Stockley noted the applicant had a background as working as a teachers' aid for many years before she worked for the respondent, which he said suggested provided her with a broader array of opportunity than otherwise might be available to her.
43. Mr Stockley noted no additional argument was required relevant to the need for treatment as Dr Powell accepted the surgical treatment recommended by Dr Rae was an appropriate treatment modality for the particular condition the applicant has.

Applicant's submissions

44. Through Mr Hickey of counsel, the applicant confirmed her duties with the respondent since she commenced her employment in 2015 were as set out in her statement. She explained her duties were hands on, involving domestic and personal care of persons in their home, and that she worked 38 hours each week. Dr Endrey-Walder took this description of her work duties and stated in effect that the applicant's work with the respondent was the main contributing factor to injury in the nature of bilateral carpal tunnel syndrome. Dr Endrey-Walder said such condition is frequently precipitated by significant daily manipulative activity with the hands, which had been the case of the applicant working her duties as a careworker. Mr Hickey said Dr Endrey-Walder provided weighty opinion in concert with that of the treating surgeon Dr Rae. Dr Rae provided opinion the applicant had suffered an aggravation to her pre-existing condition which was triggered to be acute by work-related increase in activity. While the applicant described an onset of symptoms during the course of her employment with the respondent and Dr Endrey-Walder may have appeared to have provided opinion relevant to a gradual onset of a disease injury, it was open to the Commission to find injury in the nature of an aggravation of a pre-existing condition.
45. Mr Hickey pointed out that in his report dated 19 June 2020, Dr Rae recorded a history of the applicant having noticed severe nocturnal wrist and hand pain over the last few months. Such history of onset of symptoms is provided in the context of the applicant being 55 year old right handed lady working with respondent, with her duties being "very hands on". Dr Endrey-Walder picked up those particular words of Dr Rae and set out a significant part of Dr Rae's report in his own report to provide the historical background on which he determined his opinion in concert with the applicant's history provided at assessment and his clinical examination of the applicant.
46. Returning to Dr Rae's report, Mr Hickey said Dr Rae noted no specific traumatic event triggered the applicant's symptoms, noted she felt she went through a period of high increased workload at the time when the symptoms developed, and noted her employment with the respondent involved frequent domestic tasks with her hands that are quite demanding. This is the description of the high increased workload during the period the applicant became symptomatic.
47. Turning to the clinical records of the treating general practitioner, there were two consultations on 5 May 2020 relevant to the applicant's symptoms of bilateral carpal tunnel syndrome and there was reference to pain killers. There was a further consultation on 8 May 2020 relevant to her symptoms. There was a consultation on 12 May 2020 relevant to the applicant suffering a fall at night with diagnosis of a left rib injury, the significance of which is that in her statement the applicant said that on 13 May 2020 she had a fall at home at night and recalled she had to get up constantly in the night to take Panadeine Forte to stop the numbness in her hands and wrist. The applicant took time off work but her bilateral carpal tunnel symptoms continued.

48. Going to the applicant's capacity, the applicant stated in her statement she had fully recovered from her fall at home but the respondent had told her to not return to work since she ceased working on 13 May 2020. Dr Rae stated the applicant had a very serious and permanent left carpal tunnel condition, which if not relieved by surgery would continue to disable her. In a report dated 21 May 2020 prepared by Matthew Austen, physiotherapist, while he stated the applicant was currently off work to enable recovery from a fractured left rib, he provided opinion it would not be suitable for her to return to work until there was an improvement in her left arm symptoms. He cautioned if conservative treatment did not provide significant relief, nerve conduction study and neurologist review was appropriate. There were a number of medical certificates, including SIRA Certificates of Capacity relating to the applicant's total incapacity for work, the first medical certificate being issued on 5 May 2020, relevant to an incapacity occurring on 4 May 2020. The applicant described severe pain, with medical opinion indicating surgical treatment was required as soon as possible. The applicant described the impact on her daily functioning and required the assistance of her elderly mother with a number of tasks. As to Dr Powell's opinion as to capacity for suitable duties but full hours, it was unrealistic for the applicant to return to full hours in circumstances where she had significant pain, used wrist splints, avoided aggravating activities, used analgesic medication and needed surgery. There was nothing the applicant could do until such time as she came to surgery, and she could not undertake the duties required of a teachers' aid.
49. Mr Hickey noted the agreed PIAWE of \$867.85 and sought the following:
- (a) Weekly compensation payable by the respondent to the applicant under s 36 of the 1987 Act from 13 May 2020 to 13 August 2020 at the rate of \$824.46, being 95% of the PIAWE, with the respondent to receive credit for payments made during this period of the applicant's entitlement to weekly compensation;
 - (b) Weekly compensation payable by the respondent to the applicant under s 37 of the 1987 Act from 14 August 2020 ongoing at the rate of \$694.28, being 80% of the PIAWE;
 - (c) The respondent to pay the costs of the proposed surgical treatment as requested and supported by Dr Rae in the letter dated 22 July 2020 addressed to icare, being described in terms of decompression of the carpal tunnel in both wrists, together with incidental expenses, and
 - (d) There be a general order under s 60 of the 1987 Act relevant to the applicant's claim for past medical treatment expenses, currently particularised in the sum of \$235.

The respondent's submissions in reply

50. The respondent made no submissions in reply to those made by the applicant, save to say that in the event the applicant was successful, a general order under s 60 for past medical treatment expenses was appropriate.

Determination

Injury

51. Section 4 of the 1987 Act relevantly defines injury as a personal injury arising out of or in the course of employment, including the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation of the disease.

52. The applicant has the onus of proving that she sustained injury in the nature of bilateral carpal tunnel syndrome and/or aggravation, acceleration, exacerbation or deterioration of injury in the nature of bilateral carpal tunnel syndrome arising out of or in the course of her employment with the respondent. This is a question of fact and consideration of her statement and all the medical evidence is required. In *Ngueyn v Cosmopolitan Homes (NSW) Limited*¹¹ McDougall J stated at [44]:

“A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* [1938] HCA; (1938) 60 CLR 336. His honour’s statement was approved by the majority (Dixon, Evatt and McTiernan JJ in *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691 at 712.”

53. Relevant to the issue of causation in *Kooragang Cement Pty Ltd v Bates*¹², Kirby J said:

“The result of the cases is that each case where causation is in issue in a workers compensation claim must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase ‘results from’ is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death ‘results from’ a work injury. What is required is a commonsense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation.”

54. As to what constitutes an aggravation of a disease process, in *Federal Broom Co Pty Ltd v Semlitch*¹³ there is discussion by Windeyer J:

“The question that each poses is, it seems to me, whether the disease has been made worse in the sense of more grave, more grievous or more serious in its effects upon the patient.”

55. In *AV v AW*¹⁴, the Commission considered the meaning of ‘main contributing factor’ and following analysis of the authorities relevantly concluded that the test of ‘main contributing factor’ is one of causation, which involves consideration of the evidence overall and in a matter involving s 4(b)(ii) it is necessary that the employment be the main contributing factor to the aggravation, not the underlying disease process as a whole.

56. In her statement, the applicant denied any problems with her hands prior to commencing employment with the respondent in 2105 and described an onset of symptoms in both wrists and hands “in the first half of 2019”, which intensified in about March 2020 “left more than right”. The clinical records of Goulburn Medical Centre and Goulburn Physiotherapy Centre are consistent with the applicant’s symptoms becoming increasingly problematic in March 2020 and when she consulted with Dr Haddad on 5 May 2020, she was provided with a diagnosis of carpal tunnel syndrome. When the applicant attended specialist consultation with Dr Rae on 19 June 2020, Dr Rae reported a history of the applicant noticing severe bilateral wrist and hand symptoms “over the last few months” and he too provided opinion her symptoms were consistent with bilateral carpal tunnel syndrome. Both the independent medical examiners, Dr Endrey-Walder and Dr Powell provide diagnosis in terms of bilateral carpal tunnel syndrome. I accept the injury the applicant has sustained is injury in the nature of bilateral carpal tunnel syndrome.

¹¹ [2008] NSWCA 246

¹² (1994) 35 NSWLR 452; 10 NSWCCR 796 at [463] (*Kooragang*)

¹³ [1964] HCA 34; 110 CLR 626 at [369]

¹⁴ [2020] NSWCCPD 9

57. In her statement, the applicant also explained that her work duties with the respondent involved the provision of personal and domestic care to elderly and disabled persons in their homes, and she explained the requirements of such “personal care” and “domestic care”. While it may be that when the applicant first consulted with Dr Haddad on 5 May 2020 relevant to her symptoms she made no mention of any work connection, when she consulted with Dr Godfrey on 2 June 2020 and was provided with specialist referral to Dr Rae, she queried whether “this can be treated as work cover” and was advised to liaise with Dr Rae in this regard. Dr Godfrey noted at that time that the applicant’s work with the respondent involved “domestic caring, meals preparation” and noted too that she had not been attending work because of her symptoms. On review on 5 June 2020, Dr Habbab made note of the applicant’s “repetitive movement at work” and on review the following day, Dr Habbab described the applicant’s symptoms as hindering her from a return to work with the respondent. Dr Habbab issued her with a SIRA Certificate of capacity/certificate of fitness at that time, in which he accepted the applicant’s injury was consistent with her description of cause and replied in response to the question of asked of him as to how the injury was related to work, “possible repetitive movement”.
58. When the applicant consulted with Dr Rae on 19 June 2020, Dr Rae noted her duties with the respondent and described them as “very hands on”. He noted too such duties involved “frequent domestic tasks with her hands that are quite demanding”. He understood from the applicant that while there had been no specific traumatic event that triggered her problematic symptoms, she felt she had gone through an increased workload at that time. In his report dated 22 July 2020 in response to specific questioning about the bilateral carpal tunnel release he had recommended, Dr Rae accepted the applicant had underlying carpal tunnel syndrome that would have required treatment within the next few years, but provided opinion this underlying condition had been “triggered to be acute by her work-related increase in activity”. Although Mr Stockley submitted this medical hypothesis advanced by Dr Rae was not supported by the applicant’s statement or history provided to her treating general practitioners in that there was no mention of an increase in her workload at the time her symptoms became problematic, it is evident this is the history taken by Dr Rae at the time the applicant consulted with him and there is no evidence before the Commission that demonstrated there had been no increase in the applicant’s workload at the relevant time.
59. At the time Dr Endrey-Walder assessed the applicant, he had available to him both the opinion provided by Dr Rae in his report dated 19 June 2020 and the opinion provided by Dr Powell in his report dated 28 August 2020. Dr Rae provided a report in which I accept an acknowledgment of a nexus between the applicant’s work duties, problematic symptoms, injury in the nature of bilateral carpal tunnel syndrome and recommended surgical release. Dr Endrey-Walder agreed with opinion provided by Dr Rae. While Dr Powell has provided opinion the applicant was suffering from idiopathic bilateral carpal tunnel syndrome and there was insufficient evidence to conclude her employment with the respondent was the main contributing factor to the development of the condition, Dr Endrey-Walder did not agree with such opinion. Dr Endrey-Walder debated Dr Powell’s comment regarding a lack of evidence to connect the development of the applicant’s condition with her work duties with specific reference to the history taken by Dr Powell of “the insidious onset of symptoms in both wrists and hands over a period of 12 months without any specific precipitating incident”, and provided opinion “the condition is, indeed, frequently precipitated by significant daily manipulative activity with the hands, which has been the case in Ms. Coombs’ employment as a Care Worker”.
60. I am of the view the applicant provided a credible history regarding the problematic development of her bilateral carpal tunnel syndrome symptoms during the course of her employment with the respondent. Considering the explanation given by the applicant and the support afforded by her treating general practitioners, treating specialist and that of Dr Endrey-Walder, who had the opportunity to review and provide comment on the opinion

provided by Dr Powell, I accept the applicant has discharged the onus of proof required of her and am of the view the applicant has sustained injury in the nature of an aggravation, acceleration, exacerbation or deterioration of her pre-existing bilateral carpal tunnel syndrome in the course of her employment with the respondent and that her employment with the respondent is the main contributing factor to such injury. I prefer the opinion provided by the applicant's treating specialist, Dr Rae, in particular, to that of Dr Powell and while I accept the respondent has expressed concern about Dr Rae's medical hypothesis not being supported by the applicant's statement or her general practitioner's clinical records, there is no evidence before the Commission that suggested the history provided to Dr Rae by the applicant of work-related increase in activity is incorrect.

61. Although none of the applicant's treating doctors have used the terminology "main contributing factor" and neither has Dr Endrey-Walder, I do not consider this to be fatal to the applicant's claim as consideration of the evidence overall demonstrates the applicant's employment with the respondent was the main contributing factor to the aggravation injury she has sustained. There is no satisfactory evidence to suggest any other cause for the problematic development of her bilateral carpal tunnel syndrome symptoms and I am satisfied that the applicant's employment with the respondent was the main contributing factor to the injury.

Deemed date of injury

62. The applicant was granted leave to amend the pleaded date of injury of 20 March 2020 to 4,5 and/or 13 May 2020.
63. I accept the applicant has sustained injury in the nature of an aggravation, acceleration, exacerbation or deterioration of her pre-existing bilateral carpal tunnel in the course of her employment with the respondent and that her employment with the respondent was the main contributing factor to such injury. Section 16 of the 1987 Act relevantly provides if an injury consists in the aggravation, acceleration, exacerbation or deterioration of a disease, the injury shall for the purposes of the Act be deemed to have happened at the time of the applicant's incapacity.
64. I am satisfied that the deemed date of injury in the circumstances of this particular matter where the applicant's claim involves a claim for weekly benefits payable under s 36 and s 37 of the 1987 Act and medical or related treatment payable under s 60 of the 1987 Act is 4 May 2020. It appears that 4 May 2020 is the commencement of the applicant's inability to earn the wages she would otherwise have earned but for the bilateral carpal tunnel injury she has sustained (*P & O Berkeley Challenge Pty Ltd in the interest of HIH Winterthur Workers Compensation (NSW) Pty Ltd v Alfonzo*¹⁵). Although the applicant appears to have first consulted with her general practitioner on 5 May 2020 relevant to her symptoms, the medical certificate provided by her general practitioner at that time certified her unfit for work the day before, being 4 May 2020.

Capacity

65. The applicant ceased work on 13 May 2020 and claims weekly benefits payable under s 36 and 37 of the 1987 Act from 13 May 2020 to date and continuing.
66. As I accept the applicant has sustained injury in the nature of injury of an aggravation, acceleration, exacerbation or deterioration of her pre-existing bilateral carpal tunnel syndrome in the course of her employment with the respondent and that her employment with the respondent was the main contributing factor to such injury, it follows she may have an entitlement to weekly benefits payable under 1987 Act.

¹⁵ [2000] NSWCA 214

67. While in her statement the applicant did not specifically address capacity for work, she said she felt very disabled and made complaint of the restrictive use she currently has of her hands. Although Dr Powell provided opinion the applicant was fit for her normal hours of work on suitable duties and Dr Endrey-Walder provided no opinion of the applicant's capacity for work but took a detailed history of complaint that is suggestive of a total incapacity, the applicant's treating general practitioner initially certified her on 5 May 2020 as totally incapacitated for work on 4 May 2020 as a result of her bilateral carpal tunnel symptoms and as at 2 November 2020, being the date of the most recent certification available, the applicant's certification remained the same. Of note too, is that the applicant's treating physiotherapy provided opinion on 21 May 2020 that he didn't think the applicant should return to work until there was an improvement in her left arm symptoms, which I accept is unlikely to occur without the surgical release recommended by Dr Rae.
68. Although Mr Stockley accepted the applicant was totally incapacitated for her pre-injury duties, he considered she could work her normal hours in suitable duties and noted the applicant's work history included many years working as a teachers' aid. Mr Stockley's submission is grounded in opinion provided by Dr Powell, being opinion with which I have not agreed, and I prefer the opinions provided by the applicant's treaters as regards her total incapacity for work since she was first so certified. I accept the applicant has had no capacity to work since 13 May 2020 as a result of her bilateral carpal tunnel symptoms, ongoing.

Quantification of entitlement to weekly benefits

69. The applicant's PIAWE is agreed at \$867.85.
70. In accordance with s 36(1)(a) of the 1987 Act the applicant's entitlement to weekly benefits is:

$$\begin{aligned} & (\text{AWE} \times 95\%) - (\text{E} - \text{D}) = \\ & \$867.85 \times 95\% - \$0 = \$824.46 \end{aligned}$$

71. In accordance with s 37(1)(a) of the 1987 Act the applicant's entitlement to weekly benefits is currently:

$$\begin{aligned} & (\text{AWE} \times 80\%) - (\text{E} - \text{D}) = \\ & \$867.85 \times 80\% - \$0 = \$694.28 \end{aligned}$$

72. The applicant's entitlement to weekly benefits is to be indexed in accordance with s 82A of the 1987 Act.

Treatment

73. The respondent does not dispute medical treatment, including surgical treatment in the nature of bilateral carpal tunnel decompression, is reasonably necessary treatment for the injury in the nature of bilateral carpal tunnel.
74. As I accept the applicant suffered injury in the nature of an aggravation, acceleration, exacerbation or deterioration of her bilateral carpal tunnel condition and I accept her employment with the respondent was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of her condition, it follows she has an entitlement to compensation for the cost of medical or related treatment payable under ss 59 and 60 for that injury, including the surgical treatment in the nature of bilateral carpal tunnel decompression recommended by Dr Rae.

SUMMARY

75. The ARD is amended to plead deemed date of injury of 4, 5 and/or 13 May 2020.
76. The applicant sustained injury in the nature of an aggravation, acceleration, exacerbation or deterioration of her bilateral carpal tunnel condition, with deemed date of injury of 4 May 2020. The applicant's employment with the respondent was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of her condition.
77. The applicant has had no current work capacity since 13 May 2020 due to the aggravation, acceleration, exacerbation or deterioration she has sustained to her bilateral carpal tunnel condition. The applicant has an entitlement to weekly benefits payable under ss 36 and 37 of the 1987 Act. The Applicant's PIAWE is agreed to be \$867.85. The Applicant's PIAWE will be adjusted in accordance with s 82A of the 1987 Act. The respondent is to receive credit for payments made during the period of the applicant's entitlement to weekly compensation.
78. The applicant requires medical treatment and services as a consequence of the aggravation, acceleration, exacerbation or deterioration she has sustained to her bilateral carpal tunnel condition. The bilateral carpal tunnel release surgical treatment proposed by Dr Rae is reasonably necessary treatment resulting from the aggravation, acceleration, exacerbation or deterioration the applicant has sustained to her bilateral carpal tunnel condition. The respondent is to pay the applicant's medical and related treatment, including the cost of the bilateral carpal tunnel release surgical treatment proposed by Dr Rae, in accordance with s 59 and s 60 of the 1987 Act.