WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **6228/20**
Applicant: **David Paul Sloane**
Respondent: **Tippings Transport Pty Limited**
Date of Determination: **24 February 2021**
Citation No: **[2021] NSWWCC 58**

The Commission determines:

1. On 22 November 2017, the applicant suffered an injury in the course of his employment with the respondent to the following body parts/systems:

    (a) Right upper extremity (shoulder);
    (b) Lumbar spine;
    (c) Cervical spine;
    (d) Right lower extremity (knee); and
    (e) Left upper extremity (shoulder).

2. The matter is admitted to the Registrar for referral to an Approved Medical Specialist for determination of the permanent impairment arising from the following:

Date of injury:	22 November 2017;
Body systems referred:	Right upper extremity (shoulder), lumber spine, cervical spine, left upper extremity (shoulder), and right lower extremity (knee).
Method of assessment:	Whole person impairment.

3. The documents to be referred to the Approved Medical Specialist to assist with their assessment data include the following:

    (a) This Certificate of Determination and Statement of Reasons;
    (b) Application to Resolve a Dispute and attachments; and
    (c) Reply and attachments.

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 Sufian

Abu Sufian
Disputes Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. On 22 November 2017, the applicant was working on a hot day in the course of his employment with the respondent and was awaiting the arrival of a truck, when he suddenly collapsed to the ground, losing consciousness. As a result, he allegedly sustained injuries to his right shoulder, both arms, both knees, cervical spine and an exacerbation of a pre-existing lumbar spine condition. The applicant also alleges that whilst undertaking rehabilitation for these injuries, he sustained a left shoulder consequential condition.

2. A number of the applicant's alleged injuries are admitted; however, the respondent disputes the cervical spine and right knee injuries. The right knee was originally claimed as a consequential condition, however, the applicant eventually presented his case in respect of that body part as one of frank injury in the alternative to consequential condition.

3. On 30 July 2020, the respondent's insurer issued a dispute notice denying the applicant was eligible for lump-sum compensation as his accepted physical injuries have not resulted in a greater than 10% whole person impairment, and denying liability for injuries to the cervical spine and right knee.

4. The applicant brings these proceedings seeking permanent impairment compensation in respect of all of the claimed body parts.

ISSUES FOR DETERMINATION

5. The only issues in dispute between the parties are whether the applicant suffered injury to his cervical spine and right knee. In the event a finding is made in favour of the applicant with respect to one or both of these body parts they, along with the other claimed injuries, will be remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for an assessment of the degree of permanent impairment arising from them. If there is an award for the respondent on the contentious body parts, then the balance of the claimed injuries will in any event be referred to an AMS for determination.

PROCEDURE BEFORE THE COMMISSION

6. I am satisfied that the parties to the dispute are aware of the effect of the representations made in the proceedings and of the allegations contained therein. I have attempted to use my best endeavours to assist the parties to resolve the matter, however, they were unable to resolve their differences.

7. At the telephone conference in this matter, the applicant was granted leave to plead the cervical spine case as both a frank injury and in the alternative as a consequential condition.

8. The matter proceeded to a hearing before me on 18 January 2021. On that occasion, the applicant was represented by Mr C Tanner of counsel instructed by Mr S Murray, solicitor and the respondent was represented by Mr P Stockley of counsel instructed by Mr C Michael, solicitor.

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 (the Application) and attached documents;

    (b) Reply and attached documents.

Oral evidence

10. There was no oral evidence heard at the hearing.

FINDINGS AND REASONS

Injury

11. In this matter, the applicant claims a frank injury to both his cervical spine (in the alternative to a consequential condition) and to his right lower extremity (knee).

12. "Injury" is defined in s 4 of the *Workers Compensation Act 1987* (the 1987 Act) as follows:

> "In this Act: injury means
>
> (a) personal injury arising out of or in the course of employment,
> (b) includes a "disease injury", which means:
>
> (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and
>
> (ii) 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 or deterioration of the disease, and
>
> (c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the Workers' Compensation (Dust Diseases) Act 1942, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined."

13. There is a useful review of the authorities concerning the issue of injury in *Castro v State Transit Authority* (NSW) [2000] NSWCC 12; (2000) 19 NSWCCR 496 (*Castro*). That case makes clear that what is required to constitute "injury" is a "sudden or identifiable pathological change". In *Castro* a temporary physiological change in the body's functioning (atrial fibrillation: irregular rhythm of the heart), without pathological change, did not constitute injury.

14. Consistent with *Castro*, the decision in *Trustees of the Society of St Vincent de Paul (NSW) v Maxwell James Kear as administrator of the estate of Anthony John Kear* [2014] NSWWCCPD 47 (*Kear*) added:

> "In any event, the authorities do not support the proposition that, on its own, an elevation in blood pressure is a personal injury. That is because, without more, it is not a sudden and ascertainable or dramatic physiological change

> or disturbance of the normal physiological state. It is no more than a temporary physiological change in the body's functioning, similar to the atrial fibrillation that occurred in Castro, without any accompanying lesion or pathological change (Castro at [138]).” (at [60])

15. It is therefore apparent from well-established authority that to the extent an applicant asserts a frank injury to a body part (as opposed to an injury in the nature of a disease process, aggravation to such a process or a consequential condition), they must prove on the balance of probabilities they have suffered not only an injurious event, but also a demonstrable pathological change in an effected body part in order to satisfy the requirements of section 4 of the 1987 Act.

Cervical Spine

16. On the alleged date of injury, the applicant was conveyed to the emergency department at Nepean Hospital. The progress notes taken on that day refer to the applicant denying neck pain but complaining of a mildly stiff neck (Reply 41). Mr Tanner submitted that this constituted contemporaneous evidence of issues with the applicant's neck from as early as the date of injury. That entry was, the applicant submitted, consistent with the evidence contained in his statement at paragraph 21 that on the day of the fall, the applicant's right shoulder pain was radiating into the right side of his neck, with an associated sensation of numbness in three fingers of his right hand.

17. Mr Tanner referred the Commission to the WorkCover Certificate of Capacity completed by Dr Chung, general practitioner on 28 November 2017 (Application page 56). That document noted the diagnosis of work-related injury being “right shoulder injury including numbness of third – fifth fingers and right knee injury." Mr Tanner submitted that entry was consistent with the history provided at paragraph 24 of the applicant's statement, where he recounts visiting Dr Chung as “my right shoulder, right arm and neck remained extremely sore."

18. On 10 January 2018, Dr Sunner, treating orthopaedic surgeon, provided a report to Dr Chung concerning the applicant's condition. In that report, the doctor took the following history:

> “He currently works as a truck driver and says that around about 22 November last year, he was waiting to have his truck loaded when he passed out and he thinks that he was passed out for about 15 to 20 minutes, and when he woke up, he noticed right shoulder and neck pain. Since then, he has had ongoing right shoulder and neck pain. He has also been complaining of some numbness in the ulnar three fingers… The pain is over the anterior aspect of the shoulder, although sometimes it does go to the right side of cervical spine. He says the pain is there most of the time but any movement, particularly with regards to elevation is quite painful."

19. Mr Tanner submitted that history is consistent with the complaints made by the applicant from the date of injury regarding his cervical spine.

20. At page 143 of the Application, there is reproduced a report of an MRI of the cervical spine which was carried out on 18 January 2018. Mr Tanner noted there were demonstrable changes to pathology in that MRI, particularly at C5/6, which demonstrated moderate-sized central disc protrusions indenting the anterior thecal sac without evidence of cord impingement. He submitted there was no other explanation for that change in pathology save for the fall at issue and sought to rely upon the report as further evidence to establish a causal link between the fall and the applicant's cervical spine symptoms.

21. On 12 March 2018, the applicant underwent a right shoulder arthroscopy at the hands of Dr Sunner at Nepean Private Hospital, with a subacromial decompression, rotator cuff repair and biceps tendinosis. Following that operation, the applicant's right shoulder was secured in a sling for approximately six weeks and he states he was entirely reliant on his left shoulder to compensate for his right. Paragraph 35 of his statement, the applicant said:

> "Post-operatively, the pain in my right shoulder was unbearable. The pain in my neck became notably worse and I often felt the pain in my right shoulder radiate into the right side of my neck. I assumed that the increasing pain in my neck was a result of my inactive shoulder, however, the pain and stiffness persisted indefinitely."

22. Mr Tanner submitted that evidence is suggestive of the applicant suffering either an injury or a consequential condition to his cervical spine, as the pain and symptoms in his neck worsened significantly after the operation to the right shoulder. He noted the applicant's neck pain continued for up to 10 months post injury, necessitating attendance on a physio therapist due to pain in the applicant's neck, lower back and shoulders, which continue to this day.

23. Mr Tanner referred to the report of Independent Medical Examiner (IME), Dr Gehr dated 16 March 2020, and noted the ongoing problems suffered by the applicant. He submitted Dr Gehr's examination revealed changes consistent with injury to the cervical spine including limitations of movement, dysmetria, decreased sensation in C6 and C8 on the left side, decreased hand grip strength on the left side, absence of deep tendon reflex on the left side, tenderness, guarding and right trapezial pain on carrying out of the brachial plexus stretch test. In summarising the applicant's condition, Dr Gehr provided the following opinion in relation to the cervical spine:

> "He has also had persisting cervical spine pain and on examination today, I found guarding, dysmetria, decreased sensation on left side, decreased hand grip on left side, decreased reflexes on left side and as per WorkCover guidelines, page 27, paragraph 4.27, he fulfils three of the criteria for radiculopathy."

24. Mr Tanner submitted that Dr Gehr's findings are consistent with those of the applicant's general practitioner recorded in their report of 13 May 2020, found at page 41 of the Application. Dr Trieu, GP found in that report the applicant was suffering from C5/6-disc protrusion with associated radiculopathy. Mr Tanner submitted that finding is not surprising and is also consistent with a referral by the general practitioner to Dr Sunner in relation to the cervical spine. Such a referral and finding by treating doctor is, Mr Tanner submitted, consistent with the presence of cervical spine injury.

25. Turning to the respondent's medical evidence, Mr Tanner noted that IME, Dr J Bentivoglio provided an initial report on 6 February 2019, which is of limited assistance to the Commission in relation to the matters in dispute in these proceedings as Dr Bentivoglio was asked only to deal with the applicant's back and right shoulder, which he did.

26. Likewise, Dr Bentivoglio's second report dated 5 March 2019 also deals with assessments and causation regarding the applicant's lower back and shoulder conditions. Of relevance, however, is Dr Bentivoglio having viewed the results of the applicant's cervical spine MRI performed in January 2018, which showed a moderate sized disc protrusion indenting the anterior thecal sac at the C5/6 level. The notation of that scan was the extent of Dr Bentivoglio's commentary on the cervical spine in this report.

27. I do not make that comment as a criticism of Dr Bentivoglio, who, as Mr Tanner noted, had only been requested to comment on the applicant's back and shoulder injuries at that time.

28. By the time of Dr Bentivoglio's further report dated 5 June 2020, which was after the report of Dr Gehr had been served upon the respondent. Dr Bentivoglio again primarily dealt with the back and shoulder issues, however, at page 25 of the Reply, the doctor noted:

> "I am unsure as to whether Mr Sloane has any lumbar spine disability at all. ***Mr Sloane has had an MRI scan taken of his cervical spine, indicating he does have some degree of discal damage, but no evidence of any nerve root irritation or compression.*** Mr Sloane did not advise me of any symptoms present in his neck and definitely from the MRI scan, there would be no radicular symptoms" (emphasis added).

29. Mr Tanner noted this was the extent of Dr Bentivoglio's address of the applicant's cervical spine symptoms, and submitted that if even on the day of examination the applicant was not suffering from cervical symptoms, that does not address the question as to whether an injury to that body part was caused by the fall. Rather, Mr Tanner submitted an absence of symptoms may go to whether there is any whole person impairment present but does not determine the existence or otherwise of an injury.

30. Relevantly, at page 27 of the Reply, Dr Bentivoglio was requested to provide an assessment of whole person impairment in relation to certain body parts as a result of the injury on 22 November 2017, including the cervical spine. Dr Bentivoglio does not mention the applicant's cervical spine in providing his assessment of whole person impairment, notwithstanding that he observed earlier in the report an MRI of the applicant's spine, which demonstrated pathological change.

31. Mr Stockley for the respondent submitted the history obtained by Dr Gehr surrounding the cervical spine was at odds with the applicant's statement. He noted the applicant was treated at Nepean Hospital on the date of the accident and the progress notes on that occasion referred to there being no head strikes or dislocations at the time of the injury. In addressing the summary of care provided to the applicant at Nepean Hospital following the incident at issue, Mr Stockley noted the history taken was complaint of right shoulder pain and exacerbation of back pain.

32. Although, as Mr Stockley points out, there was no mention of neck pain in that history there is a reference to reduced sensation in the distal half of the 3rd to 5th digits on the right hand "which is new."

33. Notwithstanding these submissions by Mr Stockley, which I accept are certainly accurate, there is a contemporaneous entry on the date of accident taken in the emergency department of Nepean Hospital which "denies neck pain but complained of mildly stiff neck." In my view, that along with altered sensation in the fingers of the right hand is suggestive of complaint of cervical spine symptomology by the applicant.

34. Mr Stockley submitted the Commission would have been assisted by the clinical records of Dr Chung, however, they are not in evidence. Mr Stockley submitted it would be appropriate to infer that there was no contemporaneous complaint of neck pain upon initial presentation because the applicant was referred to Dr Sunner only in relation to his shoulder symptoms.

35. Mr Stockley also submitted the applicant's symptoms when presenting to Dr Sunner were primarily complaints relating to the right shoulder, with a notation by the doctor that "sometimes it does go to the right side of the cervical spine." The respondent noted that Dr Sunner requested an MRI of the cervical spine on 10 January 2018 but only to rule out significant cervical pathology.

36. The difficulty with that submission is the subsequent MRI which was carried out on 18 January 2018 did reveal significant pathology, namely a moderate-sized disc protrusion indenting into the anterior thecal sac at C5/6.

37. Dr Sunner's subsequent report found at page 45 of the Application and dated 24 January 2018 reported on the MRI of the cervical spine and noted the C5/6-disc protrusion. Dr Sunner was of the view that the protrusion was fairly central, indenting the anterior thecal sac, however, there is no evidence of foraminal stenosis or neural compression. He reached the conclusion that the source of the applicant's pain was primarily the right shoulder.

38. That finding by Dr Sunner does not, however, rule out an injury to the cervical spine. Dr Sunner is an orthopaedic surgeon to whom ethe applicant was referred for treatment of shoulder problems. He opined that there are sufficient reasons contained within the MRI of the right shoulder for it to be causing the applicant pain and therefore recommend an arthroscopic decompression and biceps tendinosis. That finding by Dr Sunner does not, in my opinion, in any way rule out the presence of a neck injury. Indeed, the doctor confirms the findings of the cervical MRI that there was a C5/6-disc protrusion following the fall at issue.

39. Mr Stockley submitted there must be some probative evidence underpinning the applicant's contention the workplace injury has caused injury or consequential condition to the applicant's neck, and it should find some expression in a medical sense. He submitted that on the applicant's own case he has failed in that endeavour, as the only real analysis of the applicant's neck symptoms was the fairly cursory examination and reporting by Dr Sunner and the much later IME report of Dr Gehr.

40. I do not agree with that submission. The contemporaneous records reveal the applicant suffering from some neck symptoms on the day of and shortly after his injury. His treating shoulder surgeon, Dr Sunner recorded at page 44 that the applicant "certainly seems to have two sources of pain. One is the shoulder itself and two is the cervical spine." In my opinion, the findings of the MRI of 18 January 2018 as sufficient clinical basis to establish the applicant suffered a cervical spine injury in the fall at issue. There is not only an experience of pain in contemporaneous records at Nepean Hospital, but radiological evidence of clear pathological change.

41. In relation to the IME evidence, I find Dr Bentivoglio of limited assistance regarding the cervical spine, largely because his earlier reports do not deal with it as he was not requested to do so. To the extent Dr Bentivoglio deals with the cervical spine in his third report, he notes the findings from the MRI in January 2018 and says at page 25 of the Reply:

> "Mr Sloane has had an MRI scan taken of his cervical spine, indicating he does have some degree of discal damage, but no evidence of any nerve root irritation or compression. Mr Sloane did not advise me of any symptoms present in his neck and definitely from the MRI scan, there would be no radicular symptoms."

42. In my view, the findings on the MRI scan to which Dr Bentivoglio refers show the presence of an injury to that body system. There is plainly pathological change by way of disc damage. The fact Dr Bentivoglio indicated the nature of that injury would not be sufficient to cause radiculopathy or that the applicant did not complain to him of cervical spine symptoms on the date of examination may well go to the question of whether that injury has led to any permanent impairment, however, it does not in my view detract from the presence of pathological change which is sufficient to ground a finding of injury to that body system.

43. Dr Bentivoglio's comments on the cervical MRI are also broadly consistent with those of Dr Gehr, IME for the applicant who described the MRI findings as consistent with his findings on examination of radiculopathy. The fact the two IMEs have made different findings with regards to the presence of radiculopathy is not a difference which goes to whether an injury took place. Rather, in my view the difference of opinion as to the presence of symptoms and whether they are caused by the agreed disc pathology is a matter in the provenance of an AMS rather than an Arbitrator.

Right knee

44. Mr Tanner noted that the WorkCover Certificate of Capacity dated 28 November 2017 completed by Dr Chung referred to a right knee injury having taken place. He submitted that contemporaneous entry was supported by Dr Gehr's report at page 35 of the Application, which revealed an examination of the right knee demonstrating wasting and retropatellar crepitus.

45. The applicant submitted the respondent's evidence concerning the right knee was not helpful, given that the only comment made by Dr Bentivoglio regarding that body part in his report of 5 June 2020 was a reference to the fact the applicant had not had any investigations of his right knee carried out to indicate any pathology present, and did not complain of any significant symptoms in his right knee subsequent to the alleged injury. Mr Tanner submitted the doctor's note of lack of complaint regarding "significant" symptoms is strongly suggestive of there being symptoms present.

46. Mr Stockley noted the right knee allegation is one of direct injury and indicated there is no record of that injury in the Nepean Hospital notes nor in the contemporaneous GP records. Likewise, no mention of a right knee injury is raised in the report of Dr Trieu, which was based on a review of documentation of Dr Chung who was the nominated treating doctor at the time of injury.

47. Mr Stockley submitted that Dr Gehr's opinion was of limited utility with regards to the right knee injury, as it simply revealed a history following the accident of "pain in the cervical spine, lumbar spine, right knee and his right arm." Indeed, Dr Gehr did not provide any detailed examination of the applicant's right knee in his report, instead focusing on his diagnoses of the cervical spine, right shoulder, left shoulder and lumbar spine. Having not provided an explanation of his diagnosis with the right knee, Dr Gehr proceeded, the respondent submitted, to merely provide an assessment of whole person impairment of that body system.

48. Mr Stockley submitted Dr Gehr's views on the right knee are not provided in a fair climate, given that he simply assumes the right knee was injured in the incident at issue and provides no substantive diagnosis as to the problems with it. He noted that no investigations as to the right knee had been carried out since the injury, and as a result, submitted the applicant could not succeed on his own case of demonstrating pathological change in that body part.

49. In further support of this submission, Mr Stockley noted the GP clinical notes from 2004 which revealed a prior right knee injury.

50. In reply, Mr Tanner noted the medical certificate six days post fall which set out a right knee injury and submitted that was a sufficiently contemporaneous complaint. He also submitted that the evidence found by Dr Gehr as to muscle wasting of the right knee region is pathological change sufficient to make a finding of injury to that body part.

51. On balance, I find that there is sufficient contemporaneous and medical evidence to ground the finding of injury to the right knee. The fact the applicant may have suffered a right knee injury in 2004 does not obviate the possibility of one having been suffered any incident at issue. Moreover, whilst the hospital notes do not contain references to the right knee in the immediate aftermath of the fall, it is apparent that less than a week after the accident, the applicant was complaining of right knee issues to his treating general practitioner. In light of that contemporaneous evidence, and accepting the applicant as a witness of truth regarding his right knee symptomology, I am satisfied on the balance of probabilities the applicant has established that he suffered a knee injury in the course of his employment on the date of injury in issue.

52. In his statement to paragraph 21, the applicant referred to presenting to the Nepean Hospital fracture clinic and noting the pain in his right shoulder remained constant together with noticing since the fall that his right knee “clicked whenever I was walking. The pain and discomfort in my right knee continued to come and go indefinitely. However, at the time, mending my right shoulder was my chief priority.”

53. In reaching a finding in favour of the applicant concerning the right knee, I have preferred the opinion of Dr Gehr who sets out his findings on an examination of the applicant's right knee, whereas Dr Bentivoglio, IME for the respondent, merely commented that the applicant had not had any investigations to indicate the presence of any pathology in it. There is no suggestion that Dr Bentivoglio undertook an examination of the applicant's right knee.

54. Dr Bentivoglio therefore provides no substantive opinion as to the applicant's right knee, however, the fact he refers to a lack of “significant" symptoms does, in my view, amount to an acknowledgment on his part that some symptomology was indeed present. Nevertheless, the presence of symptoms is not enough to satisfy the requirements of section 4 of the 1987 Act. Rather, in my view the findings of Dr Gehr do amount to such findings of pathological change. Dr Gehr found muscle wasting around the right knee and the presence of crepitus, which he attributed to the injurious incident at issue.

55. Moreover, the fact the applicant had a right knee injury in 2004, it is something which can be taken into consideration when assessing the level of whole person impairment arising from this injury. If appropriate, an AMS will make a deduction for any pre-existing problems with that right knee, keeping in mind the prior injury in 2004.

56. Accordingly, I find on the balance of probabilities that the applicant suffered an injury to his right lower extremity (leg) in the incident on 22 November 2017, and that body system will therefore also be referred for determination by an AMS.

SUMMARY

57. Given the findings made above, the Commission will make the orders set out in page 1 of the Certificate of Determination.