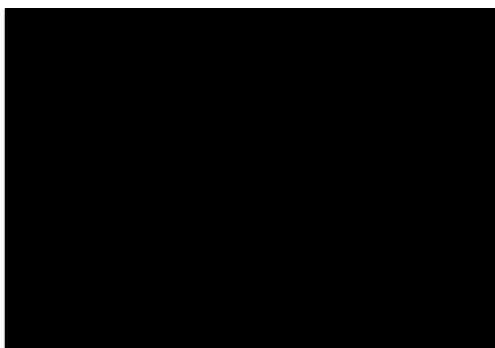


Submission of Anne Lestin



Years of service: 29 years

Postal Delivery Officer – Traralgon Delivery Centre

1. I would ask the Inquiry to consider my case as outlined by my lawyers in the enclosed Applicant's Statement of Facts, Issues and Contentions.
2. Put simply, Australia Post distorted the opinion of the treating specialist and used this as a reason to cease liability for my back & sciatica. This determination was made on 19 November 2008. It was not until 31 August 2009 that the Litigation Section undertook a reconsideration of own motion of this determination.
3. In the meantime I suffered considerable anxiety that I would be put off at work as I then was managed under the Non Work Related Medical Restrictions Policy. I was stressed by the Administrative Appeals Tribunal process and suffered considerable financial hardship as a result of this determination.
4. I believe that Claims Managers who make such unsound decisions should be reviewed and receive some training to decrease the likelihood of such decisions.

IN THE ADMINISTRATIVE APPEALS
TRIBUNAL
VICTORIAN REGISTRY
AT MELBOURNE

)
)
) No. V2009/0371
)
)

BETWEEN:

MS ANNE LESTIN

Applicant

- and -

AUSTRALIAN POSTAL
CORPORATION

Respondent

APPLICANT'S STATEMENT OF FACTS, ISSUES AND CONTENTIONS

Date of Document:

Filed on behalf of:

The Applicant

Prepared by:

Maurice Blackburn
Lawyers
Level 10, 456 Lonsdale Street
Melbourne Vic 3000

Solicitor's Code: 564
Tel: (03) 9605 2700
DX: DX 466 (Melbourne)
Ref: DXL/3002979 901

PART 1 – DECISION UNDER REVIEW

1. 2009/0371 – Reviewable Decision of 18 December 2008 (T84/143-145) was made pursuant to the *Safety, Rehabilitation and Compensation Act* 1988 (the SRC Act) in relation to a primary Determination, dated 19 November 2008 (T77/132-133).
2. The effect of the Decision is to find that as at 19 November 2008, the Respondent had no present liability to pay compensation to Ms Lestin pursuant to ss 16 and 19 of the SRC Act in respect of "**Aggravation of degenerative condition of lumbar spine L4/5 and L5/S1 with right sided sciatica**", the subject of a claim dated 14 March 2008.

PART 2 – REASONS FOR DECISION

3. The Respondent gave as reasons for the Decision:
- (a) [REDACTED] the Applicant's treating Neurosurgeon, had opined that Ms Lestin suffers from an underlying degenerative disease of the lumbar spine;
 - (b) Any liability of Australia Post falls to be determined by s 5B of the Act;
 - (c) As a result of her injury, Ms Lestin has been working in accordance with medical restrictions and has not been performing any motor cycle delivery duties which was initially seen as the contributor to the aggravation of her degenerative lumbar spine condition;
 - (d) Therefore, Australia Post considered that [REDACTED] had concluded that Ms Lestin's current employment is not contributing to her condition which (Australia Post asserted) [REDACTED] had concluded was currently in remission, and that none of her symptoms related to the exacerbation in February 2008.
4. The report of [REDACTED] referred to is dated 25 October 2008 (T70/118-121).

PART 3 – BRIEF STATEMENT OF FACTS

5. [REDACTED]

Employment

6. The Applicant Commenced work with Australia Post in 1980, some 28 years prior to her claim for compensation completed in March 2008. At all material times she has been employed as a Postal Delivery Officer, designation SPD02, located at the Traralgon Delivery Centre.
7. Her duties involved sorting of mail for a delivery round and riding a motor cycle with mail to make deliveries to customers of Australia Post.

Prior history

8. Ms Lestin was involved in a motor vehicle accident around 1985 and sustained a whiplash injury to her neck. This was not in the course of her

employment with Australia Post. She was off work for a short period. She suffered no fractures. The injuries resolved after a period of time, but the Applicant is not able to recall how long.

9. In 1998 whilst conducting a bicycle delivery round, a car backed out of a driveway causing Ms Lestin to fall to the ground. She sustained bruising to her ribs and required physiotherapy. She may have had a short period of time off work, but she is not presently able to recall how long. Her symptoms resolved after a period of time.

2001 – right shoulder, head and middle back injury

10. On or about 20 August 2001, Ms Lestin suffered a fall in the driveway of a property on her round. This was caused when a car caught her bike and forced her and the bike on to the ground. She fell on to her right side.
11. The Applicant lodged a claim form (T6/11-13) and an incident report (T3/7-8). The claim was accepted by Australia Post on 29 October 2001 as "right shoulder and mid-back injury" (T12/19). Liability was accepted for 12 sessions of physiotherapy treatment. Ms Lestin was certified by [REDACTED] as fit for alternative duties from 20 August 2001 to 23 August 2001 inclusive (T4/9), and from 23 August 2001 to 26 August 2001 (T5/10).
12. She was certified in a Fitness for Duty Assessment dated 29 August 2001 as needing physiotherapy (T7/14) and certified as requiring restricted hours for one week and lifting restrictions in a Medical Certificate dated 17 September 2001 (T8/15).
13. Further restrictions limiting lifting to no regular lifting from below the knees for more than 5 kg was set out in a further Fitness of Duty Assessment, dated 24 September 2001 (T9/16).
14. In a medical report dated 27 September 2001, [REDACTED] describes an injury to the right shoulder area with restricted movement and diagnoses a soft tissue injury to the right shoulder, and recommends some modification to her duties with an expected recovery over a period of six to eight weeks (T10/17).
15. In a Fitness for Duty Assessment dated 9 October 2001, she was certified as fit to work from 9 October 2001 and ongoing with no restrictions, and noted to be still attending physiotherapy "Fit for Work" (T11/18).

2003 – right shoulder injury

16. On 2 July 2004, the Applicant complained of pain in the middle back and completed an incident report on 6 July 2004 which described pain in the lower back and hands over a period of a few weeks, with no specific cause (T23/35-36).
17. On 13 July 2004, Ms Lestin completed a further incident report claiming numbness in both hands and the middle back (T24/37-39) in which she described a numbness sensation in the middle back sometimes while sorting mail and while sleeping, causing her to wake with a pain "... like my hands are burning". She also noticed a loss of strength in her hands. She noted she had recently made a delivery of two lots of C5 householders and over the last few weeks had been working longer hours (see T24 at 39).
18. On 13 August 2004, [REDACTED] General Practitioner, provided a report to Australia Post noting an aggravation of low back pains and a worsening of longstanding pain in the back and arms. It was considered that lumbosacral and cervical spondylosis were probably due to prolonged standing and lifting heavy objects at work. The GP opined that Ms Lestin suffered from left carpal tunnel syndrome and spondylosis of the spine – cervical and lumbosacral, and recommended further investigations (T26/42-44).
19. Australia Post denied liability for the back claim in a Determination 30 August 2004, (T27/45-47) and for a claim for "Numbness in both hands" (T29/49). It accepted liability for "left carpal tunnel syndrome" ("CTS") only.
20. [REDACTED] provided a subsequent undated report (T28/48) in which he diagnosed right CTS. He recommended the same treatment for both hands that is, anti-inflammatory medication and physiotherapy.
21. Despite this report Australia Post continued to deny liability for right CTS in a Determination dated 21 December 2004 (T29/49).
22. She was certified as unfit to attend work on 29 February 2008 (T30/50) due to low back pain ("LBP"). In his second letter of the same date [REDACTED] stated that the LBP was "secondary to her work-related back problem".
23. She was certified as unfit to work on 3 March 2008 and reported the same date by [REDACTED] (T33/53).

24. On 28 February 2008 Ms Lestin reported "pain in back and leg (R)" in an incident report dated 4 March 2008 (T34/54). In answer to question 11 "Describe how the accident happened" she stated:

"Whilst delivering mail by motorcycle to 25 Albert Street I went to put my left foot down and my foot slipped. I lost balance and jarred lower back as I tried to prevent m/cycle from falling".

25. On 14 March 2008 the Applicant completed and lodged a claim for compensation (T35/55-57) for "right back and leg pain". In an addendum she stated:

"Over the past few months I have been having some pain in my right lower back but presumed it might have something to do with my menstrual cycle as the pain seemed to be coming from deep inside and I did not have pain in regards to bending or moving and only when the pain became severe and was affecting my right leg that I followed it up with my doctor".

26. Australia Post took some time to determine liability. Whilst it was doing so CRS Australia provided an "initial assessment report" on behalf of Australia Post. In this it was noted that Ms Lestin had experienced mild LBP for approximately six months and reported a sharp stabbing pain (sciatica) down the back of her right leg stopping at the knee since Thursday, 28 February. It noted that her medication had changed from Mobic to Ibuprofen on 4 March 2008. The description of Ms Lestin's attribution of her back pain to the slipping of her left foot was provided (T38/63). The report also noted "Ms Lestin has been using some second-hand ankle boots since Christmas 2007".

27. Recommendations were made for Ms Lestin to work within medical restrictions, to be reviewed by her GP on 13 March 2008, to arrange the purchase of some new high motorbike boots. It was highly recommended that someone follow her to ensure that her delivery technique was safe and that she manoeuvre the motorbike as close as possible to the letterbox and scanned the terrain for placement of her left foot. If she could not safely deliver from the motorcycle she was to disembark to complete delivery.

28. On 7 March 2008 Ms Lestin underwent a CT lumbar spine which concluded:

"Dorso-central protrusion L4/5, L5/S1 discs, larger at the latter level apparently indenting the L5, S1 nerves the right S1 nerve appears impinged."

29. On 28 March 2008 Australia Post denied liability for "right back and leg pain" by way of a Determination of the same date (T42/69-71).
30. By letter dated 6 April 2008 Ms Lestin requested an extension of time to obtain medical evidence for a reconsideration of that determination (T43/72). She advised that she was booked in to see a specialist. She sent a further letter clarifying the time required on 23 April 2008 (T44/73).
31. On 24 April 2008 [REDACTED] provided a certificate of capacity diagnosing "right sciatica L4/5, L5/S1 disc prolapse with prob compression right S1 nerve root". In answer to the question "Injury/disease is consistent with patient's description of cause? He answered 'yes'". Ms Lestin was certified as fit for modified duties from 24 April 2008 to 23 May 2008.
32. On 22 May 2008 [REDACTED] produced another certificate of capacity in similar terms for modified duties from 24 May 2008 to 23 June 2008 (T48/78).
33. On 26 May 2008 Ms Lestin underwent an MRI lumbar spine. This included a conclusion as follows:
- "Two level (L5 and L5/S1) disc degeneration with mild to moderate central canal stenosis at L4/5 with small central canal at L5/S1 exacerbated by broad-based right paracentral disc protrusion with posterior displacement of the right S1 nerve root. No free disc fragment is seen."* (T49/79)
34. On 26 May 2008 Ms Lestin underwent a lumbar spine x-ray whose report stated:
- "Lateral flexion/extension radiographs were performed. Alignment is anatomic in both positions. Loss of disc space height and marginal spur is demonstrated at L4/5 and L5/S1. End plates are intact."*
35. On 6 June 2008 [REDACTED] provided a report to the Communication Workers' Union which stated that he had "determined that she has a degenerative condition of lumbar spine with worn-out discs at L4/5 and L5/S1. Her current condition with back pain and right-sided sciatica has quite clearly been aggravated by work that she has done for Australia Post whilst doing rounds on a motorbike." (T51/84)
36. On 6 June 2008 [REDACTED] provided a certificate of capacity in similar terms to his previous certificates and certified Ms Lestin as fit for modified duties from 24 June 2008 to 23 July 2008 (T52/85).

37. On 9 June 2008 [REDACTED] provided a medical report (T53/86).
38. In the report he noted that he had discussed with her, her employment with Australia Post since 1980. He stated:

"In more recent years she had been using the motorbike to deliver mail. She described how her job involved bending and lifting and at times there was a fair bit of jolting whilst on the bike. She could not recall a specific incident where her pain started, more an insidious onset of pain over the preceding six months or so." And was referred to neurosurgeon, [REDACTED] on 13 March 2008.

"In [REDACTED] report to me dated 26 May 2008 he was able to get Anne to elaborate the details of her job. It was apparent that when fellow workers where (sic) on leave that Anne was required to do relieving rounds on the motorbike. She had noticed that the pain was worse during these relieving months and would ease as soon as she did less motorcycle work. He stated that her L4/5 and L5/S1 disc were 'demolished' and that this was degenerative. He said he was quite sure that this was exacerbated by work on the motorbike. He has advised that Anne no longer rides the motorbike and avoids bending and twisting at the waist. He has initially advocated a conservative approach to treatment. Anne has been advised to undertake a walking regime and to avoid those activities now shown to aggravate her back".

39. Dr [REDACTED] concurred with the assessment and opined that the restrictions will be long-term. He went on to state:

"It is my opinion that her employment as a Postal Worker has contributed to the premature development of multi-level lumbar disc disease. This has resulted through a combination of riding the motorcycle on uneven terrain with associated jolting and twisting and as a result of bending and lifting in the course of her employment with Australia Post over the last 20 years or so."

40. On 20 June 2008 Australia Post provided a Reviewable Decision revoking its earlier Determination to reject liability and finding that liability did exist in relation to "aggravation of degenerative condition of lumbar spine L4/5 and L5/S1, with right-sided sciatica" sustained in the course of Ms Lestin's employment on 28 February 2008.

41. On 17 July 2008 [REDACTED] certified Ms Lestin as unfit to attend work on 3 March 2008 (T56/94).
42. On 21 August 2008 he certified her as fit for modified duties from 24 August 2008 to 23 September 2008. These included "no bending at the waist, no riding motorcycle, no lifting > 12kg, avoid twisting lower back" (T60/100).
43. On 25 August 2008 [REDACTED] treating neurosurgeon of Ms Lestin, provided a certificate of capacity in which he described a diagnosis "L4/5, L5/S1 disc injuries which were consistent with the patient's description of cause". He certified Ms Lestin as fit for modified duties from 25 August 2008 to 22 September 2008 as "Not to do bike rounds, except on pavements. And not until New Year. To start at 2 hours per day" (T61/101).
44. On 11 September 2008 [REDACTED] produced a certificate of capacity certifying Ms Lestin as fit for modified duties from 24 September 2008 to 9 October 2008 with the same restrictions as his previous medical certificate (T63/106).
45. On 9 October 2008 he produced a further certificate of capacity in similar terms certifying Ms Lestin as fit for modified duties from 24 September 2008 to 23 October 2008 (T65/110).
46. By letter dated 23 October 2008 [REDACTED] referred the Applicant to [REDACTED] of Latrobe Valley Sport Physio for treatment (T67/114).
47. On 23 October 2008 [REDACTED] certified the Applicant as fit for modified duties from 24 October 2008 to 23 November 2008 in similar terms to his previous certificates (T68/115-116). He added "Anticipate that she will be fit to return to bike rounds on paved surfaces only doing two hours per day when reviewed in the New Year".
48. On 25 October 2008 [REDACTED] treating neurosurgeon, provided a report to Australia Post (T70/118-121). In this report he opined as follows:

"I formed the impression that this lady had cumulative changes of injury to the lower two motion segments of her lumbar spine, and on the basis of the history as presented to me I felt that her job riding the motor bike had contributed to these injuries,

particularly when she did the round taking in rough terrain for a month some time in the past".

49. Later, under the heading "Conclusions", he stated:

"This lady has degenerative (i.e. cumulative injury) changes at the L4/5 and L5/S1 levels in her lumbar spine, and the history would appear to be quite clear that at times her work delivering mail on a motor cycle has exacerbated her condition".

50. In answer to specific questions put to him, [REDACTED] stated:

"3. Does Ms Lestin's current claimed condition **now** relate to any underlying previous or degenerative changes?
[Answer] At present Ms Lestin's condition is in remission, and none of her symptoms relates to the exacerbation in February.

4. If there is aggravation of any underlying pre-existing or degenerative condition, have the effects of the underlying pre-existing or degenerative condition surpassed the effects of any work-related aggravation? If no, when would aggravation cease? Please provide us with a timeframe.

[Answer] Aggravation has ceased at the present time, but there may be aggravation when Ms Lestin tries the motor cycle rounding in the New Year.

18. Does her work restriction still relate to the incident in February 2008 or to any underlying degenerative changes?

[Answer] The motor cycle rounding restriction and the restriction on bending at the waist and lifting from below Ms Lestin's level do indeed still relate to the exacerbation of February 2008. In my opinion, Ms Lestin could successfully argue that were it not for the exacerbation in February 2008 (the straw that broke the camel's back, so to speak) restrictions would not have had to be imposed".

51. By letter dated 7 November 2008, Australia Post accepted liability under s 16 for hydrotherapy treatment (T81/124).

52. On 19 November 2008 Australia Post made a Determination based on the report of [REDACTED] dated 25 October 2008 that:

- "• *As at 19 November 2008, there is no present liability for compensation benefits under the provisions of s 16 of the SRC Act in respect of medical costs;*
- *As at 19 November 2008, there is no present liability for compensation benefits under the provisions of s 19 of the SRC Act in respect of incapacity payments".*

53. On 16 December 2008 Maurice Blackburn, as agents for Ms Lestin, sought a reconsideration of the Determination dated 19 November 2008 and disputed that the opinion of [REDACTED] supported the Determination (T83/141-142).
54. On 18 December 2008, the Respondent made the Reviewable Decision which is the subject of these proceedings, number V2009/0371 (T84/143-145).
55. On 5 January 2009 [REDACTED] certified Ms Lestin fit for modified duties in similar terms to his previous Certificates for the period 6 January 2009 to 5 February 2009.

PART 4 – ISSUES

56. The following issues are raised for determination:
- (a) At or after 19 November 2008, did the employment injury or injuries sustained by the Applicant result in incapacity for work?
 - (b) At or after 19 November 2008, what treatment costs have been incurred or are recommended in relation to the Applicant's injuries?

PART 5 – CONTENTIONS

57. The Applicant contends that as a result of her injuries in the course of her employment with Australia Post, she has a continuing incapacity for work.
58. The contention of the Reviewable Decision that as at 19 November 2008 Ms Lestin's condition does not continue to be significantly aggravated by her employment is erroneous. The injuries, contributed to by her employment, continued to result in incapacity for work and need for treatment well after the date, and continue to result in disability entitling Ms Lestin to compensation pursuant to the SRC Act.

59. The report of [REDACTED] does not support the Reviewable Decision. In particular, the Applicant refers to his Answer to question 18 set out in paragraph 50 above.

60. In a report dated 30 April 2009, to the Applicant's Solicitors [REDACTED] [REDACTED] Consultant Neurosurgeon commented as follows:

"I consider on the information provided that this lady has suffered aggravation of lumbar spine degenerative changes, with intervertebral disc derangement. I consider that on the balance of probabilities that this lady has suffered an actual injury of intervertebral disc damage with derangement as a result of the aggravation of the long-standing intervertebral disc degenerative changes, with the described working activities being a significant contributing factor. I consider on the information provided, that employment has been a significant contributing factor to the aggravation of lumbar degenerative changes with associated intervertebral disc derangement. I consider on the information provided that on the balance of probabilities, this lady's employment has represented a significant contributing factor to the aggravation of underlying pre-existing lumbar spine degenerative changes.

Noting that she did not have any pain before 2007 with the onset of back pain and then later leg pain following the awkward motor cycle lifting incident at work and the continuation of pain since then, I consider that the effects of her employment aggravation are still operative.

It is not possible to state whether her present symptoms would have developed at a later stage in the absence of her work activities. Such symptoms may have occurred, but it is common clinical experience that people may have advanced lumbar spine degenerative changes for many years, without the onset of any symptoms.

I consider that ongoing conservative treatment is appropriate. The outcome of any surgical procedure (such as 2 level spinal fusion) could not accurately be predicted for her.

I consider that she should avoid the activities I have referred to above. She should modify her mail delivery procedures so that she avoids jolting on a motor cycle or performing forced spinal mobility or extended reaching".

61. Mr [REDACTED] also assessed the Applicant as having suffered a degree of whole person impairment (WPI) at 13% under Table 9.17 of the Comcare Second Edition Guides.
62. The decision to cease liability for incapacity benefits and medical and related expenses should be set aside.

PART 6 – ORDERS SOUGHT

63. The Applicant requests the Tribunal to make the following Orders:
- (a) The Reviewable Decision dated 18 December 2008 (T84/143-145) is set aside;
 - (b) The Tribunal decides in substitution for the Decision set aside:
 - (i) The Applicant suffered incapacity and impairment as a result of injuries affecting the lower back and right leg arising out of or in the course of employment with Australia Post, the subject of a claim made on 14 March 2008 which gives rise to an entitlement to compensation pursuant to the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act);
 - (ii) The Respondent shall pay to the Applicant:
 - A. The costs of all medical and related treatment expenses incurred in respect of the injury pursuant to s 16 of the SRC Act;
 - B. Weekly payments of compensation in respect of incapacity for work for all periods when the Applicant's ability to earn was less than the normal weekly earnings pursuant to s 19 of the SRC Act.

- (iii) The Respondent shall pay the Applicant's costs and disbursements in respect of these proceedings pursuant to s 67 of the SRC Act.

DATED the 22nd day of July 2009.

Maurice Blackburn

.....
Maurice Blackburn
Solicitors for the Applicant

FILED on behalf of the Applicant

Reference: 08/309188
 Telephone: 9202-6785

HUMAN RESOURCES DEPARTMENT
 NEW SOUTH WALES

219-241 Cleveland Street
 STRAWBERRY HILLS NSW 1420
 Facsimile 02 9202 6027
 auspost.com.au

31 August, 2009

Mr Damian Lynch
Maurice Blackburn Lawyers
PO Box 523
MELBOURNE VIC 3000

Dear Mr Lynch,

RE: ANNE LESTIN V AUSTRALIA POST CORPORATION
AAT NUMBER 2009/0371

I refer to the reconsideration dated 18 December 2008 which affirmed the determination dated 19 November 2008 for no present entitlement to pay compensation in respect of 'aggravation of degenerative condition of lumbar spine L4/5 and L5/S1 with right sided sciatica'.

I have reviewed the available evidence and decided to exercise my powers under section 62(1) of the *Safety, Rehabilitation and Compensation Act 1988* by undertaking a reconsideration of own motion of the determination dated 19 November 2008.

I refer to a medical report dated 20 July 2009 by [REDACTED] Neurosurgeon to be correct in relation to Ms Lestin's degenerative changes at L4/5 and L5/S1 levels in her lumbar spine. I am now prepared to accept [REDACTED] opinion that Ms Lestin suffers degenerative or cumulative injury changes in the lumbar spine with intermittent exacerbation both at home and at work.

I note [REDACTED] comments:

"It would appear on the basis of history and [REDACTED] medical records that the incident on 28.02.2008 changed the level of symptomatology and the level of fragility in Ms Lestin's low back, and the history of exacerbations with minor trauma since then is consistent with increased fragility since that injury. I therefore conclude that Ms Lestin's job with Australia Post has made (and continues to make) a significant contribution to her low back symptoms and disability."

Accordingly, I **REVOKE** the determination of 19 November 2008 and determine that liability is accepted pursuant to sections 16 and 19 of the *Safety, Rehabilitation and Compensation Act 1988* in respect of 'aggravation of degenerative condition of lumbar spine L4/5 and L5/S1 with right sided sciatica'.

Please note that this decision revokes the determination of 19 November 2008 which was affirmed by the reviewable decision of 18 December 2008. This decision overturns the reconsideration of 18 December 2008, which is the subject of an Administrative Appeals Tribunal proceeding 2009/0371. Accordingly, Administrative Appeals Tribunal

procedure 2009/0371 is aborted and we ask you to withdraw these proceedings. However, pursuant to Section 67(2) of the Act you are entitled to submit any account for legal costs reasonably incurred by you in relation to these proceedings to date.

If you are dissatisfied with this decision you will need to lodge an application with the Administrative Appeals Tribunal to review the decision. Please note that you will be liable to pay your legal costs, if any, if you ask for a review and the AAT's decision is not in your favour. If you succeed, costs or part costs may be payable. Full details including the address of the AAT are outlined in the enclosed form: "Employees' Rights and Responsibilities".

Yours sincerely,

