PO-7005

Ombudsman's Determination

Applicant	Ms R Mureph
Scheme	NHS Pension Scheme
Respondent(s)	NHS Business Services Authority (**NHS BSA**)

Complaint summary

Ms Mureph has complained that her eligibility for a permanent injury benefit (**PIB**) has not been considered in a proper manner.

Summary of the Ombudsman's determination and reasons

The complaint should be upheld against the NHS BSA because they did not give due consideration to the contribution Ms Mureph's NHS employment made to her back condition.

Detailed Determination

Relevant regulations

1. The regulations which apply in Ms Mureph's case are the NHS (Injury Benefits) Regulations 1995 (SI1995/866) (as amended).

2. As at the date of Ms Mureph's application for a PIB, Regulation 3 provided,

> "(1) … these Regulations apply to any person who, while he -
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> (a) is in the paid employment of an employing authority …
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> (hereinafter referred to in this regulation as "his employment"), sustains an injury before 31st March 2013, or contracts a disease before that date, to which paragraph (2) applies.
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> (2) This paragraph applies to an injury which is sustained and to a disease which is contracted in the course of the person's employment and which is wholly or mainly attributable to his employment and also to any other injury sustained and, similarly, to any other disease contracted, if -
>
> (a) it is wholly or mainly attributable to the duties of his employment …"

3. Regulation 4 provided that benefits shall be payable to any person to whom regulation 3(1) applies whose earning ability is permanently reduced by more than 10 per cent by reason of the injury or disease (referred to as Permanent Loss of Earning Ability or **PLOEA**).

Material facts

4. Ms Mureph was employed as a Recovery Nurse for Abertawe Bro Morgannwg University Health Board (the **Health Board**).

5. In March 2011, Ms Mureph was attending to a patient sitting on a trolley. While Ms Mureph was adjusting the back of the trolley, the patient sat back suddenly resulting in Ms Mureph taking his full weight. She experienced pain in her back. An incident report recorded Ms Mureph saying that she spoke to a colleague at the time and also took some painkillers. Her sickness record shows that she had three days' sick leave in March 2011, for "back strain". This incident was the subject of a personal injury claim by Ms Mureph. Liability was admitted by the Health Board for the purposes of an insurance claim.

6. Ms Mureph met with her manager in July 2011. The notes of the meeting record that she still had issues with her lower back; especially when there was a heavy workload. Ms Mureph's manager recorded that Ms Mureph felt that she would benefit from a move to a less strenuous environment. She completed an occupational health referral form for Ms Mureph and gave the reason as "lower back pain, ? related to work related incident worse in heavy workload environment".

7. In September 2011, she was seen by the Health Board's occupational health department. In a letter to Ms Mureph's manager, the occupational health nurse reported that Ms Mureph had been suffering with the symptoms of lower back pain which she said had been exacerbated by an incident at work. The occupational health notes record that Ms Mureph had returned to work on full duties with continuing residual lower back pain.

8. In 2012, Ms Mureph fell and injured her knee. She went on sick leave in July 2012. In September 2012, Ms Mureph's manager referred her to the occupational health department at her request. The referral recorded that Ms Mureph was on long term sick leave with a knee injury and back pain. Her manager asked for advice on whether Ms Mureph could continue in her current role and whether there were any adjustments which could be made to support her.

9. On 3 September 2012, the physiotherapy practitioner treating Ms Mureph, Mr Collins, wrote an open letter. In this, he said that Ms Mureph had referred herself for physiotherapy approximately one year previously for low back pain. Mr Collins said that Ms Mureph had "a longstanding history of low back pain which was aggravated by supporting a patient on a 'faulty bed' in recovery room in theatres". He said that Ms Mureph had reduced lumbar spine extension and was tender and stiff over her right lumbar facet joints. Mr Collins explained that extensive physiotherapy, including hydrotherapy and acupuncture had not helped. He said that Ms Mureph had seen an orthopaedic consultant following her fall and had had an MRI scan, which was negative. Mr Collins said that the orthopaedic consultant thought that Ms Mureph's knee pain may be related to her lumbar spine problems.

10. Ms Mureph underwent an MRI scan in October 2012. In a letter to Ms Mureph's GP, the consultant orthopaedic surgeon, Mr Davies, said that the results for her knee were unremarkable. He said that the results for her back showed a small disc bulge at L4/5, minor narrowing of the lateral recess at L4/5 and some facet joint hypertrophy but no other major abnormality. Mr Davies suggested a referral to Neurology.

11. Ms Mureph was seen in the Health Board's occupational health department in October 2012. The clinical manager wrote to Ms Mureph's manager on 5 October 2012. He said he had been informed that Ms Mureph's main underlying back condition was the result of an injury sustained at work. He said that she was currently undergoing physiotherapy but symptom relief had been intermittent and limited. He referred to the MRI results and said that Ms Mureph was awaiting a referral to Neurology. The clinical manager said that he was "cautiously optimistic" that Ms Mureph's symptoms would moderate but said that, at present, she was unfit for work.

12. Ms Mureph was seen by Dr Egeler, a consultant anaesthetist, on 22 October 2012. She underwent a spinal block for her back pain but this was unsuccessful. Ms Mureph was referred to a consultant neurologist, Dr Walters.

13. The occupational health department's clinical manager wrote to Ms Mureph's manager again on 1 November 2012. Amongst other things, he said he had been

asked to advise on a temporary injury allowance (**TIA**). The clinical manager said that Ms Mureph had described the 2011 incident to him and had said that she had felt an immediate twinge in her back and side. He requested sight of an incident report. The clinical manager went on to say that, on the basis of his assessment, he would advise that Ms Mureph's current condition was "likely to be considered as mainly due to the injury sustained in March 2011". Ms Mureph was awarded a TIA in February 2013.

14. In a letter to Ms Mureph's GP, dated 7 March 2013, Dr Walters referred to Ms Mureph having had an accident at work in March 2011. He said that an MRI scan of her lumber spine had been normal. Dr Walters said that he would refer Ms Mureph for an MRI scan of her cervical and thoracic spine because he occasionally saw patients who had pain from a "hemi cord type problem which can be related to trauma, sometimes quite trivial trauma". He said he would also request an ultrasound scan to ensure that no other organ was causing the pain.

15. Dr Abdulla, an occupational health doctor at the Health Board's occupational health department, wrote to Dr Egeler on 8 March 2013. He asked if Ms Mureph's appointment could be brought forward because she had been on sick leave for some time and her job might be compromised. Dr Abdulla also wrote to Ms Mureph's manager explaining that she continued to have quite severe pain and was receiving appropriate treatment for it.

16. Dr Walters wrote to Ms Mureph's GP on 16 April and 8 May 2013, saying that the ultrasound scan was normal and the MRI scan showed no cord compression.

17. Ms Mureph attended her local chronic pain clinic in May 2013. In a letter to her GP, Dr Egeler said that she had had a trigger point injection which had not helped. He said that Ms Mureph used a crutch and had probably developed pain in her thighs, knees and foot as well as her back. Ms Mureph says that she was using a crutch because she had pain radiating down her back and leg. Dr Egeler said that Ms Mureph was concerned that the pain was of a "nerve type" but he did not think it was. He said that an MRI scan of Ms Mureph's lumbar, thoracic and cervical spine was "essentially age related normal". Dr Egeler said that an x-ray of Ms Mureph's knee was also normal. He noted that she was tender over her paravertebral muscles and went on to discuss treatment options.

18. In May 2013, Ms Mureph was awarded an Industrial Injuries Disablement Benefit (**IIDB**) in respect of the 2011 incident. She was assessed at 14% disabled because of "reduced painful movements of back". The award was due for review in March 2014.

19. Ms Mureph applied for a PIB in September 2013. On 18 October 2013, the NHS BSA's occupational health advisers issued a decision declining Ms Mureph's application. They said they were unable to conclude that she had suffered an injury which was wholly or mainly attributable to the duties of her NHS employment. The medical advisers said,

"The incident is clearly recorded. EA state that she was off sick from 16.3.11 – 19.3.11. There is then reference to difficulties with her back at work, but no further absence is noted until she went on long term sick on 17.7.12. It appears that following the incident, OH assessed her in Sep 2011, when she was carrying out her full duties; however, with symptoms of lower back pain. The applicant had raised the possibility of redeployment at this stage.

She was seen by an extended scope physiotherapy practitioner in September 2012, when her back symptoms were unchanged. It is recorded here, and in OH records, that her knee pain developed following a fall in a hotel in early 2012, when she sustained swelling and bruising of the knee. At that time she was absent with anterior knee pain, and irritation of the femoral nerve. She was subsequently seen and treated by an Orthopaedic surgeon for knee pain of uncertain aetiology, which has not been linked to her back injury. She was also seen by a Neurologist who carried out full MRI investigations of the rest of her spine. These have been reviewed by her specialists and only minor degenerative changes noted. Her Pain specialist comments in May 2013, that her spine is essentially normal for age.

Whilst back symptoms have been attributed to the incident, it appears that she was able to return to her duties for a very considerable period of time before going off sick. Investigation has not revealed any signs of injury, or any explanation for her symptoms. Subsequent absence appears to be related to her knee injury, which appears to have caused significant symptoms at the time. The Orthopaedic surgeon has no explanation for her symptoms but does not link them to her injury at work. Investigations have all been normal.

The incident undoubtedly occurred, and is likely to have led to a short term soft tissue injury; however, she does appear to have recovered from this and continued working. It is difficult to tease out exactly what precipitated her absence from July 2012, as the GP records of her back pain start in Sep 2012, but her knee seems to be a significant factor.

The evidence is inadequate to support the view that there is any ongoing PLOEA wholly or mainly attributable to the incident in March 2011. There is no evidence that any other aspect of her NHS duties contributed significantly to her current disability, and so PLOEA."

20. Ms Mureph appealed this decision under the Scheme's internal dispute resolution (**IDR**) procedure. She made the following points:

- She had not been able to perform her full duties after the 2011 incident and she had brought this to the attention of her managers on several occasions.
- She had returned to work out of financial necessity and because she was conscientious.
- Staff shortages in Theatre Recovery made her duties more physically demanding and this exacerbated her injury.

- She had been told that she would be referred for physiotherapy but this did not happen. She self-referred when she was told she could do so.
- She made several requests to move to a less strenuous environment. This was first recorded in a meeting with her manager in July 2011.
- She had been awarded IIDB and a TIA.
- She had been receiving physiotherapy for two years without significant improvement. It had been discontinued because it was not helping her; not because her symptoms had cleared up.
- She did not have a chronic back problem prior to the 2011 incident. There were no medical records detailing any chronic low back problems prior to the 2011 incident.
- She acknowledged that there were two occasions in 2009 when she had had sick leave amounting to seven days due to back strain. This was temporary in nature and two years prior to the 2011 incident.
- Mr Collins had asked her if her back pain had been long standing and she had replied that it had been since the time of the 2011 incident.
- Atos had said that investigations had not shown any signs of injury but the injury was to soft tissue which would not necessarily show up on an MRI scan.
- Atos had suggested that her decision to take sick leave in July 2012 was related to her knee problem; it was because of her back symptoms as well as her knee. Her knee was investigated and no abnormality was detected. It had not caused her serious pain or physical limitation in the same way as her back.
- Dr Davies had suggested that her knee problems might be related to her back problems.

21. Ms Mureph submitted a letter from Dr Abdulla, dated 29 November 2013, in support of her appeal. In his letter, Dr Abdulla had said that he felt that Ms Mureph was suffering from a condition which was mainly attributable to her work. He said she had had an injury at work in March 2011, which had been accepted for the purposes of awarding a TIA. Dr Abdulla referred to the suggestion, by an orthopaedic consultant, that Ms Mureph's knee problems might be related to her lumbar spine. He explained that Ms Mureph was in considerable pain and had been referred to a pain clinic. Dr Abdulla said that Ms Mureph was severely limited in what she could do. He did not think she would be able to undertake sedentary work because she could not sit for a prolonged period. Dr Abdulla concluded,

> "The primary problem, I feel is the back problem related to her work. Specifically, originating from the work related injury, that it is mainly attributable to the duties of her NHS employment."

22. Ms Mureph attended her local chronic pain assessment team in January 2014. In a letter to her GP, Dr Richie, a chronic pain specialist, said that he understood, from discussing the matter with Ms Mureph, that her problem started after the 2011 incident. He went on to say that the physiotherapist felt that Ms Mureph's right side

muscles had tightened over time and this was partly due to posture. Dr Richie said that was not what had caused the problem but had "resulted from the original injury".

23. In July 2014, Ms Mureph was awarded further IIDB. The award was for a 15% loss of faculty relating to spinal and lower limb dysfunction and is due for review in May 2016.

24. The NHS BSA issued a stage one IDR decision on 7 March 2014. They declined Ms Mureph's appeal. The NHS BSA explained that her case had been reviewed by their medical advisers and quoted the advice they had received. The NHS BSA decision maker said that, although she was not medically qualified, it appeared to her that the medical advisers had taken full account of all the available medical evidence. She said that the rationale they had offered appeared to her to be reasonable in the context of the Scheme's requirements. The NHS BSA's medical adviser had said:

- The incident report had shown that Ms Mureph reported having strained her back on 15 March 2011. She had mentioned this to a colleague and taken some painkillers.
- Ms Mureph's employer had said that she had continued to work immediately after the incident and that she took sick leave from 16 to 19 March 2011.
- Ms Mureph had acknowledged prior episodes of back pain in 2009.
- The GP's records did not show any consultation for back symptoms around the time of the 2011 incident and Ms Mureph travelled abroad shortly afterwards.
- The first record of back symptoms in the GP's records was 3 December 2012.
- Ms Mureph had requested a move to a less strenuous environment in July 2011 and reported ongoing issues with her back.
- The occupational health department had reported that Ms Mureph had returned to full duties but had persistent lower back symptoms.
- Ms Mureph had requested less strenuous work; this was not a recommendation from the occupational health department. Her employer had said that a less strenuous environment was not available in the theatre department.
- It was contradictory for Ms Mureph to say that she had not returned to full duties and to say that there were staff shortages causing her to feel under pressure to continue working. The evidence indicated that she returned to her full duties and continued to report some back symptoms.
- The evidence indicated that Ms Mureph felt back pain in relation to the incident and incurred three days sickness absence. This was less than the leave taken in 2009.
- The occupational health records showed the first report of back pain on 13 September 2011, which was about six months after the incident.
- The occupational health records also showed that Ms Mureph had reported a similar incident in March 2010.
- The occupational health records contained an entry, dated November 2012, suggesting that the injury sustained in March 2011 was likely to have caused the

chronic symptoms Ms Mureph was experiencing. This related to a claim for TIA, was based on Ms Mureph's report and had an incorrect date for the incident.

25. The NHS BSA's medical adviser concluded,

> "It is considered that the evidence does not show that this applicant required more than three days absence from her physically demanding job nor GP, nor occupational health involvement for the claimed incident, at or around the time of the incident. The evidence does not show that significant pathological change for the worse occurred around the time of the claimed incident.
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> Terminal absence commenced on 17/07/12.
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> On 03/09/12 B Collins, extended scope physiotherapy practitioner, wrote that the member has a long standing history of low back pain, 'which was aggravated by supporting a patient on a 'faulty bed' in recovery room in theatres. This is considered to have been based on the applicant's self report. B Collins does not confirm the date of the relevant claimed incident.
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> The applicant was off work with right anterior knee pain and nerve irritation of her femoral nerve in September 2012. B Collins stated that this may take a while to settle because of her chronic back problems. MRI knee was stated to be unremarkable and MRI lumbar spine showed a small disc bulge at L4/5, minor narrowing of the lateral recess at L4/5, some facet joint hypertrophy but no other major abnormality. There was no surgical target. The diagnosis was 'muscular low back pain'. She had medications and neurological referral/injection treatment were under consideration in October 2012.
>
> On balance it is considered that this member had, at most, temporary exacerbation of her long standing back symptoms, in consequence of the index incident. Within four days she was sufficiently recovered to return to her physically demanding role.
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> Any subsequent back symptoms are considered to be part of her long standing back symptoms and not at all attributable to the duties of her NHS employment. Her requests for less physically demanding duties are considered to be due to her lack of perceived resilience to the demands of her NHS role because of her long standing, non-attributable back symptomatology.
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> It is my opinion that, on the balance of probabilities, the evidence in this case does not confirm that the claimed current back related symptoms were contracted in the course of the applicant's NHS employment and are wholly or mainly attributable to that NHS employment."

26. In addition to the report relating to the 15 March 2011, incident, Ms Mureph's records contain reports dated 13 March 2002 (back/groin/leg strain), 6 August 2002 (patient assault), 26 September 2002 (needle stick injury), 16 December 2002 (neck and left

side strain) and 15 July 2005 (neck/scapular sprain/strain). Her sickness absence record from February 2006 to March 2011 contains (amongst other things) two periods relating to back pain; 15 September for one day and 16 to 21 December for six days.

27. Ms Mureph submitted a further appeal. She disagreed that she had a long standing back problem prior to the March 2011 incident. Ms Mureph said that the two absences in 2009 did not involve the same area of her back or the same symptoms. She pointed out that she had returned to work and managed her work load without further problems for two years. Ms Mureph also disagreed with the diagnosis of lower back pain. She said she had been diagnosed with "musculoligamentus and tight right sided parervertebral muscles". Ms Mureph said that this had been confirmed by Dr Egeler, Dr Ritchie and Atos on behalf of the DWP. She disagreed that the incident had caused a temporary exacerbation of long term back symptoms or that the symptoms were part of a long term back problem. Ms Mureph said that there was an assumption that pathological change for the worse did not occur at the time of the incident but she did not have any symptoms prior to this. She did not agree that she had returned to full duties and said that she had been helped by her colleagues. Ms Mureph said that she had not attended occupational health until September 2011, because her employer had not referred her. She also disagreed that the occupational health department had not recommended less strenuous duties. Ms Mureph also pointed out that the reference to an incident in March 2010, was an error on the part of the occupational health department.

28. The NHS BSA sought further advice from their medical advisers. They then wrote to Ms Mureph, on 24 June 2014, declining her appeal. The NHS BSA said that it was accepted that the March 2011 incident had caused a soft tissue injury which had caused a temporary exacerbation of pre-existing symptoms of back pain. They quoted from their medical adviser who confirmed his understanding of the regulations and that he had seen (amongst other things) the correspondence from Drs Abdulla, Egeler, and Walters and Mr Davies. He said,

> "Ms Mureph states that she injured her back at work on 15/03/2011. She was raising the head of a recovery trolley to assist a patient to sit up. The patient became disorientated, put his weight on the head of the trolley, the locking mechanism had not been in place and Ms Mureph took the weight of his upper body. She states that she felt an immediate twinge in her back. She completed her shift. She was off work from 16/03/2011 until 19/03/2011.
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> She was seen by her GP on 23rd March 2011, with a chest infection; no symptoms of back pain were reported. She was seen later that month for travel advice, twice in April, once in May and again in December 2011, at no time did she mention symptoms of back pain.
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> She returned to work to her normal duties but states that she continued to experience symptoms of back discomfort. Long term sickness absence commenced on 17/07/2012 after she fell outside work and injured her knee.

> I have carefully reviewed the GP records the first entry relating to symptoms of back pain is dated 03/09/2012 “ongoing knee and back pain”.
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> She consulted her GP on 06/01/2012 “disorder of patella …” no reference is made to back pain, and again on 13/07/2012 “… still knee pain …” no reference is made to back related symptoms.
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> She attended occupational health in September 2011 and reported that she had some symptoms of residual lower back discomfort but was at work doing full duties. The management referral in July 2011 referred to low back pain,? Related to an incident at work, worse in a heavy workload environment. A report from [the occupational health nurse] dated 13/09/2011 reads “… suffering with symptoms of lower back pain which she states have been exacerbated by an incident at work …”. Similarly a report from B. Collins …, dated 03/09/2012, records a history of “… longstanding low back pain which was aggravated by supporting a patient on a “faulty bed” …”
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> … It is accepted that Ms Mureph sustained a soft tissue injury to her lumbar spine on 15/03/2011. This did not cause significantly incapacitating symptoms and she did not seek medical advice for this for a number of months. She remained at work until July 2012 after a fall in which she injured her right knee. She consulted her GP at the time of the injury to her right knee and again no reference was made to back pain.
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> Information in Occupational health records indicates that she had a history of back pain, which she must have reported to the practitioners at the time. The evidence therefore confirms that the incident of 15/03/2011 caused a soft tissue injury which exacerbated longstanding back-related symptoms. She referred herself to physiotherapy in September 2011. Back related symptoms then became more severe and were reported to the GP in September 2012. An MRI scan of the lumber spine has revealed minor degenerative changes and no spinal pathology.
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> It is advised that, on the balance of medical probabilities, the incident of 15/03/2011 caused a temporary exacerbation of pre-existing symptoms of back pain. The current severely disabling symptoms of back pain, developed following a fall onto her right knee and are not wholly or mainly attributable to the duties of her NHS employment …”

29. The NHS BSA said that, having taken advice from their medical advisers and considered this against the requirements of the Scheme, they were satisfied that the evidence allowed them to conclude that Ms Mureph’s back condition was not wholly or mainly attributable to her NHS employment. The NHS BSA decision maker said that she could see nothing in the medical adviser’s analysis or the evidence upon which it was based which would cause her to disagree with his findings.

Summary of Ms Mureph's position

30. Ms Mureph says she is still receiving treatment to the injured area and has provided copies of recent correspondence from Dr Egeler to her GP outlining this. She says that she still receives physiotherapy.

31. Ms Mureph says that the Health Board's management failed to refer her for physiotherapy after the March 2011 incident and did not act on her requests to be moved.

32. Ms Mureph suggests that it was the reference to exacerbation of her back pain in the September 2011 letter from the occupational health nurse which gave the NHS BSA the impression that she had already been suffering with back pain at the time of the incident. She argues that the refusal to move her to less strenuous duties did exacerbate her symptoms from the injury. Ms Mureph says that there was no long standing history of back pain prior to the March 2011 incident.

33. Ms Mureph says that the comments by Mr Collins, in 2012, have been taken out of context. She says that the reference to a longstanding history of low back pain meant since March 2011 because she felt that six months was a long time, particularly when she thought her work was exacerbating the condition. Ms Mureph says that there was no basis for such a conclusion in her medical records. She believes that her current chronic pain could have been avoided if she had received treatment at an earlier date.

34. Ms Mureph says that the NHS BSA have not explained the medical basis for their conclusions. For example, they have not identified any underlying constitutional cause for her back pain or any other cause.

35. Ms Mureph considers that the NHS BSA gave insufficient weight to Dr Abdulla's opinion.

36. Ms Mureph cites a study in 2009 by a manual handling adviser who recommended that the Health Board replace the theatre trolleys because they posed a risk to staff. She says the trolleys were deemed unfit for purpose. She considered that it is more likely than not that her work caused the back pain she suffered in 2009 as well as the injury in 2011. She says that the NHS BSA have failed to recognise that a qualifying injury does not have to relate to a single incident but can arise over a period of time.

37. Ms Mureph says that she intended to work until she was 65 and is now unable to find any work. She says that she is reliant on savings, a small Personal Independent Allowance and Industrial Injury Benefit.

Summary of the NHS BSA's position

38. The NHS BSA submit that they have correctly considered Ms Mureph's application for a PIB, using the correct test, taking into account relevant evidence and ignoring anything irrelevant. They say that, in making their decisions, they have sought and accepted the advice of their medical advisers. They argue that the fact that they have

weighed the evidence differently or drawn a different conclusion to Ms Mureph is unfortunate, but it is a finding for them to make on the facts.

39. The NHS BSA accept and acknowledge that an injury occurred on 15 March 2011, which was wholly or mainly attributable to Ms Mureph's NHS employment. They say that the effects of this injury were self-limiting and temporary in nature and, on their own, would not result in a PLOEA. They do not accept that the 2011 injury or Ms Mureph's NHS employment as a nurse is the reason for her ongoing incapacitating back condition.

Conclusions

40. Ms Mureph would be eligible to receive a PIB if, before 31 March 2013, she sustained an injury (or contracted a disease) in the course of her employment which is wholly or mainly attributable to that employment or the duties of that employment. She has made an application for a PIB on the basis of the injury she suffered in March 2011, and also on the basis that her current back condition is the result of the nature of her duties over a period of time.

41. Ms Mureph is quite correct to say that eligibility for a PIB can arise as a result of an injury sustained over a period of time if that injury is wholly or mainly attributable to her NHS employment or the duties of her NHS employment. Regulation 3 refers to an injury sustained "**in the course of** the person's employment" (my emphasis). It is not overstretching the language to say that this covers both injuries resulting from single incidents and injuries sustained over a period of time.

42. The decision as to Ms Mureph's eligibility for a PIB is for the NHS BSA to make. First instance decisions have been delegated to their medical advisers and the NHS BSA review decisions at stage one and two of the IDR procedure.

43. The initial decision to decline Ms Mureph's application for a PIB appears to have been made on the basis that she returned to work after three days absence and remained in work until July 2012; that MRI scans had revealed only minor degenerative changes in her spine, which was described as essentially normal for her age; and it was likely that the March 2011 incident had led to a short term soft tissue injury from which Ms Mureph had recovered. The medical adviser also said that there was no evidence that any other aspect of Ms Mureph's NHS duties had contributed significantly to her current disability. Whilst Ms Mureph disagreed with the conclusions drawn by the NHS BSA's medical adviser, it does not appear to be inconsistent with the available evidence.

44. Ms Mureph submitted her appeal on the basis of (amongst other things) not having had a chronic back problem before 2011. She acknowledged that she had taken sick leave in 2009 because of back strain but said that this had been temporary in nature and two years before the 2011 incident. Ms Mureph referred to Mr Collins' comment that she had a longstanding history of low back pain which was aggravated by the 2011 incident. She said that she had told Mr Collins that her back pain had been

longstanding *since the time of the 2011 incident*. I have no reason to doubt that Ms Mureph was giving her recollection of the consultation in good faith. However, I can see why the medical advisers might interpret Mr Collins' comments differently. He did, after all, refer to the incident with the trolley having aggravated Ms Mureph's back pain; it could only have been aggravated if it already existed.

45. The NHS BSA sought further advice from their medical advisers. The medical adviser who reviewed Ms Mureph's case referred to the fact that she had continued to work after the incident, had taken only three days sickness absence and had not consulted her GP about back pain until December 2012. He referred to there having been a similar incident in 2010. As Ms Mureph has pointed out, this was an error in the occupational health notes which were referring to the 2011 incident. The medical adviser noted that there was no evidence of significant pathological change. He noted the results of the MRI scan. The medical adviser expressed the view that the 2011 incident had caused a temporary exacerbation of longstanding symptoms from which Ms Mureph had recovered sufficiently within four days to return to work. There was no discussion as to the cause of Ms Mureph's longstanding symptoms. The medical adviser did subsequently describe these as "non-attributable"; from which he might be taken to mean that he did not think that the longstanding back symptomology had been caused by the nature of Ms Mureph's NHS duties.

46. The NHS BSA accepted their medical adviser's advice and declined Ms Mureph's appeal. The weight that the NHS BSA give to any of the evidence is for them to determine and it is open to them to prefer the opinion of their own medical advisers. I note that Ms Mureph feels that insufficient weight was given to Dr Abdulla's letter of 29 November 2013. There are circumstances in which it would not be appropriate for the NHS BSA to rely on the advice they have received from their own medical advisers. For example, if there had been an error or omission of fact by the medical advisers or they had misinterpreted the relevant regulations. However, a difference of opinion is not usually sufficient reason. This is not a hard and fast rule since there may be circumstances where a difference of opinion would carry significant weight. For example, a difference of opinion between the NHS BSA's medical advisers and a specialist in a particular condition. However, in Ms Mureph's case the NHS BSA's medical advisers are occupational health specialists as is Dr Abdulla. There is no reason to find that the NHS BSA should have given Dr Abdulla's opinion greater weight than that from their own medical advisers.

47. Following a further appeal by Ms Mureph, the NHS BSA sought a further opinion from their medical advisers. This opinion largely confirmed the previous two; that the incident on 15 March 2011, had caused a soft tissue injury which exacerbated longstanding back symptoms. Again, the medical adviser noted that Ms Mureph had only taken three days' sickness absence and had not consulted her GP. He noted that she had consulted her GP in April, May and December 2011, without mentioning back pain. The medical adviser said that the first entry in the GP's notes relating to back pain was on 3 September 2012. He did note that the occupational health notes referred to residual back pain in September 2011, and that Ms Mureph had raised it in

a meeting with her manager in July 2011. It was, perhaps, contradictory of the medical adviser to refer to Ms Mureph's back problem as longstanding at the same time as pointing to the fact that she had not consulted her GP about it until late in 2012.

48. It is clear that the NHS BSA's medical advisers had the correct regulation in mind when reviewing Ms Mureph's case. They appear to have taken account of all the available, relevant evidence. With exception of the one reference to an incident in 2010, there do not appear to have been any factual errors or omissions. My concern is with the lack of discussion around the contribution made by Ms Mureph's NHS duties over the period of her employment. The focus has been very much on the March 2011 incident.

49. In many of the PIB cases seen by the NHS BSA involving back problems, constitutional degenerative changes have been identified as the prime cause of the individual's symptoms. This does not appear to be the case here. The medical advisers have been quite clear about their reasons for not finding that the March 2011 resulted in a qualifying injury. However, they have been less clear about the effect of Ms Mureph's duties over the period of her employment. Without that clarification, the NHS BSA could not properly reach a conclusion as to Ms Mureph's eligibility.

50. The difficulty faced by the NHS BSA and their medical advisers is that a cause for Ms Mureph's back pain does not appear to have been identified by the doctors treating her. However, that does not mean that they should not give due consideration to the question of whether, and to what extent, the nature of her NHS duties has contributed to her back problems. It may simply be the case that they require further information before doing so. I find that the NHS BSA has not given proper consideration to Ms Mureph's eligibility for a PIB. This amounts to maladministration and, as a result, she has suffered injustice inas much as her eligibility for benefit has not been determined correctly. I uphold Ms Mureph's complaint on this basis and to this extent.

51. In the circumstances, the proper course of action is for me to remit the decision for the NHS BSA to reconsider. Before doing so, they will need to seek further advice on the question of the contribution made by Ms Mureph's NHS employment to her back problems. In remitting the decision, I am making no finding as to Ms Mureph's eligibility for a PIB; that remains for the NHS BSA to determine. It is also the case that eligibility for a PIB requires meeting a two-step eligibility test. Depending upon the outcome of the further review, the NHS BSA may need also to determine whether Ms Mureph has suffered a PLOEA of greater than 10% as a consequence of a qualifying injury.

52. Whilst I have no reason to doubt that the NHS BSA reached their decision(s) in good faith, it is the case that the failure to consider Ms Mureph's eligibility properly has prolonged the process unnecessarily. This will have caused Ms Mureph additional stress and inconvenience for which it is appropriate that she receive some modest compensation.

53. I have not dealt with Ms Mureph's assertions regarding the failure to refer her for physiotherapy or to move her to less strenuous duties. These issues concern the actions of her former employer and are not the responsibility of the NHS BSA. In any event, eligibility for a PIB does not require any consideration of 'blame' and, therefore, these issues and the continued use of a particular type of trolley do not have a direct relevance to the matter before me.

Directions

54. I direct that, within 14 days of the date of my final determination, the NHS BSA will refer Ms Mureph's case back to their medical advisers for further consideration. On receipt of the further advice and within 14 days of its receipt, the NHS BSA will make a further determination as to Ms Mureph's eligibility for a PIB.

55. Also within 14 days of the date of my final determination, the NHS BSA will pay Ms Mureph £250 in recognition of the additional stress and inconvenience she has incurred in consequence of the maladministration I have identified.

Anthony Arter

Pensions Ombudsman
10 July 2015