WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **4581/19**
Applicant: **CLAUDINE CATHERINE PEATS**
Respondent: **BRAS N THINGS PTY LIMITED**
Date of Determination: **19 December 2019**
Citation: **[2019] NSWWCC 413**

The Commission determines:

1. The need for the applicant's nasal surgery (septorhinoplasty) results from the work injury on 26 September 2017.

2. Respondent to pay the applicant's section 60 of the *Workers Compensation Act 1987* expenses for the septorhinoplasty surgery by Dr Doyle on 8 November 2018 in the amount of $11,492.45.

3. The clinical notes of Chevron After Hours Medical Service and Prime Health Family Medical Centre tendered at the arbitration hearing are to be filed by the applicant within seven days.

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

Ross Bell
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 ROSS BELL, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. This Application to Resolve a Dispute (the Application) registered on 4 September 2019 is in respect of injury on 26 September 2017. The insurer denied the claim in a Notice issued under s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act) dated 21 August 2018. The Application is for s 60 of the *Workers Compensation Act 1987* (the 1987 Act) medical expenses including rhinoplasty surgery performed by Dr Doyle on 8 November 2018.

ISSUES FOR DETERMINATION

2. The following issue remains in dispute:

    (a) Do Ms Peats' s 60 medical expenses, including the need for the nasal surgery by Dr Doyle, result from the injury on 26 September 2017?

PROCEDURE BEFORE THE COMMISSION

3. The parties attended a conciliation conference and arbitration hearing on 27 November 2019. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Oral evidence

4. There was no oral evidence adduced.

Documentary evidence

5. The following documents were in evidence before the Commission and I have taken them into account in making this determination:

    (a) The Application with annexed documents.

    (b) Reply with annexed documents.

    (c) Clinical notes of Chevron After Hours Medical Service; and Prime Health Family Medical Centre tendered at the conciliation/arbitration (to be filed within seven days).

SUBMISSIONS

6. The representatives made oral submissions at the arbitration hearing. Ms Peats (the applicant) also tendered written submissions. I have taken the submissions into account, and they are referred to in the discussion below.

Does the need for the surgery carried out by Dr Doyle on 8 November 2018 result from the injury on 26 September 2017?

Relevant evidence

Applicant

Ms Peats' statement

7. Ms Peats outlines the circumstances of the injury in her statement of 1 June 2019. On 26 September 2017 when at work she was taking out some rubbish in a trolley through a shopping centre doorway with large plastic strips hanging over it. One of the plastic strips was caught on the trolley somehow, and Ms Peats was struck in the face "quite forcefully in the nose". She felt dizzy after being struck and needed to sit down and security brought an ice pack for her nose. She states that her nose began to bruise quite quickly. She felt unable to drive home and was instead picked up and driven home. Her nose was swollen as well as bruised and she attended her general practitioner, Dr Kaur, and had two weeks off work. After the bruising and swelling had gone, she was finding it difficult to breathe and she noticed the shape of her nose had changed, which she found distresssing. She also developed excessive nasal discharge from the right nostril. She was sent for scans and referred to Dr Mark Doyle, who told her she required a septorhinoplasty to correct her nose. As the insurer declined to pay for the surgery, she took out a loan and paid for it herself. The surgery was performed on 8 November 2018.

8. Since the surgery she has found she can breathe a lot better; the appearance of her nose has improved; and her nose no longer runs as it had after injury.

Dr Mark Doyle

9. Dr Doyle, in the Operation Record of 8 November 2018, records the Septo/Rhinoplasty procedure he carried out on Ms Peats' nose on the same day.

10. Dr Doyle reports on the procedure in the report of 9 December 2018, saying that the procedure was "to correct the nasal deformities sustained as a result of an injury to her nose on the 28/9/2017" [26 September 2017]. Dr Doyle goes on,

> "At operation it was noted that her nasal septum deviated to the right at the top of her nose and then deviated to the left as the septum approached the nasal tip. Her nasal bones were crooked and there was a significant asymmetry of her lower ala cartilages with the right ala being concave and !ell convex in shape.
>
> These deformities were all corrected at her surgery on the 8th November 2018."

11. In his report of 17 April 2019 Dr Doyle explains,

> "As a result of injuries sustained to her nose, she had a deviated nasal septum, ala deformities and decreased airway on her right side.
>
> I believe the injuries sustained whilst she was employed has given rise to the above diagnosis.
>
> She has had a septorhinoplasty performed in order to improve her airway and to improve her appearance."

CT report Dr D Homewood 29 September 2017

12. Dr Homewood reported the "Deviated nasal septum with asymmetrical concha bullosa, more prominent on the left, with no facial bone fracture seen."

Clinical notes Chevron After Hours Medical Service

13. The entry for 26 September 2017 by Dr I Luey records,

> "works as retail shop manager
> While wheeling garbage bins the 'butchers' plastic door flap suddenly hit her in nose
> No loc
> No bleeding
> Pain nose since then ac forhead pain
>
> No past nasal injury
>
> Examination:
> Alert no distress
> Nose minor swellling bridge nose
> No obvious lateral deformity
> Inspection of nasal passages nad …"

Clinical notes Prime Family Medical Centre

14. Dr R Kaur records on 28 September 2017,

> "was taking bins out as was pushing bins
> hit nose bride [bridge]
> felt dizzy and giddy
> was feeling spacy
> was unable to drive
> iced on it all night
> went to hospital GCUH
> …
> Examination:
> Bruising, swelling, tender …"

15. The notes record the requested CT scan, and the record for 29 September "post CT" notes the symptoms and "panadol, ice pack, going to hospital to see specialist next week".

Reports of Dr R Kaur

16. In his report of 22 May 2018 Dr Kaur says Ms Peats was then "… suffering from severe nasal issues since injury and not feeling well. She has poor sleep. Early morning wakening. Poor self esteem. Depressed mood. Anxious. …" Dr Kaur reports on examination,

> "physically shape of nose had changed since injury
> She c/o drips secretion from right nostril since then. She is dealing with self image issues since then cosmetically [affected] her and dealing with difficulty breathing
> Feels like [can't breathe from] one side, and she had damaged her cartilage in the nose."

17. Dr Kaur, in his referral to Dr Doyle refers to, "deviation of nose since injury, shape has changed"

Dr Frank Anning 16 May 2019

18. Dr Anning takes the history,

> "When the swelling actually receded Ms Peats noted that there was some asymmetry of her nose particularly that there was a palpable difference between the lower left and the right nostril and that her right nostril hyper secreted.
>
> She became very self-conscious of the look of her nose and became extremely anxious and upset to the extent that she was given treatment for anxiety in the form of medication from her practitioner."

19. Dr Anning notes the referral to Dr Doyle and the history of surgery,

> "She did get a satisfactory result from the Septo-Rhinoplasty, though she has noted some slight asymmetry of her nose still present. She can however breathe through her nose adequately and the excessive nasal discharge has stopped."

20. Dr Anning says under "Diagnosis", "Her nose and internal nasal structures are now within normal limits following an apparent blunt injury to the nose."

21. Dr Anning also noted the current situation on review of investigations,

> "The nasal septum is in good position. There is a slight asymmetry of her nostrils on the base view and the left lower lateral cartilage is slightly more prominent than the right lower lateral cartilage with a very slight deviation of the nasal tip to the left. The nasal airway is adequate."

22. Asked about the relationship between the work incident and the injuries diagnosed, Dr Anning responds,

> "As I have no record of Ms Peats' nose prior to the accident of the 26 September 2017, I have no alternative but to believe that her nose was not in this shape before the accident. Certainly it is somewhat unusual to get this degree of nasal internal anatomic injury without any bleeding from the nose. Ms Peats said her nose did not bleed."

23. Dr Anning also says when asked about whether the surgery was reasonably necessary to treat the symptoms,

> "I consider that the surgery performed by Dr Doyle was reasonably necessary in order to treat Ms Peat's symptoms and signs.
>
> I have seen a video which Ms Peats provided for me to show me the deformities of which she was complaining pre-operatively. Apart from a surgical approach there is no other treatment that could have been offered."

Respondent

Dr Allison 31 July 2018

24. Dr Allison take a history of the incident and the aftermath consistent with the other histories, but with some additional detail provided by Ms Peats,

> "From the time she resumed work onwards she was still concerned about the appearance of her nose, a degree of nasal obstruction and right-sided watery rhinorrhoea. She feels that the bony nasal skeleton has been affected with the change in its shape on the right. She also feels the cartilaginous nasal skeleton has been

disrupted as she can push the cartilaginous part of her nose easily to the left but with only minimal movement to the right. These nasal symptoms have persisted since that time and have remained unchanged."

25. On examination Dr Allison reports,

> "Examination showed that her nasal profile was straight. I could detect no significant thickening or swelling on the right side. Her nose was straight.
>
> The nasal septum deviated slightly to the right internally. This was almost certainly a longstanding finding rather than being related to the injury."

26. Under "Diagnosis" Dr Allison says,

> "Previous injury to the nose ten rnonths ago. Although Ms Peats feels there is a change in appearance of the nose since, together with right-sided nasal obstruction and unilateral rhinorrhoea, there was no ongoing abnormality that I can identify."

27. Dr Allison says on the question of the connection to the work injury,

> "Ms Peats does not have an external nasal deformity. Her nasal septum does deviate to a minor degree to the right side making it harder for her to breathe on the right. However, this is almost certainly longstanding. The deviation of the septum is internal and in my opinion would not have been affected by the injury last September."

CT Scan report 13 July 2018 Dr T Thiel (for Dr Allison)

28. The conclusion to the report is,

> "There is no clear abnormality seen [in] relation to the paranasal sinuses and the nasal airways. No mucosal thickening or retention cysts identified.
> No clear evidence to suggest fracture of the nasal bone. Deviation of the nasal septum convex to the right.
> There is a faint line leading through the cribriform plate towards the left posterior ethmold air cells (see Key images), most likely in keeping with a vascular channel but a discrete fracture there cannot be excluded completely. Please exclude leaking of CSF ftuld. No clear cause for rhinorrhoea seen olherwise."

Discussion

29. The respondent submits that the deformities notes by Dr Doyle did not occur in the incident of injury, relying on Dr Allison and the CT imaging. The respondent submits there was no pathology found by Dr Allison to explain the excessive nasal discharge; or that any cartilage deformity was caused by the injury; and the deviated septum was of long standing.

30. Roche DP in *Murphy v Allity Management Services Pty Ltd* [2015] NSWWCCPD 49, noted the established authority[1] that there may be multiple causes of an injury, and also emphasised that the test with medical expenses is whether the injury was a material contribution to the need for the claimed treatment.

31. In the familiar case of *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 the Court said,

[1] See *Comcare v Martin* [2016] HCA 43

> "The result of the cases is that each case where causation is in issue in a workers compensation claim, must be determined on its own facts. … What is required is a commonsense evaluation of the causal chain."

32. It has been indicated by the High Court since that the "commonsense" concept does not operate at large. All the evidence must be considered, with the onus of proof on the applicant throughout.[2]

33. The evidence establishes that before the incident of injury Mr Peats was not suffering from the issues she describes following injury. There is no history in the clinical records of such issues pre-existing.

34. The evidence is compelling as to the symptoms that emerged from the time of injury. The physical changes, breathing difficulties and running right nostril clearly caused Ms Peats considerable distress. There is no record of such distress before the injury. There is no reason to doubt Ms Peats' evidence.

35. Considering Dr Allison's opinion in the light of that clear history, there is no explanation as to why the symptoms appeared if not caused by the incident. When addressing the changes in appearance of the nose, Dr Allison notes that the nose was straight and there was no thickening or swelling on the right hand side. He says there is no external nasal deformity. This however, does not establish that there was no change on the appearance of the nose as Ms Peats states. Dr Allison had no familiarity with Ms Peats' features before the incident.

36. As to the nasal obstruction Dr Allison says there was no abnormality that he could see other than the deviation in the nasal septum which he says does make it harder to breathe on the right side, but this is of long standing. Dr Allison could otherwise identify no abnormality to explain the symptoms.

37. Dr Allison's examination was prior to to the surgery, whereas Dr Anning (16 May 2019) saw her afterwards. Dr Anning did note that Ms Peats had a satisfactory result from the surgery and could then breathe adequately and the excessive discharge had stopped. He also notes that she was aware of slight asymmetry of her nose still present. Interestingly Dr Anning also notes on examination there was still slight asymmetry of the nostrils on the base view and there remains slightly more prominent cartilage on the left than the right, with a very slight deviation of the nasal tip to the left. He noted an adequate airway.

38. It is apparent that the surgery conducted by Dr Doyle to address the symptoms identified as arising from the work incident was successful. This leaves Dr Allison's opinion that the nose was essentially normal lacking weight.

39. The respondent submits that it is significant that the opinion of Dr Allison is that the deviated nasal septum is almost certainly of long standing. I do not agree with that submission because on the relevant principles this is not conclusive on the issue. Even if the deviation was a pre-existing abnormality or congenital feature, the symptoms requiring surgery began only with the work injury. As is very familiar law, an employer takes the worker as they find them.[3]

40. The respondent also submits that there is no finding on examination by Dr Allison of any abnormality except the deviated septum, with no apparent cause of the problems of the excessive discharge, moving cartilage, or changed appearance. This does not take account of the reported symptoms arising from the injury. In this regard it is significant that the symptoms were largely eradicated by Dr Doyle's surgery.

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[2] *March v Stramare (E & M H) Pty Limited* [1991] HCA 12; (1991) 171 CLR 506; *Flounders v Millar* [2007] NSWCA 238

[3] *State Transit Authority of NSW v Fritzi Chemler* [2007] NSWCA 249; (2007) 5 DDCR 286; *Attorney General's Department v K* [2010] NSWWCCPD 76

41. The respondent submits that the incident should be seen as being on the low end of violence because of the mechanism of injury and the fact that the nose did not bleed. However, the clinical notes and the referrals are consistent with quite a significant injury even if it was mainly a soft tissue injury which did not bleed. It was of such severity that Ms Peats was "dizzy and giddy" immedately after, and later on suffered psychological symptoms as a result of the symptoms and the change in appearance. She told Dr Anning that after the swelling subsided she noticed there was an apparent difference between the lower left and right nostril. This is consistent with Dr Doyle's findings at surgery. I note also that from the CT scan reported by Dr Thiel on 13 July 2018 an undisplaced fracture could not be excluded completely.

42. I have no trouble accepting that the symptoms of breathing difficulties on the right side, excessive nasal discharge (rhinorrhoea) also on the right side, the sensation of loose cartilage that could be moved, and a change in the shape of the nose all occurred in the incident of injury. This was followed by referral to Dr Doyle who considered the symptoms and carried out the surgical procedure that has had a good result and largely rectified the symptoms. There is no evidence of such problems before the injury or of any intervening event that might have broken the chain of causation.

43. Taking account of all the evidence I find that the injury on 26 September 2017 was a material contribution to the need for surgery carried out by Dr Doyle; the need for the surgery results from the injury.

44. It follows from the above findings that Ms Peats is entitled to s 60 of the 1987 Act expenses, including expenses for the surgical procedure by Dr Doyle.

SUMMARY

45. The need for the surgery carried out by Dr Doyle on 8 November 2018 resulted from the injury in the course of Ms Peat's employment with the respondent on 26 September 2007.