WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **4190/19**
Applicant: **Markou Seif**
Respondent: **Trustees of the Christian Brothers**
Date of Determination: **15 October 2019**
Citation: **[2019] NSWWCC 334**

The Commission determines:

1. The applicant sustained injury to right knee arising out of or in the course of his employment with the respondent on 20 September 2017.

2. The applicant's employment was a substantial contributing factor to his injury.

3. The applicant was incapacitated and took time off work on sick leave on various dates from 20 September 2017 to 11 September 2018 as a result of his right knee injury.

4. The applicant requires medical treatment as a consequence of his injury and the respondent is liable to pay reasonably necessary medical expenses.

5. The surgery undertaken by Dr Nagamori on 27 November 2017 was reasonably necessary as a result of the right knee injury sustained on 20 September 2017.

The Commission orders:

6. No order in respect of the claim for weekly compensation. Liberty to the parties to apply within 28 days of the date of this determination.

7. The respondent is to pay the applicant's reasonably necessary medical expenses, including the cost of the surgery undertaken by Dr Nagamori on 27 November 2017 and associated expenses, pursuant to s 60 of the *Workers Compensation Act 1987*.

8. No order as to costs.

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

Glenn Capel
Senior 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 GLENN CAPEL, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Markou Seif (the applicant) is 46 years old and commenced employment with Trustees of the Christian Brothers (the respondent) as a high school teacher on 25 January 2010. He is still employed by the respondent.

2. It is not disputed that the applicant injured his right knee on 21 November 2016. This injury was originally disputed by Catholic Church Insurance (the insurer) in dispute notices issued pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) on 10 January 2017 and 24 April 2017. The dispute was the subject of a claim for weekly compensation and medical expenses that resolved at a conciliation conference in the Workers Compensation Commission (the Commission).

3. According to the Certificate of Determination (COD) in matter no. 3045/17 dated 6 September 2017, the respondent agreed to pay the applicant weekly compensation for various periods from 5 December 2016 to 24 March 2017 and medical expenses incurred prior to 1 September 2017 up to $6,500, otherwise there was an award for the respondent. There were also consent findings that the applicant had no incapacity since 25 March 2017, he had recovered from the effects of his work injury from 1 September 2017 and he required no treatment as a result of the subject work injury.

4. On 5 October 2017, the applicant submitted a claim form in which he alleged that he had injured his right knee on 20 September 2017 as a result of standing and walking continuously for the entire day at work and until late at night on the Year 12 graduation day and mass. He alleged that he had suffered an aggravation of his prior knee injury and he claimed that he reported his injury to David Gerlach and Pat Gorton.

5. On 13 October 2017, the insurer advised that provisional payments of weekly benefits would not commence because it required acceptable evidence that the applicant's employment was a substantial contributing factor to his condition. This was on the background of the consent findings in the COD dated 6 September 2017.

6. On 25 October 2017, the insurer issued a notice pursuant to s 74 of the 1998 Act, disputing that the applicant had sustained an injury on 20 September 2017 and that his employment was a substantial contributing factor to his condition. It disputed that the applicant was incapacitated as a result of his work injury and that it was liable for the payment of medical expenses. It cited ss 4, 9A, 33 and 60 of the *Workers Compensation Act 1987* (the 1987 Act). The applicant's solicitor sought a review of the decision, but it seems that the insurer failed to comply with this request.

7. Presumably the applicant's solicitor then served a notice of claim for weekly compensation and medical expenses on the insurer. Proceedings were issued by the applicant in the Commission in 2019, but these were discontinued at a conciliation conference on 6 June 2019.

8. By an Application to Resolve a Dispute (the Application) registered in the Commission on 19 August 2019, and amended at the arbitration hearing, the applicant claims weekly compensation from for various periods from 20 September 2017 to 11 September 2018 pursuant to ss 36 and 37 of the 1987 Act and medical expenses pursuant to s 60 of the 1987 Act due to an injury sustained to his right knee on 20 September 2017.

PROCEDURE BEFORE THE COMMISSION

9. 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.

10. At the commencement of the arbitration hearing, the applicant's counsel, Mr Young, objected to the admission into evidence of four statements that were attached to an Application to Admit Late Documents filed in the Commission on 26 September 2019 by the respondent's solicitor.

11. Submissions were made by Mr Young and the respondent's counsel, Mr Saul. I gave an ex-tempore decision in relation to the issue and I admitted the documents into evidence. Mr Young declined my offer of an adjournment to address these statements. A recording and transcript of my reasons are available to the parties if required.

ISSUES FOR DETERMINATION

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

    (a) whether the applicant injured his right knee on 20 September 2017– ss 4(a) and/or 4(b)(ii) of the 1987 Act;

    (b) whether the applicant's employment was a substantial and/or the main contributing factor to his condition – ss 4(b)(ii) and 9A of the 1987 Act;

    (c) extent and quantification of the applicant's entitlement to weekly compensation, – ss 36 and 37 of the 1987 Act;

    (d) whether the surgery performed by Dr Nagamori on 27 November 2017 was reasonably necessary as a result of the right knee injury sustained on 20 September 2017 – s 60 of the 1987 Act, and

    (e) the respondent's liability in respect of medical expenses – s 60 of the 1987 Act.

Documentary evidence

13. The following documents were in evidence before the Commission and taken into account in making this determination:

    (a) The Application to with attached documents;
    (b) Reply with attached documents, and
    (c) Application to Admit Late Documents received on 26 September 2019.

Oral evidence

14. Neither party sought leave to adduce oral evidence or cross examine any witnesses.

REVIEW OF EVIDENCE

Applicant's statements

15. The applicant provided statements on 3 January 2017 and 25 August 2017 regarding the right knee injury sustained on 21 November 2016. The initial statement is not in evidence.

16. In the applicant's statement dated 21 November 2017, he advised that on 20 September 2017, he was overseeing the Year 12 graduation and mass service. He commenced work at 7.30 am and finished at 8.00 pm.

17. The applicant stated that he spent the whole day standing, walking and going up and down stairs. In or around the late afternoon, he began to notice pain and aching in his right leg across his knee and extending down his lower leg. He kept working because he had to usher people to their seats and take parents and guardians to different areas of the school and hall. By the end of the night, he had a lot of pain in his right knee.

18. The applicant stated that he returned to see Dr Nagamori, who referred him for an MRI scan. The doctor told him that he required an arthroscopy, but the insurer declined to approve the procedure. He had experienced much pain and had taken a number of days off work on sick leave.

19. In his statement dated 19 June 2019, the applicant stated that there was a great deal of preparation required to set up the school hall for the graduation and mass service on 20 September 2017. He advised that he walked up and down the school stairs at least 50 times, carrying chairs and boxes of programmes from 7.30 am until classes commenced, during recess and lunch, and then until the graduation commenced.

20. The applicant stated that he walked at a fast pace and need to pivot to go up and around the stairs. He explained that Dr Bodel correctly recorded that he felt a popping sensation in his right knee, and this occurred late in the afternoon and was in the same part of his knee as his previous injury.

21. The applicant denied that he needed a second operation prior to the settlement of his prior claim on 6 September 2017. He denied that Dr Moussad referred him back to Dr Nagamori on 18 August 2017. He merely had a review with Dr Nagamori to assess his progress.

22. The applicant took issue with the insurer's "view note" dated 29 September 2017 that indicated that he required surgery "now" and he did not recall saying that he had been booked for surgery. He also denied that he had told the insurer about discussions that he allegedly had with his solicitor. The point that he wished to make was that he suffered an aggravation of his original injury.

23. The applicant confirmed that he injured his right knee at work on 20 September 2017, and he reported his injury to David Gerlach and Patrick Gorton. The school holidays commenced on 22 September 2017 and concluded on 8 October 2017. The conversation with the case manager of the insurer occurred during the school holidays.

24. The applicant stated that Dr Moussad referred him to Dr Nagamori at the consultation on 2 October 2017. He had an MRI scan and Dr Nagamori performed surgery on 27 November 2017.

Clinical notes and certificates of Dr Moussad

25. The clinical notes of Dr Moussad commence on 11 August 2016 and conclude on 10 July 2018.

26. On 28 November 2016, the doctor recorded that the applicant had right knee pain and swelling following an incident on the background of a tripping incident on 21 November 2016.

27. An MRI scan taken on 30 November 2016 showed a horizontal tear in the posterior horn of the lateral meniscus and a perimeniscal cyst and minor synovitis. The doctor referred the applicant to Dr Nagamori. During subsequent consultations, Dr Moussad recorded complaints of pain and swelling in the applicant's right knee. The doctor prescribed medication and physiotherapy.

28. On 6 May 2017, the doctor recorded that the applicant had made a good recovery from surgery. He had less pain and the swelling was going down. On 25 May 2017, the applicant complained of right knee pain, but he did not see the doctor again until 14 August 2017. On that occasion, the doctor wrote to Dr Nagamori. On 18 August 2017, Dr Moussad noted that the applicant had last seen Dr Nagamori two months earlier.

29. On 2 October 2017, the doctor recorded that the applicant had right knee pain and swelling. He was unable to put any weight on his knee. The doctor indicated that the applicant had suffered an exacerbation and aggravation of his previous right knee injury and he recommended specialist treatment. Accordingly, the doctor wrote a letter to Dr Nagamori.

30. The applicant complained of pain, swelling and an inability to put weight on his knee at the consultation on 9 October 2017. The doctor reported that there was a restricted range of movement. On 11 December 2017, the doctor recorded that the applicant had surgery on 27 November 2017.

31. Dr Moussad certified that the applicant had the capacity to undertake some work for full hours from 2 October 2017 to 1 December 2017. The applicant had no current work capacity from 10 October 2017 to 11 October 2017 and from 27 November 2017 to 29 January 2018, when he was cleared for his pre-injury duties.

Reports of Dr Nagamori

32. Dr Nagamori reported on 6 December 2016. He confirmed that the applicant felt a popping sensation in his right knee after stumbling at work 2.5 weeks earlier. The doctor diagnosed a lateral meniscus tear in the presence of a discoid lateral meniscus. This pathology was identified when the doctor performed the arthroscopy and lateral meniscectomy on at the Sydney Adventist Hospital on 9 March 2017.

33. In his report dated 20 March 2017, Dr Nagamori advised that the applicant had not experienced any pain since surgery and he had an excellent range of motion.

34. In a report dated 24 May 2017, Dr Nagamori advised that an MRI scan showed no evidence of any new tears of the lateral meniscus and the horizontal tear was stable. The cyst was no longer present, but there was some oedema and effusion. This scan is not in evidence. The doctor stated that the applicant's pain would settle with time and no further surgery was indicated.

35. The applicant returned to see Dr Nagamori on 27 September 2017 and the applicant was referred for an MRI scan. This showed the previous debridement of the free edge of the lateral meniscus, a cleavage tear in the anterior horn/ anterior third of the lateral meniscus extending into the body and posterior horn of the lateral meniscus, together with prominent oedema.

36. In a certificate issued dated 27 September 2017, the doctor advised that the applicant and aggravated his knee at work and required further investigations. In a report of the same date, the doctor indicated that there had been a considerable deterioration in the applicant's symptoms and pain. He was unable to extend his knee and walked with a marked antalgic gait. He confirmed the scan findings and recommended surgery.

37. On 13 November 2017, Dr Nagamori sought approval to perform an arthroscopy on the applicant's right knee. The surgery was not approved by the insurer.

38. Dr Nagamori performed the arthroscopy on 27 November 2017. According to the operation report, the doctor repaired an extensive further horizontal tear of the lateral meniscus.

39. In a report dated 5 February 2018, Dr Nagamori noted that the applicant's right knee pain had settled but he still had some swelling as well as catching and locking without any history of trauma. He referred the applicant for an MRI scan, which was reported to only show some oedema and no evidence of a recurrent tear, but in his report dated 14 February 2018, the doctor advised that the scan showed a tear of the remaining lateral meniscus anteriorly. He suspected that there was significant attenuation of the granulation tissue or a tear which was causing symptoms.

40. In his report dated 3 July 2018, Dr Nagamori recorded a history of the two incidents in November 2016 and noted that MRI scan showed a lateral meniscus tear with a discoid lateral meniscus. He stated that an MRI scan showed a further tear or attenuation causing further symptoms.

41. Dr Nagamori stated that the lateral meniscus tear was caused by the incident on 21 November 2016 and he was presently considering a third arthroscopy. The doctor confirmed that the applicant had limited work capacity after each operative procedure.

Report of Dr Bodel

42. Dr Bodel reported on 11 September 2018. He noted that the applicant injured his knee on 21 November 2016 when he fell through a small trap door in the library and twisted his right ankle and foot. He continued to work and his knee settled, but two weeks later his knee became swollen and he could hardly walk. The applicant consulted Dr Moussad and he was referred to Dr Nagamori, eventually having surgery on 9 March 2017. He had a good outcome from the operation and he was only off work for a couple of weeks.

43. Dr Bodel recorded that for a few weeks up to 20 September 2017, the applicant experienced some aching in his right knee. He had difficulty going up and down stairs and he asked for a lift pass. The doctor noted that on 20 September 2017, he developed increasing knee pain and when he was walking and twisted during the graduation ceremony and mass service, he felt a popping sensation. His knee became swollen, he consulted Dr Moussad and was referred back to Dr Nagamori. The doctor recommended surgery but liability was declined. Eventually the applicant paid for the operation himself.

44. Dr Bodel diagnosed a tear of the lateral meniscus in the incident on 21 November 2016. He noted that there was further progression of the tear as a result of the work injury on 20 September 2017. The doctor stated that the applicant had developed a disease process of gradual onset. The initial injury left the applicant with a vulnerable knee and minor twisting injuries had caused an aggravation, acceleration, exacerbation and deterioration in the knee. This was the main contributing factor.

45. Initially, Dr Bodel stated that the surgery performed by Dr Nagamori on 27 November 2017 was reasonably necessary as a result of the injury sustained on 21 November 2016 and the injury on 20 September 2017, but later in his report, he indicated that the need for surgery arose as a result of the injury sustained on 20 September 2017. He stated that the applicant was presently fit for work, but he had been partially unfit at times. He stated that there was no absolute indication for a further arthroscopy at the present time, but he advised that the further proposed surgery was also reasonably necessary.

Reports of Dr Rimmer

46. Dr Rimmer examined the applicant on behalf of the insurer in respect of the prior injury and reported on 21 December 2016 and 1 August 2017. He disputed that the applicant injured his right knee on 21 November 2016 and the applicant's employment was a substantial contributing factor.

Report of Dr Powell

47. Dr Powell reported on 9 February 2018. He noted that the applicant developed "difficulties" in his right knee in an incident at work when he stepped onto a cover of a junction box that gave way. The applicant twisted his knee and felt a "pop". He continued to work, and 10 days later he tripped on carpet and again felt a "pop". He developed swelling and had difficulty walking. He was referred to Dr Nagamori, who initially recommended conservative treatment, but he eventually came to surgery in March 2017.

48. The applicant told the doctor that his symptoms greatly improved and his gait became normal. He resumed work on light duties and eventually returned to full teaching duties.

49. Dr Powell recorded that in around August 2017 [sic September 2017], the applicant was involved in a Year 12 function. He worked the full day and was then involved in ushering students and their parents into the school for the function. This involved a lot of walking in an out of the venue, turning, twisting and so on. Whilst undertaking this activity, he turned on his right leg and felt a "pop". His knee became painful and he had to leave the function.

50. Dr Powell noted that the applicant saw his local doctor a day or so later, had an MRI scan and was referred to Dr Nagamori, who recommended surgery. The arthroscopic procedure to remove further meniscal tissue was undertaken in late November 2017.

51. The doctor did not have access to any of the diagnostic tests on the right knee, but he noted that in his report dated 6 December 2016, Dr Nagamori had indicated that the MRI scan had shown a partial discoid lateral meniscus with a horizontal cleavage component extending into the posterior half.

52. Dr Powell stated that based on the limited information before him, the applicant had a right knee discoid lateral meniscus. This was a congenital abnormality that frequently deteriorated under loading and activities, leading to tears. It was not a disease process.

53. The doctor stated that the initial incident may have caused but more likely extended the degenerative condition in the discoid meniscus with a likely further failure through the deteriorating meniscus as was common in the natural history of the condition.

54. Dr Powell acknowledged that the clinical information was incomplete, but he considered that the minor incident at work had rendered his right knee symptomatic in the process of a structural failure of the lateral meniscus. He conceded that the work may have extended the failing meniscus, but the underlying cause was the congenital abnormality.

55. Dr Powell believed that the applicant developed symptoms in August 2017 [sic September 2017] on a background of the progressive failure of the meniscus. There was a similar process occurring in the applicant's left knee.

56. Dr Powell stated that the natural history of the congenital abnormality had reached the stage that allowed a mechanical incident, which would not be expected to cause injury or failure of a normal cartilage, to render the condition symptomatic. He noted that the applicant was performing his full duties, but he should take care with stairs and uneven ground, and avoid jumping, turning, twisting squatting, and getting down to or lifting from low levels, so as to reduce and avoid rotational loading and mechanical aggravation or extension of the structural tears.

Respondent's documents

57. The respondent relies on a document described as a "View Note" and identified in the index of the Reply as being completed by Aimee Ballard, presumably an employee of the insurer. She advised that she had received a call from the applicant informing her that he now required an arthroscopy and he required approval for the procedure that had been booked for Thursday.

58. Ms Ballard informed the applicant that in accordance with the terms of the settlement in the COD, medical expenses would only be paid until 1 September 2017. The applicant respondent that his solicitor had told him that he had two options, namely ask for approval of the surgery, or submit a claim for an aggravation. She advised the applicant that he would need to advise the insurer how the aggravation had occurred and the applicant asked her how he could do that when he was not at work. She suggested that he speak with his lawyer.

Respondent's statements

59. Barry Walsh, the Deputy Principal, provided a statement on 13 September 2019. He advised that the applicant's duties did not include setting up or packing up the school hall before and after events. He was aware that the applicant had made a previous claim for a right knee injury and at times the applicant would tell him that his knee was not good.

60. Mr Walsh stated that the respondent accommodated any restrictions arising from his injury and did not allocate duties that caused him discomfort or potentially aggravate his knee injury. He was not aware that the applicant had injured his knee on 20 September 2017 until he had recently read the applicant's statement. He could not recall the applicant reporting his injury and the first time that the staff became aware was when the insurer contacted them.

61. Mr Walsh stated that the respondent had a maintenance department comprising Greg Keightley, Michael Brown and James Henderson. They were responsible for maintenance and setting up the school hall for events and packing up the following day.

62. Mr Walsh indicated that the applicant did not oversee Year 12, but his role was only from a pastoral perspective. A Year 12 teacher was responsible for co-ordinating the day. He did not recall that the applicant was responsible for co-ordinating the day or for setting up the school hall. There was no reason why he would have, because this was the responsibility of Mr Brown or Mr Henderson. Mr Keightley would assist if one of them was absent.

63. Mr Walsh stated that the hall was set up days before the Year 12 graduation and mass. This involved placing chairs in rows, ensuring the video and audio was working and doing anything else that was required. The chairs are located in a storeroom that adjoins the hall on the same level and there were sufficient chairs to accommodate the attendees.

64. Mr Walsh stated that he did not recall of the applicant being present at the function, but that did not mean that he was not present. He stated that he could provide the names of the teachers who attended.

65. Mr Walsh stated that there was a graduation assembly at 9.00 am. The Year 12 students then left the school. The remaining students and teachers returned to their classes. When they returned with their parents at 4.45 pm for the ceremony and mass, they were ushered in by the Year 11 prefects and teachers. Approximately 300 to 400 mass booklets were printed for the students and their parents and there was an average of 100 to 120 students in Year 12, but this needed to be confirmed with Zac Culican, the Director of Identity, who was responsible for the booklets and the organisation and running of the day.

66. Mr Walsh advised that he was not aware whether Mr Culican asked the applicant to carry the boxes of booklets on the day. He believed that there would have only been one or two boxes and he doubted that they would have been heavy. The booklets are printed in the print room and would have been carried across the playground, up 10 steps leading to the entry of the hall. There are then 15 steps to a landing, then a right turn followed by a further 10 steps to reach the hall. The applicant would not have used the steps to attend the function unless he was in or had to go to a classroom. There was also a lift available and the applicant had a lift pass prior to his injury.

67. David Gerlach, the maths co-ordinator to whom the applicant reported, provided a statement on 19 September 2019. He advised that the applicant's job description did not include setting up the school hall. He was unaware that the applicant injured his knee at work on 20 September 2017 until about four weeks ago. He did not recall the applicant complaining about his knee and he confirmed that the applicant did not report any injury or incident to him.

68. Mr Gerlach stated that the hall setup and pack up was conducted by the maintenance team. The hall would have been set up the day before and Mr Culican would have ensured that everything was in place. He stated that the applicant did not oversee the function and his role was potentially from a pastoral perspective.

69. Mr Gerlach stated that he did not recall the applicant ever setting up the school hall, but this did not mean that he did not do so, but he thought this would be highly improbable. There was no reason why he or any other teacher would have been asked to do so by the maintenance team.

70. Mr Gerlach stated that he did not recall the specifics of the graduation and mass in 2017 or seeing the applicant at the function, but that did not mean that he was not there. He confirmed the timetable for the day, the location of the chairs and the print room and the description of the steps. He conceded that Mr Culican may have asked the applicant or other teachers to carry the boxes of booklets, but these would have fitted in one or two boxes, so multiple trips would not have been necessary. It would also have been unnecessary for the applicant to go up and down steps unless he was going to or from the classrooms.

71. Mr Gerlach stated that Year 11 students handed the mass booklets to the attendees on arrival and the teachers, parents and students found their own seats. They sat down during the function. He stated that the applicant's role on the day and on the days leading up to the ceremony and mass would have been minimal.

72. Patrick Gorton, the Head of Curriculum, provided a statement on 19 September 2019. He was unaware of the applicant's duties and rarely interacted with him, but he stated that his duties would not have included setting up or packing up the school hall. He stated that the applicant had not spoken about a knee injury to him, He did not recall the applicant complaining about or reporting a knee injury and the first he knew was about four weeks ago.

73. Mr Gorton stated that the applicant would only have to stand during playground duties, assemblies and when teaching. He was able to sit when he felt the need and he could use a lift. His evidence regarding the responsibilities of the maintenance team, the setting up of the hall, the practice on the day, the use of stairs and the boxes of booklets mirrored those of Mr Walsh and Mr Gerlach. He did not recall the applicant ever setting up the hall and there was no reason why the maintenance team would have asked him to assist.

74. Mr Gorton stated that the ceremony commences at 5.00 pm and lasts 2.5 hours. The attendees were seated during this period. He did not recall the applicant overseeing or being present at the event. He stated that the Year 11 students distributed the booklets to the attendees and ushered them to their seats. He conceded that many teachers also did this although they were not obliged to do so.

75. Tracey Shaw, the Year 8 Pastoral Co-ordinator, provided a statement on 19 September 2019. She advised that she saw the applicant irregularly and she did not interact with him. She stated that she was the Year 12 Co-ordinator in 2017 and she was required to oversee the Year 12 graduation and mass service. She did not recall the applicant being a year co-ordinator, so he would have sat with his home room with the rest of the school community and not at the front of the hall facing the attendees.

76. Ms Shaw provided similar evidence regarding the morning assembly, the maintenance team and its responsibilities, the procedure for the set up and pack up of the hall, the printing and transporting of the booklets and the nature and number of steps to be traversed. She stated that if the maintenance team required assistance, she would have expected that it would have approached her pastoral team.

77. Ms Shaw advised that all teachers were required to attend the mass and the ceremony and they usually sit at the back of the hall or in available seating. She did not recall if the applicant, or for that matter any other teacher, was present at the function, but that did not mean that he was not there.

78. Ms Shaw stated that the applicant would not have needed to stand for long periods because there were chairs available. The applicant would not have needed to use the stairs, unless he was in or had to go to the classroom. He would not need to do this once the mass and ceremony commenced. If the applicant was asked to assist to set up the hall, carry booklets or usher parents, he could have refused to do so. All of the preparation was usually done on the day before and there was no need to carry chairs up and down the stairs.

79. None of these employees could advise the precise number booklets that were printed, the number of students in Year 12 in 2017, and how many attendees were at the function. All of the numbers quoted were approximations.

APPLICANT'S SUBMISSIONS

80. Mr Young submits that the applicant does not seek an award for weekly compensation if he is successful in his claim, but only seeks a finding of injury on 20 September 2017 and incapacity during the period 20 September 2017 to 11 September 2018, because any entitlement will be proceeded by a recrediting of sick leave taken during this period.

81. Mr Young submits that the applicant suffered a right knee injury in November 2016 and this was the subject of a resolution of the dispute in the Commission in 2017. In this matter, the applicant alleges that on 20 November 2017, he sustained a personal injury in terms of s 4(a) of the 1998 Act, or alternatively an aggravation of a disease in terms of s 4(b)(ii) of the 1987 Act.

82. Mr Young submits that in his statement dated 19 June 2019, the applicant clarifies and amplifies the contents of his earlier statements. He confirmed that he suffered an aggravation and his right knee pain significantly worsened. He was mostly on his feet standing, walking and going up stairs for the entire day.

83. Mr Young submits that this history amplifies what was recorded by Dr Bodel in his report. He described what he meant by "twisting" and how he had walked up and down the school stairs at least 50 times, carrying chairs and boxes of programmes during the course of the day from 7.30 am until the ceremony started. He had to pivot on his right knee to go up and around the stairs. He felt the popping sensation later in the afternoon.

84. Mr Young submits that the MRI scan dated 27 September 2017 showed a pathological change in the applicant's right knee after the incident and before the operation on 27 November 2017. The applicant denied that he had always needed surgery before the conclusion of the prior proceedings and he was not scheduled to see Dr Nagamori with a view to surgery. He was only going to have a review to assess his condition. On 24 May 2017, Dr Nagamori reported that he expected that the applicant's condition would settle in time. The need for the operation was due to the incident on 20 September 2017.

85. Mr Young submits that in his report dated 27 September 2017, Dr Nagamori advised that the applicant had further aggravated his knee during the course of his work and required investigation. This time lone is consistent with the applicant's evidence of injury on 20 September 2017. The doctor provided a quote for the proposed surgery that occurred in November 2017.

86. Mr Young submits that there is no evidence that the surgery was booked on a Thursday prior to his injury on 20 September 2017 as suggested by the use of the word "now" in the View Note. The use of this word was explained by the applicant in his statement as is consistent with the injury sustained on 20 September 2017. The applicant was not at work when he spoke to the claims officer as he was on school holidays.

87. Mr Young submits that according to the applicant's statement, he had experienced a significant reduction in his pain following his second arthroscopy. Therefore, there was evidence of improvement, so the procedure was reasonably necessary in accordance with the authorities.

88. Mr Young submits that the MR scan dated 30 November 2016 showed a horizontal tear of the posterior horn of the lateral meniscus. In his post-operative report dated 20 March 2017, Dr Nagamori advised that the applicant was pain free and had an excellent range of motion. However, the MRI scan taken seven days after the injury on 20 September 2017 showed a cleavage tear in the anterior horn of the lateral meniscus, which Dr Nagamori described as a further extensive tear in his report dated 27 November 2017.

89. Mr Young submits that there was clearly a pathological change in the same part of the knee as a result of two injurious events, so there was an aggravation and exacerbation of the knee pathology in terms of s 4(b)(ii) of the 1987 Act. Dr Nagamori confirmed that following the surgery, there had been a significant reduction in the applicant's symptoms, so the procedure was reasonably necessary in accordance with the authorities.

90. Mr Young submits that Dr Powell obtained an incomplete history regarding the injury on 20 September 2017 and it was not consistent with the applicant's statement. The doctor based his opinion on the history that he recorded and he was lacking information. This diminishes the weight that can be given to his opinion. The doctor considered that the work incident was minor and made the congenital condition symptomatic, but he came to this conclusion because he did not have a complete history.

91. Mr Young submits that Dr Powell stated that the applicant's work may have extended the failing lateral meniscus, but the applicant was asymptomatic prior to November 2016 and then there was the aggravation and exacerbation at work on 20 September 2017. Both Dr Powell and Dr Nagamori agree that the applicant had an extended tear and/or attenuated lateral meniscus.

92. Mr Young submits that there was a change in the pathology as a result of the work injury so the applicant's employment was the main contributing factor or a substantial contributing factor. There was no other contributing factor to the aggravation or exacerbation. Dr Powell also referred to the susceptibility to a degenerative disease, so there is a disease process present. The certificates support an incapacity from 2 October 2017 to 29 January 2018.

93. Mr Young submits that the evidence of Dr Bodel is consistent with that of Dr Nagamori. There was a separate injurious event and the need for surgery in November 2017 was due to the injury on 20 September 2017. Dr Bodel confirmed that the applicant had a disease process and the disease was aggravated by minor twisting incidents at work that resulted in an aggravation, acceleration, exacerbation and deterioration which was the main contributing factor in terms of s 4(b)(ii) of the 1987 Act.

94. Mr Young submits that there are no statements from the members of the maintenance team who were responsible for setting up the school hall or from Mr Culican. An inference in accordance with *Jones v Dunkel*[1] could be drawn.

95. Mr Young submits that the employees who provided statements had no recollection of the applicant being present at the ceremony, but conceded that that did not mean that he was not there. Further, they thought it was unlikely that the applicant would have been involved in the setting up of the hall. The applicant's evidence has not been directly rebutted.

96. In reply, Mr Young submits that the applicant's evidence should be accepted as this was consistent with twisting and pivoting recorded by Dr Bodel. In his report dated 3 July 2018, Dr Nagamori only referred to the incident in November 2016 and he made no express comment about the aggravation on 20 September 2017. Nevertheless, he referred to a further tear which is consistent with further pathology. This represents an aggravation of a pre-existing condition and the doctor's opinion does not preclude an aggravation.

97. Mr Young submits that something happened to the applicant's knee that caused an aggravation and exacerbation, and there was no other contributing factor other than his employment. On 27 September 2017, Dr Nagamori reported that the applicant was unable to extend his knee and he walked with an antalgic gait. His knee was tender and the MRI scan showed oedema. This was consistent with trauma. The only contributing factor was the applicant's employment, not just the main or a substantial contributing factor.

[1] [1959] HCA 8; 101 CLR 298 (*Jones v Dunkel*)

RESPONDENT'S SUBMISSIONS

98. Mr Saul submits that this claim only concerns the allegation of an injury sustained by the applicant on 20 September 2017. The history recorded by Dr Powell may be incomplete when compared to the applicant's statement, but the same applies to the history recorded by Dr Bodel. The applicant's credit is in issue and the manner in which the case is presented is curious.

99. Mr Saul submits that in his report dated 3 July 2018, Dr Nagamori noted that since the applicant's second injury, he complained that he had a reduced range of motion and pain. The doctor noted that despite having two arthroscopies, the applicant still had a locking sensation and an MRI scan showed a further tear or attenuation that caused symptoms. He attributed the meniscal tear to the incident on 21 November 2016. There is no other report from Dr Nagamori with respect to causation and he related all of the applicant's problems to the injury sustained on 21 November 2016. There is also no evidence in support of any incapacity arising from the injury.

100. Mr Saul submits that the history contained in the applicant's statement is not recorded elsewhere. Dr Bodel obtained a different history in that he noted that the applicant had experienced some aching and experienced increasing difficulty with stairs in the few weeks leading up to 20 September 2017. However, there is no allegation of injury arising from the nature and conditions of employment.

101. Mr Saul submits that the history recorded by Dr Bodel referred to walking and twisting during a work-related activity and the applicant felt a popping sensation. The doctor provided an opinion based on this history which did not refer to the applicant climbing stairs and carrying chairs and boxes of booklets. Therefore, Dr Bodel's opinion is the most compromised and the opinion of Dr Nagamori carries more weight.

102. Mr Saul submits that according to Dr Bodel, the need for surgery related to the injury in 2016 and the subsequent injury in 2017. Dr Bodel does not address whether the incident in 2017 materially contributed to the need for surgery.
103. Mr Saul concedes that the View Note seemed to be directed to the earlier injury. The applicant was told by the insurer that he could not recover compensation related to the injury in November 2016 that was the subject of a settlement. There was no mention of an injury on 20 September 2017. The applicant only disputed the accuracy of the View Note in his third statement.

104. Mr Saul submits that the applicant cannot be accepted as a reliable witness. The was no allegation of injury arising from the use of stairs in the certificates or his claim form. In his report dated 27 September 2017, Dr Nagamori did not articulate that anything happened on 20 September 2017.

105. Mr Saul submits that in his statement dated 21 November 2017, the applicant indicated that he spent the whole day standing, walking and going up and down stairs, but this history and that recorded in his last statement were completely different to that recorded by Dr Bodel. There is also some doubt whether the applicant's last statement was in his own words. It is strange that there is no updated report from Dr Bodel and a *Jones v Dunkel* inference might be drawn.

106. Mr Saul submits that Dr Powell recorded that the applicant's conditions settled following his second incident on 28 November 2016. The history that he recorded regarding the third incident was similar to that of Dr Bodel, but Dr Nagamori had no such history. The applicant has not adduced evidence that the injury materially contributed to the need for surgery.

107. Mr Saul submits that the statements of the respondent's employees have not been challenged by any evidence from the applicant. Mr Walsh, Mr Gerlach, Mr Gorton and Ms Shaw confirmed that the maintenance team was responsible for setting up the school hall the day before the event and there was no reason for the applicant to be involved. Their evidence is powerful and uncontradicted. There was no need for any evidence from the members of the maintenance team.

108. Mr Saul submits that the clinical notes showed two injuries, namely on 18 August 2017, when the applicant complained of right knee pain and on 2 October 2017, when the applicant complained about an exacerbation or aggravation, although the circumstances were not recorded.

109. Mr Saul submits that there is no report from Dr Moussad or Dr Nagamori and the applicant's case rises and falls on the report of Dr Bodel, who recorded an incomplete history and gave no explanation why the applicant's employment was the main contributing factor to the injury or aggravation. The main contributing factor was the injury in 2016 and there was a natural progression of that injury.

110. Mr Saul submits that if one were to accept that the applicant could feel pain when standing around this could have happened anywhere. The factors to be considered in respect of a substantial contributing factor can be absorbed into those relating to main contributing factor which commands a higher standard. Accordingly, one could not be satisfied that the applicant's employment injury on 20 September 2017 was the main contributing factor to his incapacity and the need for surgery. This was due to the injury in November 2016.

REASONS

Did the applicant sustain injury to his right knee on 20 September 2017? – ss 4(a), 4(b)(ii) and 9A of the 1987 Act.

111. Section 4 of the 1987 Act defines injury as follows:

> "In this Act-
>
> ***Injury***-
>
> (a) means 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".

112. In order to be satisfied that an injury has occurred, there must be evidence of a sudden or identifiable pathological change: *Castro v State Transit Authority (NSW)*[2], or as stated by Neilson CCJ in *Lyons v Master Builders Association of NSW Pty Ltd* [3], "the word 'injury' refers to both the event and the pathology arising from it".

113. The issue of causation must be determined based on the facts in each case. The accepted view regarding causation was set out in *Kooragang Cement Pty Ltd v Bates*[4] where Kirby J stated:

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

114. The applicant alleges an injury in the form of a meniscal tear in his right knee and/or an aggravation of the pre-existing knee condition. Therefore, he relies on a personal injury in terms of s 4(a) of the 1987 Act and an aggravation of a disease process in terms of s 4(b)(ii) of the 1987 Act and he bears the onus.

115. In *Department of Education & Training v Ireland*[5], President Keating considered the principles regarding the discharge of the onus of proof. He stated:

> "The principles relevant to the discharge of the onus of proof were discussed in *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246 (16 October 2008) ('*Nguyen*') where McDougall J (McColl and Bell JJA agreeing) said at [44]–[48]:
>
> '44. A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336. His Honour's statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in *Helton v Allen* (1940) 63 CLR 691 at 712.
>
> 45. Dixon CJ put the matter in different words, although to similar effect, in *Jones v Dunkel* (1959) 101 CLR 298 at 305 where his Honour said that '[t]he facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied'. Although his Honour dissented in the outcome of that case, the words that I have quoted were cited with approval by the majority (Stephen, Mason, Aickin and Wilson JJ) in *West v Government Insurance Office of NSW* (1981) 148 CLR 62 at 66. See also Stephen J in *Girlock (Sales) Pty Limited v Hurrell* (1982) 149 CLR 155 at 161–162, and Mason J (with whom Brennan J agreed) in the same case at 168.

[2] [2000] NSWCC 12; 19 NSWCCR 496.
[3] (2003) 25 NSWCCR 422, [429].
[4] (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*), [463].
[5] [2008] NSWWCCPD 134 (*Ireland*).

46. It is clear, in particular from *West* and *Girlock*, that the requirement for actual satisfaction as to the occurrence or existence of a fact is one of general application, and not limited to cases where the fact in question, if found, might reflect adversely on the character of a party or witness.

47. In *Malec v JC Hutton Pty Limited* (1990) 169 CLR 638 Deane, Gaudron and McHugh JJ said at 642-643:

"A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain; if the probability of it having occurred is less than it not having occurred, it is treated as not having occurred."

48. On analysis, I think, what their Honours said is not inconsistent with the requirement that the tribunal of fact be actually persuaded of the occurrence or existence of the fact before it can be found. On their Honours' approach, what is required is a determination of the respective probabilities of the event's having occurred or not occurred. There is nothing in that analysis to suggest that the determination in favour of probability of occurrence should not require some sense of actual persuasion.'"[6]

116. Therefore, in order for the applicant to discharge the onus that he sustained an injury on 20 September 2017, I "must feel an actual persuasion of the existence of that fact".

117. The first issue that I need to consider is whether the evidence establishes that the applicant was involved in the activities identified in his statements.

118. According to the applicant's claim form dated 5 October 2017, he injured his right knee on 20 September 2017 as a result of standing and walking continuously for the entire day at work and until late at night on the Year 12 graduation day and mass. He alleged that he reported his injury to Mr Gerlach and Mr Gorton, although he did not say when he did this.

119. It is true that the two statements provided by the applicant in respect of this claim give different versions of the mechanism of the alleged injury, but there are also consistencies.

120. In his initial statement, the applicant claimed that he was overseeing the Year 12 graduation ceremony and mass. It seems that the use of the word "overseeing" is an inaccurate way of describing the tasks that the applicant allegedly performed, when one has regard to the evidence of Mr Walsh, Mr Gerlach and Ms Shaw.

121. The applicant claimed that he commenced work at 7.30 am and he finished at 8.00 pm. He stated that he spent the whole of the day standing, walking and going up and down stairs. This is largely consistent with his contemporaneous claim form. The applicant performed his usual teaching duties during normal class hours, and this involved standing. It is consistent that he may well have needed to use the stairs to move between classrooms and the school hall. The respondent's employees confirmed that the applicant would have needed to use the stairs to go from the classrooms to the school hall. Whether he needed to use the stairs to go to other parts of the school is unknown.

[6] *Ireland*, [89].

122. The applicant claimed that he kept working despite noticing pain in his knee and lower leg because he had to usher people to their seats. Whilst the respondent's employees indicated that this task was the responsibility of the Year 11 prefects, they conceded that teachers did this task as well.

123. Unfortunately, the applicant's last statement is poorly drafted and raises more questions than answers. The applicant indicated that he carried chairs and boxes of programmes from 7.30 am until classes commenced, during recess and lunch, and then until the graduation commenced. Therefore, it this seems that these activities occurred outside the usual classroom hours.

124. The applicant stated that he walked up and down the school stairs at least 50 times. He did not explain where he was coming from or going to. It is unclear how many chairs and boxes of booklets he carried, where he carried them from and how often he carried them. He stated that he felt a popping in his knee late in the afternoon. Whether this occurred in the classroom or when assisting with the setup of the school hall is unclear.

125. According to the respondent's employees, there were 10 steps leading to the building entrance, 15 steps up to the landing, a right turn and then a further 10 steps to the entry of the school hall. Therefore, it is conceivable that there was the potential for some pivoting on the stairs.

126. The respondent relies on statements from four employees. All confirmed that the setting up of the school hall done by the maintenance department that comprised three employees. It was not the applicant's responsibility and there was no reason why he would do this. Be that as it may, none of the employees could confirm that the applicant was not involved in the activities alleged by him or even that he was present or absent from the function. Mr Walsh offered to provide a list of the teachers who attended, but this is not in evidence.

127. Mr Walsh could not recollect the applicant reporting an injury. The applicant claimed that he reported his injury to Mr Gerlach and Mr Gorton, but this has been disputed by them. In any event, a claim form was submitted on 5 October 2017.

128. Mr Walsh stated that the applicant would not have used the steps to attend the function unless he was in or had to go to a classroom. Given that the applicant was teaching classes during the day, he would have used the stairs to go to the school hall at some stage, unless he used the lift, but there is no evidence that he did this.

129. Mr Walsh advised that the chairs were located on the same level and there were sufficient chairs for the attendees. He was uncertain how many people were in attendance and he had no real idea about the number of booklets that were printed, but suggested that there would have been only one or two boxes. He did not know if Mr Culican had asked the applicant to assist him. One would have thought this could have easily been clarified. Therefore, it is difficult to know what to make of his evidence.

130. The contents of Mr Walsh's statement were confirmed in the statements of the other employees of the respondent. Mr Gorton stated that the applicant would stand during playground duties, assemblies and when teaching and that teachers assisted with ushering parents and students at the graduation ceremony, so he corroborates some of the applicant's evidence.

131. None of these employees could advise the precise number booklets that were printed, the number of students in Year 12 in 2017, and how many attendees were at the function. All of the numbers quoted were approximations. Enquiries could easily have been made by Mr Walsh and the others.

132. In summary, according to the applicant's evidence, he worked from 7.30 am until 8.00 pm on the day of the graduation ceremony. This involved his usual class room duties where he was required to stand. He claims that he assisted with the setup of the school hall before classes commenced, during the morning tea and lunchtime periods and after classes finished.

133. The only material relied upon by the respondent to challenge the applicant's evidence are statements from four employees who had no idea what the applicant actually did at work on 20 September 2017. They lacked any specific recollection, did not check contemporaneous records and merely speculated that it was not the applicant's responsibility to assist in setting up the school hall or help with other tasks such as carrying boxes of booklets and ushering attendees at the ceremony.

134. Surely the most crucial and persuasive evidence regarding the events on the day would have been the evidence of Messrs Keightley, Brown, Henderson and Culican. Curiously, I do not have the benefit of the factual investigation or any explanation why statements were not obtained from the most important and relevant witnesses who would be in the best position to challenge the applicant's evidence.

135. Therefore, the absence of such statements can only lead me to the conclusion that the evidence of these four employees would not have advanced the respondent's case in accordance with the principles set out in *Jones v Dunkel.*

136. I have some reservations about the applicant's last statement when he suggested that he went up and down stairs 50 times, carried chairs and boxes of booklets, but this may be more to do with poor drafting and confusing terminology and syntax, rather than any conscious attempt to deceive the reader. In my view, I am unable to place any weight on this aspect of the applicant's statement which has not been corroborated elsewhere.

137. It is true that there are inconsistencies in the applicant's evidence about the precise activities that he performed on 20 September 2017, but there is no persuasive evidence before me to dispute what the applicant indicated in his claim form, his initial statement and the history recorded by Drs Powell and Bodel. In the circumstances, I accept that he spent the day standing, walking and there was some going up and down stairs that involved pivoting movements. The next question to consider is whether the applicant injured his right knee.

138. In his initial statement, the applicant indicated that he began to notice pain and aching and he had a lot of pain in his right knee by the end of the night. In his second statement, he referred to pivoting on and around the stairs and a popping sensation that occurred late in the afternoon.

139. The contents of the View Note are confusing, but it seems that the case manager was mistaken as to the time frame and the fact the applicant was at home when he contacted her. Therefore, this note is of little significance.

140. It is true that I do not have the benefit of a report from Dr Moussad on causation, but that is not uncommon in this jurisdiction. The focus of treating doctors is on treatment and they rarely comment on causation unless they are specifically called upon to do so.

141. The clinical notes of Dr Moussad are of little assistance regarding the circumstances of the applicant's alleged injury on 20 September 2017, but he confirmed that the applicant had suffered an exacerbation and aggravation of his previous right knee injury. Therefore, it seems that something happened shortly before the consultation on 2 October 2017 to cause the applicant to have increased symptoms and warrant a referral for specialist treatment.

142. The reports of Dr Nagamori confirm that the applicant achieved a good outcome from the first lateral meniscectomy. Although Dr Nagamori did not record a history of the mechanism of injury when he saw the applicant on 27 September 2017, the doctor indicated that the applicant aggravated his knee at work and there had been a considerable deterioration of his condition. Therefore, it seems that something happened to cause the applicant's symptoms.

143. Significantly, the MRI scan revealed a cleavage tear in the anterior horn of the lateral meniscus extending into the body and posterior horn of the lateral meniscus. There was also prominent oedema. Dr Nagamori described this as an extensive further horizontal tear of the lateral meniscus. Therefore, there was evidence of further pathology that was not previously in existence. The tear was also located on the posterior side which differs from the location of the previous tear on the anterior side.

144. In his report dated 3 July 2018, Dr Nagamori only referred to the two incidents in November 2016 and he limited his comments on causation to the effects of the incident on 21 November 2016. That opinion is not controversial, as there was evidence of a meniscal tear in 2016 and this was treated during the first arthroscopy.

145. However, Dr Nagamori failed to comment on the aggravation that he described as occurring at work in September 2017 and the radiological and operative evidence of a further horizontal tear. In my view, this is a significant omission on the doctor's part. It is strange that a supplementary report was not obtained from the doctor seeking his specific comments regarding the effect on the injury on 20 September 2017.

146. As we do not know the doctor's views on causation in respect of the injury which is the subject of this dispute, little weight can be given to the opinion expressed in his report. The situation would have been different had he specifically ruled out a causal nexus between the injury on 20 September 2019 and the pathology in the applicant's knee.

147. It is true that the history recorded by Dr Bodel differed from the applicant's last statement. He referred to aching in the applicant's knee for a few weeks prior to the incident on 20 September 2017. This history is not recorded elsewhere, but in any event, the doctor did not seem to place any weight on this when he expressed his opinion on causation.

148. Dr Bodel recorded that the applicant was walking when he twisted at the graduation and felt a popping sensation. Such a history is not recorded elsewhere, although the applicant referred to walking, pivoting and experiencing a popping sensation in his last statement. There was no reference to walking up and down the stairs 50 times, carrying chairs or carrying boxes of booklets, but I have already discounted placing any weight on the applicant's evidence regarding these activities.

149. The fact that Dr Bodel did not record such a history, which I have determined to be of no force, would give credence to his opinion regarding the effect that the walking and twisting had on the applicant's knee.

150. Further, given that he already supported the applicant's claim, any further opinion based on the additional history identified in the applicant's last statement would have only strengthened rather than diminished the weight to be given to the doctor's evidence. Accordingly, I am not persuaded that an inference can be drawn regarding the absence of a further report from Dr Bodel in accordance with the principles in *Jones v Dunkel*.

151. Like Dr Nagamori, Dr Bodel diagnosed a tear of the lateral meniscus on 21 November 2016, but he also felt that there had been further progression of the tear as a result of the work injury on 20 September 2017. This seems consistent with the opinion of Dr Nagamori expressed in his 2017 reports.

152. According to Dr Bodel, the applicant had developed a disease process and minor twisting injuries had caused an aggravation, acceleration, exacerbation and deterioration in the knee. This was the main contributing factor. He also attributed the need for surgery to the injury sustained on 20 September 2017.

153. Dr Nagamori described the applicant's injury as an aggravation and there had been a significant deterioration. He did not describe any disease process, so he seems to support an injury simpliciter in accordance with s 4(a) of the 1987 Act.

154. The respondent relies on the reports of Dr Rimmer, who disputed that the applicant suffered an injury on 21 November 2016. Given the acceptance of an injury to the right knee by the insurer during the proceedings that resolved in the Commission on 6 September 2017, and because Dr Rimmer had not seen the applicant since 2016, his opinion is of no assistance in respect of the current dispute.

155. The respondent also relies on the views of Dr Powell. Given that he saw the applicant approximately two months after the surgery, it is remarkable that he was not provided with copies of the post-injury medical evidence. This obviously placed him at a disadvantage. This in turn raises issues about the weight to be given to his opinion.

156. Dr Powell recorded that the applicant's symptoms improved following his first operation. He noted that the applicant was involved in the Year 12 graduation and he worked the full day. He was then involved in ushering the attendees to their seats. The tasks involved a lot of walking in an out of the venue, turning and twisting. This history is largely consistent with the applicant's statements and the history received by Dr Bodel.

157. The applicant told Dr Powell that he turned on his right leg and felt a "pop" and then he had to leave the function. This history is somewhat similar to the applicant's claim form and his first statement, but differs from the second statement.

158. Dr Powell acknowledged that he was hampered by the lack of information, such as the diagnostic tests, and he only had access to the report of Dr Nagamori dated 6 December 2016. He accepted that the applicant had a congenital discoid lateral meniscus in his right knee, which could deteriorate under loading, but he stated that the condition was not a disease process.

159. Significantly Dr Powell conceded that the initial incident may have caused or more likely extended the degenerative condition in the meniscus with a likely further failure via natural progression. Therefore, he seems to accept that there was a degenerative condition in the knee and there was some contribution from the work injury on 21 November 2016. Of course, injury on 21 November 2016 is not in dispute. The doctor also acknowledged that the congenital condition had reached a stage where a mechanical incident could render the condition symptomatic.

160. Such a conclusion would seem to reflect precisely what happened on 20 September 2017, namely an incident that caused not only symptoms, but further pathology, namely an extension of the tear in the lateral meniscus as shown in the MRI scan take shortly afterwards. This seems more in the nature of an injury in terms of s 4(a) of the 1987 Act.

161. The Court of Appeal decision in *Rail Services Australia v Dimovski*[7] and Commission decisions of *Gibson v Royal Life Saving Society of Australia*[8] and *Norambuena v Transfield Services (Australia) Pty Ltd*[9], confirmed that an injury that results in the aggravation of a disease can be an injury simpliciter in terms of s 4(a) of the 1987 Act. This appears to be what has transpired in the present matter.

162. What constitutes an aggravation of a disease process was discussed by Windeyer J in *Federal Broom Co Pty Ltd v Semlitch*.[10] His Honour stated:

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

163. The applicant relies on his statements and the medical evidence of Drs Moussad, Nagamori and Bodel. I have discounted some aspects of the applicant's last statement, but overall the history given to his doctors is largely consistent, although there are certainly some areas of concern. The post injury MRI scan is particularly persuasive and this was not something that Dr Powell had access to. Indeed, he had very little information and this creates an issue regarding the weight that can be given to his opinion. He is the only doctor who takes issue with causation but even he acknowledged the possibility of an incident resulting in symptoms.

164. Accordingly, having regard to the common-sense evaluation test in *Kooragang*, I am satisfied on the balance of probabilities that the applicant suffered an injury to his right knee arising out of or in the course of his employment on 20 September 2017 in accordance with s 4(a) of the 1987 Act.

Substantial contributing factor

165. Section 9A of the 1987 Act provides:

> **"9A No compensation payable unless employment substantial contributing factor to injury**
>
> (1) No compensation is payable under this Act in respect of an injury (other than a disease injury) unless the employment concerned was a substantial contributing factor to the injury.
>
> **Note.** In the case of a disease injury, the worker's employment must be the main contributing factor. See section 4.
>
> (2) The following are examples of matters to be taken into account for the purposes of determining whether a worker's employment was a substantial contributing factor to an injury (but this subsection does not limit the kinds of matters that can be taken into account for the purposes of such a determination):
>
> (a) the time and place of the injury,
>
> (b) the nature of the work performed and the particular tasks of that work,
>
> (c) the duration of the employment,

[7] [2004] NSWCA 267; 1 DDCR 648, [68] (Hodgson JA)
[8] [2009] NSWWCCPD 137, [67] (Roche DP)
[9] [2009] NSWWCCPD 52, [60] – [61] (Roche DP)
[10] [1964] HCA 34; 110 CLR 626 (*Semlitch*), [369].

(d) the probability that the injury or a similar injury would have happened anyway, at about the same time or at the same stage of the worker's life, if he or she had not been at work or had not worked in that employment,

(e) the worker's state of health before the injury and the existence of any hereditary risks,

(f) the worker's lifestyle and his or her activities outside the workplace…"

166. In *Badawi v Nexon Asia Pacific Pty Limited t/as Commander Australia Pty Limited*[11] and in *Van Wessem v Entertainment Outlet Pty Ltd*[12]*,* the Court of Appeal held that the phrase "substantial contributing factor" in s 9A of the 1987 Act involved a causative element that was a different or added requirement to "arising out of" employment in ss 4 and 9 of the 1987 Act. For employment to be a "substantial contributing factor" to the injury under s 9A of the 1987 Act, the causal connection must be "real and of substance".

167. Section 9A(2) of the 1987 Act provides examples of matters to be taken into account when determining whether employment was a substantial contributing factor. Whether employment is a substantial contributing factor to an injury is a question of fact and is a matter of impression and degree to be decided after a consideration of all the evidence and is a more stringent test than that imposed by s 4 of the 1987 Act.[13]

168. The section concerns itself with whether the employment was "a" substantial contributing factor, not whether it was "the" substantial contributing factor, and it is accepted that an injury may have a number of contributing factors. In order to determine this issue, I need to consider the specific provisions in s 9A(2) of the 1987 Act.

169. The evidence that I have accepted confirms that the applicant sustained injury during his working hours from 7.30 am to 8.00 pm on 20 September 2017. This factor assists the applicant's case (ss 9A(2)(a), 9A(2)(b) and 9A(2)(c) of the 1987 Act).

170. The applicant suffered a pre-existing meniscal injury, but the prior surgery had largely relieved his symptoms. However, the applicant's knee was vulnerable and he may have suffered an injury or a similar injury under other circumstances, so perhaps this factor is neutral or favours the respondent (s 9A(2)(d) of the 1987 Act).

171. There is no evidence to suggest that the applicant had any major health or hereditary problems or that his lifestyle and activities when he was away from work would be of any concern. This factor is in the applicant's favour (ss 9A(2)(e) and 9A(2)(f) of the 1987 Act).

172. In accordance with *Badawi*, the relevant 'employment concerned', or what the applicant was doing in his employment at the time of his injury, was attending to his duties as an employee of the respondent. The employment was real and of substance.

173. The weight of evidence confirms that the applicant suffered a meniscal tear as a result of the incident. Accordingly, I am satisfied that the medical and factual evidence establishes a causal connection between the applicant's injury and his employment such that the applicant's employment was the substantial contributing factor to his injury as required by s 9A of the 1987 Act.

[11] [2009] NSWCA 324 (*Badawi*)
[12] [2011] NSWCA 214
[13] *Dayton v Coles Supermarkets Pty Ltd* [2001] NSWCA 153 at [29]; *McMahon v Lagana* [2004] NSWCA 164 at [32]; (2004) 4 DDCR 348 at 349.

174. Even if I am wrong and the applicant in fact suffered an injury in terms of s 4(b)(ii) of the 1987 Act, I consider that his employment could also be considered the main contributing factor to his injury.

175. In order to understand what "main contributing factor" means, one must interpret the ordinary and grammatical meaning of the text, language and structure of the legislation, the legal and historical context, and the purpose of the statute in order to come to a reasonable conclusion as to its meaning and application[14].

176. A consideration of the text can be assisted by reference to dictionary definitions of the words used in the legislation. When one has regard to the online version of the Macquarie Dictionary, "main" contributing factor can be interpreted as the "chief" or "principal" contributing factor. Such an interpretation is not dissimilar to the interpretation of "wholly or predominantly caused" used in s 11A of the 1987 Act, which has been held to mean "mainly or principally caused": *Kooragang*; *Ponnan v George Weston Foods Ltd*[15]; *Temelkov v Kemblawarra Portuguese Sports and Social Club Ltd*[16], and *Smith v Roads and Traffic Authority of NSW*[17].

177. However, the term "wholly" seems to connote "entirely" or "totally" to the exclusion of everything else, whereas the terms "mainly", "chiefly", "principally" and "predominantly" suggest a slightly lesser degree, but those terms seem to demand a level more than "substantially".

178. When one analyses the evidence, there seems little doubt that the applicant's employment was the main contributing factor to an aggravation and exacerbation. The employment was the chief or principal cause of the aggravation and there is no evidence to suggest otherwise.

Extent and quantification of the applicant's capacity

179. Mr Young informed me that the applicant did not want me to enter an award for weekly compensation as the applicant will be entitled to a recrediting of sick leave take during the period of the claim. All that the applicant required was a determination in respect of injury.

180. The evidence confirms that the applicant took time off work from time to time and during these periods he was incapacitated.

181. Accordingly, I do not propose to make any determination in respect of the extent and quantification of the applicant's capacity, but will give the parties liberty to apply within 28 days of this determination in the event that this cannot be resolved.

Was the surgery undertaken on 27 November 2017 reasonably necessary as a result of the injury sustained on 20 September 2017?

182. Section 60 of the 1987 Act provides:

> "60 (1) If, as a result of an injury received by a worker, it is reasonably necessary that:
>
> (a) any medical or related treatment (other than domestic assistance) be given, or

[14] *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355, [69] – [71] (per McHugh, Gummow, Kirby and Hayne JJ); *Hesami v Hong Australia Corporation Pty Ltd* [2011] NSWWCCPD 14, [43] – [44] (per Roche DP) and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* [2009] HCA 41; 239 CLR 27, [47] (per Hayne, Heydon, Crennan and Kiefel JJ).
[15] [2007] NSWWCCPD 92.
[16] [2008] NSWWCCPD 96.
[17] [2008] NSWWCCPD 130.

(b) any hospital treatment be given, or
(c) any ambulance service be provided, or
(d) any workplace rehabilitation service be provided,

the worker's employer is liable to pay, in addition to any other compensation under this Act, the cost of that treatment or service and the related travel expenses specified in subsection (2)".

183. What constitutes reasonably necessary treatment was considered in the context of s 10 of the *Workers Compensation Act 1926* in *Rose v Health Commission (NSW)*[18], Burke CCJ stated:

> "Treatment, in the medical or therapeutic context, relates to the management of disease, illness or injury by the provision of medication, surgery or other medical service designed to arrest or abate the progress of the condition or to alleviate, cure or remedy the condition. It is the provision of such services for the purpose of limiting the deleterious effects of a condition and restoring health. If the particular 'treatment' cannot, in reason, be found to have that purpose or be competent to achieve that purpose, then it is certainly not reasonable treatment of the condition and is really not treatment at all. In that sense, an employer can only be liable for the cost of reasonable treatment."[19]

184. Further, His Honour added:

> "1. *Prima facie*, if the treatment falls within the definition of medical treatment in section 10(2), it is relevant medical treatment for the purposes of this Act. Broadly then, treatment that is given by, or at the direction of, a medical practitioner or consists of the supply of medicines or medical supplies is such treatment.
>
> 2. However, although falling within that ambit and thereby presumed reasonable, that presumption is rebuttable (and there would be an evidentiary onus on the parties seeking to do so). If it be shown that the particular treatment afforded is not appropriate, is not competent to alleviate the effects of injury, then it is not relevant treatment for the purposes of the Act.
>
> 3. Any necessity for relevant treatment results from the injury where its purpose and potential effect is to alleviate the consequences of injury.
>
> 4. It is reasonably necessary that such treatment be afforded a worker if this Court concludes, exercising prudence, sound judgment and good sense, that it is so. That involves the Court in deciding, on the facts as it finds them, that the particular treatment is essential to, should be afforded to, and should not be forborne by, the worker.
>
> 5. In so deciding, the Court will have regard to medical opinion as to the relevance and appropriateness of the particular treatment, any available alternative treatment, the cost factor, the actual or potential effectiveness of the treatment and its place in the usual medical armoury of treatments for the particular condition."[20]

[18] (1986) 2 NSWCCR 32 (*Rose*)
[19] *Rose*, [42].
[20] *Rose*, [47].

185. His Honour considered the relevant factors relating to reasonably necessary treatment under s 60 of the 1987 Act in *Bartolo v Western Sydney Area Health Service*[21] and stated:

> "The question is should the patient have this treatment or not. If it is better that he have it, then it is necessary and should not be forborne. If in reason it should be said that the patient should not do without this treatment, then it satisfies the test of being reasonably necessary."[22]

186. In *Diab v NRMA Ltd*[23], Deputy President Roche questioned this approach and cited *Rose* with approval. He provided a summary of the principles as follows:

> "In the context of s 60, the relevant matters, according to the criteria of reasonableness, include, but are not necessarily limited to, the matters noted by Burke CCJ at point (5) in *Rose* (see [76] above), namely:
>
> (a) the appropriateness of the particular treatment;
> (b) the availability of alternative treatment, and its potential effectiveness;
> (c) the cost of the treatment;
> (d) the actual or potential effectiveness of the treatment, and
> (e) the acceptance by medical experts of the treatment as being appropriate and likely to be effective.
>
> With respect to point (d), it should be noted that while the effectiveness of the treatment is relevant to whether the treatment was reasonably necessary, it is certainly not determinative. The evidence may show that the same outcome could be achieved by a different treatment, but at a much lower cost. Similarly, bearing in mind that all treatment, especially surgery, carries a risk of a less than ideal result, a poor outcome does not necessarily mean that the treatment was not reasonably necessary. As always, each case will depend on its facts.
>
> While the above matters are 'useful heads for consideration', the 'essential question remains whether the treatment was reasonably necessary' (*Margaroff v Cordon Bleu Cookware Pty Ltd* [1997] NSWCC 13; (1997) 15 NSWCCR 204 at 208C). Thus, it is not simply a matter of asking, as was suggested in *Bartolo*, is it better that the worker have the treatment or not. As noted by French CJ and Gummow J at [58] in *Spencer v Commonwealth of Australia* [2010] HCA 28, when dealing with how the expression 'no reasonable prospect' should be understood, '[n]o paraphrase of the expression can be adopted as a sufficient explanation of its operation, let alone definition of its content'".[24]

187. Whether the need for reasonably necessary treatment arises from an injury is a question of causation and the principles in *Kooragang* are also relevant to this issue.

188. It is accepted that a condition can have multiple causes, but the applicant must establish that the injury materially contributed to the need for surgery. This was confirmed by Deputy President Roche in *Murphy v Allity Management Services Pty Ltd*[25], where he stated:

> "Moreover, even if the fall at Coles contributed to the need for surgery, that would not necessarily defeat Ms Murphy's claim. That is because a condition can have multiple causes (*Migge v Wormald Bros Industries Ltd* (1973) 47 ALJR 236; *Pyrmont Publishing Co Pty Ltd v Peters* (1972) 46 WCR 27; *Cluff v Dorahy Bros (Wholesale) Pty Ltd* (1979)

[21](1997) 14 NSWCCR 233 (*Bartolo*).
[22] *Bartolo*, [238].
[23] [2014] NSWWCCPD 72 (*Diab*).
[24] *Diab*, [88] to [90]
[25] [2015] NSWWCCPD 49 (*Murphy*).

53 WCR 167; *ACQ Pty Ltd v Cook* [2009] HCA 28 at [25] and [27]; [2009] HCA 28; 237 CLR 656). The work injury does not have to be the only, or even a substantial, cause of the need for the relevant treatment before the cost of that treatment is recoverable under s 60 of the 1987 Act.

Ms Murphy only has to establish, applying the commonsense test of causation (*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796), that the treatment is reasonably necessary 'as a result of' the injury (see *Taxis Combined Services (Victoria) Pty Ltd v Schokman* [2014] NSWWCCPD 18 at [40] – [55]). That is, she has to establish that the injury materially contributed to the need for the surgery (see the discussion on the test of causation in *Sutherland Shire Council v Baltica General Insurance Co Ltd* (1996) 12 NSWCCR 716)."[26]

189. At the conciliation conference in the prior proceedings, the respondent accepted that the applicant injured his right knee on 21 November 2016 and it agreed to pay some weekly compensation and medical expenses. This included costs associated with the first arthroscopy performed by Dr Nagamori. The insurer has disputed that it is liable for the second procedure.

190. According to the applicant, he experienced a lot of pain following the popping sensation on 20 September 2017. Dr Moussad recorded a history of pain and swelling and an inability to weight bear at the consultation on 2 October 2017 and he referred the applicant to Dr Nagamori. Following the surgery, he had experienced significant improvement in his pain, but he later developed some clicking and catching and Dr Nagamori had recommended further surgery.

191. The MRI scan taken following the applicant's injury in September 2017 showed that there was a further tear of the lateral meniscus, although on this occasion, it was located on the anterior side extending into the posterior side.

192. Dr Nagamori considered that this pathology justified the need for surgery which was undertaken on 27 November 2017 and on 6 December 2017, he reported that the applicant's symptoms had significantly improved and he was walking normally.

193. Dr Bodel noted that the applicant benefited from the surgery although further issues arose in January 2018. He advised that the treatment was reasonably necessary for management of the applicant's work injuries.

194. Dr Powell reported that the applicant had been steadily improving since the operation, but he was still troubled by discomfort on standing. The doctor did not specifically comment on whether the second arthroscopy was reasonably necessary as a result of the injury on 20 September 2017, presumably because he considered that it was undertaken to treat the tear of the congenital discoid meniscus. He seems to confirm that an arthroscopy was one form of treatment for the management of a knee condition. Therefore, in the absence of any specific comment, his report is of little assistance.

195. The respondent disputes that the proposed surgery was reasonably necessary as a result of the knee injury on 20 September 2017, based on the opinion of Dr Powell, but he did not deal with the current issue in dispute.

196. According to *Murphy*, a condition can have many causes. In this matter, the surgery was undertaken to repair a further extension of the meniscal tear which had developed since the previous procedure. The applicant experienced significant symptoms during and following the incident on 20 September 2017 and new pathology was identified in the MRI scan.

[26] *Murphy*, [57] to [58].

197. Whilst it seems the applicant may have had some aching in the weeks before the incident, there is no persuasive evidence to suggest that the tear was not caused by the work injury on 20 September 2017.

198. In my view, applying the common-sense test of causation in *Kooragang*, the weight of evidence from Dr Moussad, Dr Nagamori and Dr Bodel supports the applicant's case that his right knee injury in 2017 materially contributed to the need for the second arthroscopy.

199. The medical evidence supported the need for the operation to address the effects of the applicant's work injury. The condition was beyond conservative forms of treatment, given the nature and level of the applicant's symptoms and the radiological findings.

200. I am satisfied that the surgery helped to alleviate the applicant's symptoms. It is an appropriate treatment and it has been effective, albeit there have been some further issues. Even Dr Powell accepted that the operation was an appropriate form of treatment for the management of knee conditions.

201. There seems to have been no alternative forms of treatment and the cost was not unreasonable. This satisfies the relevant factors discussed in *Rose* and *Diab*.

202. Accordingly, I am satisfied on the balance of probabilities that the surgery undertaken by Dr Nagamori on 27 November 2017 and associated expenses, was reasonably necessary treatment as a result of the injury sustained on 20 September 2017.

Medical Expenses – s 60 of the 1987 Act

203. As the applicant has succeeded in his claim, I accept the medical evidence that supports the need for payment of reasonable medical, hospital and associated expenses that relate to the injury sustained on 20 September 2017. This includes the cost of the surgery undertaken by Dr Nagamori on 27 November 2017 and the associated expenses. Accordingly, there will be a general order pursuant to s 60 of the 1987 Act.

204. Some of the expenses identified in the schedule of medical expenses attached to the Application were incurred prior to 20 September 2017, so they would clearly relate to the earlier right knee injury. Whether they form part of the settlement in the previous consent orders is unknown and will be a matter for discussion between the parties.

Costs

205. There will be no order as to costs.

FINDINGS

206. The applicant sustained injury to right knee arising out of or in the course of his employment with the respondent on 20 September 2017.

207. The applicant's employment was a substantial contributing factor to his injury.

208. The applicant was incapacitated and took time off work on sick leave on various dates from 20 September 2017 to 11 September 2018 as a result of his right knee injury.

209. The applicant requires medical treatment as a consequence of his injury and the respondent is liable to pay reasonably necessary medical expenses.

210. The surgery undertaken by Dr Nagamori on 27 November 2017 was reasonably necessary as a result of the right knee injury sustained on 20 September 2017.

ORDERS

211. No order in respect of the claim for weekly compensation. Liberty to the parties to apply within 28 days of the date of this determination.

212. The respondent is to pay the applicant's reasonably necessary medical expenses, including the cost of the surgery undertaken by Dr Nagamori on 27 November 2017 and associated expenses, pursuant to s 60 of the *Workers Compensation Act 1987*.
213. No order as to costs.