

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 5083/19
Applicant: MILENKA ALLEN
Respondent: OUTDOOR EDUCATION EXPERIENCE PTY LIMITED T/AS GREAT AUSSIE BUSH CAMP
Date of Determination: 16 DECEMBER 2019
Citation: [2019] NSWCC 406

The Commission determines:

1. The matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) to determine the extent of the applicant's whole person impairment, if any, which results from injury to her left lower extremity and scarring which occurred on 18 December 2004.
2. The Registrar is requested to place before the AMS a copy of the documents identified in paragraph 8 in the Reasons for Decision below together with a copy of this Certificate of Determination.

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

PHILIP YOUNG
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 PHILIP YOUNG, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A MacLeod

Ann MacLeod
Acting Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Milenka Allen (the applicant) is a 69 year old lady who was employed by Outdoor Education Experience Pty Limited t/as Great Aussie Bush Camp (the respondent) in cooking, cleaning and house keeping duties. On 18 December 2004 in the course of her employment she lifted a heavy steel double bunk bed as a result of which she suffered injury to her lumbar spine and left upper extremity.
2. Liability for the above injuries was accepted by the respondent's insurer and on 10 December 2012 Dr Pillemer, AMS, determined that the applicant had suffered whole person impairment pursuant to section 66 of the Workers Compensation Act 1987 as amended (1987 Act).
3. On 30 May 2012 whilst walking next door to her mother's house, the applicant experienced sudden pain in her back and left leg as a result of which she fell. It is not in dispute that this incident relevantly resulted from the injury of 18 December 2004. It is not in dispute that the applicant fell on to her outstretched left hand resulting in fractures to her radius requiring surgery at Maitland Hospital on 5 June 2012. This surgery involved the placement of four plates and screws in the applicant's left arm.
4. The respondent by section 78 notice dated 29 January 2019 disputes that the applicant suffered any consequential condition to her left knee in the fall and disputes any scarring. The respondent relies upon medical opinion from Dr J Bentivoglio in that the applicant had not complained of any problems with her left knee until about six weeks after the fall.

ISSUES FOR DETERMINATION

5. The primary issue for determination is whether the applicant suffered any consequential condition in respect of her left knee resulting from her fall on 30 May 2012.

PROCEDURE BEFORE THE COMMISSION

6. The matter came for conciliation and arbitration hearing in Newcastle on 3 December 2019. Mr M Hammond of Counsel instructed by Mr O Amacha appeared for the applicant. The applicant's attendance had been excused because she recently underwent heart surgery. Mr P Perry of Counsel appeared for the respondent.
7. The matter proceeded to conciliation and various arguments were put on behalf of each party. I was satisfied that the parties understood the issues in the proceedings and the nature of the evidence before the Commission. I was satisfied that the parties had ample opportunity to discuss potential resolution of the matter but despite my best endeavours were unable to resolve their differences. The matter accordingly proceeded to an arbitration hearing.

EVIDENCE

Documentary evidence

8. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute and attachments registered 1 October 2019 (Application);
 - (b) Reply and attachments registered 23 October 2019 (Reply);

- (c) Application to Admit Late Documents and attachments filed by the applicant on 29 October 2019 (AALD 1);
- (d) Application to Admit Late Documents and attachments filed by the applicant on 29 November 2019 (AALD 2);
- (e) Application to Admit Late Documents and attachments filed by the respondent on 23 October 2019 (AALD 3);
- (f) Application to Admit Late Documents and attachments filed by the respondent on 26 November 2019 (AALD 4), and
- (g) Chronology prepared by Mr Hammond, tendered by consent.

Oral evidence

9. No oral evidence was given.

THE APPLICANT'S SUBMISSIONS

10. The claim is for a consequential condition in relation to the applicant's left knee. The respondent concedes that the applicant's fall on 30 May 2012 was a consequence of her injury on 18 December 2004.
11. The applicant concedes that her first complaint to any doctor concerning her left knee was to Dr Khan on 11 July 2012, a period of about six weeks after her fall. The applicant offers a ready explanation for not mentioning her left knee, namely that she had fractured her wrist and was more concerned with her wrist than her knee at the time.
12. The matter is a medical contest between the opinions of Dr Bentivoglio and Dr Kleinman. However, there is also persuasive evidence contained in an Interim Payment Direction made by the Registrar¹ dated 28 November 2012 in that reference is made to a medical report from the insurer's doctor, Dr O'Keefe. Dr O'Keefe when questioned concerning the applicant's compensable symptoms included a "twisted left knee as a result of a fall".
13. Dr Kleinman's reports should be preferred because he saw the applicant closer to May 2012² and noted ongoing problems with the applicant's left knee following the fall. Dr Kleinman found that the fall aggravated the applicant's left knee and this is the necessary material contribution, namely the aggravation.
14. Dr Bentivoglio's opinion is not entirely strong because in his report of 12 November 2019³ he comments that the applicant clearly had a pre-existing condition with her knees which undoubtedly would have become symptomatic following the fall.

THE RESPONDENT'S SUBMISSIONS

15. The applicant saw Dr Gill on 12 February 2013. This is not long after the fall of 30 May 2012. The applicant was 63 when she saw Dr Gill and complained of a problem in her right knee. She gave Dr Gill a history that she had a problem with her left knee last year but that had settled down.
16. Dr Gill diagnosed degenerative knees and referred the applicant to MRI on 4 March 2013 and arthroscopy of her right knee. By 6 March 2013 the left knee had flared up significantly.

¹ Application pages 25-27.

² Report Dr Kleinman dated 19 February 2014 attached to AALD1.

³ Attached to AALD 4.

17. The notes from Maitland Hospital⁴ include a handwritten document dated 31 May 2012, the day after the fall. The history was given that the applicant fell on to her outstretched hand when her knee gave way. There is no account of twisting of the applicant's left knee. A history is given of back pain, shoulders, elevated blood pressure and other conditions but no history at all of any impact or injury to either knee.
18. The discharge referral from Maitland Hospital only diagnoses left distal radius fracture. It can therefore be inferred that there was no account of the applicant hurting her knee. Although Dr O'Keefe accepted that there was a twist of her left knee, if in fact there had been such a twist, it would have appeared in the Maitland Hospital records.
19. When the applicant attended Dr Khan on 11 July 2012, Dr Khan reported simply that the applicant "hit" her left knee. Dr Khan does not record any condition of her left knee.
20. In the applicant's statement she says that she was focussed on her left wrist. The applicant had ample opportunity to mention her left knee but made no complaint when she saw Dr Thompson on 1 June 2012, Dr Khan on 18 June 2012 and Dr Khan on 28 June 2012. The situation is that by 11 July 2012 the applicant was feeling the affects of serious degenerative changes and this is reinforced when one notes that the left knee behaved the same way as the right knee subsequently behaved. The applicant has not satisfied the onus of establishing that there was a material contribution to her left knee condition as result of the fall.

APPLICANT'S SUBMISSIONS IN REPLY

21. In relation to Dr O'Keefe's opinion, it is submitted that twisting and giving way of the knee are interchangeable terms. The expression in the Maitland Hospital notes concerning the applicant falling on her outstretched hand is equally consistent with Dr Khan's mention of a "hit" to her left knee. A fall on to the outstretched left hand does not necessarily mean that other parts of the body cannot be impacted.

FINDINGS AND REASONS

22. The concession by Dr Bentivoglio that the applicant's pre-existing condition with her knees would have become symptomatic following the fall is of some significance. In addition, examination by Dr O'Keefe at the insurer's request on 20 July 2012⁵ contains an early history of problems the applicant was experiencing with her left knee. Dr O'Keefe's conclusion is expressed in terms of "compensable symptoms" which include the applicant's "twisted left knee".
23. In terms of the respondent's submissions concerning the absence of left knee complaint in the Maitland Hospital and other notes, the fact that there is no initial record does not necessarily mean that there were no left knee symptoms. It may well be that the severity of the symptoms were overshadowed by the left wrist symptoms.
24. The applicant clearly first mentioned her left knee pain to general practitioner Dr F Khan, on 11 July 2019. That is made out not only by the respondent's submissions concerning the absence of any notation in the clinical notes, but also by the applicant's own evidence. The applicant's explanation for not mentioning her left knee pain earlier is that her focus had been on her left wrist. Human experience suggests that it is understandable that the applicant's focus would have been on her left wrist. The injury to the left wrist was obviously a significant injury, requiring operative intervention involving the placement of four plates and screws. It follows in my view that the left wrist injury was, consistent with the applicant's evidence, at the forefront of her mind.

⁴ Attached to AALD 3.

⁵ Interim Payment Direction, Application page 26; Application page 8.

25. In accepting the applicant's evidence in this regard, I have given consideration to two further matters. First, none of the doctors record the applicant as exaggerating or embellishing her condition or symptoms at any time. The applicant's credibility is not affected and that being the case, the Commission can accept her version of events in terms of left knee pain and symptoms. Second, I am mindful of the fact that the delay in complaint was six weeks which to my mind is not a significant delay and not only is explicable, but has in fact been explained by the applicant.
26. It follows that I make the following findings:
- (a) The applicant on 30 May 2012 as a consequence of her injury on 18 December 2004 suffered a fall ("fall").
 - (b) In the fall the applicant suffered a consequential condition to her left knee/left lower extremity.

ORDERS

27. The matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) to determine the extent of the applicant's whole person impairment, if any, which results from injury to her left lower extremity and scarring which occurred on 18 December 2004.
28. The Registrar is requested to place before the AMS a copy of the documents identified in paragraph 8 above together with a copy of this Certificate of Determination.