

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 6449/19
Applicant: Ian Picken
Respondent: State of New South Wales (NSW Police Force)
Date of Determination: 3 March 2020
Citation: [2020] NSWCC 60

The Commission determines:

1. Award for the respondent for the claim made by the applicant of a consequential condition affecting his lumbar spine, as a result of the injury he sustained to his left knee on 17 May 2017.

The Commission orders:

1. This matter is remitted to the Registrar for referral to an Approved Medical Specialist as follows:

Date of injury: 17 May 2017

Body Parts: Left lower extremity (knee); scarring (TEMSKI)

Method of Assessment: Whole Person Impairment

2. The following documents are to be forwarded to the Approved Medical Specialist:
 - (a) Application to Resolve a Dispute with attachments;
 - (b) Reply with attachments;
 - (c) Application to Admit Late Documents with attachment filed by the respondent on 5 February 2020, and
 - (d) This Certificate of Determination and Statement of Reasons.

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

John Isaksen
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 JOHN ISAKSEN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. The applicant, Ian Picken, sustained an injury to his left knee on 17 May 2017 whilst working as a police officer.
2. The applicant was participating in a training exercise with the Public Order and Riot team when he twisted his left knee and sustained injury.
3. The respondent, State of New South Wales (NSW Police Force), has accepted liability for this injury.
4. The applicant underwent a partial medial meniscectomy and chondroplasty, performed by Dr Rizkallah, on 29 May 2017. The applicant underwent a further partial medial meniscectomy and chondroplasty, again performed by Dr Rizkallah, on 17 August 2017. The applicant also underwent stem cell therapy for treatment of his left knee, and which was performed by Dr Bright, on 31 January 2019.
5. The applicant also underwent a course of physiotherapy treatment as a result of his injury which commenced on 21 June 2017 and ended on 11 October 2018.
6. The applicant claims that as a consequence of the injury to his left knee, he developed an altered gait, which in turn caused restrictions and symptoms in his lumbar spine.
7. The applicant claims permanent impairment which results from the injury to the left knee, scarring from the surgery he underwent, and the consequential condition affecting his lumbar spine.
8. The respondent agrees to have the matter referred to an Approved Medical Specialist (AMS) for assessment of any permanent impairment which results from the injury to the left knee and scarring but disputes that the applicant has developed a consequential condition affecting his lumbar spine.

ISSUES FOR DETERMINATION

9. The parties agree that the following issue remains in dispute:
 - (a) Whether the applicant has a consequential condition affecting his lumbar spine which results from the injury he sustained to his left knee on 17 May 2017.

PROCEDURE BEFORE THE COMMISSION

10. The parties attended a conference and hearing on 21 February 2020 at Penrith. 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.
11. Mr McManamey appeared for the applicant, instructed by Mr Taouk. Mr Doak appeared for the respondent, instructed by Ms Nguyen.
12. The claim that had been made by the applicant also included permanent impairment of both left and right hips as a consequence of the injury to the left knee but those claims were discontinued at the commencement of the arbitration.

EVIDENCE

Documentary evidence

13. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute and attached documents;
 - (b) Reply and attached documents, and
 - (c) Application to Admit Late Documents filed by the respondent on 5 February 2020.

Oral evidence

14. There was no application to cross examine the applicant or to adduce oral evidence.

FINDINGS AND REASONS

15. The applicant has provided a statement dated 3 December 2019.
16. The applicant states that following the first operation which he underwent on 29 May 2017, he expected to have restored mobility after about six weeks. He states that on 11 July 2017, it was noted by his then physiotherapist, Paula Peralta, that "I presented with an intermittent altered gait." Mr Picken states that: "Given that I was walking with an altered gait, I note that I developed pains and restrictions in my right knee, lower back and both hips."
17. The applicant states that following the second operation which he underwent on 27 July 2017, he engaged in rehabilitation programs in an effort to get full strength again in his left knee, but was overcompensating with his other knee, which in turn caused right knee pains, lower back pains and hip pains.
18. The applicant states that by December 2017 he had experienced several months of restricted left knee mobility and reduced function and his back and hip pains were increasing.
19. The applicant states that on 5 January 2018 he requested his physiotherapist to help him with some foam rolling rehabilitation for his back pain.
20. The applicant states that on 10 January 2018 he could not go to work because of back pain and visited his physiotherapist and a chiropractor to deal with the back pain. He states that he also visited his general practitioner on the following day and complained of back pain.
21. The applicant states that the pain in his back "was a gradual process" and that his left knee was his main issue and the focus of his treatment.
22. The applicant states that in or around May 2018 he returned to full and unrestricted duties. The applicant states that going back on to full duties caused further aches and pains in his knee and back and that on 8 October 2018 he returned to see his general practitioner to complain of a muscle strain.
23. The applicant states that in or around early May 2019 he recalls aggravating his lower back when he was bending over. He states that the "pains in my lower back are now recurrent and I experience twinges in my back every so often."
24. The applicant states that he continues to suffer restrictions and disabilities which include "constant pain in lower back", restricted range of motion and tightness in his lower back, and "limping favouring right side."

25. The applicant states:

“Since my injury, my ability to complete homecare duties has been reduced significantly. I can only do a little bit at a time as I really do have to take my time in ensuring that I don’t caused an aggravation injury to my lower back or other body parts. I am still able to do most homecare duties, but I prefer doing light loads and taking more time to do them. Such activities include vacuuming, laundry, cleaning and doing various home renovation tasks around the house.”

26. The medical support for the claim made by the applicant that he has a consequential condition affecting his lumbar spine as a result of the injury to his left knee is based upon the opinion of Dr Lai, general surgeon, whom the applicant saw at the request of his solicitors and has provided a report dated 9 July 2019.

27. Dr Lai takes the following history:

“Following his left knee injury, Mr Picken started to complain of pain in his right knee as a result of over dependency and avoiding weight bearing on his left knee. As a result, he developed an altered gait which in turn led to pain in his left hip and later his right hip. Together with the pain in both hips, there was also stiffness involved. As a result of the altered gait, Mr Picken also started to develop pain in his lower back with intermittent episodes of the pain radiating down his buttocks and thighs.”

28. Dr Lai records that the applicant “walked into the consultation room in no distress.” Dr Lai records tenderness to palpation of the lower lumbosacral region with underlying spasm and limited lateral flexion of the lower back on the left side.

29. Dr Lai opines:

“It is my opinion that your client’s right knee, bilateral hip pain and lumbosacral injury are consequential to his left knee injury sustained on 17 May 2017. As a result of his left knee torn medial meniscus and with the arthroscopic left medial meniscectomy, Mr Picken has had to undergo rehabilitation. During this time of rehabilitation, he has had to depend mainly on his right lower limb to bear the majority of the weight of his body. As a result he developed pain in his right knee as well as an altered gait. As a result of the altered gait causing abnormal biomechanical stress forces on his hips and lower back, it has resulted in pain in both hips and his lower back.”

30. Dr Lai assesses the applicant as meeting DRE lumbar category II, being 5% whole person impairment, and adds a further 2% for effects upon the applicant’s activities of daily living, being restricted in domestic duties and recreational activities.

31. Although the applicant states that he continues to limp favouring his right side, there are several records in the medical evidence which contradict this. In a final report from Sports Physiotherapy and Work Rehabilitation Centre Penrith dated 15 October 2018, Stephanie Leeson records nil pain reported and “Gait: NAD.” Ms Leeson also writes that the applicant “has completed many exertional tasks with no issues in his left knee, for example a physical assessment including the beep test as part of his work duties with NSW Police.”

32. Dr Bright, who treated the applicant by way of stem cell therapy, writes in a report dated 27 March 2019:

“Ian is now able to run on a treadmill for 12 minutes with no pain or stiffness while running or after running.

It would appear at this stage that he is 100% recovered.”

33. When the applicant is examined by Dr Powell at the request of the respondent on 27 September 2019, it is recorded that the applicant “had a normal gait” and that there “was no antalgic component.”
34. I have already noted that when the applicant was examined by Dr Lai in July 2019, the applicant walked into the consultation room in no distress. Dr Lai does not record any observations regarding the applicant having an altered gait.
35. In his submissions Mr McManamey acknowledged these references but contended that it was the altered gait which the applicant had during the course of his rehabilitation which caused the applicant to develop restrictions and symptoms in his lower back and which now causes him to have some permanent impairment in his lumbar spine. Mr McManamey submits that so long as I am satisfied those symptoms and restrictions in the lumbar spine result from the injury to the left knee, it is a matter for an AMS to determine if the applicant does have any permanent impairment of the lumbar spine from that injury.
36. The determination of whether a pathological condition suffered by a worker is as a consequence of a work injury is well summarised by DP Roche in *Moon v Conmah Pty Limited* [2009] NSWCCPD 134 (*Moon*). In that matter the worker claimed whole person impairment from symptoms experienced in the left shoulder as a consequence of an accepted injury to the right shoulder. DP Roche said at [45-46]:
- “It is therefore not necessary for Mr Moon to establish that he suffered an ‘injury’ to his left shoulder within the meaning of that term in section 4 of the 1987 Act. All he has to establish is that the symptoms and restrictions in his left shoulder have resulted from his right shoulder injury. Therefore, to the extent that the Arbitrator and Dr Huntsdale approached the matter on the basis that Mr Moon had to establish that he sustained an ‘injury’ to his left shoulder in the course of his employment with *Conmah* they asked the wrong question.
- The test of causation in a claim for lump sum compensation is the same as it is in a claim for weekly compensation, namely, has the loss ‘resulted from’ the relevant work injury (see *Sidiropoulos v Able Placements Pty Limited* [1998] NSWCC 7; (1998) 16 NSWCCR 123; *Rail Services Australia v Dimovski & Anor* [2004] NSWCA 267; (2004) 1 DDCR 648).”
37. Deputy President Roche then proceeded to state that the expression “results from” should be applied using the principles set out by Kirby P in *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*). In *Kooragang* Kirby P said at [462]:
- “It has been well recognised in this jurisdiction that an injury can set in train a series of events. If the chain is unbroken and provides the relevant causative explanation of the incapacity or death from which the claim comes, it will be open to the Compensation Court to award compensation under the Act”.
38. Kirby P then said at [463-4]:
- “...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. In each case, the question whether the incapacity or death ‘results from’ the impugned work injury... is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions”.
39. Mr McManamey submits that the applicant had an antalgic gait for a long period of time during 2017, 2018 and beyond. However, I could only identify a few references to any alteration of the applicant’s gait in the medical evidence.

40. There is a report from Ms Peralta of Sports Physiotherapy and Work Rehabilitation Centre Penrith dated 11 July 2017 which records in examination of "Gait", an intermittent limp without the use of tape. That reference coincides with the applicant's statement that on 11 July 2017 it was noted by his then physiotherapist, Paula Peralta, that "I presented with an intermittent altered gait."
41. The actual notes for that consultation on 11 July 2017 reads: "Noticed limping when got out of car @ work for 10 mins until got moving."
42. There is a further report from Ms Peralta dated 5 September 2017 which records on examination: "Gait: decreased L knee extension in L stance phase."
43. There is an entry in the notes from Sports Physiotherapy and Work Rehabilitation Centre Penrith on 8 January 2018 of the applicant limping when he woke up but also: "Got moving + walking – been great since."
44. Thereafter I could not locate in the material from Sports Physiotherapy and Work Rehabilitation Centre Penrith, nor could Mr McManamey direct me to, any specific reference to an altered gait until a note on 13 September 2018 of "limits gait."
45. Mr McManamey submits that while there is a lack of any specific references to an altered gait in those notes, there is also no reference to the applicant's gait being normal. Mr McManamey refers to the following entries as being an indication of the applicant's biomechanics working differently during this period of rehabilitation:
 - (a) A record is made on 11 April 2018 of the applicant having increased calf tension on his affected side;
 - (b) A record is made on 31 May 2018 of the applicant having pain in the knee when walking in a straight line;
 - (c) A record is made on 30 July 2018 of restricted movement of the left knee compared to the right knee;
 - (d) A record is made on 13 August 2018 of different movement in the left knee compared to the right knee.
46. Mr McManamey submits that one has to extrapolate from these entries what they actually mean, and he submits that those entries are consistent with the applicant having an altered gait.
47. There are, however, other references within those notes from Sports Physiotherapy and Work Rehabilitation Centre Penrith which would lead to a conclusion that while the applicant was clearly having problems with full mobility and function of his left knee, there was no alteration to his gait, other than for a short period of time after both the operations which the applicant underwent in 2017.
48. In a report dated 2 November 2017, Ms Peralta writes that "Ian is on track to commence jogging and more dynamic movements on the 13th November."
49. There is an entry on 16 November 2017 of the applicant commencing to run, although it is also recorded that he was getting a pain at the top of his kneecap every five or six steps while running.
50. There is an entry on 8 February 2018 of the applicant running, although it is also recorded that the applicant felt 'jelly legged' in the calves.

51. There is an entry on 11 April 2018: "Increasing running distance and intensity without any issues."
52. There is an entry on 17 July 2018: "Running more than thought; also was in full gear for longer than expected; but nil issues."
53. There is an entry on 30 July 2018 of the applicant having worked for four days at the Splendour music festival in Byron Bay and walking with nil problems with the knee, although "hips a little achy."
54. There is a reference in the notes on 13 August 2018 of the applicant passing a beep test. The notes refer to some pain and soreness after that test but those symptoms then settled down. Mr McManamey did not dispute the assertion made by Mr Doak for the respondent that a beep test involves different levels of running, and stopping and starting from running.
55. There is an entry in the notes of the applicant's general practitioner, Dr Borland, on 27 November 2017 of: "Can't run. Difficulty straightening leg" and 11 December 2017 of: "Now has had to restart physio program. No running capacity", which indicates that the applicant did have a setback at that point in time with his rehabilitation. However, I have already referred to the note made in the physiotherapy notes on 8 February 2018 of the applicant running and Dr Borland records in notes on 27 April 2018 of "Running/jogging OK."
56. In my view, there is an inconsistency between the applicant asserting that he had developed an altered gait due to the limited function and mobility of his left knee between June 2017 and October 2018, and the notes from Sports Physiotherapy and Work Rehabilitation Centre Penrith which indicate that he was capable of some jogging or running from November 2017 onwards, being some three months after his second operation. At the same time in July and August 2018 when Mr McManamey submits that the applicant's biomechanics were working differently, the notes from Sports Physiotherapy and Work Rehabilitation Centre Penrith indicate that the applicant was running, had passed a beep test, and was undertaking his duties as a police officer.
57. No assistance has been provided on the issue of whether the applicant has developed a consequential condition affecting his lumbar spine as a result of the injury to his left knee by the applicant's treating specialist, Dr Rizkallah. There are several reports in evidence from Dr Rizkallah which relate to treatment of the applicant's left knee, from 29 May 2017 to 10 January 2018. This is during much of the period in which the applicant claims he had an altered gait and that this was causing symptoms in his lower back. Yet there is no reference in any of those reports to the applicant having an altered gait. Nor is there any reference in any of those reports to the applicant complaining of any lower back pain.
58. No report has been provided by Dr Rizkallah which asks for his opinion as to whether the applicant had an altered gait during the period of time that Dr Rizkallah treated the applicant and, if so, whether any restrictions and symptoms in the lower back were as a result of that altered gait.
59. I accept that it is likely that the applicant did limp and alter his gait on occasions for several weeks after each of the two operations performed by Dr Rizkallah. For instance, the complaint made by the applicant on 11 July 2017, some six weeks after his first bout of surgery, and which is recorded in the physiotherapy notes, that he noticed a limp when he got out of his car at work, is consistent with that. However, it is also recorded that the limping lasted about 10 minutes until the applicant got moving.
60. There is no expert evidence to support a conclusion that these short, discrete periods of time caused the onset of restrictions and symptoms in the applicant's lumbar spine.

61. The opinion of Dr Lai is that during the time of the applicant's rehabilitation, the applicant developed an altered gait. However, the applicant's period of rehabilitation occurred over a 16 month period. But for several weeks after each of the two operations, I cannot be satisfied from the evidence available that the applicant did have an altered gait. The activities recorded by Sports Physiotherapy and Work Rehabilitation Centre Penrith such as jogging, running and undertaking the duties of a police officer indicate that the applicant suffered no such restriction through most of the period of his rehabilitation.
62. I agree with the submission made by Mr Doak that Dr Lai has not properly identified the period of rehabilitation when the applicant suffered a consequential condition affecting his lower back, given that by late 2017 the applicant was starting to undertake activities such as jogging or running and there is little reference in the medical material to the applicant having an altered gait.
63. There is also little reference to any lower back pain or symptoms in the medical evidence. I have already referred to there being no reference to any restrictions or symptoms in the lower back in the reports of Dr Rizkallah, despite him treating the applicant during at least part of the applicant's period of rehabilitation.
64. The references to lower back and symptoms in the medical evidence are for a short period in January 2018 and do not provide any link or connection with the injury to the applicant's left knee.
65. There is an entry in the notes from Sports Physiotherapy and Work Rehabilitation Centre Penrith on 5 January 2018 of the applicant being provided with a foam roll for his lumbar spine at his request. However, there is nothing else in the notes for that consultation that indicate the need for the foam roll was due to any altered gait or for any lower back pain or symptoms at all.
66. There is an entry on 10 January 2018 of the applicant having back pain, being the day when the applicant states that he stopped work because of back pain. However, again there is nothing in the notes to relate the lower back pain to problems that the applicant was having with his left knee. The notes actually include: "knee feeling good."
67. In notes recorded on 11 April 2018 for a "Handover", which contains a summary of the applicant's condition at that point in time, there is no reference to lower back pain, symptoms or restrictions.
68. In a final reporting letter from Sports Physiotherapy and Work Rehabilitation Centre Penrith to Dr Rizkallah on 15 October 2018 there is no reference to lower back or symptoms.
69. No report has been provided by Sports Physiotherapy and Work Rehabilitation Centre Penrith that would assist in drawing a link between the applicant's left knee and these complaints of lower back symptoms for the short period in which those symptoms are recorded in their notes.
70. The clinical notes from Andrew Lyell, chiropractor, do not provide any further assistance to the applicant. The notes record a history of low back pain for the past two or three days, as opposed to the applicant's evidence that his lower back pain commenced in July 2017. The notes do not draw any connection between this lower back pain and the problems that the applicant was having with his left knee, in particular an altered gait.
71. The record made by Dr Borland on 11 January 2018, the day after the applicant saw both his physiotherapist and chiropractor, simply records: "Low back ache", without any accompanying reason given for these symptoms. There is no further reference to lower back pain or symptoms in the notes from Dr Borland or the practice of Southlands Family Doctors until 18 October 2018 and then it is for "Mid back muscle strain."

72. No report has been provided by Dr Borland on the issue in dispute, notwithstanding that he has treated the applicant before the injury to his left knee, during his rehabilitation, and until at least 1 April 2019.
73. Mr McManamey refers to findings of tenderness in the lower back not only by Dr Lai, but also Dr Powell, and submits that these are hard signs of the applicant having problems with his lower back. However, it does not follow that these symptoms are caused by any altered gait. The applicant states that in early May 2019 he aggravated his lower back when he bent over. That incident is much closer in time to the applicant's examinations with both Dr Lai and Dr Powell than the short period that has been recorded of lower back pain almost 18 months earlier in January 2018.
74. Finally, there are critical inconsistencies in the applicant's own evidence which adds to my conclusion that that the applicant has not been able to establish that he developed a consequential condition affecting his lumbar spine as a result of the injury to his left knee. The applicant states that he continues to limp by favouring his right side whereas I have already referred to several medical reports which record the applicant having no altered gait since October 2018.
75. The applicant states that he has "constant pain in lower back" whereas Dr Lai records the applicant experiencing intermittent low back pain and that the pain would come on especially after intensive training and sitting for long periods of time. The applicant also states that that he has recurrent pains in his lower back and twinges in his back every so often, which is hardly consistent with him declaring that he has "constant pain in lower back."
76. I am not satisfied from my review of the available contemporaneous medical evidence, the opinion of Dr Lai that is relied upon by the applicant, and the inconsistencies in the applicant's own evidence, that the applicant has sustained a consequential condition affecting his lumbar spine which results from the injury to his left knee on 17 May 2017. There will be an award for the respondent for this particular claim.
77. The matter will otherwise be remitted to the Registrar for referral to an Approved Medical Specialist for assessment of whole person impairment of the left lower extremity and scarring from the two operations that the applicant underwent on his left knee.

