WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **563/20**
Applicant: **Colin Beadman**
Respondent: **State of NSW**
Date of Determination: **9 April 2020**
Citation: **[2020] NSWWCC 114**

The Commission determines:

1. I find that the applicant suffered an injury within the meaning of s 4(b)(ii) to his right knee on 29 May 2018.

2. The respondnet is to pay the s 60 expenses of and incidental to right total knee replacement surgery proposed by Dr Olschewski.

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

Catherine McDonald
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 CATHERINE McDONALD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Colin Beadman is employed by the State of NSW at Nepean Hospital (the Hospital) as a waste management leading hand. He asks that the hospital pay the costs of total knee replacement surgery as a result of an injury deemed to have been suffered on 29 May 2018.

2. Mr Beadman argues that the injury is the aggravation, acceleration, exacerbation or deterioration of a disease as a result of the nature of his employment.

3. The hospital has declined his claim on the basis that he has not suffered an injury as defined by s 4(b)(ii) of the *Workers Compensation Act 1987* (the 1987 Act) and that the total knee replacement is therefore not reasonably necessary medical treatment as a result of an injury, under s 60 of the 1987 Act.

4. The only issue I am required to determine is whether Mr Beadman suffered an injury.

PROCEDURE BEFORE THE COMMISSION

5. The matter was listed for a conciliation conference and arbitration hearing by telephone on 2 April 2020. Mr Stockley of counsel, instructed by Mr Corcoran, appeared for Mr Beadman and Mr Baran of counsel, instructed by Mr Mitchell appeared for the hospital. Ms Lumsden also attended on behalf of the hospital.

6. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

7. 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;

    (c) Application to Admit Late Documents dated 23 March 2020, attaching Dr Olschewski's report dated 12 March 2020;

    (d) Application to Admit Late Documents dated 26 March 2020, attaching Dr Maniam's report dated 26 March 2020.

8. There was no oral evidence.

9. Mr Beadman said in his statement dated 4 December 2019 that his job requires him to obtain a tug with a trailer attached and to drive a set route around the hospital to collect waste. He said that he is required to lift the tug [sic] which weighs 40kg up and down throughout the day and that the weight of the bins and their contents are added to the weight that is required to be lifted up and down and pushed and pulled. He is also required to bend when picking up bins, placing strain on his right knee.

10. He said that constant walking has taken a toll on his right knee. He first noticed the pain "about 18 months ago" and it was more noticeable on days when his work was heavier.

11. Mr Beadman described his symptoms. He said that he can no longer play golf or walk for recreation. He said that he is committed to undergoing the right total knee replacement proposed by Dr Olschewski.

12. Kathy Hollingworth is the hospital's general service manager. She provided a statement dated 8 November 2019. She said that Mr Beadman's role requires him to drive a tug with a trailer, at the rear of which is a tailgate that serves as a ramp to push bins onto the trailer. Mr Beadman is required to collect general and clinical waste in 120, 240 and 660 litre bins which are transported to the waste area where the bins are lifted by hydraulic arm.

13. Ms Hollingworth said that Mr Beadman is required to leave the tug to lower the tailgate to remove four empty bins and swap them for full bins, manually wheeling them on and off the trailer and manually closing the tailgate. He manually removes the bins and wheels them to the compactus. When the bins are empty, he washes them and returns the four empty bins to the trailer. He performs these duties up to 10 times during a shift.

14. A Job Demands checklist is attached to Ms Hollingworth's statement. The physical demands are:

"**Physical Demands**	**Frequency**
Sitting - remaining in a seated position to perform tasks	Occasional
Standing - remaining standing without moving about to perform tasks	Frequent
Walking - Floor type: even/uneven/slippery, indoors/outdoors, slopes	Frequent
Running - Floor type: even/uneven/slippery, indoors/outdoors, slopes	Not Applicable
Bend/Lean Forward from Waist - Forward bending from the waist to perform tasks	Occasional
Trunk Twisting - Turning from the waist while sitting or standing to perform tasks	Frequent
Kneeling - remaining in a kneeling posture to perform tasks	Infrequent
Squatting/Crouching - Adopting a squatting or crouching posture to perform tasks	Infrequent
Leg/Foot Movement - Use of lea and / or foot to operate machinery	Frequent
Climbing (stairs/ladders) - Ascend / descend stairs ladders, steps	Infrequent
Lifting/Carrying - Light lifting & carrying: 0 - 9 ka	Frequent
Lifting/Carrying - Moderate lifting & carrying: 10 - 15 kg	Occasional
Lifting/Carrying - Heavy lifting & carrying: 16kg & above	Infrequent
Reaching - Arms fully extended forward or raised above shoulder	Occasional
Pushing/Pulling/Restraining - Using force to hold/restrain or move objects toward or away from the body	Frequent
Head/Neck Postures - Holding head in a position other than neutral (facing forward)	Occasional
Hand & Arm Movements - Repetitive movements of hands and arms	Frequent
Grasping/Fine Manipulation - Gripping, holding, clasping with fingers or hands	Frequent
Work At Heights - Using ladders, footstools, scaffolding, or other objects to perform work	Not Applicable
Driving - Operating any motor powered vehicle	Frequent"

Medical evidence

15. On 23 June 2015, Mr Beadman's former general practitioner, Dr J O'Halloran, referred him to Dr P Johnson, rheumatologist. She said in her referral that Mr Beadman had non-specific joint pains and intermittent joint swellings in his knees and ankles which impeded his daily activity.

16. On 29 May 2018, Mr Beadman saw Dr Tin, general practitioner. Dr Tin recorded:

> "Moderate, Chronic Right Knee pain
> exam- normal , no swelling , no ROM
> plan: reassured , in agreement to do imaging
> Imaging request printed: Ultrasound scan - Knee, Right
> Plain X-ray - Knee, Right . (right knee pain shifting up and below
> underlying rheumatoid arthritis
> knee injury before because of contact sports)"

17. Mr Beadman saw Dr A Ahmed in the same practice on a number of occasions in 2018. On 19 September 2018, Dr Ahmed noted that the pain was worse when Mr Beadman was at work.

18. On 30 October 208, Dr Y Khatib, orthopaedic surgeon, reported to Dr Ahmed and said:

> "Colin is a 51-year-old male who works in services.at Nepean Public Hospital. He reports a history of about 6 months of medial right knee pain which is worse with activity. He does not recall a particular incident which caused his pain, however, he Is involved in maintenance in a role that includes walking long distances and prolonged standing, He also performs activities that involve carrying heavy weights and pushing and pulling of carts and other heavy objects."

19. Dr Khatib noted that Mr Beadman had rheumatoid arthritis. He said:

> "I believe that Colin's diagnosis is a degenerative medial meniscal tear on the background of inflammatory (rheumatoid arthritis). There is no significant traumatic mechanism to this injury and this may have happened over a period of time. This would have been predisposed by his Initial pathology which is rheumatoid arthritis.
>
> Colin is currently managing his work related activities reasonably well with no modifications to his duties and as long as his symptoms are under control then I am happy for him to continue in this role. He may benefit from a period of physiotherapy and rehabilitation."

20. Dr Johnson reported to Dr Ahmed on 19 December 2018. He said that when he had seen Mr Beadman in 2015, rheumatoid arthritis was affecting his hands – there was more generalised arthralgia but nothing of note. He said:

> "It is important to note that at that stage there was no significant problem affecting his knees and subsequently, his disease responded so well to therapy that there was no obvious progression of his condition. He was able to manage his work at the hospital as a leading hand in Waste Management without any major disability.
>
> Six to eight months ago he developed pain in his right knee. The pain gradually increased. He was treated with a steroid injection which was unhelpful and came to an MRI scan."

21. Dr Johnson noted that Mr Beadman's job involved significant heavy work. He said:

> "Mr. Beadman has osteoarthritis affecting his right knee with a meniscal tear.
>
> I can see no reason to relate this to his previous history of rheumatoid arthritis and there is no suggestion either historically or on the current investigations to suggest that he has suffered damage to the knee previously.
>
> Given the nature of his work it is hard to avoid a relationship. I suspect he has suffered a tear of the medial meniscus in relation to his activity."

22. Mr Beadman was referred to Dr E Olschewski, orthopaedic surgeon, who reported to his general practitioner, Dr Ahmed, on 19 February 2019. He wrote:

> "Colin is a 51 year old gentleman who has been having increasing pain in his right knee for the past year. He does not recall a specific injury or event which triggered his knee pain. He works in waste removal at Nepean Public Hospital and this job requires significant pushing, pulling, lifting and carrying. These duties have all become more difficult over the past year and have been associated with increasing discomfort. Colin has now reached the point where he has pain almost all of the time, even when he is at rest and not moving.
> …
> Colin has a history of rheumatoid arthritis. He saw Dr Peter Johnson regarding this for the first time three years ago. Colin was achy in the elbows and the hands at the time. Dr Johnson put him on Methotrexate, and that managed his symptoms."

23. Under the heading Impression and Plan, Dr Olschewski said:

> "Colin has significant degenerative changes in his right knee, particularly involving the medial compartment. These changes have been progressing with time. Certainly, work related duties, particularly those involving significant loading of the joint would have contributed to these wear and tear changes. However, exactly how much his work has contributed cannot be clearly ascertained. It is also quite possible that these degenerative changes may have occurred in the absence of Colin's work duties. However, I suspect the changes would have taken place over a longer time course and it is likely that he would not yet have been affected to the degree that he currently is."

24. Dr Olschewski wrote to the Hospital's insurer on 26 April 2019. He was asked if employment was the main contributing factor to the onset of the disease and said:

> "Colin's degenerative arthritis occurred over time. Certainly, heavy duties at work with Colin working in a waste removal role, requiring significant pushing, pulling, lifting and carrying would have contributed to the acceleration and progression of degenerative changes in the knee. However, I could not say with certainty that employment is the main contributing factor to the onset of the disease, although it likely was a significant contributor. It is quite possible that Colin's degenerative changes may have occurred even if he worked in a sedentary role. However, I suspect Colin's symptoms would have come on at a much later date had he had a sedentary job, and he would likely not have symptoms to the same degree that he currently has them, were his job different."

25. When asked if employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease, Dr Olschewski said:

> "Employment was a significant contributing factor to the aggravation, acceleration, exacerbation and deterioration of the disease. Although Colin does not describe a specific injury or event which triggered his pain, many of the tasks he is required to perform could have resulted in his meniscus tear, which may have gone unnoted at the time. That meniscus tear has likely contributed to a more rapid progression of degenerative changes and onset of symptoms. It is not possible to be definitive about what the main contributing factor is. Time in general and use of the knee when Colin was not working would have also played a role."

26. An MRI scan on 27 September 2018 showed a meniscal tear. The insurer asked Dr Olschewski if employment was the main contributing factor to the meniscal tear and he responded:

> "The duties that Colin is required to perform at work would place him at risk for suffering a meniscal tear. This includes squatting and pivoting on the knee. Colin does not remember a specific injury or event triggering his pain, however it is possible that the initial injury went unrecognised. It is not possible to answer whether Colin suffered his meniscal tear at work or not with any certainty."

27. On 12 June 2019, Dr Olschewski confirmed that Mr Beadman sought to undergo right total knee replacement. In a report to Mr Beadman's solicitor dated 11 March 2020, Dr Olschewski said:

> "I appreciate having you outline Mr Beadman's work history and requirements in detail for me, which are consistent with what I have documented during my prior assessments. These duties include significant physical requirements that are described in your letter and Mr Beadman's signed statement, dated 4/12/2019.
>
> It is my opinion, that Mr Beadman's employment, on the balance of probabilities is the main contributing factor to the aggravation of his symptoms. It has caused an acceleration in the degenerative process and is more likely than not the reason for the exacerbation of symptoms and deterioration of the disease causing the symptoms Mr Beadman currently complains of in his right knee."

28. Mr Beadman's solicitors qualified Dr V Maniam who reported on 23 September 2019. Dr Maniam noted that:

> "On 29/05/2018, he noticed pain in his right knee and it was of moderate intensity. Earlier, he had noticed minor pains when lifting, pushing and pulling, and repetitive bending."

29. Dr Maniam carried out an examination and reviewed medical reports. He noted the diagnosis of rheumatoid arthritis. He said:

> "However, given the severity of the arthritic changes in the knees, on both sides, it is likely that these had developed over several years. Although he was unaware of these symptoms, the work activity, which is very manual, bought about pain and stiffness in the right knee, which would indicate that there has been an acceleration and deterioration of the osteoarthritic symptoms in the right knee.
>
> Given the above, it would be reasonable to assume that his job description, had served to accelerate and deteriorate the osteoarthritis in the right knee. The medial meniscal tear will be part of the degenerative issues, and there were no work-related factors or a specific mechanism that could have bought about the tears.

> The attributability, then, would be an aggravation and deterioration of the arthritic processes in the right knee. The MRI does not contain signs to indicate that the knee had been involved in the rheumatoid arthritic processes."

30. On 27 November 2019, Dr Maniam noted that the doctors who had reviewed Ms Beadman considered that the problems in his right knee were constitutional degenerative disease. Dr Maniam considered, however, that Mr Beadman suffered post traumatic arthritis, a condition which develops after acute, direct trauma of the joints.

31. In a further report dated 26 March 2020, Dr Maniam said that Mr Beadman's employment was the main contributing factor to the aggravation, exhilaration, exacerbation and deterioration of arthritis in the right knee.

32. The hospital relies on three reports of A/Prof P Miniter, orthopaedic surgeon. The first is dated 21 February 2019. A/Prof Miniter noted the diagnosis of rheumatoid arthritis and the treatment for it and said:

> "The Methotrexate appears to have caused substantial resolution of the sero-positive rheumatoid disease and at no stage until fairly recently has he had problems relating to his wrists or his knees."

33. A/Prof Miniter recorded that Mr Beadman's right knee has been a particular problem and that about 18 months ago he began to experience pain over the medical joint line without specific injury. A/Prof Miniter undertook an examination and said:

> "He demonstrates bilateral varus alignment at the lower limbs. There is medial pseudolaxity on both sides, worse on the right hand side, there are no meniscal signs and there is no obvious involvement of the lateral compartment.
>
> Indeed, I could also see no evidence of synovitis or swelling in the knee. The knee is correctable to passive manipulation."

34. A/Prof Miniter considered that:

> "Mr Beadman has medial compartment osteoarthritic disease of both knees. It may or may not have a rheumatoid component. Personally, I feel that he justifies arthroscopy with high tibial osteotomy and if a high tibial osteotomy is not indicated, that is, if there is significant synovitis or chondral disease indicative of ongoing rheumatoid disease, then I would suggest that he progress directly to a knee replacement. He has a genuine disorder that requires treatment and would be recommended to seek such treatment."

35. He said:

> "Mr Beadman has rheumatoid disease but it is unlikely to be involved with his knees. I do not believe that the nature and conditions of his employment have led to the deterioration of function that is evident on the MRI scan and by way of x-ray. He simply has constitutional medial compartment disease. It is very common in the population.
>
> Personally, I would recommend arthroscopy combined with high tibial osteotomy, as mentioned earlier in this report. I feel that he would do well from this treatment and if, at surgery, it is noted that he has other features of disease then I would proceed directly to knee replacement surgery. I suspect that this will allow him excellent function and should allow him to continue with his job."

36. In answer to questions asked of him, A/Prof Miniter said that Mr Beadman's employment was "not a substantial contributing factor except by way of exacerbation which is intermittent." However, when asked if the condition was an aggravation of a pre-existing or degenerative condition, he said:

> "The matter of aggravation is not in question in this particular case. He simply has constitutional disease."

37. A/Prof Miniter provided a report dated 3 April 2019 in which he said, without further explanation, that Mr Beadman's employment was not the main contributing factor to the onset of "the disease" nor was it the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of "the disease".

38. In a third report dated 17 February 2020, A/Prof Miniter considered Dr Maniam's report dated 23 September 2019. He disagreed with Dr Maniam's opinion. He said that Mr Beadman had not had an injury and that the most salient feature was the bilateral nature of his findings. He reiterated that employment was not the main contributing factor to either the onset or aggravation of a disease, noting that Mr Beadman's knees did not improve.

39. A/Prof Minter said:

> "Employment with Nepean Blue Mountains LHD was not the main contributing factor to aggravation or deterioration of a disease injury at the right knee. I could see no evidence of disease injury. Mr Beadman simply has significant osteoarthritic disease. It is real, will require treatment and, in my opinion, should be managed by arthroscopic surgery combined with high tibial osteotomy, if at arthroscopy there are no features of synovitis suggestive that rheumatoid arthritis is the causative issue."

40. The hospital's insurer disputed Mr Beadman's claim on the basis that he did not suffer an injury, based on A/Prof Miniter's report. It prepared decision notices dated 8 May 2019, 31 October 2019 and 17 January 2019.

SUBMISSIONS

41. Mr Stockley submitted, on behalf of Mr Beadman that the need for surgery was supported by Dr Maniam but said that the main thrust of his submissions focused on the opinions of Mr Beadman's treating doctors.

42. Mr Stockley said that the statement in the recent decision of *AV v AW*[1] that the test of main contributing factor is a test of causation and involves an evaluative process[2] is consistent with a long line of authority. He referred me to the decision of the Court of Appeal in *Seltsam Pty Ltd v McGuinness*[3] (*Seltsam*) to submit that medical evidence cannot necessarily determine questions of causation for legal purposes. He referred me to the following passages from the judgment of Spigelman CJ:

> "With respect to many diseases, medical science is able to give clear and direct evidence of a causal relationship between a particular act or omission and a specific injury or disease. There are, however, fields of inquiry where medical science is not able to give evidence of that character. There are cases in which medical science cannot identify the biological or pathological mechanisms by which disease develops. In some cases medical science cannot determine the existence of a causal relationship. Such a state of affairs is not necessarily determinative of the existence or non-existence of a causal relationship for purposes of attributing legal responsibility. ...

[1] [2020] NSWWCCPD 9.
[2] At [78].
[3] [2000] NSWCA 29.

In circumstances where the aetiology of a disease is uncertain, or subject to significant scientific dispute, the Courts are not thereby disenabled from making decisions as to causation on the balance of probabilities. As Herron CJ said in *EMI (Australia) Ltd v Bes* [1970] 2 NSWR 238 at 242:

> 'Medical science may say in individual cases that there is no possible connection between the events and the death, in which case, of course, if the facts stand outside an area in which common experience can be a touchstone, then the judge cannot act as if there were a connection. But if medical science is prepared to say that it is a possible view, then, in my opinion, the judge after examining the lay evidence may decide that it is probable. It is only when medical science denies that there is any such connection that the judge is not entitled in such a case to act on his own intuitive reasoning. It may be, and probably is, the case that medical science will find a possibility not good enough on which to base a scientific deduction, but courts are always concerned to reach a decision on probability and it is no answer, it seems to me that no medical witness states with certainty the very issue which the judge himself has to try.' "[4]

And

> "When assessing expert evidence on causation, the legal concept of causation requires the court to approach the matter in a distinctively different manner from that which may be appropriate in either philosophy or science, including the science of epidemiology.
>
> The commonsense approach to causation at common law is quite different from a scientist's approach to causation. (See *National Insurance Co of New Zealand Ltd v Espagne* [1961] HCA 15; (1961) 105 CLR 569 at 591; *March v E & M H Stramare Pty Ltd* [1991] HCA 12; (1990-91) 171 CLR 506 at 509, 522, 530-531; *Chappel v Hart* (1998) 195 CLR 232 esp at [6]-[7], [23], [62]-[64], [93], [111], [122]. An inference of causation for purposes of the tort of negligence may well be drawn when a scientist, including an epidemiologist, would not draw such an inference."[5]

43. Mr Stockley said that the evaluative process required of the Commission does not require scientific certainty. Dr Olschewski's report dated 19 February 2019 was a report to Mr Beadman's general practitioner, not a medico-legal report and his observations as to causation should be seen in that context. The report supported the contention that the injury was an aggravation of degenerative changes, which Mr Beadman's duties rendered symptomatic. A/Prof Miniter expressed a similar view in his first report where, in response to a specific question, he said that "employment was not a substantial contributing factor except by way of aggravation which is intermittent."

44. In his report to the hospital's insurer dated 26 April 2019 Dr Olschewski responded to specific questions. Mr Stockley said that Dr Olschewski's response to the question about whether Mr Beadman's employment was the main contributing factor to the onset of the disease was useful with respect to the question of causation. Dr Olschewski considered the contribution of employment to the progression of the disease when he said that he considered that the symptoms would have come on later if Mr Beadman had a sedentary job. Mr Stockley said that was evidence that Mr Beadman's duties caused an acceleration of the underlying disease and led to the inevitable conclusion that the total knee replacement was required earlier than it otherwise would have been.

[4] At [93]-[94].
[5] At [142]-[143].

45. In the same report, Dr Olschewski said that Mr Beadman's work tasks placed him at risk of suffering a meniscal tear but it was not possible to answer with certainty if it was suffered at work. Mr Stockley said that Dr Olschewski was sincerely trying to engage with legal questions by answering with scientific certainty, which required him to be guarded and measured. That conclusion however allowed me to draw an inference that was supportive of Mr Beadman's case and to determine that there was a causal nexus between Mr Beadman's work and the need for surgery and to conclude that the employment had materially contributed to the need for surgery, referring to *Murphy v Allity Management Services Pty Ltd*[6] (*Murphy*).

46. Mr Stockley said that A/Prof Miniter's opinion was substantially expressed as terse answers to questions. He initially said that the condition was an aggravation but later said that the condition was not caused by work and failed to engage with the question of whether it was accelerated or aggravated by work. Mr Stockley said that A/Prof Miniter did not explain his opinion.

47. The evidence on which Mr Beadman relied was, Mr Stockley said, supported by the opinion of Dr Maniam who agreed that work was the main contributing factor to the aggravation of the pre-existing condition.

48. Mr Baran began his submissions by stressing that s 4(b)(ii) as amended in 2012 used the definite article to confirm that employment must be the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of a disease, in that there will be one main contributing factor, citing paragraph 78 of *AV v AW* set out below.

49. Mr Baran said it was necessary to consider all of the evidence and that the medical evidence was relevant but not determinative. He took me to the references in Mr Beadman's statement to golf and walking. Mr Baran also took me to limited references in Ms Hollingworth's statement, such as her comment that it is not necessary for Mr Beadman to "manually lift bins into the compactus" and the job demand checklist to argue that the job was not heavy in that Mr Beadman was not often required to lift and carry more than 16 kg.

50. Mr Baran said that Dr Olschewski did not say that Mr Beadman's employment caused the aggravation of underlying degenerative changes which he was required to do for me to accept Mr Beadman's case. Mr Baran said that Dr Olschewski vacillated between different theories for the causation of the condition in his reports, referring primarily to the report to Dr Ahmed dated 19 February 2019 and the report to the hospital's insurer dated 26 April 2019. Mr Baran stressed Dr Olschewski's statement that "exactly how much his work has contributed cannot be clearly ascertained." Mr Baran submitted that it has to be at least ascertained as a matter of medical science to a degree where, as a matter of law, causation can be established to satisfy the statutory test. He said that Dr Olschewski did not say that the connection was probable, and his evidence only supported a conclusion that it was possible or uncertain.

51. Mr Baran stressed the reference to Mr Beadman's knees in Dr O'Halloran's referral to Dr Johnson.

52. When taking me to A/Prof Miniter's reports, Mr Baran said that there was nothing "magical" about the opinions of the treating doctors and that Dr Miniter provided a thorough analysis. While accepting that Mr Beadman has a genuine condition, he considered that it is a constitutional problem. Even if it was aggravated by Mr Beadman's work, it was only from time to time. Importantly, A/Prof Miniter identified that the degenerative changes were bilateral and Mr Baran said that the identical pathology confirmed that the condition was constitutional.

[6] [2015] NSWWCCPD 49.

53. Noting that there were various expert opinions but no suggestion of a clear answer, Mr Baran submitted that it was necessary to apply the decision of the High Court in *Luxton v Vines*[7], recently applied in the Commission, with respect to the drawing of inferences, such that where they are inferences of an equal degree of probability, so that there is only speculation or conjecture, an applicant must lose because he has to prove that one inference is more probable than not.

54. In this case, Mr Baran said, the conclusion I should draw was that the constitutional condition alone was the cause of Mr Beadman's need for surgery because the condition was the same in both of his knees and because he has difficulties whether he is working or not. He submitted that there was no identifiable event which would allow me to draw an inference that it occurred and the evidence is that if there was an event it may have gone unnoticed – it may have been a contributing event but was not the main contributing event. There were numerous activities which could have brought the condition on. It was therefore impossible to state on the balance of probabilities that s 4(b)(ii) was satisfied. He said that even if surgery was appropriate it would be a high tibial osteotomy and arthroscopy and a further claim would need to be made before a total knee replacement was undertaken.

55. In reply, Mr Stockley noted that Mr Beadman described his duties in his statement. More importantly, he noted that Mr Baran invited me to consider that employment was not the main contributing factor to Mr Beadman's condition. The question is whether work is the main contributing factor to the aggravation and no alternative contributing factor was identified.

FINDINGS AND REASONS

56. The hospital denies that Mr Beadman suffered an injury. Mr Beadman says that he suffered injury as defined by s 4(b)(ii) of the 1987 Act.

The law

57. Section 4 provides:

> "**4 Definition of 'injury'** (cf former s 6 (1))
> 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
> …"

58. Mr Beadman's case is that he suffered pre-existing degenerative changes in his right knee and that the injury suffered was the aggravation and acceleration of that disease and that his employment as a waste management leading hand was the main contributing factor to that aggravation and acceleration leading to the need for a right total knee replacement. The medical evidence shows that the injury includes, but it not limited to, a meniscal tear. When I refer to "the injury" in the discussion which follows, I use those words to refer to the injury which is the aggravation, acceleration, exacerbation or deterioration of degenerative changes.

[7] [1952] HCA 19; 85 CLR 352.

59. In *AV v AW*, Snell DP said, dealing with the test of main contributing factor[8]:

> "In *Awder Pty Limited t/as Peninsular Nursing Home v Kernick*, I expressed the view that whether 'substantial contributing factor', for the purposes of s 9A of the 1987 Act, was satisfied was "a question to be decided on the evidence overall, including a consideration of the matters described in section 9A(2). It is not purely a medical question." That view was applied by Keating P in *Hogno v Fairfax Regional Printers Pty Limited*[and by Roche DP in *Villar v Tubemakers of Australia Pty Ltd*. The test of 'main contributing factor', like that of 'substantial contributing factor', involves a broad evaluative consideration of potential competing causative factors. It should be decided on the evidence overall and is not purely a medical question.
>
> In *El-Achi* Roche DP, considering the application of the test in s 4(b)(ii) in its current form, said:
>
> > 'That a doctor does not address the ultimate legal question to be decided is not fatal (*Guthrie v Spence* [2009] NSWCA 369; 78 NSWLR 225 at [194] to [199] and [203]). In the Commission, an Arbitrator must determine, having regard to the whole of the evidence, the issue of injury, and whether employment is the main contributing factor to the injury. That involves an evaluative process.' (emphasis added)
>
> I agree with the above passage from *El-Achi*. The Deputy President in *El-Achi* also referred, in my view correctly, to the 'main contributing factor' test as 'one of causation'. This is consistent with the discussion of s 9A of the 1987 Act by the Court of Appeal in *Badawi v Nexon Asia Pacific Pty Limited*. Their Honours referred to the 'causative element' of the test in s 9A. It is consistent with the discussion in *State of New South Wales v Rattenbury* in which Roche DP, dealing with s 4(b) after the 2012 amendments, discussed whether 'main contributing factor' was satisfied, by reference to whether there were competing causal factors to the relevant 'disease' injury.

60. Snell DP said[9]:

> "Where the relevant aggravation involves both employment and non-employment factors, the evaluative process involves a consideration of the causative role of both. An evaluation that involved only employment factors would leave the provision with no work to do. This would be inconsistent with the context of the provision. It would also be inconsistent with the plain meaning of the words. There is a general presumption against surplusage in statutes.
>
> It follows that the test of 'main contributing factor' involves consideration of whether there were competing causal factors (both work and non-work related) of the aggravation, and whether on a consideration of relevant causal factors the employment represented the main contributing factor.
>
> The following may be taken from the above:
>
> (a) The test of 'main contributing factor' in s 4(b)(ii) is more stringent than that in s 4(b)(ii) in its previous form, which applied in conjunction with the test in s 9A. There will be one 'main contributing factor' to an alleged aggravation injury.

[8] At [72]-[72] footnotes omitted, referring to *State Transit Authority of New South Wales v El Achi* [2015] NSWWCCPD 71.
[9] At [76]-[78].

(b) The test of 'main contributing factor' is one of causation. It involves consideration of the evidence overall, it is not purely a medical question. It involves an evaluative process, considering the causal factors to the aggravation, both work and non-work related. Medical evidence to address the ultimate question of whether the test of 'main contributing factor' is satisfied is both relevant and desirable. Its absence is not necessarily fatal, as satisfaction of the test is to be considered on the whole of the evidence.

(c) In a matter involving s 4(b)(ii) it is necessary that the employment be the main contributing factor to the aggravation, not to the underlying disease process as a whole."

The evidence

61. Part of the evaluation I am required to undertake is to consider Mr Beadman's duties. Mr Baran sought to downplay the heavy nature of those duties. A careful reading of his statement, and that of Ms Hollinghurst, shows that the work was heavy. Mr Beadman said that he is required to lift, push and pull and walk, all of which places strain on his right knee.

62. Though Ms Hollinghurst said that Mr Beadman was not required to lift bins into the compactus as Mr Baran pointed out, her statement described the need to manually open and close the tailgate of the trailer which serves as a ramp. She confirmed that he needs to leave the tug to retrieve full bins which are manually wheeled on and off the trailer when they are empty and when they are full. The bins are 120, 240 and 660 litre bins. Mr Beadman wheels full bins to the compactus and rinses them after they have been emptied.

63. The job demands checklist attached to Ms Hollinghurst's statement indicates that Mr Beadman's role entails frequent walking, frequent lifting light loads, occasional lifting of moderate loads and infrequent lifting of loads over 16kg. It requires frequent pushing, pulling and restring requiring the use of force.

64. I am satisfied that the duties were heavy and I am satisfied that they are likely to have placed significant loading on Mr Beadman's right knee. Dr Khatib's history of Mr Beadman's duties is consistent with that conclusion.

65. The only other relevant activities which Mr Beadman undertook were golf and walking. There is no evidence of any others.

66. The phrase main contributing factor allows for the possibility of there being other contributing factors, of which the main contributing factor is the most important. The legislation does not require employment to be the only contributing factor to the aggravation.

67. As Spigelman CJ said in *Seltsam*, the inability of medical science to identify a causal relationship "is not necessarily determinative of the existence or non-existence of a causal relationship for purposes of attributing legal responsibility." I accept Mr Stockley's submission that Dr Olschewski's reports should be read with that principle in mind.

68. Dr Olschewski conceded in his first report to Dr Ahmed that work related duties, particularly those involving significant loading of the joint would have contributed to wear and tear. He said that exactly how much cannot be clearly ascertained but went on to carefully consider the likely progress of the condition, saying that it is likely that Mr Beadman would not yet have been affected to the extent he currently is if it were not for his work. As Mr Stockley pointed out, that report was addressed to Mr Beadman's general practitioner and was not a medico-legal report.

69. When asked a series of questions by the hospital's insurer, Dr Olschewski was careful and measured in his answers. He clearly stated that work was a significant contributing factor to the aggravation of the disease but when considering if work was the main contributing factor, used the word "certainty" on several occasions. He said that time and the use of the knee when not working would have played a role. Dr Olschewski was not, for this purpose, required to be certain, rather to consider that it was more probable than not that work was the main contributing factor to the injury.

70. His report dated 11 March 2020 is the only report addressed to Mr Beadman's solicitors. When referred to the correct test of causation, Dr Olschewski considered the duties set out in Mr Beadman's statement and expressed his opinion on the balance of probabilities. He explained his opinion in a manner which bears repeating:

> "It is my opinion, that Mr Beadman's employment, on the balance of probabilities is the main contributing factor to the aggravation of his symptoms. It has caused an acceleration in the degenerative process and is more likely than not the reason for the exacerbation of symptoms and deterioration of the disease causing the symptoms Mr Beadman currently complains of in his right knee."

71. Dr Maniam's opinion supports that contention.

72. All of the medical experts accept that Mr Beadman does not suffer rheumatoid arthritis in his knees so that the reference to knee pain in Dr O'Halloran's original referral to Dr Johnson does not need to be further considered.

73. Snell DP noted in *AV v AW* that it is desirable that medical evidence address the question of whether employment is the main contributing factor to the injury. However, a report which baldly states that employment is the main contributing factor to the injury will not comply with the requirement in rule 15.2 of the *Workers Compensation Commission Rules 2011* that evidence be logical and probative nor will it provide a proper basis on which the Commission can make its findings[10]. Expert opinion must be explained and not constitute a mere *ipse dixit*[11] – an assertion without proof.

74. A/Prof Miniter's reports do not provide the basis for his opinion that Mr Beadman's employment was not the main contributing factor to the injury. His opinion is that Mr Beadman has constitutional degenerative change, expressed baldly in a series of statements in response to the questions asked by the hospital's insurer. The statements in his report dated 3 April 2019 that employment is not the main contributing factor to the onset of the disease nor the main contributing factor to aggravation, acceleration or deterioration is unhelpful.

75. A/Prof Miniter's opinion is, in fact, difficult to discern except to the extent that he considers that Mr Beadman's condition is constitutional because he has similar radiology and signs in both knees. He said in his first report dated 21 February 2019 that employment was not a substantial contributing factor "except by way of aggravation which is intermittent." He recommended surgery but apparently only in respect of Mr Beadman's right knee.

76. In his third report, A/Prof Miniter said that he had referred to the statement of work duties. Precisely which document he means is not clear. He stressed that Mr Beadman had not had an injury but what he means by that is unclear. A/Prof Miniter said he could see no evidence of a disease injury and that Mr Beadman "simply has significant osteoarthritis disease." The only explanation provided for his opinion is that Mr Beadman's condition did not improve when he was not at work.

---

[10] See for example *Hancock v East Coast Timber Products Pty Ltd* [2011] NSWCA 11 at [81].
[11] *HeviLift (PNG) Ltd v Etherington* [2005] NSWCA 42 at [84]

77. A/Prof Miniter did not consider the opinion expressed by Dr Olschewski – that Mr Beadman's employment caused an acceleration in the degenerative process, an exacerbation of symptoms and the deterioration of a disease.

78. Contrary to Mr Baran's submission, it is not necessary that there be an identifiable event causing the injury. Mr Beadman suffered a meniscal tear which Dr Olschewski said may have gone unnoticed. It is a feature of the injury but is not the whole of the injury. Mr Beadman's case is that the heavy nature of his work was the main contributing factor to the injury and I accept that it was.

79. Mr Baran said that where the evidence gave rise to inferences of an equal degree of probability, Mr Beadman could not succeed, referring to *Luxton v Vines*.

80. The President quoted from *Luxton v Vines* in *State of NSW v Barrett*[12]

> "In *Luxton v Vines* the plurality quoted the following from *Bradshaw v McEwans Pty Ltd*, describing it as 'the test to be applied':
>
> > 'In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture. But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise." (excluding references)
>
> In *Seltsam Pty Limited v McGuiness* Spigelman CJ, after referring to the test in *Luxton*, said:
>
> > 'Causation, like any other fact can be established by a process of inference which combines primary facts like 'strands in a cable' rather than 'links in a chain', to use Wigmore's simile. (excluding references)"

81. Once Dr Olschewski's reports are read with an eye turned to legal rather than medical causation, it cannot be said that are competing inferences of equal degrees of probability. His final report provides a proper basis for concluding that employment was the main contributing factor to the injury. A/Prof Miniter's report does not.

82. I am satisfied that Mr Beadman suffered an injury to his right knee within the mearing of s 4(b)(ii) and that the injury was deemed to have been suffered on 29 May 2018.

Section 60 expenses

83. The notices issued by the hospital's insurer only relied on s 60 of the 1987 Act to the extent that the expenses incurred were not as a result of an injury. Mr Baran's submission that the treatment should be that recommended by A/Prof Miniter need not be considered.

84. In *Murphy*, Roche DP said:

> "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) 53 WCR 167; *ACQ Pty Ltd v Cook*

[12] [2019] NSWWCCPD 56 at [51]-[52].

> [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)."

85. Dr Olschewski recommended right total knee replacement and explained the reason for his recommendation. Because I have found that Mr Beadman suffered an injury, the cost of that surgery is payable under s 60.

86. I make the following orders:

    (a) I find that Mr Beadman suffered an injury within the meaning of s 4(b)(ii) to his right knee on 29 May 2018.

    (b) The hospital is to pay the s 60 expenses of and incidental to right total knee replacement surgery proposed by Dr Olschewski.