WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **759/20**
Applicant: **Terrance Arthur Roberts**
Respondent: **Secretary, Department of Communities and Justice**
Date of Determination: **10 June 2020**
Citation: **[2020] NSWWCC 195**

The Commission finds:

1. The proposed surgery is reasonably necessary.

2. The need for the proposed surgery arises as a result of a work related injury on 13 June 2004.

The Commission orders:

1. The respondent will pay the costs of and associated with the proposed right total knee replacement surgery.

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

John Wynyard
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 WYNYARD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. On 13 June 2004, the applicant claimed he suffered an injury to his right knee when it was struck by a heavy metal bucket thrown at him by a juvenile detainee during the course of his employment as a Senior Youth Office at the Kariong Detention Centre. He brings an action seeking a declaration that the cost of a proposed total right knee replacement be met by the respondent.

2. A s 78 notice issued on 19 October 2019, and a s 287A notice issued on 24 January 2020.

3. The Application to Resolve a Dispute (ARD) and Reply were duly lodged and the matter came before me for teleconference on 13 March 2020.

ISSUES FOR DETERMINATION

4. The parties agree that the following issue remains in dispute:

   (a) Does the need for a total knee replacement arise as a result of a work-related injury?

PROCEDURE BEFORE THE COMMISSION

5. At teleconference on 13 March 2020 I determined that the matter was suitable to be decided on the papers. Mr Christian Hobbs solicitor appeared for the applicant and Mr Graham White solicitor appeared for the respondent. 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.

6. The parties have agreed to the determination of the matter without a conference or formal hearing.

EVIDENCE

Documentary Evidence

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

   (a) ARD and attached documents,
   (b) Reply and attached documents, and
   (c) Written submissions from both parties.

Oral Evidence

8. No application was made for oral evidence.

FINDINGS AND REASONS

9. At teleconference, I decided this matter was suitable for determination on the papers, and issued a timetable for the filing of written submissions, which were duly received and for which I acknowledge the industry that both counsel have demonstrated.

10. The applicant's submissions were prepared by Mr B G McManamey and the respondent's reply thereto by Mr Andrew J Parker.

11. It was common ground that the subject accident occurred as alleged by Mr Roberts on 13 June 2004.

12. The issue for determination as I indicated when refusing an application to issue directions to produce by the respondent at teleconference, is whether the need for a total knee replacement was caused by the subject injury or whether the pre-existing constitutional abnormality or indeed the 1984 injury was responsible. There is, as was observed by Mr McManamey, no dispute that the right knee treatment is reasonably necessary.

13. Mr McManamey supplied a thorough chronology of the history of this matter and it is convenient to reproduce it as an accurate account of the relevant factual background herein:

> "2. The Applicant initially suffered an injury to his right knee in 1984 whilst working as a merchant seaman. The details are not clear, but it appears he had an open meniscectomy performed by Doctor Walker, followed by an arthroscopy performed by Doctor Sorrenti. The Applicant made a good recovery from that surgery and continued working as a merchant seaman. In 2000, he commenced employment with the Respondent as a youth worker. He was able to perform that work without restriction until the subject accident on 13 June 2004. The Applicant's GP, Doctor Caska, confirms[1] that the knee was asymptomatic prior to the subject incident. It is accepted that by 2004 there was a pre-existing degenerative change in the knee however, as noted by Doctor Caska, that had never caused the Applicant any problems nor were there any significant symptoms relating to the lateral side of the right knee.
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> 3. The Applicant had been seen by Doctor Ellis on 8 March 2004 in respect of a right shoulder injury. As part of what appears to have been a medicolegal examination, Doctor Ellis reported that the Applicant walked well, walked on heels and toes, trotted normally and squatted fully. The right calf was 0.5cm greater in circumference than the left[2].
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> 4. The Applicant was struck with force on his right knee. He says he felt immediate pain in the right knee following the incident and the force of the blow was sufficient for him to be knocked off his feet[3]. The Applicant consulted Doctor Caska on 15 June 2004. At that time, the right knee was very tender on palpation, swollen and had a small abrasion on the medial side[4]. On 24 June 2004, Doctor Caska thought there was possible bruising to the bone on the medial side of the right knee. On 14 June 2004, the right knee was still very painful and swollen. The Applicant remained off work until September 2004 and Doctor Caska certified him fit for suitable duties with standing only for up to 20 minutes and to avoid excessive walking and not to climb up steps or ladders. The Applicant had further time off work, apparently from 11 November 2004 until 19 February 2005.

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[1] ARD page 35.
[2] ARD page 40.
[3] ARD page 9.
[4] ARD page 33.

5. The Applicant was seen by Doctor Ellis in February 2005. At that time, the Applicant said the right knee is always swollen, is tender medially and is painful on sudden turning and wrenching movement. The whole knee was painful but it was worse on the medial side. He said the knee gave way and he was very precautious on stairs and regularly holds the rail.[5]

6. On examination, the Applicant walked slowly, complaining of a deep click in the right knee. He could not walk on his heels but could walk on his toes but said that this hurt his right knee. He could not trot. He squatted one-third of the normal range and said this hurt his right knee. The right knee was the site of an effusion. The knee was tender over the joint line medially[6]. Doctor Ellis considered that there had been a deterioration of the knee condition since 8 March 2004 and the assault of 13 June 2004 had probably aggravated the right knee materially. He considered the assault, which included the blow on the knee and the fall, to be a material cause of deterioration of the right knee over the 8-month period leading up his examination[7]. Doctor Ellis considered that the assault would have contributed to one third of any impairment in the knee. Upon being provided with weight-bearing x-rays, Doctor Ellis assessed a 20% whole person impairment due to articular cartilage narrowing. He attributed one third of this to the injury of June 2004. On that basis, he assessed a 7% whole person impairment resulting from that injury.

7. The Applicant made a claim for permanent impairment benefits. That claim was resolved on 20 February 2006, with the Respondent consenting to pay $6250 in respect of a 5% whole person impairment[8]. The complying agreement does not identify the basis on which the 5% was derived however. it is likely to have been based upon the assessment of Doctor Ellis.

8. The Applicant made a further claim for lump sum compensation in 2009. That claim was resolved with the Respondent agreeing to pay compensation for an additional 2% whole person impairment. The complying agreement discloses that the report of Doctor Ellis of 17 December 2008 was relied upon to assess the degree of permanent impairment. That report appears at ARD48. Doctor Ellis again assessed a 20% whole person impairment based on the cartilage interval. He again attributed one third of the loss of articular cartilage to the work injury in June 2004. Doctor Ellis considered there had been a further loss of cartilage between 2005 and 2008.

9. Doctor Ellis was of the view in 2008 that the Applicant needed a total knee replacement. The Applicant was seen by Doctor Glase in July 2004. Doctor Glase's report from that time is not available however Doctor Caska says that Doctor Glase agreed that the injury in June 2004 caused a severe aggravation of dormant osteoarthritis causing longstanding pain and swelling in the right knee.[9] Doctor Glase saw the Applicant again in April 2019. In his report of 15 April 2019, Doctor Glase does not make any comment about the causation of the need for the right knee replacement.

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[5] ARD page 38.
[6] ARD page 39.
[7] ARD page 40.
[8] Reply page 1.
[9] ARD page 63

10. Doctor Bodel examined the Applicant in December 2019. Doctor Bodel was aware of the history involving the injury in 1984. Doctor Bodel was of the view that the injury to his right knee at work on 13 June 2004 had caused aggravation, acceleration, exacerbation and deterioration of a previously asymptomatic degenerative process. He thought that there was a direct causal link between the injury that occurred at work in June 2004 and the Applicant's ongoing pathology and need for the surgery[10]. Doctor Bodel accepted that part of the need for the surgery related to the previous injury in 1984 however he said the Applicant was able to work for ten years after that surgery in the merchant marine and then passed a pre-employment medical before he started work with the Department of Juvenile Justice. Although there may well have been some earlier change in that knee, it was functioning normally until the event that occurred at work and therefore that the injury in 2004 is a substantial contributing factor to the need for the surgery.

11. Doctor Bodel provided a supplementary report on 24 March 2020. The doctor had been provided with the reports of Doctor Bentivoglio. Having considered those reports, Doctor Bodel again highlighted the fact that the Applicant had been able to work without difficulty up until the injury of 13 June 2004. He thought that the event at work did cause some additional structural damage and over time that has at the very least caused some acceleration to the degenerative process which has steadily gotten worse[11].

12. The Respondent relies upon the opinions of Doctor Bentivoglio. Doctor Bentivoglio first saw the Applicant in 2009. In his report dated 3 March 2009, Doctor Bentivoglio recorded that whilst the Applicant had been able to resume his full pre-injury duties, he had continuing symptoms in the knee and that he continued to notice swelling present in the knee region[12]. At that stage, the knee still tended to swell and give way. The Applicant could fall to the ground as a result of this. He had to limit his walking to less than 1.5 kilometres at that stage. He noticed that he tended to limp and had difficulty walking up and down stairs.[13] Doctor Bentivoglio did not have access to the original x-rays. The only x-rays he considered were those of November 2008. He considered other x-ray reports and thought that the x-ray changes in the right knee had remained exactly the same from 17 June 2004.

13. Doctor Bentivoglio saw the Applicant again in September 2019. At this time, Doctor Bentivoglio was of the view that the degenerative changes in the lateral compartment of the knee were unrelated to either the injury in 2004 or the previous injury requiring surgery in 1984, and that any aggravation of them had ceased. There was accordingly no causal nexus with the need for surgery."

SUBMISSIONS AND FINDINGS

Mr Parker

14. Mr Parker agreed that the issue for determination related as to whether the need for the right knee replacement surgery was due to the accepted injury of 13 June 2004.

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[10] ARD page 60.
[11] AALD page 2.
[12] Reply page 6
[13] Reply page 7.

15. Mr Parker referred to s 59A of the 1987 Act, submitting that a further teleconference should be arranged in the event that the applicant was otherwise successful to determine whether I should make a finding or a finding and an order. He referred to *Flying Solo Properties Pty Limited t/as Artee Signs v Collette*[14]. However, the issue of s 59A of the 1987 Act was not raised in either the s 78 Notice of 19 October 2019, or the s 287A Notice of 24 January 2020. No application was made pursuant to s 289A(4) of the 1998 Act, and I accordingly put this submission to one side.

16. Mr Parker submitted that Mr Roberts did not mention his earlier injury in his statement. Mr Parker submitted nonetheless that the medical records demonstrated that there were "extensive issues" with Mr Roberts' right knee. He took me through the evidence of the prior surgery with Dr Walker referred to by Dr Glase and Dr Ellis. Dr Bentivoglio assumed that there had been an open medial meniscectomy in 1984[15] noting that Mr Roberts was not a particularly good historian[16].

17. Further Mr Parker submitted that the medical evidence showed that at the time of the conceded injury of 13 June 2004 the state of the knee was "severely degraded". I was referred to the radiological report of Brisbane Waters Radiology dated 15 June 2004 which spoke to the advanced osteoarthritic changes in the lateral joint compartment which had cartilage thinning and subchondral sclerosis in the lateral compartment, valgus angulation and osteophytic bone reaction around the articular margins. A joint effusion was noted.

18. Mr Parker referred to the opinion of Dr Glase of 23 July 2004[17] where Dr Glase indicated that a knee replacement or a distal femoral osteotomy was eventually going to be needed and also expressing hope that surgery could be delayed for some years. I note however that this report was made after the subject injury of 13 June 2004, and was made in the context of the likely treatment options following the subject injury, as will be seen.

19. Mr Parker submitted that because there could be no suggestion that underlying pathology was caused by the subject accident, the possibility of future surgery "could only have been due to the underlying pathology".

20. I have my reservations as to that submission. Mr Roberts was asymptomatic at the time of his accident and it may be that if his knee had not been so insulted in the assault, he would not have come to a need for knee replacement at all. It is not the underlying pathology that has caused the need for surgery, but rather its aggravation in the incident of 13 June 2004.

21. Mr Parker referred to the opinions of Dr Bentivoglio on 3 March 2009 and 19 September 2019, noting that whilst the earlier report allowed a possibility that Mr Roberts was becoming symptomatic as a result of the subject injury, Dr Bentivoglio sought to distinguish that finding in his second report by saying that the subject injury had not caused any worsening of the degenerative changes already present in the knee. Dr Bentivoglio found that any aggravation caused to those degenerative changes in the June 2004 incident had long since settled. The increase in the amount of symptoms by the date of the second report, 19 September 2019, were simply the natural progression of the degenerative changes.

22. Mr Parker conceded that Dr Bentivoglio had thus "somewhat" altered his opinion.

23. Mr Parker then considered the reports relied on by the applicant of Dr Caskar, Dr Ellis and Dr Bodel, and submitted that I should nonetheless accept Dr Bentivoglio's reports and not those relied upon by Mr Roberts.

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[14] [2015] NSWWCCPD 14.
[15] Reply page 19.
[16] ARD page 16.
[17] ARD page 54.

24. Dr Caska was a general practitioner, Mr Parker observed. Dr Caska would not necessarily be experienced in matters of causation. He attempted to embrace an orthopaedic surgeon's role without giving any qualifications that would enable him to be accepted as an expert witness regarding causation.

25. Mr Parker submitted that the assumption made by Dr Caska that Mr Roberts was asymptomatic at the time of the subject accident was not supported and that indeed Mr Roberts may well have been symptomatic on 8 March 2004, when he saw Dr Ellis.

26. Mr Parker noted that the applicant had been seen on 8 March 2004 for a shoulder injury, notwithstanding which the right knee was examined[18]. The relevant report had not been provided and Mr Parker submitted that the right knee would only have been examined if there had been a complaint made about it, which in turn would must lead to the conclusion that it had been symptomatic at the time.

27. Mr Parker submitted "that an appropriate inference" could be drawn from the failure to produce that report by the applicant. The Commission was accordingly not able to evaluate the opinions expressed by Dr Caska and Dr Ellis without the original report being produced. Mr Parker relied generally upon the principles of *Makita v Sprowles*[19].

28. Mr Parker submitted that Dr Ellis's reports were otherwise of very little probative weight, as his opinions as to causation were dated.

29. Mr Parker referred to Dr Bodel's reports. In his first report of 4 December 2019, Dr Bodel said[20]:

> "There is an element of the need for this surgery that relates to the previous injury and the previous surgery back in 1984 but it is too difficult to determine the exact level of that contribution in regard to the need for surgery. He was able to work for 10 years after that surgery in the Merchant Marine and then passed a pre-employment medical before he started work with the Department of Juvenile Justice. Although there may well have been some early arthritic change in that knee, he was functioning normally until the event that occurred at work and therefore, that is a substantial contributing factor for the need for surgery."

30. The assumptions made in that passage, Mr Parker submitted, were subsequently contradicted or at least undermined by Dr Bodel's second report, and as I understood him, other evidence.

31. Dr Bodel's assumption that Mr Roberts was asymptomatic was "logically inconsistent" with the evidence that Dr Ellis had examined the knee on 8 March 2004, prior to the subject injury, Mr Parker contended.

32. I do not accept that submission. Mr Parker was inviting me to speculate on how it was that the knee was examined during Dr Ellis's examination. One reason may very well be that there was a complaint about it. The nature of the complaint and the surrounding circumstances however are completely unknown. It may be that Dr Ellis examined it because Mr Roberts mentioned that he had undergone a meniscectomy in 1984. Mr Roberts did not refer to his 1984 injury in his statement. It may be that he did have the occasional twinge in his knee, and asked Dr Ellis to look at it since he was there. It may be that the twinge was so minor that Mr Roberts had forgotten about it. Mr Parker cannot overcome the difficulty in the evidence that Mr Roberts worked on following his meniscectomy in 1984 for 16 years in a very active and arduous occupation as a merchant seaman.

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[18] ARD page 40.
[19] [2001] NSWCA 305.
[20] ARD page 56.

33. Mr Parker submitted that there was an inconsistency where Dr Bodel in his first report made an assumption that Mr Roberts was fit enough to pass pre-employment medical but in the second report indicated that he was unsure whether a pre-employment medical had to be passed or not.

34. I reject that submission also. The respondent is a government department. It is improbable that the NSW Government would hire a person for such a demanding job without there first being a whole series of checks on him/her, including a medical examination.

35. Further, the hypothesis upon which the submission was made is flawed. Even assuming that there had been no medical examination, it does not follow that Mr Roberts accordingly must have been symptomatic over the past two decades.

36. It follows that the alleged inconsistency was neither here nor there.

37. The third inconsistency between the two reports of Dr Bodel, Mr Parker submitted, was that in the first report the need for the proposed surgery was said to be multifactorial, that is to say, due partly to the 1984 injury and partly to the subject injury, whereas in the second report he suggested that the subject injury had "at the very least brought forward the timing of the inevitable total knee replacement". The inconsistency was said to be that Dr Bodel did not indicate when such a procedure would ordinarily be expected. Dr Glase, however, had foreshadowed a knee replacement independently of the subject assault.

38. That submission is rejected. In his report of 15 April 2019, Dr Glase said:[21]

> "I first saw him with regard to his right knee *in July 2004*. He had had a number of surgical procedures to his right knee performed by Michael Walker. *At the time I saw him* initially x-rays showed advanced osteoarthritic change involving his right knee and I advised him that he was probably eventually heading for joint replacement." (Emphasis added).

39. That passage does not indicate that Mr Roberts would have needed a TKR independently of the subject injury. Mr Parker has rather turned a blind eye to the fact that Dr Glase was assessing Mr Roberts in July 2004 - after the subject injury of 13 June 2004 - and his opinion necessarily included the damage done on that occasion. Both Dr Glase and Dr Bodel found that the subject injury had a causal connection with the need for surgery.

40. Mr Parker concluded by referring to Dr Bentivoglio's opinion in his second report that: [22]

> "The [need] for a knee joint replacement is not as a result of the injury in either 1984 or in 2004. It is as a result of pre-existing constitutional abnormalities."

41. Accordingly Mr Parker submitted that the applicant has not satisfied his burden of proof.

42. With respect to Mr Parker's inventive and thorough submissions, I am unable to accept this proposition. The unchallenged evidence is that Mr Roberts injured his knee in 1984 but worked as a merchant seaman until he obtained employment in 1990 with the respondent. That employment was an occupation which would require some measure of physical capacity to deal with occasional violent episodes such as the one in which he sustained his injury. Since that injury Mr Roberts has been advised to undergo a total knee replacement.

43. As Mr McManamey submitted, it was not germane as to whether Mr Roberts was symptomatic or asymptomatic but rather as to whether the injury he suffered in 2004 materially contributed to the need for the surgery.

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[21] ARD page 50.

[22] Reply page 21.

Mr McManamey

44. I accept the relevant submissions of Mr McManamey, which I have incorporated into the discussion.

DISCUSSION

45. The incident of 13 June 2004 was a significant one. Mr Roberts was knocked off his feet by the impact of the bucket and his injury put him off work for several months. It is common ground that he now needs a total knee replacement.

46. The attempt to avoid liability for the cost of the surgery has centred primarily on the report of Dr Bentivoglio of 19 September 2019. It has been acknowledged by the respondent that his opinion has altered from that of his earlier report of 3 March 2009. In that report he admitted a possibility that the subject injury had aggravated the underlying degenerative condition, although he stated that the degenerative changes themselves related to the original injury in 1984, and that the aggravation caused by the subject assault had been minor.

47. In his later report Dr Bentivoglio noted that the 1984 surgery had been a medial meniscectomy, but that the investigations showed degeneration on the lateral side of the knee. Therefore the 1984 meniscectomy was not responsible for the degenerative changes, notwithstanding that the effect of a medial meniscectomy normally leads to degenerative changes in the medial compartment.[23] Dr Bentivoglio accepted that the subject assault would have aggravated the degenerative changes, but said that the aggravation would have been temporary.

48. I do not accept Dr Bentivoglio's opinion that the aggravation was temporary. He did not explain the facts and circumstances which formed the basis of his opinion. Mr Roberts said that he has never recovered from that injury, and Dr Bentivoglio's opinion is not shared by any other medical practitioner.

49. Neither do I accept Dr Bentivoglio's opinion that the 1984 meniscectomy was not the cause of his degenerative condition. It is inconsistent with his finding that there was a whole person impairment caused by it.[24]

50. I note that the respondent did not address the effect of the Complying Agreements of 16 February 2006 and 6 July 2009. Mr McManamey submitted that in any event they constitute an estoppel. The terms identify the injury of 13 June 2004 with the respondent. However, the nature of the admission is not clear. If, for instance, liability had been accepted on the basis of an aggravation of a degenerative condition, such an estoppel would not apply if circumstances had changed and it could be shown that the aggravation had subsequently ceased – as indeed was the basis of the respondent's defence in this case.

51. I am satisfied that the need for surgery does arise as a result of the assault on 13 June 2004.

52. The assault aggravated a pre-existing degenerative condition that had been asymptomatic. That degenerative condition consisted of arthritis in the right knee joint. Whether it was constitutional or caused by the 1984 injury, the aggravation has not ceased. The need for the surgery results from the subject injury if the subject injury materially contributes to the need for the surgery.[25] It is not necessary that the incident be a substantial or main contributing factor.

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[23] Reply page 19.
[24] Reply page 20.
[25] *Murphy v Allity Management Services Pty Ltd* [2015] NSWWCCPD 49.

SUMMARY

53. Accordingly the Commission finds:

    (a) The proposed surgery is reasonably necessary.
    (b) The need for the proposed surgery arises as a result of a work related injury on 13 June 2004.

54. The Commission orders:

    (a) The respondent will pay the costs of and associated with the proposed right total knee replacement surgery.