WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**1248/19**
Applicant:	**Kevin Martine**
Respondent:	**State of New South Wales (Healthshare NSW)**
Date of Determination:	**8 July 2019**
Citation:	**[2019] NSWWCC 237**

The Commission determines:

1. The matter is remitted to the Registrar for referral an Approved Medical Specialist to assess the degree of permanent impairment, if any, as a result of injury on 12 December 2016 to the right lower extremity.

2. The documents to be forwarded to the Approved Medical Specialist are those admitted by consent in these proceedings as follows:

    (a) Application to Resolve a Dispute and attached documents with the exception of the first sentence of paragraph 7 of the applicant's stament dated 3 April 2017 which is not admitted.

    (b) The Reply and attached documents.

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

Jane Peacock
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 JANE PEACOCK, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. By Application to Resolve a Dispute (the Application) Mr Martine seeks lump sum compensation in respect of the right lower extremity as a result of injury on 12 December 2012.

2. The Respondent is the State of New South Wales) (Healthshare NSW) (Healthshare). Healthshare was insured at the relevant time for the purposes of workers compensation by QBE Insurance (Australia) Ltd as Agent for NSW Self Insurance Corporation (the insurer).

ISSUES FOR DETERMINATION

3. There is no dispute that Mr Martine injured his right lower extremity at work on 12 December 2016. There is no dispute that he was in the course of his employment with Healthshare as a patient transport officer at the time of injury.

4. Healthshare disputes that Mr Martine's employment was a substantial contributing factor to his injury.

5. The dispute arises because Mr Martine suffered a seizure at work on 6 December 2016. It is not alleged by Mr Martine that work caused his seizure.

6. In the event Mr Martine is successful on the liability question, the parties agree that the matter would be remitted to the Registrar for referral to an Approved Medical Specialist (AMS) to assess the degree of permanent impairment, if any, of the right lower extremity as a result of injury on 12 December 2016, with the documents to be forwarded to the AMS being those admitted by consent in these proceedings as set out below.

PROCEDURE BEFORE THE COMMISSION

7. The parties attended a conciliation arbitration in Newcastle. Both parties were represented by counsel with Mr Levvick appearing for Mr Martine and Ms Comptom appearing for Healthshare. 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

Documentary evidence

8. The following documents were in evidence before the Commission being admitted by consent, and taken into account in making this determination:

    For Mr Martine:

    (a) Application and attached documents subject to the following:

    (b) Paragraph 7 of Mr Martine's statement dated 3 April 2017 was initially objected to by counsel for Ms Compton. Counsel for the Mr Martine did not press the admission of the first sentence of that paragraph but pressed the second sentence. Ms Comptom then withdrew her objection and submitted that the second sentence could be admitted but it was a matter of weight.

For Healthshare:

(a) The Reply and attached documents

Oral evidence

9. Mr Martine did not seek leave to adduce further oral evidence and counsel for Healthshare did not seek leave to cross-examine Mr Martine.

10. There was originally objection taken by Ms Comptom, counsel for Healthshare, to the unsigned "statement" of Scott James Beattie which appears at page 3 of the Application described as a "note to file" apparently recorded by Mr Evers, the solicitor for Mr Martine. The matter was stood in the list to enable Mr Levvick to give advice to Mr Martine as to the readiness of the matter to proceed. During that time Mr Martine's legal representatives contacted Mr Beattie by telephone. Mr Levvick then advised that Mr Beattie was available to give evidence by telephone. Ms Compton advised that she consented to this course of action. She advised that she wanted to cross-examine Mr Beattie. Leave was to be granted for her to do so. I raised however, that given she wanted to cross-examine Mr Beattie and given the limits on its effectiveness over the telephone, the matter should be stood over to another day to enable Mr Beattie to appear in person after giving a sworn statement. Ms Compton then advised that she did not require Mr Beattie for cross-examination and nor did she in fact require him to give evidence by telephone and that she would consent to the record of his evidence as recorded in the "note to file" being treated effectively as a sworn statement by Mr Beattie to enable the matter to proceed. This course of action was entirely at the election of Ms Compton and I note that she was given the express opportunity to have the matter stood over to another day for Mr Beattie to be cross-examined in person after giving a signed statement. The matter proceeded at the parties' election.

FINDINGS AND REASONS

11. There is no dispute that Mr Martine injured his right lower extremity at work on 12 December 2016.

12. There is no dispute that the injury occurred during the course of Mr Martine's employment as a patient transport officer.

13. Healthshare disputes that Mr Martine's employment was a substantial contributing factor to his injury.

14. The dispute arises because Mr Martine suffered a seizure causing him to fall to the ground. Mr Martine does not allege that his employment was a substantial contributing factor to his seizure.

15. He had never suffered a seizure before 12 December 2016 and it would seem that, most fortunately, he has not suffered one since.

16. Mr Martine's case is that he had a seizure (unrelated to his employment but in the course thereof) and he fell injuring his right hip suffering a peri-prosthetic fracture of the right hip. It is alleged that the connection to his employment is real and of substance because he fell in the driveway of the hospital (where Mr Martine was transporting a patient) and hit his hip on the concrete lip of the driveway.

17. Mr Levvick submitted that the injury is the fracture to the hip and that injury occurred in the course of his employment in a patient transport bay which exposed him to a bitumen and a raised concrete lip upon which he suffered injury when he fell.

18. Ms Compton submitted that Mr Martine has not established on the balance of probabilities that his employment was a substantial contributing factor to his injury. Ms Comptom submitted that Mr Martine has not stablised the factual basis necessary for me to find that employment was a substantial contributing factor. Ms Compton submitted that the seizure could have happened anywhere causing him to fall and suffer injury to his hip.

19. I must make a determination on the balance of probabilities on the evidence in this case in accordance with the law.

20. The applicable law is set out in section 9A of the *Workers Compensation Act 1987* which provides as follows:

> "**No compensation payable unless employment substantial contributing factor to injury**
>
> (1) No compensation is payable under this Act in respect of an injury (other than a disease injury) unless the employment concerned was a substantial contributing factor to the injury.
>
> **Note:** In the case of a disease injury, the worker's employment must be the main contributing factor. See section 4.
>
> (2) The following are examples of matters to be taken into account for the purposes of determining whether a worker's employment was a substantial contributing factor to an injury (but this subsection does not limit the kinds of matters that can be taken into account for the purposes of such a determination):
>
> (a) the time and place of the injury,
>
> (b) the nature of the work performed and the particular tasks of that work,
>
> (c) the duration of the employment,
>
> (d) the probability that the injury or a similar injury would have happened anyway, at about the same time or at the same stage of the worker's life, if he or she had not been at work or had not worked in that employment,
>
> (e) the worker's state of health before the injury and the existence of any hereditary risks,
>
> (f) the worker's lifestyle and his or her activities outside the workplace.
>
> (3) A worker's employment is not to be regarded as a substantial contributing factor to a worker's injury merely because of either or both of the following:
>
> (a) the injury arose out of or in the course of, or arose both out of and in the course of, the worker's employment,
>
> (b) the worker's incapacity for work, loss as referred to in Division 4 of Part 3, need for medical or related treatment, hospital treatment, ambulance service or workplace rehabilitation service as referred to in Division 3 of Part 3, or the worker's death, resulted from the injury.

(4) This section does not apply in respect of an injury to which section 10, 11 or 12 applies."

21. Mr Levvick referred me to the case of *Marrickville RSL Club Ltd v Mukesh* [2006] NSWWCCPD 152. This was an appeal heard by Deputy President Candy. In that case a bar worker suffered a fit and fell to the ground behind the bar, striking his shoulder on the bar fridge on the way down. In that case the worker was successful on the section 9A issue before the arbitrator at first instance and this was upheld on appeal. Deputy President Candy said as follows:

> "The arbitrator found that the worker fell behind the bar area hitting his shoulder on the bar fridge. This does not exclude the cause for the fall being a seizure of some sort. While such a seizure would not of itself be compensable because of section 9A, it may be otherwise where that seizure leads to a physical injury by contact with part of the premises where the worker is required to work, that is, it is possible, I think, to differentiate between the seizure and the injuries suffered a result of a fall following that seizure. The employer may well argue that the seizure was the case of the worker suffering injury. Consistent with authority, however this does not exclude the fact that employment may still be a substantial contributing factor to the injury".

22. Ms Comptom referred me to the leading case on section 9A is the decision of the Court of Appeal in *Badawai v Nexon Asia Pacific Pty Ltd t/as Commander Australia Pty Ltd* [2009] NSWCA 324 (*Badawai*).

23. In *Badawai*, the majority of the Court of Appeal said that section 9A requires a causative element and that the connection to employment must be real and of substance. The majority observed as follows:

> "First, and perhaps most importantly, the word '*substantial*', must be given effect. It is a word of ordinary English meaning. It is a word of evaluative concept. The word substantial has been said to be not only susceptible of ambiguity, but also to be a word calculated to conceal a lack of precision. Which of the various possible shades of meaning the word bears is determined by the context. Here, the concept and purpose of the introduction of s 9A was to remove the possibility of compensation for injury with only a '*remote or tenuous connection with work*'. This was the purpose [of] the amendment:...We would endorse the separate comments of Meagher JA and Davies AJA in *Dayton v Coles Supermarket.* As Meagher JA said, something which is minor is not substantial, or, as Davies AJA said, '*substantial*' as it appears in s 9A means '*in a manner that is real and of substance*' and does not apply where, as a matter of practical reality, the contribution of the employment to the injury was of, or had, '*little substance*'. We agree with his Honour that it is not useful to search for or use other terms, such as '*large*', or '*weighty*', or by way of further example, other concepts such as '*predominant'*. We consider that to do so may carry the vice of introducing concepts with different nuances from the words used by the legislature and which would take the meaning of the word beyond that needed to fulfil the purpose of the provision in its legislative context. In this respect, we prefer the views of Davies AJA in *Dayton* to the views in the *extempore* judgment in *Bulga*, which did not refer to *Dayton* and to the views of Mason P in *Mercer*. The words of the statute should be adhered to: '*a substantial contributing factor*'. The '*proper link'* in the legislative context was a causal connection expressed by the words '*a substantial contributing factor'*, meaning one that was real and of substance. Given the conflict in the existing authority (*Mercer*, *Bulga* and *Dayton*), we think it important to clarify this issue." (emphasis in original)

24. Each case will turn on its own facts.

25. Turning then to an examination of the evidence in this case.

26. Mr Martine is a patient transport officer. He gives evidence in a statement dated 3 April 2017 about what happened on 12 December 2016 as far as he can recollect as follows:

> "5. On Monday, 12 December 2016, I started work at 1.00pm. I start work at the John Hunter Hospital. I and my driver Scott Beattie drove from the John Hunter Hospital to the Newcastle Mater but the job was cancelled and we drove back to the John Hunter Hospital to pick up a patient to transfer to Taree Hospital.
>
> 6. I do not have any recollection of what occurred but I have been told by Scott Beattie that I got giddy, looked dazed and then he went to get a wheelchair for me to sit in. He said that I didn't want to get in it. He went away to get a nurse and when he (sic) came back I was fitting on the ground. As a result of fitting on the ground I broke my right femur that lead to a right hip replacement. I also had severe concussion. I have been tested for the cause of my seizure but no cause has yet been found. I am presently on medication and have been banned from driving a motor vehicle for 6 months i.e. June 2017 subject to further review.
>
> 7. (First sentence was objected to, was not pressed and was not admitted). The area is the Patient Transport Bay at the John Hunter Hospital which is bitumen and a raised concrete footpath."

27. Mr Beattie was working with Mr Martine. He gives evidence in the note to file, which manner of giving evidence has been expressly consented to by Ms Compton, as follows:

> "About 3 o'clock on 12 December 2016 I was working with (Kevin) John Martine at the patient delivery bay Royal Newcastle Clinic. We had just loaded a patient into the van and John was standing at the front corner of the van (van parked pointing towards helipad with hand on corner of van staring into space). I asked him: 'Are you okay? He said: 'I felt giddy'. I went into the hospital to get a wheelchair. When Radmila and I got back to John he was on the asphalt having what appeared to be a grand mal seizure. The rapid response was called.
>
> From what I saw it is most likely that John has fallen over and hit his right hip on the concrete kerb and gutter and asphalt of the road. I understand John injured his right hip and had to have a hip replacement."

28. Mr Beattie was not cross-examined about his evidence.

29. There is no dispute that Mr Martine suffered a peri-prosthetic fracture of the right hip. On the basis of the evidence of Mr Beattie, Mr Martine's lawyers then wrote to Professor Kleinman asking him to answer a specific question which he does in a report dated 1 February 2019 as follows:

> "Given the assumption that Mr Martine suffered a periprosthetic fracture of his right hip when he experienced a seizure in the patient transport bay of the John Hunter Hospital when he collapsed and landed on the edge of a kerb; do you believe on the balance of probabilities that the workplace ie the features of the patient transport bay which exposed Mr Martine to a hard surface kerb and gutter was a substantial contributing factor when it came to Mr Martine suffering a periprosthetic fracture of his right hip as opposed to him having experienced the seizure in another location?

> On 12/12/2016, Mr Martine had a seizure at the John Hunter Hospital, fell to the ground, and in falling, struck the edge of his right hip against the edge of the kerb. It is likely that the increased leverage from the features of the kerb would have been a substantial contributing factor to the per-prosthetic fracture which he sustained."

30. Ms Compton submitted that it was open to me to find an asphalt surface but no evidence to support the proposition that he hit himself on a kerb and gutter.

31. My job is to make a determination on the evidence in this case in accordance with the law. I must make a determination on the balance of probabilities.

32. When I have regard to the evidence which is before me, I am satisfied on the balance of probabilities that Mr Martine suffered an injury to his right hip when he fell on 12 December 2016. He fell because he suffered a seizure unrelated to his employment. He injured his hip because he had a seizure causing him to fall. This happened when he was in the course of his employment. This is not enough by itself to satisfy the terms of section 9A. His employment must be a substantial contributing factor to his injury. However, it does not have to be *the* substantial contributing factor to injury but *a* substantial contributing factor. To be a substantial contributing factor to injury the connection to employment must be real and of substance.

33. Through no fault of his own, Mr Martine's evidence cannot really help because he has no recollection of what occurred due to the seizure. He can however give a description of the patient transport bay as comprising bitumen and a raised concrete path. Mr Beattie's evidence is that is he returned to the patient transport bay and saw Mr Martine "on the asphalt having what appeared to be a grand mal seizure. He gave evidence that "From what I saw it is most likely that John has fallen over and hit his right hip on the concrete kerb and gutter and asphalt of the road."

34. There is no evidence that controverts what Mr Beattie says he saw. He was not cross-examined although the opportunity to adjourn the matter and call Mr Beattie to be cross-examined was given to Ms Compton. Healthshare has provided no other evidence that controverts that of Mr Beattie.

35. Professor Kleinman gave his opinion about the mechanism of injury after being asked to assume that Mr Martine struck the edge of his right hip against the edge of the kerb based on the evidence from Mr Beattie. Professor Kleinman opined that "It is likely that the increased leverage from the features of the kerb would have been a substantial contributing factor to the peri-prosthetic fracture which he sustained." There is no other expert evidence that controverts the opinion of Professor Kleinman in this regard.

36. When all of the evidence is weighed in the balance, I am satisfied that, it is more likely than not, Mr Martine injured his right hip when he fell and hit his right hip on the concrete kerb and gutter and asphalt of the road and that the increased leverage from the features of kerb was a substantial contributing factor to the peri-prosthetic fracture of the right hip which Mr Martine sustained. I am satisfied on the balance of probabilities that the connection to employment was real and of substance.

37. Accordingly, the matter will be remitted to the Registrar for referral to an AMS to assess the degree of permanent impairment, if any, of the right lower extremity as a result of injury on 12 December 2016. The documents to be forwarded to the AMS are those admitted in these proceedings as set out above.