

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2933/19
Applicant: Steven John Tierney
First Respondent: Evalast Fencing Pty Ltd (Deregistered)
Second Respondent: Workers Compensation Nominal Insurer
Third Respondent: Metal Fencing Specialists Pty Ltd
Fourth Respondent: GC Group Company Pty Ltd t/as GC Civil
Date of Determination: 25 November 2019
Citation: [2019] NSWCC 375

The Commission declares:

1. That the first respondent, Evalast Fencing Pty Ltd (Deregistered) was not insured as required by the *Workers Compensation Act 1987* at the time of the applicant's injury on or about 23 November 2015.

The Commission determines:

2. On or about 23 November 2015 the applicant was a worker employed by the first respondent.
3. Pursuant to section 4(b)(ii) of the *Workers Compensation Act 1987* the applicant sustained injury on or about 23 November 2015 to his right knee and his employment with the first respondent was the main contributing factor to the aggravation, acceleration, exacerbation, and deterioration of his pre-existing disease of osteoarthritis.
4. Pursuant to section 20 of the *Worker Compensation Act 1987* the third respondent is liable as the principal to pay compensation to the applicant.
5. Award for the second respondent.
6. Award for the fourth respondent.
7. The lump sum claim is remitted to the Registrar for referral to an Approved Medical Specialist for assessment of permanent impairment in relation to the right lower extremity (knee) and scarring. The documents to be referred are to include those in evidence and a copy of this Certificate of Determination/Statement of Reasons.
8. The third respondent is to pay the treatment expenses on production of accounts, receipts and or Medicare notice of charge pursuant to 60 of the *Workers Compensation Act 1987*, noting that the claims for blood pressure or heart medication, being Ramipril and Rosuvastatin, were withdrawn.

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

Josephine Bamber
Senior 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 JOSEPHINE BAMBER, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. The fourth respondent GC Group Company Pty Ltd t/as GC Civil contacted with the third respondent, Metal Fencing Specialists Pty Ltd, to perform works including at Pennant Crescent Berkeley to install Rhino Stop Crash barriers to various lots. This work was commenced on 23 November 2015 and completed by 26 November 2015, at which time the third respondent rendered a tax invoice to the fourth respondent.¹
2. The third respondent had engaged the first respondent, Evalast Fencing Pty Ltd, to install the guard rails at the above-mentioned site. The director of Evalast Fencing Pty Ltd was Mr Shane Green. He alleges that Mr Stephen Tierney, the applicant, was engaged by him as a sub-contractor to assist him performing various jobs for two weeks out of each month.
3. On or about 23 November 2015 Stephen Tierney alleges he sustained injury to his right knee and relies on section 4(b)(ii) of the *Workers Compensation Act 1987* (the 1987 Act). He asserts he was a worker employed Evalast Fencing Pty Ltd, not a sub-contractor. In the alternative, he asserts he is a deemed worker pursuant to Schedule 1, clause 2 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).
4. It is common ground that the first respondent became deregistered after the commencement of these proceedings. It is also common ground that the first respondent at all material times did not hold a workers' compensation policy in New South Wales.
5. The second respondent, Workers Compensation Nominal Insurer, disputes that Mr Tierney was a worker employed by the first respondent or a deemed worker.
6. There were a number of amendments made to the Application to Resolve a Dispute (ARD) as follows:
 - (a) After the name of the first respondent wherever it appears "(Deregistered)" is added after its name;
 - (b) In Part 4 "on or about" was added to the date of injury "23/11/2015";
 - (c) In Schedules C and D, the pleading against the third and fourth respondents was amended to reflect that the pleading against them was confined to one of a section 20 principal;
 - (d) The claim for weekly compensation was discontinued, and
 - (e) In relation to the claim for treatment expenses pursuant to section 60 of the 1987 Act, reference to blood pressure or heart medication, being Ramipril and Rosuvastatin, were withdrawn.
7. The claims for compensation being sought are a claim for lump sum compensation in relation to the right lower extremity (knee) and scarring and a claim for treatment expenses. In relation to the latter, if Mr Tierney was successful, he sought a general order for treatment expenses.
8. In addition to the worker issue, the issues in dispute for each respondent involve a denial of liability under sections 4(b)(ii), 60 and 66 of the 1987 Act. While the third and fourth respondents adopt the submissions of the second respondent, they submit, in the alternative, that Mr Tierney was a worker employed by the first respondent.

¹ Fourth Respondent's Reply page 11

PROCEDURE BEFORE THE COMMISSION

9. This matter was listed for conciliation/arbitration hearing on 10 October 2019. Mr Greg Young, counsel appeared for Mr Tierney instructed by Jessica Cheung, solicitor. Mr Paul Stockley of counsel appeared for the second respondent and Mr Campbell Robertson, counsel, instructed by Mr Jim Vrettos, appeared for the third and fourth respondents. in turn instructed by Mr Chris Stojanovski in the interests of GIO, the insurer of the third respondent, and Ms Cook for icare for the fourth respondent.
10. As the first respondent became deregistered after these proceedings were issued, it did not appear at the conciliation/arbitration hearing.
11. 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

12. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) ARD and attached documents;
 - (b) Reply filed on behalf of second respondent;
 - (c) Reply filed on behalf of the third respondent and
 - (d) Reply filed on behalf of the fourth respondent.

Oral evidence

13. There was no oral evidence. Counsel made oral submissions, which were sound recorded. A written transcript (T) has been made of the recording.

FINDINGS AND REASONS

Steven Tierney's statements

14. Mr Tierney has provided statements dated 26 October 2017² and 5 September 2018³. He sets out his employment history including that in 2010 he worked with Bob McGregor carpet laying. He says he left this work around 2012 and started to work with Shane Green doing metal fencing. He says Bob McGregor also left the carpet laying work to also work with Shane Green, performing metal fencing. He says from 2012 he would work with both of them erecting metal fencing along the new Campbelltown train line. He said this was his first job doing fencing and was trained on the job by Mr Green.
15. Mr Tierney stated it was very strenuous work and they would mostly work 12 hours per day, five days per week and sometimes on Saturday. He says he was paid \$1,000 per week in cash, regardless of the hours he worked. He says he was paid directly by Bob McGregor even though Mr Green was the boss of the job. He says it was the same arrangement he had when he was doing carpet laying with Mr McGregor, \$250 per day.

² ARD page 1

³ ARD page 15

16. Mr Tierney says he understood Mr McGregor was paying his taxes and he did not ask him to get an ABN nor did he have to provide an invoice and he did not get a payslip from Mr McGregor.
17. Mr Tierney states that he was not aware of the business arrangement between Mr McGregor and Mr Green. He says in 2013 he had an argument with Mr McGregor about his rate of pay and he decided to leave. He says he rang Mr Green to apologise that he would not be returning to work.
18. He says he did not know the name of Mr Green's business and he understood the business running the fencing jobs at the railway line was Metal Fencing and that John Holland was the major construction company building the railway.
19. He says when they required equipment and tools, they would get them from Mr Green and if he did not have what they needed they would go to the Metal Fencing yard at Arndell Park. He says he did not have to provide any tools. He says he was given some Hi Vis shirts with "Metal Fencing" signage. He said in some sections of the railways they would need particular Hi Vis shirts, sunglasses, long pants, hard hats, gloves and he would provide these himself.
20. Mr Tierney says after four months of him leaving work with Mr Green he rang him to see if he could get some work with him doing the fencing. He says he had heard that Mr McGregor had moved to Queensland. He says he met Mr Green in the Metal Fencing yard in March 2014 and he offered Mr Tierney work as a fencer working with him on building sites, car parks and roadways. He was told by Mr Green he would be on the same rate of pay as when he was doing the railway work. Mr Tierney says he explained that he was earning \$250 per day with Bob and Mr Green said he should have been on a metre rate as that was what Mr McGregor was on.
21. Mr Tierney says their agreement was on a metre rate, depending on the type of fence. He says Mr Green asked him to get an ABN and helped him with getting it online. He said Mr Green paid the \$60 fee for this. In paragraph 40 of his first statement Mr Tierney says, "I understood that I was a sub-contractor to Shane Green⁴."
22. He says he received payments directly into his bank account at varying times, depending on when a job finished and when Steve from Metal Fencing would pay Mr Green. Mr Tierney states that he would provide an invoice to Mr Green every few months with a list of the payments he had made to him at his request. The invoices were made out to Evalast Fencing. He says during his time working with Mr Green he did some work directly for Metal Fencing and invoiced them directly. He says this occurred when Mr Green travelled to Queensland in about five weeks in May and June 2015.
23. Mr Tierney says he did not advertise for work as he had more than enough work with Mr Green. He said Mr Green did not have anyone else working for him during his time with him. He said on occasion some of the Metal Fencing guys would come and work with us if the job needed to finish due to completion dates.
24. He says the jobs they did came through Metal Fencing and they would get all the material from Metal Fencing. If they picked up supplies from the manufacturer, it would always be under the name Metal Fencing.
25. He says he would take direct orders and supervision from Mr Green and he was present in the office at Metal Fencing when Steve would give instructions to Mr Green. Mr Tierney says he did not receive instructions or directions from Metal Fencing.

⁴ ARD page 7

26. Mr Tierney says on 23 November 2015,⁵ he was working with Mr Green in Wollongong, measuring a site where they were to install guard rails along a driveway on a construction site. Mr Tierney says he proceeded to lift the guard rail posts from off the back of a truck and carried them along the driveway and was putting them along the driveway at one metre intervals. He says he had laid out about 20 posts and then commenced to load posts from the truck onto a wheelbarrow, pushing them up the cement driveway to lay them out. He says he would load seven or eight posts into the barrow at a time. He said the bullnosed posts would weigh approximately 20 kg. He says on his fourth load he felt his right knee give way and he fell to the ground. He said he landed on his knees. Mr Tierney says he was able to stand up and he tried walking, but he was in a lot of pain. He says he walked down the driveway and located Mr Green, who was measuring the driveway. He says he walked about 50 metres to Mr Green.
27. Mr Tierney says he told Mr Green that he “had just done his knee and was not able to get the barrow.” He says he asked Mr Green if he could put the rest of the posts out. He said Mr Green said ok and put out the posts and Mr Tierney sat and rested for about 10 minutes. He says he noticed that his right knee was swollen, and it was in a lot of pain. He says after a short break he kept working. He said Mr Green asked if he was ok to work and he said yes. He says he is able to tolerate a certain amount of pain and he wanted to get the job finished and assist Mr Green.
28. He says they finished the fence late at about 7 pm and cleaned up the site and left around 8 pm and it was dark. Mr Tierney says he drove his car from Doonside to his home in Westmead and his right knee was really swollen and he wrapped it in a compression bandage when he got home and took some Panadol for the pain. The next day he still had right knee pain and he drove to the Metal Fencing yard in Arndell Park and met Mr Green. They then drove together to a work site in the city. Mr Tierney says that Mr Green asked him how his knee was, and he told him it was no good and he was in pain, although not as severe as the day before. He says they started working installing guard rails on a driveway leading to a carpark and he worked all day in pain.
29. He says when he got home that night, he felt his knee was worse. He took the bandage off and the swelling had increased. The following morning, he says he called Mr Green and he said he would need some time off with his knee injury. He says Mr Green said, “just do what you have to do”.
30. Mr Tierney relates that he saw Dr Muni Kumar, who referred him for x-rays and to an orthopaedic surgeon, Dr Thomas, who he saw in early December 2015. Mr Tierney underwent a right knee replacement in December 2016.
31. Mr Tierney, in his second statement, clarifies a number of matters that he said in his first statement, including that the date of injury was 23 November 2015. However, in paragraph 12 he says “Since 21 November 2015, I have been certified as totally incapacitated to work by Dr Kumar. Despite this, I worked on 22 November 2015, as I was friends with my boss, Shane Green, and did not want to let him down.”
32. In his claim form, he states the date of injury was 21 November 2015 and that he stopped work on 22 November 2015. This claim form is undated, but bears a received stamp of 21 September 2017 from the “workcover claims branch”⁶.

⁵ In his first statement, he gives the date of injury as 24 November 2015 and in his second statement corrects this to 23 November 2015.

⁶ ARD page 20

33. In the ARD, there a number of invoices from Mr Tierney. The invoices numbered 0015508 and 0015509 are addressed to "Evalast Fencing, Shane Green" and refers to "Labour and tools" on 27 dates in 2015. The amounts vary from \$500 to \$2,200.⁷ Invoice dated 0015510 is also addressed to Evalast Fencing and is in similar terms for the period from 19 January 2015 to 23 June 2015 with a total of \$15,230⁸.
34. The invoice numbered 0015511 is addressed to Metal Fencing Spec" and refers to labour on 4.5.15 825.00, 11.5.15 825.00, 5.6.15 550.00, 10.6.15 275.00 and 1.6.15 275.00 total 2,750.00"⁹
35. The invoice numbered 0015512 is not addressed to anyone. It records the following "10.7.15 1,250.00, 20.7.15 1,560.00, 10.8.15 1,250.00, 17.8.15 1,600.00, 4.9.15 1,000.00, 11.9.15 1,300.00, 2.10.15 1,620.00, 12.10.15 2,360.00, 30.10.15 1,300.00, 9.11.15 1,620.00, 26.11.15 1,300.00 and 9.12.15 1,200.00 total 17,040"¹⁰. It does not refer to labour or labour and tools like on the other invoices.
36. In the ARD there are a number of bank statements from Mr Tierney covering the period 27 June 2015 to 26 December 2015. Listed are payments described as being from "Evalast Fencing contractor payment" and the dates and amounts coincide with those on invoice 0015512.

Shane Green

37. Mr Green provided a statement dated 8 December 2017, in which he states that he is the sole director of Evalast Fencing Pty Ltd. He says it is a business which installs metal fencing at commercial sites around Sydney. He says he obtains work from Metal Fencing Specialists. He states when he needs work, he goes to the Metal Fencing Specialists' yard at Arndell Park and meets Steve Diener, who is the owner. Mr Diener gives him details of the job and a contact person. He loads the material on his truck and goes to the site and carry out the required job.
38. Mr Green says Metal Fencing Specialists supplies all the materials for the job and that Mr Green provides his own transport and tools. He says if he has someone working with him, they provide their own tools and safety equipment. He says it is his responsibility to hire workers if the job requires it. Mr Green describes that he lives in Queensland and cares for his son for two weeks and then he travels to Sydney to work for two weeks. He says on the completion of a job he invoices Metal Fencing Specialists and they pay the money into his business banking account. He is mainly paid monthly. He usually charges a per metre rate.
39. Mr Green says he did not have a written agreement with Mr Tierney, but they had a verbal agreement that he would be a subcontractor and be responsible for his own tax liabilities, workers compensation insurance and public liability insurance. He says Mr Tierney was free to work for anyone else whenever he wanted, but with Evalast there was work for two consecutive weeks out of every month.
40. Mr Green says Mr Tierney was paid on a metre rate and would provide invoices at the end of a job and then Evalast would pay the money to his nominated account.

⁷ ARD pages 170/ 171

⁸ ARD page 169

⁹ ARD page 168

¹⁰ ARD page 167

41. Mr Green says Mr Tierney finished working for Evalast Fencing on 4 December 2015, as he said he needed some weeks off as he was feeling sore and tired, and after a few weeks he called to say he would not be coming back as he could not handle the work anymore. Mr Green says the type of work he does is very physical and hard work. He says when Mr Tierney first approached him for work, he said he had bad knees standing in one spot all day when working for Mongrel Boots.
42. Mr Green states that during the week commencing 23 November 2015, he travelled to Wollongong with Mr Tierney to complete a fencing job. He says he believes the job was done over two days being 26 and 27 November 2017 [sic], installing guardrails along a stretch of a road/driveway where a new housing estate was being developed. There was approximately 250 metres of fencing to be installed.
43. He says during this job Mr Tierney approached him saying the ground was slippery and he was having trouble. Mr Green says he told him not to put as many posts in the wheelbarrow or carry them two by two by hand. Mr Green says he offered to do that part of the job himself but Mr Tierney kept laying out the posts using the wheelbarrow. Mr Green says it was a sloping block and pushing the wheelbarrow up and down the concrete roadway was hard work due to its dusty surface. He says at the end of the second day Mr Tierney says he was sore and tired, and the job had really taken it out of him. Mr Green says during the trip home Mr Tierney did not mention or report that he had injured his knee, although he did say he was sore.
44. He says when Mr Tierney stopped work the following week, he said it was because he was too sore and tired. He said he rang Mr Tierney back a couple of weeks later and he said the doctor said he should have six months off to rest his legs. He says a few months later he spoke to Mr Tierney who said he need surgery to fix his knee, but that he did not say it had been caused by work with Mr Green or on a particular day.
45. Mr Green admits he had no workers compensation insurance.
46. Mr Green has filled out a document for the Nominal Insurer headed Schedule A, dated 6 October 2017. The gross estimated salaries paid by Evalast Fencing Pty Ltd to all employees for the current financial year was \$79,236. He states that Mr Tierney was paid \$57,529 in the 19-20 months he was contracted to him. He disputes anything happened on 21 November 2015 as it was a Saturday and they were not working then. He says the job he claims he injured himself on was 26 and 27 November. At 3.5 the question asked was "Did the claimant report the injury? When? To whom?" Mr Green answered,

"Not at the time, but later on the job he said to me he did something earlier that day maybe, but not the date he has given you, this was on the 27th we weren't even at work on the 21st."
47. Mr Green stated that the method of payment was "paid for job to job for work that was completed and installed, correctly". He said his usual duties were installation of fencing, supplying tools and labour, no material. Mr Green adds comments at the end of this form, firstly that Mr Tierney had problem with his knees from years of carpet laying and tiling floors. Mr Green also says they "worked as a team, anything he did was his choice, he worked as his own boss under his rates as a contractor and only got paid if the job was completed same as me."

Steven Diener

48. Steven Diener is a director of Metal Fencing Specialists Pty Ltd. He has written a brief letter stating that Mr Tierney was never an employee of his company and at the time of his apparent injury he was working for another company¹¹.
49. Mr Diener has also given a statement dated 26 February 2018. He says his company carries out work for a number of businesses as a sub-contractor. He says on occasion due to the size of the project he will also engage the services of other fencing contractors to perform work on behalf of Metal Fencing Specialists on a Principal Contractor/ Sub-Contractor basis, such as Evalast Fencing. He says Evalast Fencing has been doing work for his company for five years and Evalast Fencing engages a number of workers as sub-contractors.
50. Mr Diener states that because Mr Green works two weeks on and two weeks off, he offered Mr Tierney some work. He paid Mr Tierney for work on 12 September 2014, 4 and 11 May 2015, 1, 5, 9 and 28 June 2015. He described this as “casual work” and also that he was engaged as a “sub-contractor”. Mr Diener says Metal Fencing did not control how Mr Tierney carried out the work, or the hours he worked. He was required to submit invoices for payment and had to provide all equipment he needed to complete the work. He said Metal Fencing did not deduct tax.
51. Mr Diener says he does not know anything about Mr Tierney having an injury and that Mr Tierney was not employed by Metal Fencing at that time and had not done work for them for five months.

Harvey Simpson

52. In the Replies filed by the third and fourth respondents is an affidavit from Harvey Simpson sworn on 4 April 2019. He is the project manager of the fourth respondent, GC Group Company Pty Ltd t/as GC Civil. He says he was the site foreman on the development of the site of Pennant Crescent, Berkeley including on 23 November 2015. He attaches various photographs about the concrete pour which was completed on 2 November 2015. He also attaches a number of photographs of contractors installing the steel guard rail on 23 November 2015. It appears this job was completed by the time of the last photograph on 25 November 2015 at 6.09 pm
53. There is an email chain in the ARD from Harvey Simpson from GC Civil to Colin Huggins dated Friday 20 November 2015 confirming the guard rail at Berkley is ready to proceed on Monday for an install of the entire guard rail in one day. It is not clear from these emails where Mr Huggins works¹². However, in the Reply filed by the third respondent there are documents identifying Mr Huggins as the Senior Sales Executive of Metal Fencing Specialists Pty Ltd.
54. The third respondent’s reply also contains a Task Risk Assessment (TRA) worksheet authorised by Mr Huggins. It lists the employees of Metal Fencing involved in the initial TRA development as Steven Diener and Colin Huggins and the On -Site supervisor as Shane Green.

Treating medical evidence

55. In Dr Muni Kumar’s progress notes, there is an entry on 18 September 2015 referring to “right pain in leg” on examination patellofemoral arthritis was recorded and the doctor prescribed Mobic capsules and requested an x-ray of both knees.

¹¹ ARD page 55

¹² ARD pages 56/57

56. On 1 December 2015, Mr Tierney attended Dr Kumar. The clinical entry is brief and refers to bilateral knee pain. It is noted that he did not have the x-rays before and that his right knee is worse, and he wanted to go on a Centrelink pension. The doctor requested x-rays.
57. On 1 December 2015, an x-ray of Mr Tierney's knees was undertaken. In relation to the right knee there was moderate joint space narrowing and osteophytes in the medial compartment consistent with osteoarthritis. There was also a small amount of fluid in the suprapatellar pouch joint recess¹³.
58. On 2 December 2015, Mr Tierney again attended on Dr Kumar and on examination a large effusion of the right knee was noted. An MRI scan was requested with the doctor querying if there was a cruciate ligament tear.
59. On 10 December 2015, an MRI scan of the right knee was undertaken which showed a horizontal cleavage tear through the posterior third of the medial meniscus, which was described as degenerate. Advanced degenerative changes were also noted in the medial compartment¹⁴.
60. Dr Kumar provided a certificate dated 18 October 2017, stating that Mr Tierney had injured his knee in late November 2015 while he was pushing a heavy wheelbarrow up a slope. Dr Kumar says he found on examination a large effusion on 2 December 2015¹⁵.
61. Dr Bijoy Thomas, orthopaedic surgeon, reported to Dr Kumar on 22 September 2016, 14 December 2016 and on 19 December 2016. He confirms he performed a right total knee replacement operation on 19 December 2016. This was done at Blacktown Hospital. On 1 February 2017, Dr Thomas reports that Mr Tierney was complaining of a clicking sensation in his knee. None of these reports refer to a work injury.
62. On 9 April 2019, Dr Thomas wrote to Mr Tierney's solicitors. The doctor confirmed that he had first seen Mr Tierney on 27 January 2016 with a history of having trouble with the right knee, which had recently become significantly worse when pushing a loaded wheelbarrow up a hill. He noticed pain, swelling and difficulty mobilising. On examination, he had a varus alignment of the knee with a large effusion and a range from 10- 100° of flexion there was pseudolaxity of the MCL, a partially correctible varus deformity and tenderness along the medial joint line. There was gross irritability of the patellofemoral joint¹⁶. Dr Thomas diagnosed osteoarthritis of the right knee with severe arthritic changes in the medial compartment and of a lesser degree in the patellofemoral compartment. He also noted the presence on MRI of a tear in the meniscus. Dr Thomas does not comment about the work injury when giving his diagnosis.

Dr Bodel

63. Dr Bodel, orthopaedic surgeon, provided a medico-legal report dated 5 July 2018, in which he notes that at the time of his injury Mr Tierney "was working 'as a subcontractor to Shane Green (*Evalast Fencing Pty Ltd or Metal Fencing Specialist Pty Ltd*)'." The doctor refers to the date of injury as 21 November 2015 and refers to Mr Tierney having severe pain in his right knee as he was pushing a wheelbarrow uphill and it contained wooden guide posts. He noted that Mr Tierney rested briefly, but continued to work in increasing pain and swelling as the day progressed. He noted the job was in Wollongong.

¹³ ARD page 79

¹⁴ ARD page 80

¹⁵ ARD page 98

¹⁶ ARD page 108

64. Mr Tierney told Dr Bodel that he never previously had any right knee pain that he can recall prior to this injury.
65. Dr Bodel diagnosed that Mr Tierney had an injury in the form of aggravation, acceleration, exacerbation and deterioration of a disease process in the right knee in the form of osteoarthritic change. He adds:

“The event that led to the onset of symptoms with the pain and swelling may well have constituted a tear of a degenerative medial meniscus but the essence of the real pathology was the aggravation, acceleration, exacerbation and deterioration of that disease process in the medial compartment of the knee which had been asymptomatic previously.”

66. Dr Bodel was asked questions about causation and gave the following responses:

(a) The relationship between the condition found on examination and the injuries sustained;

I am satisfied that the event that occurred at work on 21 November 2015 has caused the “injury” as described above.

(b) Whether our client's employment (whether or not it was with Evalast Fencing or Metal Fencing Specialists as this is still in dispute) was the main contributing factor to our client's subject Injury and/or condition, subsequent Incapacity and need for treatment;

The event that occurred at work was the main contributing factor by way of aggravation, acceleration, exacerbation and deterioration of the disease process being the arthritic change in the knee change in the knee.”

Dr Quain

67. Dr Quain is an orthopaedic surgeon qualified by the Nominal Insurer to provide a medico-legal opinion. In his report dated 7 November 2018 he has a history that Mr Tierney was on 21 November 2015 pushing a barrow of approximately 10 wooden posts and in so doing strained his right knee. He says Mr Tierney told him the right knee “went on him”. Mr Tierney said that he dropped the barrow and returned to his boss and reported the injury, but he kept working that day, avoiding carrying weights and wheelbarrow work. He says he returned to work the following day but then saw his doctor.
68. Dr Quain records Mr Tierney’s past health and says that “he stated he had some mild pain bending his knees but denied a significant restriction”.
69. Dr Quain diagnosed that Mr Tierney has advanced medial compartment principally osteoarthritis of the right knee which pre-exists the alleged injury date of 21 November as evidenced by x-rays only several weeks later. He agrees with Dr Bodel that there has been an aggravation of the underlying condition but says it has not been the principal cause, although a substantial contributing factor.
70. Dr Quain was asked “Is employment on 21/11/2015 the main contributing factor to an aggravation, acceleration, exacerbation or deterioration of a disease condition in the right knee?” He replied “No; although he admits to mild symptoms prior to November 2015 and I have noted it has been an aggravation in my opinion it has not been the principal contributing factor to the need for a total knee replacement.”

Worker

71. The main issue in this case is whether Mr Tierney was a “worker” employed by Evalast Fencing Pty Ltd.
72. Section 9 of the 1987 Act provides that “A worker who has received an injury... shall receive compensation from the worker’s employer in accordance with this Act.”
73. “Worker” is defined in section 4 of the 1998 Act as meaning:
- “a person who has entered into or works under a contract of service or training contract with an employer (whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, and whether the contract is oral or in writing.)
74. Mr Tierney has the onus of proof to establish he is a worker.
75. Each counsel in their submissions referred to a number of cases establishing the principles to be applied when determining if a person is a worker. In *Stevens v Brodribb Sawmilling Co Pty Ltd*¹⁷ the High Court set out a number of relevant indicia. These include, but are not limited to, the following:
- The mode of remuneration;
 - The provision and maintenance of equipment;
 - The obligation to work;
 - The timetable of work and provision for holidays;
 - The deduction of income tax;
 - The right to delegate work;
 - The right to dismiss the person;
 - The right to dictate the hours of work, place of work and the like, and
 - The right to the exclusive services of the person engaged.
76. The above indicia are a guide to establishing the nature of the relationship between the two parties, but the whole of the relationship needs to be considered. The third and fourth respondents’ counsel submitted that the authorities state that it is the totality of the arrangement between the parties that needs to be considered. Counsel submitted that it needed to be borne in mind that Mr Tierney had over the years worked at many jobs, often of short duration and that he had no particular trade. It was also submitted that he had never run a business.
77. The third and fourth respondents’ position was that Mr Tierney was employed by the first respondent, or in the alternative was a deemed worker as per schedule 1, clause 2 of the 1998 Act. Counsel addressed some of the indicia referred to below, but also submitted that Evalast Fencing was in control, as evidenced by the fact that Mr Tierney travelled to sites with Mr Green, Mr Green set the hours worked and Mr Green directed Mr Tierney what work jobs had to be undertaken. Furthermore, it was submitted that Mr Tierney did not have the power to delegate any of the work he was given by Mr Green. It was submitted that these factors support that Mr Green was running a business and Mr Tierney was not running a business.

¹⁷ [1986] HCA 1; (1986) 160 CLR 16, *Stevens*

78. The Nominal Insurer asserted that Mr Tierney was not a worker employed by the first respondent. Its counsel referred to the notices issued by the Nominal Insurer under section 78 of the 1998 Act, including that dated 20 May 2019, wherein the reasons for denial of liability were articulated and it was determined that Mr Tierney was a contractor to the first respondent. The following factors were considered:

ABN

79. The Nominal Insurer submits that the fact that Mr Tierney had an ABN tends to support that he was not a worker.
80. The third and fourth respondent submitted that having an ABN is a matter to be taken into account, but of itself is not determinative. It relied upon *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)*¹⁸ wherein Mr Justice Broomberg stated:

“Each of these interpreters perceive themselves to be self-employed and have an ABN. Their evidence also indicated that they interacted with the ATO on the basis that they conducted a business. I attach little weight to those indicators. Obtaining an ABN is a simple process in which the existence of a business is not required to be demonstrated in the absence of other indicators of the existence of a business. The fact that some of the regulatory requirements of a business were in place is likely more to do with an incorrect self-assessed conclusion of the existence of a business than the fact of such a business exists.”

81. I find that the third and fourth respondents’ submissions on this point have force. I find that often having your own ABN can be a factor to support that a person was not a worker. However, in Mr Tierney’s matter, I find this is not a strong factor as the ABN was obtained at Mr Green’s request and Mr Green paid the \$60 fee and did not take reimbursement when it was offered to him by Mr Tierney. The obtaining of the ABN does not seem to have been a step taken by Mr Tierney to establish his own business.

Issuing of Invoices to Evalast Fencing and rate of pay

82. The Nominal Insurer’s counsel conceded the evidence about the invoices was “a little bit indistinct” as to whether Mr Tierney was setting the rate of pay, but he relied on the fact that Mr Tierney issued invoices, which was submitted was certainly consistent with him being a contractor, but he concedes that he could not submit that it was entirely inconsistent with him being an employee. Nor was the fact that he was paid when jobs finished.
83. While the issuing of invoices can be a factor to point to a person not being a worker, Mr Tierney’s invoices had no letterhead, no business address, no phone number, they were handwritten and apart for the ABN, they had no other information one would normally expect for a business.
84. Furthermore, as submitted by the third and fourth respondents’ counsel, there is evidence from Mr Tierney to suggest that he wrote up the invoices by looking at his bank statements and copying the amounts he saw Evalast Fencing had paid into his account. So, he did not issue the invoices in order to obtain payment, but after the event of payment. Also, when one looks at the invoices it seems readily apparent, they were not issued after each job, but at the end of cumulative periods of time. For instance, the invoice 0015510 covers 15 entries from 19 January 2015 to 23 June 2015 and has a total. Similarly invoice 0015512 has 12 entries from 10 July 2015 to 9 December 2015 and again a total for the 12 entries. To my mind these are not invoices one would expect from a business.

¹⁸ [2011] FCA 366, *On Call Interpreters*

85. Additionally, while the amounts vary each week there is no reference to hours worked or meterage undertaken. Mr Green said the payment to Mr Tierney was by meterage and the amount would vary depending on how heavy the fence was. Mr Tierney's invoices do not record such details. Mr Tierney's evidence, that he did not know the rates and he trusted Mr Green to pay the correct amount, seems to be supported by the form of his invoices and to my mind are factors which tend to support he was a worker.

Performed work for others

86. The evidence establishes there were only a few days where he worked for Metal Fencing, being on 12 September 2014, 4 and 11 May 2015, 1, 5, 9 and 28 June 2015. There is no evidence that when Mr Green was in Sydney from Queensland that Mr Tierney did work for anyone else. Their arrangement was unusual in that it involved work for two consecutive weeks a month, but in those two weeks Mr Tierney working only for Mr Green.
87. The Nominal Insurer submitted that this work for Metal Fencing would not be incompatible with Mr Tierney being a worker simpliciter, but it would tend against a finding of a deemed worker.

Mr Tierney could refuse work offered to him by Evalast Fencing

88. The Nominal Insurer's counsel did not expand upon this point in his submissions.

Payment out of business monies received by Evalast Fencing from Metal Fencing

89. The Nominal Insurer's counsel queried if this was a relevant consideration to the issue. He did not develop any argument that it was relevant. I do not consider this to be relevant.

Evalast Fencing did not pay tax or superannuation for Mr Tierney

90. The Nominal Insurer submitted that Evalast Fencing did not pay tax for or superannuation on behalf of Mr Tierney and these were indicia in favour of Mr Tierney being a contractor, rather than an employee. I agree with this submission and find this is a fairly strong indication of non-employment relationship.

Other factors

91. Mr Tierney's understanding of the legal relationship between himself and Evalast Fencing was not listed as an indicia in the section 78 notice on which the Nominal Insurer's counsel based his submissions. However, I note that Mr Tierney in his first statement said he understood that he was a sub-contractor to Mr Green. This is not necessarily determinative, but is a factor to be taken into account when considering the totality of the evidence.
92. The third and fourth respondents submitted that Mr Tierney did not have his own place of business, he did not have any assets, there is dispute as to whether he provided his own tools and in any real sense he was not developing any good will. Therefore, it was submitted on an analysis of the entire arrangement the Commission would be satisfied that Mr Tierney was a worker, and he was not conducting his own business. Reliance was placed on the following passage from *Stevens*:

"Those which indicate a contract for services include work involving a profession, trade or distinct calling on the part of the person engaged, the provision by whom of his own place of work or his own equipment, the creation by him of good will or saleable assets in the course of his work, the payment by him from his remuneration of business expenses or any significant proportion and the payment of remuneration without deduction for income tax. None of these leads to any necessary inference however in the actual terms and the terminology of the contract will always be of suitable importance."

93. Mr Tierney's counsel also relied upon the decision in *Hollis v Vabu Pty Ltd*¹⁹. In that case the High Court upheld Mr Hollis' claim, stating that too much weight had been placed on the fact that the bicycle couriers owned their own bicycles. The Court considered that the couriers had little control over the manner of performing their work and, looking at the relationship as a whole, it should properly be characterised as one of employment. Mr Tierney's counsel pointed out, as did the third and fourth respondents' counsel, that the section 78 notice issued by the second respondent did not consider the indicia of control.
94. Mr Tierney's counsel submitted that supervision was always through Mr Green for Evalast Fencing and Mr Tierney did not choose his own hours. Mr Tierney's counsel adopted the submission that he could not be considered to be running a business.
95. I find that the submissions made by Mr Tierney's counsel and that of the third and fourth respondents are persuasive. My consideration of the indicia referred to above has led me to find that Mr Tierney was a worker employed by the first respondent. I acknowledge the facts that Evalast Fencing did not pay Mr Tierney superannuation or pay tax on his behalf are factors suggesting a non-employment relationship, however the control that Evalast Fencing exercised in the relationship to my mind outweighs these factors. The control was significant it covered the travel arrangements to job sites, the hours worked and the rates of pay. Also, of significance, was the manner of Mr Tierney issuing his invoices. As I have found above, he did not issue the invoices in order to obtain payment, but after the event of payment. The invoices did not have any features one would expect of business invoices, excepting the ABN. Furthermore, I accept there is no evidence that Mr Tierney was developing any good will or has assets which one would expect had he been conducting a business.
96. I find that the totality of the evidence supports that Mr Tierney was a worker and that he was employed by Everlast Fencing on or about 23 November 2015.

Section 20 principal

97. Counsel for the Nominal Insurer submitted if the Commission was to find that Mr Tierney was employed by Evalast Fencing, or was a deemed worker of Evalast Fencing, then the evidence is clear that Evalast Fencing contracted with Metal Fencing. It was submitted that as Evalast Fencing was uninsured, then Metal Fencing would be found liable under section 20 of the 1987 Act. Counsel for the third respondent did not cavil with this submission.

Injury

98. The counsel for the Nominal Insurer submitted that there is no real factual challenge to Mr Tierney's assertion that he sustained injury on or about 23 November 2015. Counsel noted that he did visit his doctors fairly shortly after the alleged date of injury.
99. The counsel for the third and fourth respondents submitted that it is abundantly clear that Mr Tierney was suffering from arthritic problems in his right knee before the event of November 2015. He pointed to the note of Dr Kumar on 18 September 2015 when Mr Tierney complained of right knee pain and there was a request for bilateral knee x-rays and a note suspecting patellofemoral arthritis. Counsel also relied on the evidence of Mr Green that Mr Tierney had prior knee problems and counsel submitted that this evidence is not contradicted. Thirdly, counsel referred to Dr Thomas reporting on 27 January 2016, that Mr Tierney had trouble with his right knee which *recently* became significantly worse, as supporting it had previously been a problem.

¹⁹ [2001] HCA 44; (2001) 207 CLR 21, *Hollis*

100. However, counsel submitted that these matters go to section 323 of the 1998 Act if the lump sum claim was being assessed by an Approved Medical Specialist (AMS) and that Mr Tierney's case is one of aggravation of pre-existing disease.
101. Mr Tierney's counsel agreed that Mr Tierney had pre-existing osteoarthritis in his right knee. He submitted that Dr Quain was confused when he was discussing the main contributing factor and that Dr Bodel's opinion should be accepted.
102. It was accepted that as these proceedings do not claim the cost of the knee replacement surgery, I do not need to make a finding about the cause of the same.
103. The causal relationship of the knee replacement surgery to the injury will be a matter for the AMS to consider when assessing the permanent impairment from the work-related injury to the right knee.
104. There was not much contest, if at all, about the issue of injury by all of the respondents in their submissions. Nor was there an issue about the date of injury being on or about 23 November 2015, instead of the other dates referred to in the evidence such as 21 November 2015 or 26 November 2015.
105. I accept the date of on or about 23 November 2015 is the more likely as it coincides with the evidence from Mr Simpson and the photographs showing the work on the Berkeley site and the later invoice from Metal Fencing to GC Civil dated 26 November 2015²⁰ after the work had been completed.
106. On 2 December 2015 Mr Tierney again attended on Dr Kumar and on examination a large effusion of the right knee was found. I find this is consistent with him having sustained an injury to his right knee on or about 23 November 2015. It is consistent with Mr Tierney's evidence, which I accept, about his knee swelling on the job. Mr Green's evidence about whether Mr Tierney had injured his knee is not precise, although in Annexure A in the document completed for the Nominal Insurer at 3.5, Mr Green says that later on the job Mr Tierney said to him "that he did something earlier that day". This seems consistent with Mr Tierney's version of events that he did mention his knee was injured during the job when pushing the wheelbarrow.
107. I accept the opinion of Dr Bodel that the injury involved an aggravation of the underlying osteoarthritic condition present in the right knee and that the work injury was the main contributing factor to that aggravation. I find that Dr Quain does support a work place injury having occurred, but his opinion about main contributing factor is expressed in a confusing manner. As he does not really answer the question asked of him. Dr Quain was asked "Is employment on 21/11/2015 the main contributing factor to an aggravation, acceleration, exacerbation or deterioration of a disease condition in the right knee?" His response muddles this issue with whether the knee replacement surgery was caused by the workplace aggravation. They are different issues.
108. Therefore, I prefer the opinion of Dr Bodel as it is expressed in clearer terms.
109. I find that pursuant to section 4(b)(ii) of the 1987 Act Mr Tierney sustained injury on or about 23 November 2015 to his right knee and his employment with the first respondent was the main contributing factor to the aggravation, acceleration, exacerbation, and deterioration of his pre-existing disease of osteoarthritis.

²⁰ Fourth respondent's reply page 11

SUMMARY

110. The Commission declares:

- (a) That Evalast Fencing Pty Ltd (Deregistered) was not insured as required by the 1987 Act at the time of Mr Tierney's injury on or about 23 November 2015.

111. The Commission determines:

- (a) On or about 23 November 2015 Mr Tierney was a worker employed by Evalast Fencing Pty Ltd (Deregistered).
- (b) Pursuant to section 4(b)(ii) of the 1987 Act Mr Tierney sustained injury on or about 23 November 2015 to his right knee and his employment with the first respondent was the main contributing factor to the aggravation, acceleration, exacerbation, and deterioration of his pre-existing disease of osteoarthritis.
- (c) Pursuant to section 20 of the 1987 Act the third respondent is liable as the principal to pay compensation to Mr Tierney.
- (d) Award for the second respondent.
- (e) Award for the fourth respondent.
- (f) The lump sum claim is remitted to the Registrar for referral to an Approved Medical Specialist for assessment of permanent impairment in relation to the right lower extremity (knee) and scarring. The documents to be referred are to include those in evidence and a copy of this Certificate of Determination/Statement of Reasons.
- (g) The third respondent is to pay the treatment expenses on production of accounts, receipts and or Medicare notice of charge pursuant to 60 of the 1987 Act, noting that the claims for blood pressure or heart medication, being Ramipril and Rosuvastatin, were withdrawn.

