WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **5778/19**
Applicant: **Sharon Rochester**
Respondent: **Best & Less Pty Ltd**
Date of Determination: **16 January 2020**
Citation: **[2020] NSWWCC 21**

The Commission determines:

1. The applicant sustained an injury to her left knee in the course of her employment with the respondent on 11 December 2017 wherein she sustained an aggravation of a disease in the left knee which included symptoms from a meniscal tear, and the effects of that injury are continuing.

2. The injury sustained by the applicant materially contributes to the need for an arthroscopy proposed by Dr Wood.

3. The left knee arthroscopy proposed by Dr Wood is reasonably necessary.

The Commission orders:

1. Pursuant to sections 60 (5) and 61 (4A) of the *Workers Compensation Act 1987*, the respondent is to pay the applicant's costs of the left arthroscopy proposed by Dr Wood and the reasonable costs associated with that surgery.

2. The respondent is to pay the cost of the consultation the applicant had with Dr Wood on 18 July 2019.

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

John Isaksen
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF JOHN ISAKSEN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A MacLeod

Ann MacLeod
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. The applicant, Sharon Rochester, sustained injuries to both knees and lower back on 11 December 2017 whilst employed as an Assistant Manager with the respondent, Best & Less Pty Ltd, at its Mudgee store.

2. The applicant reported the injury but took no time off work following the injury. The applicant attended her general practitioner, Dr Hearn seven days after the injury and provided Dr Hearn with details of the injury. The applicant started her own picture framing business in January 2018 and did not seek any further treatment for her left knee until she again consulted Dr Hearn some 10 months later on 2 October 2018.

3. The applicant has been referred to two orthopaedic surgeons for treatment for her left knee, being Dr Lyons and Dr Wood. Dr Wood has proposed an arthroscopy of the left knee to repair a meniscal tear found on MRI scans.

4. The respondent disputes liability for the left knee arthroscopy proposed by Dr Wood.

5. The applicant seeks an order pursuant to section 60 (5) of the *Workers Compensation Act 1987* (the 1987 Act) that the respondent meets the costs of the left arthroscopy proposed by Dr Wood and any expenses associated with that surgery, and also an order for the respondent to pay for a consultation the applicant had with Dr Wood on 18 July 2019.

ISSUES FOR DETERMINATION

6. The parties agree that the following issues remain in dispute:

    (a) whether any aggravation of the applicant's left knee condition caused by the injury on 11 December 2017 has now resolved;

    (b) the cause of the left meniscal tear that requires repair by way of arthroscopy;

    (c) whether the injury of 11 December 2017 materially contributes to the need for the proposed surgery, and

    (d) whether the proposed surgery is reasonably necessary.

PROCEDURE BEFORE THE COMMISSION

7. The parties attended a conference and hearing at Penrith on 9 January 2020. 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.

8. Mr Hanrahan appeared for the applicant, instructed by Ms Lauren Hunt. Mr Beran appeared for the respondent.

EVIDENCE

Documentary evidence

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

(a) Application to Resolve a Dispute (ARD) and attached documents;
(b) Reply and attached documents.

Oral evidence

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

FINDINGS AND REASONS

The applicant's evidence

11. The applicant has provided a statement to an investigator on behalf of the respondent dated 10 December 2018. The applicant has provided a further statement dated 7 October 2019.

12. The applicant states that she commenced employment with the respondent in February 2013 as an Assistant Manager. She states that she had worked in the retail industry for nearly 30 years before the injury she sustained on 11 December 2017,.

13. The applicant states that there was a lot of manual work involved during her period of employment with the respondent. She states that most of her work involved unloading pallets, pulling out stock and putting stock out on display. In her second statement the applicant states that prior to the injury on 11 December 2017 she had no pain or problems with her left knee, although in her first statement she states that she could not squat down or kneel on either of her knees.

14. The applicant states that on the morning of 11 December 2017 she was walking down an aisle in the respondent's Mudgee store when she slipped on the floor which had been wet from cleaning and fell on her knees and jarred her back. She states that her left knee took most of her fall.

15. The applicant states that she reported the injury to management but continued working for the rest of the day.

16. The applicant states that she had given notice of her resignation of employment with the respondent on 15 November 2017 and worked out her four week notice period until 15 December 2017.

17. The applicant states that before the injury she had arranged an appointment with her general practitioner, Dr Hearn, on 18 December 2017, and informed Dr Hearn of the injury she had sustained on 11 December 2017 at that consultation. She states that she showed Dr Hearn the bruises she had on both knees from the fall. She states that she was given a referral for a MRI scan but did not proceed with it because she thought the left knee would settle once the bruising and swelling went down.

18. In her second statement the applicant states that the bruising and swelling went down after about one month but that she continued to experience intermittent pain in both knees thereafter.

19. The applicant states that she commenced her own picture framing business in January 2018. She states that this work includes using a hand operated cutter and a pedal operated guillotine to cut frames which requires the use of her left foot. She states that this work involves her standing for most of the day but there is not a lot of bending and lifting. In her second statement she states that she plans each day depending on the level of her pain and avoids using the foot pedal if her pain is particularly bad.

20. In her first statement the applicant states that a few months before she made this statement the pain in both knees had become worse. She states that she then returned to see Dr Hearn. The applicant also states in that first statement:

> "In terms of what's happened between the injury to now, both knees were pretty sore when I first did it and it took a month to get over the initial bruising. I had pain for a few months on and off but in the last two or three months it's just gotten worse and worse and it's not getting any better. I don't know what's caused it to get worse in the last three months, I don't know if it's because I'm standing on it all the time and because its already injured it's not helping."

21. The applicant was referred to Dr Lyons and then to Dr Wood for a second opinion. The applicant states that Dr Wood performed surgery on her right knee in 2006. She states that she has arthritis in her right knee and uses arthritic cream to help to alleviate that pain.

22. In her second statement the applicant states that she wants to undergo the arthroscopy proposed by Dr Wood as the pain in her left knee is constant and severe.

The medical evidence

23. The entry made on 18 December 2017 by Dr Hearn on the applicant's first attendance with him after her injury reads:

> "Left job, much happier
> Started picture framing business
> Fell just before left; on to knees. Same bruised ++ Appears no structural damage."

24. There are several entries in the clinical notes from Mudgee Medical Centre during 2018 which relate to urinary tract infections but no further entry regarding treatment for the applicant's left knee until 2 October 2018 when the applicant attends Dr Hearn for bilateral knee pain. The entry for that day includes: "Last Dec fell on to knees at work. Were bruised ++. Improved, but recently increasingly painful."

25. There is also an entry made by Dr Tan on 30 June 2016 which includes:

> "fall 10 days ago in car park,
> landed on left knee, bruise and swelling,
> but walking fine, nil limping
> nil locking or giveway.."

26. The applicant underwent an x-ray of the left knee following that attendance upon Dr Tan. The x-ray report dated 1 July 2016 records prepatellar swelling but no other abnormalities.

27. Dr Lyons, orthopaedic surgeon, initially sees the applicant on 24 October 2018 and takes a history of the applicant injuring both knees in December 2017 when she slipped on a wet floor at work "landing on the apex of both knees." Dr Lyons records: "Sharen struggled with that initial injury with peripatellar tenderness. It did improve a little bit but has flared over the last several months."

28. The initial diagnosis made by Dr Lyons is that the applicant has aggravated arthritic changes in her right knee and potentially precipitated further chondromalacia in her left knee. An MRI scan was ordered for both knees to define the chondral spaces more clearly.

29. An MRI scan report dated 5 November 2018 reports bilateral osteoarthritis, the right knee being worse than the left knee, and a radial tear involving the posterior horn of the left medial meniscus.

30. Dr Lyons sees the applicant again on 14 February 2019 after she has undertaken a "360 Knee System non operative treatment program." He sees her again on 9 May 2019 and reports that the applicant has advanced arthritis of both knees that has been aggravated and continues to be aggravated by her work related injury. Dr Lyons writes that the only predictable, durable and effective treatment now available would be a total knee replacement but orders a further MRI scan before that surgical option is advanced.

31. A further MRI scan of the left knee only dated 31 May 2019 confirms the radial tear involving the posterior horn of the left medial meniscus.

32. Dr Lyons provides a report to Allianz, the insurer of the respondent, dated 6 June 2019, in answer to certain questions put to him. Dr Lyons opines:

> "As Ms Rochester has documented osteoarthritis of both knees which predated her fall, she was completely asymptomatic with regards to the left knee prior to her employment. Her work related fall is what has rendered her symptomatic. It is conceivable that as she had asymptomatic osteoarthritis predating her fall that she could have continued in this vain for an indefinite period and therefore there is not a probability that the bilateral knee injury would have happened anyway irrespective of her employment."

33. Dr Lyons also addresses the difference between the work the applicant was doing with the respondent and the work in her picture framing business and opines:

> "Having discussed Ms Rochester's work at Best & Less and presently as a Picture Framer, I would contend that walking the floor, bending over and lifting heavy boxes to be more problematic then standing for extended periods. As such, I believe that her employment at Best & Less has precipitated her current demise. This aggravation continues presently."

34. Dr Lyons also opines that "the meniscal tear which Ms Rochester has developed through the cause of her employment is the main contributing factor to her current discomfort."

35. Dr Wood, orthopaedic surgeon, has provided one report dated 18 July 2019, which is addressed to Dr Hearn. Dr Wood records that the applicant had an onset of left knee pain "about two years ago" when she slipped and fell while working for the respondent. Dr Wood concludes that the left meniscus is damaged. He writes that the torn meniscus "is clearly causing a lot of problems" and "it is certainly not giving her benefit having that torn portion." Dr Lyons recommends an arthroscopy, although he does not provide any opinion on the link between the fall at work and the torn meniscus.

36. Dr Wood does opine that "there is about a 75% chance she will do well but a 25% chance the arthritis is causing the problem and the knee will not be any better."

37. There is in evidence a report from Ms Matt, physiotherapist, dated 21 January 2019 which includes a history of a gradual onset of left knee pain over the past few years which "was further exacerbated by a fall at her previous workplace 1 year ago when she fell directly onto both her knees."

38. The applicant attended Dr Bodel at the request of her solicitors and Dr Bodel has provided a report dated 12 August 2019.

39. Dr Bodel records details of the fall that the applicant at work on 11 December 2017. He records that the applicant put up with the pain until 5 October 2018 with the pain getting worse. He records that the applicant uses a manual guillotine in her picture framing business, which requires the use of a pedal with her left leg and this tends to aggravate her left knee "a little."

40. Dr Bodel opines:

> "The injury is twofold in this circumstance with a direct blow to the front of both knees causing aggravation of some retropatellar articular cartilage damage but the main injury to the left knee is a tear of the posterior horn of the medial meniscus."

41. Dr Bodel also opines:

> "I am satisfied that the specific event that occurred at work on 11 December 2017 has caused the tear of the posterior horn of the medial meniscus on the background of some underlying previously minimally symptomatic degenerative change."

42. Dr Bodel considers that the arthroscopy proposed by Dr Wood is reasonable and necessary, with the anticipation that it will delay a total knee replacement for some years.

43. The applicant attended Dr Panjratan at the request of the respondent and Dr Panjratan has provided a report dated 13 March 2019.

44. Dr Panjratan records that following the fall on 11 December 2017 the applicant's left knee "did not seem too bad for a little while and the bruising did settle down." He records details of the work undertaken by the applicant in her picture framing business, including that she uses a guillotine with her left foot and stands for most of the working day. He records that from time to time the left knee swells and becomes painful. He writes that this work is "totally different" to what the applicant was doing with the respondent, which he understands was "customer service."

45. Dr Panjratan opines:

> "In my opinion if she has not been too bad for the past few months after the fall and the pain has become worse, the logical conclusion would be that it may be the nature and conditions of her work as a picture framer in which she is standing for prolonged periods."

46. Dr Panjratan is asked for a specific diagnosis both pre-injury and post-injury of the applicant's left knee and how the incident in December 2017 has changed in her presentation and replies:

> "The diagnosis pre-injury was asymptomatic osteoarthritis of the left knee.
> The diagnosis post-injury would be triggering symptoms in the left knee which were otherwise asymptomatic."

47. Dr Panjratan opines that the left medial meniscus tear is a minor free edge radial tear that is degenerative in nature.

48. In a supplementary report dated 11 June 2019, Dr Panjratan opines that the fall triggered osteoarthritic symptoms which have now resolved and her ongoing symptoms are due to the duties undertaken in her picture framing business.

49. In a supplementary report dated 4 October 2019, Dr Panjratan opines that the arthroscopy proposed by Dr Wood is not reasonably necessary as it will flare up the osteoarthritis and only makes things worse for the applicant.

The applicant's submissions

50. The "Injury Details" in the ARD states that the applicant sustained injury to her lumbar spine and both knees when she slipped and fell on 11 December 2017 and that she sustained injury by way of aggravation, acceleration or exacerbation or deterioration of a disease with a deemed date of injury of 11 December 2017. During the course of his submissions, Mr Hanrahan withdrew any claim that the applicant sustained injury pursuant to section 4 (b) of the 1987 Act and claimed only that the applicant sustained injury on 11 December 2017 as provided by section 4 (a) of the same Act.

51. Mr Hanrahan referred to the test to be applied in section 60 (1) of the 1987 Act for medical treatment to be reasonably necessary 'as a result of an injury received by a worker' which was set out by DP Roche in *Murphy v Allity Management Services Pty Ltd* [2015] NSWWCCPD 49 (*Murphy*) at [57-58]:

> "Moreover, even if the fall at Coles contributed to the need for surgery, that would not necessarily defeat Ms Murphy's claim. That is because a condition can have multiple causes (*Migge v Wormald Bros Industries Ltd* (1973) 47 ALJR 236; *Pyrmont Publishing Co Pty Ltd v Peters* (1972) 46 WCR 27; *Cluff v Dorahy Bros (Wholesale) Pty Ltd* (1979) 53 WCR 167; *ACQ Pty Ltd v Cook* [2009] HCA 28 at [25] and [27]; [2009] HCA 28; 237 CLR 656). The work injury does not have to be the only, or even a substantial, cause of the need for the relevant treatment before the cost of that treatment is recoverable under s 60 of the 1987 Act.
>
> Ms Murphy only has to establish, applying the common sense test of causation (*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796), that the treatment is reasonably necessary 'as a result of' the injury (see *Taxis Combined Services (Victoria) Pty Ltd v Schokman* [2014] NSWWCCPD 18 at [40]–[55]). That is, she has to establish that the injury materially contributed to the need for the surgery (see the discussion on the test of causation in *Sutherland Shire Council v Baltica General Insurance Co Ltd* (1996) 12 NSWCCR 716)."

52. Mr Hanrahan submits that a condition can have multiple causes and the injury that the applicant sustained to her left knee on 11 December 2017 is and remains a cause of her current condition, and that the injury now materially contributes to her need for surgery.

The respondent's submissions

53. Mr Beran for the respondent submits that I cannot rely upon the opinions of Dr Lyons or Dr Bodel as they have not been provided with all relevant details regarding the condition of the applicant's left knee. Neither doctor is made aware of the previous injury the applicant sustained to her left knee in June 2016, which was recorded as having caused bruising and swelling, warranted a referral for an x-ray, and involved a second consultation with her general practitioner. Dr Lyons proceeds to provide an opinion based on the applicant having "asymptomatic osteoarthritis predating her fall." Dr Bodel provides an opinion based on the applicant having no prior problems with her left knee "apart from the ache that she associates with arthritis."

54. Mr Beran submits that the opinion of Dr Lyons is also deficient in that he does not consider the lack of contemporaneous records of left knee problems during the course of 2018 or the reason for the increase in symptoms shortly before he sees the applicant in October 2018. In contrast, Dr Panjratan provides a plausible explanation for the increase in those symptoms, being the work the applicant has undertaken in her picture framing business during 2018.

55. Mr Beran queries how serious the injury to the applicant's left knee was given that she waited for a pre-arranged medical appointment one week after the incident to seek advice for her injuries, did not undertake a MRI scan despite being provided with a referral by her doctor, and that it was another 10 months before she consulted her doctor regarding her left knee pain despite several consultations for other conditions during that 10 month period. Mr Beran points out that no explanation is provided by the applicant in regard to any of this. Mr Beran submits that this history of events is consistent with an aggravation of a left knee condition that had resolved well before she returned to see Dr Hearn in October 2018.

Determination

56. A determination of this dispute requires me to address the following:

    (a) the nature of the injury sustained by the applicant on 11 December 2017;

    (b) whether that injury materially contributes to the need for the surgery proposed by Dr Wood, and

    (c) whether that surgery is reasonably necessary.

The nature of the injury sustained by the applicant on 11 December 2017

57. There are three different opinions provided as to the nature of the injury sustained by the applicant on 11 December 2017:

    (a) Dr Bodel opines that the main injury sustained by the applicant was a tear of the posterior horn of the medial meniscus. Although he also considered the applicant sustained an aggravation of some retropatellar articular cartilage damage, that particular injury does not require repair by way of arthroscopy. It is the tear of the meniscus that is the cause for the proposed surgery;

    (b) Dr Lyons opines that the applicant had asymptomatic pre-existing osteoarthritis in her left knee prior to the injury in December 2017 and the left meniscal tear developed during the course of her employment with the respondent. It was the injury which rendered her left knee symptomatic and thereafter she has continued to decline;

    (c) Dr Panjratan opines that the incident triggered osteoarthritic symptoms in both of the applicant's knees, but those symptoms resolved and the current symptoms in the left knee are due to activities that are part of her picture framing business. Dr Panjratan considers the tear in the meniscus to be minor and degenerative in nature.

58. The opinion provided by Dr Bodel that "I am satisfied that the specific event that occurred at work on 11 December 2017 has caused the tear of the posterior horn of the medial meniscus" is, in my view a bare *ipse dixit*. In *Hevi Lift (PNG) Ltd v Etherington* [2005] NSWCA 42, McColl JA (Mason P and Beazley JA agreeing) said at [84]: "It has been long been the case that a court cannot be expected to, and should not, act upon an expert opinion the basis for which is not explained by the witness expressing it."

59. While I accept that a fall such as that suffered by the applicant could cause a meniscal tear, Dr Bodel provides no explanation as to how he comes to his opinion that he is "satisfied" that the fall caused the tear. I consider Dr Bodel needs to provide more of an explanation than merely making such a bald statement, particularly given the opinion of a treating specialist, Dr Lyons, that the tear was developing over time; the lack of any radiology soon after the incident; the lack of any treatment for some 10 months after the subject event; and the increase in symptoms in the latter part of 2018. None of these matters are reconciled by Dr Bodel in his opinion.

60. I consider that particular regard should be given to Dr Lyons in his capacity as a treating specialist, even though he is not the specialist recommending the arthroscopy. Dr Lyons has overseen a regime of treatment and investigations of the applicant. His report dated 6 June 2019 endeavours to address the issues of causation that are central to this dispute.

61. The opinions expressed by Dr Lyons in his report dated 6 June 2019 are not clear cut. His opinion that "the meniscal tear which Ms Rochester has developed through the cause of her employment is the main contributing factor to her current discomfort" invites the applicant to rely upon section 4 (b)(i) or (ii) of the 1987 Act, but that claim was specifically withdrawn by Mr Hanrahan during his submissions. (I should add that I have presumed that Dr Lyons meant to write "course" rather than "cause").

62. However, Dr Lyons' opinion that the applicant's osteoarthritis in the left knee was asymptomatic during her employment with the respondent but rendered symptomatic as a result of her fall, fits the definition of injury in section 4 (a) as applied in cases such as the Court of Appeal decision in *Australian Conveyor Engineering Pty Ltd v Mecha Engineering Pty Ltd* [1998] NSWCC 51; 17 NSWCCR 309; 45 NSWLR 606 (*Mecha*), *Rail Services Australia v Dimovski* [2004] NSWCA 267 (*Dimovski*); 1 DDCR 648, and *Macarthur Training Group Ltd v Tahere* [2019] NSWWCCPD 46 (*Tahere*).

63. In *Tahere*, DP Wood referred to *Mecha* and said at [95-97]:

> "95. In *Mecha*, the Court of Appeal considered the nature of an injury in circumstances where the evidence suggested there had been an aggravation of degenerative changes. In that case the worker was injured in a fall on 11 February 1992 (a 'frank injury'). As in this case, the nature of the injury was the aggravation of pre-existing degenerative changes in his back (aggravation of a disease). The worker suffered a further injury to his back with a second employer as a result of the nature and conditions of his employment with that employer (a 'nature and conditions' injury), which further aggravated his degenerative condition. The trial judge apportioned liability between both employers under s 22 of the 1987 Act.
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> 96. On appeal it was held that while the injury on 11 February 1992 could have satisfied either definition of 'injury' in s 4 (either a 'frank injury' or 'injury in the nature of an aggravation of a disease') the words 'injury consists in the aggravation ... of a disease' in s 16(1) should be construed as not referring to something which is an injury independently of its aggravating effects on a previously existing disease, but as being confined to what are entirely injuries by aggravation. In other words, the 'frank injury' and the 'nature and conditions' injury were separate injuries each giving rise to compensation entitlements. Justice Powell discussed the legislative history of s 4 of the 1987 Act and the High Court decision in *Zickar v MGH Plastic Industries Pty Ltd* and referring to *Zickar*, relevantly said that:

> ‘The effect of the decision of the majority is, thus, first, that, if there can be identified an incident which involves--either by being itself the change, or by bringing about the change--a physical change in the worker, then--even though that change may be no more than the culmination of a progressive disease, and not the product of some external force--that damage is to be regarded as an “injury” within the meaning of par (a) of the definition of “injury” in s 4 of the Act
>
> ...
>
> In the present case, the medical evidence which was before the trial Judge was sufficient to demonstrate that, even before the fall which he sustained on 11 February 1992, the worker’s lumbo-sacral spine had begun to degenerate. ... This notwithstanding, the evidence of the worker, which was accepted by the trial Judge, was that, prior to the fall, his back condition was asymptomatic.
>
> The worker’s evidence, which was supported by that of his general practitioner, was that, following his fall, he began to suffer pain in his back and neck, which pain grew worse and led to his ceasing work for a period ...
>
> There thus having been an identifiable incident, which incident appears to have caused, at least, ligamentous injury to the lumbar spine segment, the sequelae of which involved pain, which was, for a time disabling, and which, in any event, has continued over the years, the decision of the majority in *Zickar v MGH Plastic Industries Pty Ltd* would seem to dictate that, even if it be the fact that the result of the incident was merely that the worker’s pre-existing back condition was rendered symptomatic, he was nonetheless to be regarded as having sustained an injury within the meaning of par (a) of the definition of “injury”.’

97. The above rationale was unanimously agreed to be correct by Handley JA, Hodgson JA and Young CJ in Eq in *Dimovski.*”

64. Applying what was said by Justice Powell to this dispute, the applicant’s pre-existing osteoarthritis was rendered symptomatic by the fall and thus can be regarded as an injury within the meaning of section 4 (a) of the 1987 Act, being an injury that has aggravated a disease. Or, to apply the reasoning in *Zickar*, which is referred to in paragraph 95 of *Tahere*, the fall sustained by the applicant brought a physical change in the condition of the applicant’s knee, which produced symptoms in a previously asymptomatic knee.

65. However, that alone does not cause the applicant to succeed. What I have just recited is consistent with the opinion expressed by Dr Panjratan, except that he considers the symptoms triggered by the fall have now resolved and her ongoing symptoms are due to the duties undertaken in her picture framing business. The applicant needs to establish that her symptoms have continued since the fall and that those symptoms include the effect of the fall upon the meniscal tear which Dr Wood intends to repair.

66. I have already observed that the opinions expressed by Dr Lyons are not straightforward. However, I am mindful of what was said by DP Roche in *State Transit Authority v El-Achi* [2015] NSWWCCPD 71 (*El-Achi*) at [72]:

> “That a doctor does not address the ultimate legal question to be decided is not fatal. In the Commission, an Arbitrator must determine, having regard to the whole of the evidence, the issue of injury, and whether employment is the main contributing factor to the injury. That involves an evaluative process.”

67. Applying an “evaluative process” to this dispute, I am satisfied and accept that the opinions of Dr Lyons which are set out in his reports dated 24 October 2018 and 6 June 2019 support a finding that the fall sustained by the applicant on 11 December 2017 caused the onset of arthritic symptoms in the left knee, which included symptoms from a meniscal tear that had been developing during the course of her employment with the respondent. I also accept his opinion that those symptoms have continued to the present time.

68. I accept those opinions of Dr Lyons because of his primary role as the applicant’s treating specialist in determining the diagnosis of her condition and the cause or causes of that condition.

69. In preferring the opinion of Dr Lyons, I am mindful of the possible limitations of that opinion which were referred to by Mr Beran in his submissions. Dr Lyons is seemingly not aware of the previous injury the applicant sustained to her left knee in June 2016. It might be that Dr Lyons would consider that fall in June 2016 also contributes to the applicant’s current symptoms but as DP Roche said in *Taxi Combined Services (Victoria) Pty Ltd v Schokman* [2014] NSWWCCPD 18 (*Schokman*) at [53]: “It is trite law that a condition can have multiple causes (*ACQ Pty Ltd v Cook* [2009] HCA 28 at [25] and [27]; [2009] HCA 28; 237 CLR 656).” I consider that notwithstanding Dr Lyons is seemingly unaware of that previous injury, it is apparent from the reports from Dr Lyons that the subsequent fall in December 2017 is of such significance as to be a cause of the applicant’s ongoing symptoms.

70. It is apparent from the first report of Dr Lyons dated 24 October 2017 that he was aware that the applicant had experienced an increase of symptoms in her left knee prior to seeing him but that has not altered his opinion that there remains a causal connection between the applicant’s fall and her ongoing symptoms. Dr Lyons also writes in his report dated 6 June 2019 that he has “discussed” the work the applicant undertook with the respondent and the work she now does in her own business. His brief summary of the activities in each job is consistent with the applicant’s own evidence and that recorded by Dr Panjratan. I am satisfied that Dr Lyons has taken the increase of symptoms in late 2018 into account when forming his opinion.

71. The opinion of Dr Lyons is also based upon his understanding that the applicant has continued to have symptoms in her left knee ever since the injury in December 2017. I acknowledge the submissions made by Mr Beran which questions this assumption. However, neither Dr Lyons or Dr Wood record any resolution of symptoms after the fall in December 2017. Dr Bodel records that the applicant continued to experience pain in the left knee until it began to worsen in October 2018. Even Dr Panjratan does not record from the applicant that the pain in her left knee resolved some time after December 2017. Rather Dr Panjratan draws a conclusion from what the applicant tells him that her ongoing symptoms are due to the activities she has undertaken in her picture framing business and merely opines that the triggering symptoms from the fall had resolved.

72. I accept that the applicant has been straightforward in describing the condition of her left knee during the course of 2018, and when that is added to what is contained in the medical reports which I have just referred to, it leads me to accept that the applicant has had ongoing symptoms in her left knee since the fall in December 2017.

73. I was referred by Mr Beran to the report from the applicant’s physiotherapist, Ms Matt, with a history of the applicant having a gradual onset of left knee pain over the past few years and an exacerbation of that pain when the applicant fell at work “1 year ago.” The applicant does not dispute that she did sustain an injury to her left knee in June 2016 but there is no other evidence, apart from this record made by the physiotherapist, of a gradual onset of pain in the left knee in the years before the fall in December 2017.

74. The preponderance of evidence supports a finding that the applicant's left knee was asymptomatic prior to the fall in December 2017. The applicant does state that she could not squat down or kneel on either of her knees prior to the December 2017 injury but does not complain of pain in the left knee. In his report dated 6 June 2019 Dr Lyons opines that the applicant "was asymptomatic from her osteoarthritis other than her inability to kneel prior to the fall." The evidence of the applicant and opinion of Dr Lyons are indicative of underlying arthritis, but not of symptoms of pain, which are brought on by the fall in December 2017.

75. I therefore accept that the nature of the injury sustained by the applicant on 11 December 2017 was an aggravation of a disease in the left knee, which brought on symptoms in the left knee, including from a meniscal tear that had developed during the course of the applicant's employment, and the effects of that injury are continuing.

Whether the injury sustained by the applicant materially contributes to the need for surgery

76. The surgery that is proposed by Dr Wood aims to repair the applicant's left meniscal tear. I already found that symptoms from the meniscal tear were brought on by the fall sustained by the applicant on 11 December 2017 and that those symptoms have continued thereafter. Although Dr Wood has not provided a medicolegal opinion, he is quite adamant in writing that "the meniscus is clearly causing a lot of problems" and it "is certainly not giving her any benefit having that torn portion."

77. It follows that the injury sustained by the applicant materially contributes to the surgery that the applicant now requires because it is the surgery which aims to repair the torn meniscus which is causing the applicant's symptoms.

Whether the left knee arthroscopy is reasonably necessary

78. Dr Panjratan opines that the arthroscopy proposed by Dr Wood is not reasonably necessary as it will flare up the applicant's osteoarthritis and only makes things worse for her.

79. In *Diab v NRMA Ltd* [2014] NSWWCCPD 72 (*Diab*) DP Roche said at [89]:

> "… It should be noted that while the effectiveness of the treatment is relevant to whether the treatment was reasonably necessary, it is certainly not determinative. The evidence may show that the same outcome could be achieved by different treatment, but at a much lower cost. Similarly, bearing in mind all treatment, especially surgery, carries a risk of a less than ideal result, a poor outcome does not necessarily mean that the treatment was not reasonably necessary. As always, each case will depend on its facts."

80. Doctors will differ on the best treatment for a patient. Dr Lyons considers that the applicant should proceed to a total knee replacement to treat the underlying arthritis. Dr Panjratan recommends various forms of conservative treatment. However, Dr Wood identifies the meniscal tear as "clearly causing a lot of problems" and recommends an arthroscopy. He concedes that there is a 75% chance of improvement and a 25% chance that the knee will be no better due to her arthritis.

81. As was observed by DP Roche in *Diab*, a poor outcome does not mean that the proposed treatment is not reasonably necessary. Dr Wood in his capacity as a treating specialist recommends a procedure that offers good prospects of some resolution of the applicant's symptoms. It is an appropriate treatment for the symptoms that the applicant presents with. I consider the recommendation made by Dr Wood for a left knee arthroscopy to be reasonably necessary.

82. I do not accept the opinion of Dr Panjratan on the issue of whether the arthroscopy is reasonably necessary. He presents his opinion that the applicant's osteoarthritis will flare up and she will be worse if she undergoes that surgery as being a certainty, without any consideration of the benefits identified by Dr Wood. Furthermore, his opinion is based upon the tear being a minor free edge radial tear that is degenerative in nature whereas Dr Wood identifies the tear as being large and with marked deterioration found between the MRI scans performed in November 2018 and May 2019. Indeed, it is also not apparent as to whether Dr Panjratan had access to the report of Dr Wood dated 18 July 2019 or the second MRI scan report, as both post-date his only consultation with the applicant in March 2019. The opinion of Dr Wood on the issue of whether the proposed arthroscopy is reasonably necessary is preferred.

83. There will therefore be an order made that the respondent pay the applicant's costs of the left arthroscopy proposed by Dr Wood and the reasonable costs associated with that surgery.

84. The respondent should meet the cost of the applicant's consultation with Dr Wood on 18 July 2019 which was also reasonably necessary for the treatment of the applicant's left knee.