WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **3079/19**
Applicant: **ROBERT WILLIAM FARRELL**
Respondent: **SECRETARY, NSW DEPARTMENT OF EDUCATION**
Date of Determination: **4 October 2019**
Citation: **[2019] NSWWCC 322**

The Commission determines:

1. Award in favour of the Respondent.

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

PHILIP YOUNG
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 PHILIP YOUNG, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Robert William Farrell (the applicant) is a 64-year-old man who was employed by Secretary, NSW Department of Education (the respondent) as a teacher. He initially alleged that the nature and conditions of his employment between 2002 and February 2016 involved him walking up and down thousands of stairs at work.

2. The applicant also seeks to rely upon a motor vehicle accident on his way to work in February 2009. The applicant particularises his injury in reliance upon s 4(b)(ii) of the *Workers Compensation Act 1987* (1987 Act), namely aggravation, exacerbation, acceleration or deterioration, (acceleration (etc)) of degenerative disease in his left hip. For reasons which appear below, reliance upon the February 2009 motor vehicle accident is in dispute.

3. The claim at this stage resolves to a claim under s 66 of the 1987 Act where liability is in dispute.

ISSUES FOR DETERMINATION

4. The issue for determination is whether the applicant suffered an injury within the meaning of s 4(b) of the 1987 Act.

PROCEDURE BEFORE THE COMMISSION

5. This matter came for conciliation and arbitration in Newcastle on 5 September 2019. Mr L Brazel of Counsel instructed by Mr M Evers, Solicitor, appeared for and with the applicant. Mr F Doak of Counsel appeared for the respondent.

6. Documents the subject of the applicant's Application to Admit Late Documents filed 6 August 2019 (AALD) as well as late documents filed by the respondent and including consultation notes of Broadmeadow Medical Centre were admitted into evidence without objection.

7. I am satisfied that the parties to the dispute engaged in conciliation and were unable to resolve their differences. I am satisfied that the parties understand the nature of the Application and the legal implications of assertions 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 both of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach agreement. The matter accordingly proceeded to arbitration hearing.

EVIDENCE

Documentary evidence

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

    (a) Application to Resolve a Dispute dated 26 June 2019 and attached documents (Application);

    (b) Reply dated 16 July 2019 and attachments (Reply);

(c) Documents the subject of the applicant's AALD;

(d) Broadmeadow Medical Centre clinical notes the subject of a Direction for Production dated 24 July 2019 (BMC notes).

Oral evidence

9. No oral evidence was given.

THE APPLICANT'S SUBMISSIONS

10. Mr Brazel prepared written submissions for the applicant in which it was clarified that the applicant's claim was in respect of whole person impairment for injuries to the applicant's left lower extremity (left hip) which occurred **between 9 May 2008 and November 2015**. The applicant last worked in November 2015.

11. The applicant underwent various scans of his pelvis and left hip on 26 April 2012, 23 November 2012 and 17 January 2013. The applicant's treating general practitioner wrote a letter on 30 April 2012 recommending the applicant work in a flat environment and avoid stairs. This was supported by Dr Hellman in a letter of 14 May 2012 where Dr Hellman said that the applicant's prolonged drive to work and multiple stairs aggravate his pain.

12. By 24 May 2012 Dr Grainger had regarded the applicant being diagnosed with osteoarthritis of both hips, the left hip being particularly severe. The applicant came under care of Dr J Young, orthopaedic surgeon, and ultimately underwent left total hip replacement surgery.

13. On 31 July 2013 Dr J Bodel reported that the applicant's hip pathology was a degenerative disease aggravated by his work as well as a motor vehicle accident on 2 February 2009. On 5 January 2015 Dr Bodel noted no prior symptomatic pathology but questioned whether the 2 February 2009 accident might also concern injury to the applicant's left hip. On 16 April 2015 Dr Bodel repeated that having to walk up and down steps at school has caused aggravation (etc) of the applicant's degenerative disease.

14. Doctor Pillemer assessed the applicant in respect of separate injuries to his cervical spine and right upper extremity, but did also mention the steps. Doctor Harrington reported on 26 April 2019 that it is arguable that the hip became symptomatic quite soon after the 2 February 2009 accident. Doctor Harrington did not think that this accident was "the substantial contributing cause of the pathology".
On 15 October 2012 Dr Young noted that the motor vehicle accident (February 2009) exacerbated his pain.

15. Since 27 June 2012 employment must be the "main" contributing factor to the injury. If it is held that the injury was a "frank" injury then consideration should be given to section 9A of the 1987 Act.

16. Doctor Harrington's assessment does not address issues concerning the applicant traversing steps each day at work and issues concerning prolonged driving. He is out of step with all of the other Drs, in that he seems to attribute any aggravation to the applicant's motor vehicle accident in February 2009.

17. The applicant has produced photographs of the numerous steps and statements concerning his pain whilst at work and driving and it is appropriate to remit the matter to an Approved Medical Specialist (AMS) because the applicant's employment was the main contributing factor to the aggravation (etc) of his underlying left hip disease.

RESPONDENT'S SUBMISSIONS IN REPLY

18. The Application does not plead the February 2009 journey and the applicant's claim resolves simply to walking up and down stairs.

19. In *Weathertex*[1], Meagher J set out the relevant criteria in terms of "main contributing factor". Some of the matters mentioned in section 9A of the 1987 Act are of relevance, but section 9A is not the ultimate test. Doctor Bodel's conclusion that walking up and down the stairs was the main contributing factor to the aggravation (etc) is simply based on the applicant's history.

20. Doctor Harrington's report of 30 July 2012 does not deal with the applicant's left hip, however, the applicant did not give Dr Harrington any history of having to traverse stairs. The applicant told Dr Harrington in April 2019 that his left hip became problematic shortly after the February 2009 motor vehicle accident. There was no history given to Dr Harrington that the applicant attributed his problems to the stairs at work.

21. In the applicant's unsigned and undated statement[2] the applicant says that he injured his left hip in the February 2009 accident and then over the next few months he had to give up playing touch football. The respondent submits that the motor vehicle accident was the main contributing factor to the aggravation (etc) of the applicant's degenerative disease. This February 2009 accident is not pleaded.

22. The applicant states that since 2010 he was limping up and down the stairs at school. Notably, however, Dr de Bruyn during consultation with the applicant on 24 January 2012, commented "wears orthotics and has problems with mobility playing touch". The applicant bears the onus of proof. The comparison is between Dr Bodel's conclusion that the aggravation was due to the stairs and Dr Harrington's conclusion that it was due to the motor vehicle accident. Doctor Bodel does not have any information concerning the applicant's ability to play touch football in January 2012 and accordingly his opinion should be discounted for that reason.

APPLICANT'S SUBMISSIONS IN REPLY

23. Doctor Bodel knew of the motor vehicle accident in February 2019 and this is recorded at Application pages 51-52. In 2017 the applicant gave a history to Dr Bodel that he had ceased playing touch football seven or eight years ago.

FINDINGS AND REASONS

Introduction

24. In these reasons, my approach is to consider separate periods of the applicant's exposure to aggravation (etc) at work. This is necessary because the test for aggravation (etc) of a disease changed on 27 June 2012, which is a date within the overall period of employment exposure relied upon by the applicant.

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[1] *CSR Timber Products Pty Limited v Weathertex Pty Limited* (2013) 83 NSWLR 433.
[2] AALD p. 56.

25. I accept Mr Doak's submission that the Application does not plead the applicant's journey (motor vehicle) injury of February 2009. That alleged injury cannot be considered. Accordingly, the applicant's claim resolves to alleged aggravations (etc) in the course of the applicant's employment between 9 May 2008 and November 2015 (stairs) and general driving to and from work (work events).

The first period: 9 May 2008 to 24 January 2012

26. Whether the applicant suffered an aggravation (etc) during the first period depends largely on whether the applicant was in fact suffering symptoms of pain and disability by reason of work events between 9 May 2008 and the date that he consulted Dr De Bruyn, namely 24 January 2012 (first period). If so, was the applicant's employment a substantial contributing factor to this aggravation (etc) within the meaning of section 9A of the 1987 Act (as it then was)?

27. In the latter regard, (the relevant) section 9A for the purposes of the first period is that which was in existence before the amendments to section 9A on 27 June 2012. Prior to 27 June 2012 section 9A applied to disease injuries. For disease employment exposures prior to that date it is necessary for the applicant's employment to have been a substantial contributing factor to his aggravation (etc) of injury.[3]

28. For this first period, at the time, indeed at least from 26 November 1998, section 9A(2) provided a number of "examples of matters to be taken into account" in determining whether the applicant's employment was a "substantial contributing factor" to his injury. These include (and I paraphrase) (sub paragraph (b)) the nature of the work performed and the particular tasks of that work; ((c)) 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 applicant's life if the applicant had not been at work; ((e)) the existence of any hereditary risks and ((f)) the applicant's lifestyle and his or her activities outside the workplace.

29. The applicant's history concerning his involvement in playing touch football during the first period is, in terms of section 9A(2)(f), unsatisfactory for the applicant. I conclude this because of the following:

    (a) It is clear from any reasonable view of the entry in the consultation cards of 24 January 2012[4] that the applicant was at least to some extent playing touch football at that time.

    (b) The applicant gave Dr Young a history on 15 October 2012[5] that "although he previously enjoyed touch football he has been unable to do so".

    (c) The applicant gave Dr Bodel a history on 31 July 2013[6] that he "in the past used to enjoy playing touch football and has not returned to this…". It follows that Dr Bodel as at 31 July 2013 knew about the applicant's involvement in touch football, but may not have known about (or did not record) when the applicant ceased playing touch football nor the extent of the applicant's involvement in that sport.

[3] See Schedule 6, Part 19H, Clause 20 *Workers Compensation Act 1987*.
[4] Broadmeadow Medical Centre-clinical notes.
[5] Application page 34.
[6] Application page 41.

(d) The applicant next saw Dr Bodel on 5 January 2015 when the applicant gave Dr Bodel a history[7] that "he used to enjoy playing touch football until about four or five years ago". This would suggest that the applicant ceased playing touch football in 2010 or 2011.

(e) On 12 September 2017 the applicant gave Dr Bodel a history[8] that the applicant "used to enjoy playing touch football and he did so until about seven or eight years ago". This would suggest that the applicant ceased playing touch football in 2009 or 2010.

(f) The applicant was examined by Dr R Pillemer, orthopaedic surgeon, in his capacity as an Approved Medical Specialist for the purposes of injuries to the applicant's cervical spine and right upper extremity occurring on 9 May 2008 and 2 February 2009. This examination occurred on 10 July 2014. Doctor Pillemer records[9] that the applicant "has not been able to play touch football or golf **since his original injury to his neck in July 2007**" (emphasis added).

(g) The applicant's unsigned statement the subject of the applicant's own AALD dated 6 August 2019 records[10] that after 2 February 2009 "I recall pain in my left groin and over the next several months, it got so bad that I had to give up playing touch football". This would suggest that the applicant asserts that he gave up touch football in **2009**.

(h) The applicant did not seek to give oral evidence to explain the inconsistency in the timing of his cessation of playing touch football, nor was there any evidence concerning the physical rigours (if any) experienced by the applicant whilst he was playing touch football, nor did the applicant offer any explanation by way of evidence or submissions concerning the contents of the 24 January 2012 entry, if any.

30. It will be seen from the above, that in terms of touch football, the applicant has been an inaccurate historian. I do not raise this as a matter relevant to the applicant's credit, because all of the Drs who have expressed an opinion about the applicant's presentation have regarded him as a consistent and cooperative person. What can be concluded, however, is that many of the Drs in arriving at their conclusions have had before them an inaccurate, or an incomplete, history. I say this because I do not think that there can be any doubt that immediately before 24 January 2012 the applicant was, at least to some extent, playing touch football. That appears from the 24 January 2012 history provided by the applicant to his general practitioner.

31. There then becomes an issue concerning the existence of evidence concerning the extent of the applicant's involvement in "touch football". There is varying evidence about when this activity ceased (as set out above). But there is no evidence concerning the extent to which the applicant engaged in this activity, nor the stresses and strains (if any) which any such activity placed upon his left hip and/or why the applicant persisted in this activity. The Commission does not know whether the applicant was a dormant, or active, player (to use loose words), or somewhere in between. The Commission does not know how often the applicant was so engaged, nor whether (for example) he so engaged under protection of fellow players,

[7] Application page 53.
[8] Application page 63.
[9] Application page 107.
[10] AALD page 107 para [20].

medication or therapeutic support. That is because neither party provided any evidence of the nature nor extent of the applicant's touch football activity. The applicant was aware of the "touch football issue" because, before these proceedings were heard, he had the various medical reports setting out the "touch football" history. No oral evidence was offered to explain the matter at the arbitration hearing. The applicant, being aware of this issue, cannot I believe be unreasonably surprised by what follows.

32. Another way of arriving at a conclusion about judicial notice of adjudicative facts concerns the extent to which the applicant was afforded an opportunity to provide evidence in rebuttal concerning his involvement in touch football and that involvement's consequences upon his person.[11] In this matter, I am satisfied that the applicant knew of the allegation (touch football) and had ample opportunity to address this allegation.

33. In those circumstances, I believe that I can take judicial notice of adjudicative facts concerning the type of physical activities involved in playing touch football.[12] Although not a heavy contact sport, the sport can include running, attempting to avoid defenders and potential exposure to jarring and twisting type injuries to, amongst other body parts, the back, hips and knees. The rhetorical question becomes why would a person subject himself or herself to potential aggravation/pain/disability of a left hip condition by engaging in that level of activity? I am not satisfied that the applicant presented with any appreciable disability in his left hip at least until after 24 January 2012, because if aggravations (etc) in fact caused him pain and disability, and in the absence of explanatory evidence, he would not have played touch football.

34. In terms of section 9A(2)(d) and (e), my view is that the aggravation of the applicant's left hip pain and disability caused or materially contributed to by the applicant's employment pales into insignificance when consideration is given to the touch football activity. The relativity of the various contributing factors requires an evaluation of impression and degree.[13] My own impression is that the employment contribution was of minor contribution to the applicant's aggravation (etc) of his left hip arthritis. The overwhelming major contribution was underlying arthritis and the activities associated with touch football.

35. Although I accept that the applicant had to negotiate many stairs in the course of his employment and that his symptoms were probably aggravated also by that activity as well as driving, having regard to the matters set out in section 9A(2) I am not satisfied that the applicant's employment was a **substantial** contributing factor to his injury during the first period, namely between 9 May 2008 and 24 January 2012.

36. I take this view for the following reasons:-

    (a) It has been held that "employment must be a substantial contributing factor to the event causing the injury; that is, to the receipt of the injury, rather than to be a substantial contributing factor to the ongoing incapacity".[14]

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[11] *Gerhardy v Brown* (1985) 159 CLR 70.
[12] *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at [65] per McHugh J.
[13] *Badawi v Nexon Asia Pacific Pty Limited trading as Commander Australia Pty Limite*d [2009] NSWCA 324.
[14] *Rootsey v Tiger Nominees Pty Limited* (2002) 23 NSWCCR 725.

(b) In this matter, whilst I accept that the applicant's employment may have been **a** contributing factor, I am not satisfied that the aggravation (etc) was, at least up until and as at 24 January 2012, in any way caused or materially contributed to by the applicant's walking up and down stairs in the time leading up to 24 January 2012. Indeed, there is no complaint made to Broadmeadow Medical Centre of any left hip pain or problems or employment difficulties between 6 April 2004 and 1 February 2013.[15]

(c) In *Dayton*[16] his Honour Giles JA said that section 9A requires an "analysis of the causal factors" and "an evaluation of the importance of the employment factors relative to the others". His Honour also indicated that one must look at the strength of the causal connection between employment and the injury. Because of the applicant's involvement in touch football, I am not satisfied that his employment exposures were of sufficient relative severity to cause him any pain or disability during times when he was able to play touch football.

(d) If the applicant was suffering pain and/or disability in the first period, he simply would not have played touch football.

The second period

37. An evaluation of what occurred between 24 January 2012 and 27 June 2012 yields a similar result. Although the applicant saw Dr de Bruyn on 24 January 2012 complaining about his mobility, between 24 January 2012 and 1 February 2013 the applicant did not attend Broadmeadow Medical Centre with **any** complaint concerning his left hip.

38. It would appear that the applicant attended Blackbutt Doctors Surgery and was referred by Doctor Grainger for hip x-rays on 26 April 2012. Doctor Bridges of that surgery provided a letter regarding the applicant's condition on 30 April 2012. This letter does not comment on causation between the applicant's employment activities and his need to work in a flat environment. Doctor Hellman provided a supporting letter on 14 May 2012 indicating that the applicant's "prolonged drive to work and the multiple stairs **will** aggravate his pain" (emphasis added). This is not evidence that the stairs (etc) have in fact caused the applicant pain. Doctor Grainger provided another supporting letter on 24 May 2012 noting that the applicant had osteoarthritis of both hips which was exacerbated "by long car trips and having to mobilise for long distances over uneven terrain". But apart from those observations, it would seem that the applicant does not provide any direct evidence of the causative nature of his employment or driving between 24 January 2012 and 27 June 2012. Any aggravation during this second period must, in my view, be considered against the background of what earlier occurred. In other words, the Drs certificates and letters to which I have referred do not make any mention of the applicant's touch football activities and therefore their opinions do not provide any evaluative benefit for the Commission on the issue of causation.

39. It is unhelpful to the Commission that the clinical records and consultation cards of Blackbutt Medical Centre from 24 January 2012, and later, are not in evidence.

[15] Broadmeadow Medical Centre- clinical notes.
[16] *Dayton v Coles Supermarkets Pty Limited* [2001] NSWCA 153 (Giles JA) at [25].

40. It follows in my view that the applicant has not discharged the onus of establishing that his employment at any time up until 27 June 2012 was a substantial contributing factor to any aggravation (etc) of his condition.

The third period

41. For employment events between 27 June 2012 (when the 2012 amendment took effect) until November 2015 (when the applicant ceased work) the applicant must show that his employment was "the main contributing factor" to the aggravation (etc) of his condition within the amended definition of "injury" under section 4(b)(ii) of the 1987 Act.[17]

42. The applicant underwent left total hip replacement surgery on 23 November 2012.[18] When seen by Dr Bodel on 31 July 2013 Doctor noted "some modifications to the workplace" but the applicant was "still required to walk significantly up and down stairs throughout the day".[19] On 25 March 2014, namely one year and four months after the left hip operation, Dr R Grainger wrote that the applicant's "symptoms have progressed with daily pain after long car trips to and from work and pain with traversing stairs".[20] However, a fair reading of this report reveals that Doctor Grainger at this time was referring to problems with the applicant's **right** hip. Doctor Bodel on 5 January 2015[21] noted under "Current Complaints" that the applicant "has had a good response to the left hip surgery" and on examination observed "a very good range of hip flexion and rotation on the left side" but "a restricted range of hip movement on the right hand side and this is painful throughout".[22]

43. Doctor Grainger wrote a further letter[23] which is in very similar terms to her earlier letter of 25 March 2014. Again, the emphasis is on less driving and stair climbing, but again the reason advanced relates to the **right** hip. Doctor Bodel's further report of 16 April 2015[24] notes that the applicant is still required to walk up and down a thousand steps each day and although he refers to both hips, the emphasis is on the **right** hip. On assessment 7 July 2017 Dr Bodel noted that the applicant's left hip was "functioning well" and on examination on the left side the applicant had "a full range of hip movement with a successful total hip replacement."[25]

44. On my reading of the evidence, there does not appear to be any evidence that the applicant reported any aggravation (etc) of his **left** hip condition, nor any worsening of pain or disability in the **left** hip associated with his employment, after 27 June 2012. Indeed, his several complaints for the **left** hip concerning employment activity (driving, stairs) commence at or shortly after the time that the applicant was playing touch football. The overall picture in relation to hip symptoms after his left hip replacement surgery is one of increasing **right** hip pain and disability. None of the Drs offer the view that the applicant's driving and stair climbing between 24 January 2012 and November 2015 caused any (additional) aggravation (etc) of pain, disability and/or symptoms in the applicant's **left** hip.

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[17] See *Ariton Mitic v Rail Corporation of NSW*, Matter No 008497/2013, 8 April 2014, (Arbitrator Harris); *Mylonas v The Star Pty Limited* [2014] NSWWCC 174 at [151]-[166] (Arbitrator Rimmer); *Egan v Woolworths Limited* [2014] NSWWCC 281 at [60]-[82] (Arbitrator Edwards).
[18] Report of Dr J Young, 3 December 2012 at Application page 36.
[19] Application page 43.
[20] Application page 47.
[21] Application page 53.
[22] Application page 54.
[23] Application page 56.
[24] Application pp 57-58.
[25] Application pp 63-64.

45. If I am wrong about this and there was in fact an aggravation (etc) of the applicant's **left** hip pain, disability and/or symptoms in the applicant's **left** hip, I am satisfied that the applicant's employment in the period after 27 June 2012 was not "the main" contributing factor to his aggravation (etc). The need for x-rays to the applicant's left hip, his referral to Dr J Young and subsequent left hip surgery all occurred against the background of the applicant's "mobility" problems **in January 2012** occasioned in circumstances where the applicant had difficulty playing touch football. The course of treatment to the left hip followed "hot on the heels of" touch football activity. Treatment for the applicant's left hip was well underway before 27 June 2012.

46. It follows that I am not satisfied that the applicant's employment with the respondent after 27 June 2012 was the main contributing factor to aggravation (etc) of his injury.

47. In the result the applicant has not discharged the onus and there will be an Award in favour of the respondent.

SUMMARY

48. Award in favour of the Respondent.