WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **5092/19**
Applicant: **Tupou Moheofo Afungia**
Respondent: **Portavin NSW Pty Ltd**
Date of Determination: **18 December 2019**
Citation: **[2019] NSWWCC 407**

The Commission determines:

1. The applicant suffered a consequential condition to her left lower extremity (knee) as a result of an injury to her right lower extremity (knee) in the course of her employment with the respondent on 22 April 2013.

2. The respondent is to pay the applicant's reasonably necessary medical and treatment expenses in relation to the left lower extremity (knee).

3. The total left knee replacement surgery proposed by Associate Professor Ireland is reasonably necessary as a result of the consequential condition referred to in (1) above.

4. The respondent is to pay the costs of and incidental to the proposed total left knee replacement as recommended by Associate Professor Ireland.

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

Cameron Burge
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 CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A MacLeod

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

STATEMENT OF REASONS

BACKGROUND

1. Tupou Afungia (the applicant) suffered an accepted injury which led to a total right knee replacement by Associate Professor Ireland on 17 July 2017. She now claims the cost of a proposed total left knee replacement, the need for which is said to arise from a consequential condition caused by the right knee injury.

2. Portavin NSW Pty Ltd (the respondent) denies liability for the left knee surgery. It does not dispute the medical necessity for the procedure but argues the left knee symptoms are not related to or relevantly caused by the accepted right knee injury. Rather, the respondent says the need for the surgery is caused by a number of factors, none of which is the right knee injury.

3. The applicant also seeks an order the respondent pay her past medical expenses relating to the left knee.

ISSUES FOR DETERMINATION

4. The parties agree that the only issue in dispute is whether the applicant suffered a consequential condition to her left knee as a result of the accepted right knee injury which took place on 22 April 2013.

PROCEDURE BEFORE THE COMMISSION

5. The parties attended a hearing on 4 December 2019. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

6. At the hearing, Mr C Tanner of counsel appeared for the applicant and Mr P Perry appeared for the respondent.

EVIDENCE

Documentary evidence

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

    (a) Application to Resolve a Dispute (the Applciation) and attached documents;

    (b) Reply and attached documents;

    (c) Respondent's Application to Admit Late Documents (AALD) dated 27 November 2019 and attached documents.

Oral evidence

8. There was no oral evidence called at the hearing.

FINDINGS AND REASONS

Consequential condition to the left lower extremity (knee)

9. As noted, the only question for determination is whether the left knee condition is consequent upon the accepted right knee injury.

10. There is a long line of authority which says an applicant does not need to establish a sudden identifiable change in pathology in order to demonstrate a consequential condition. That is, an injured worker does not have to satisfy the requirements of injury as set out in section 4 of the *Workers Compensation Act 1987* (the 1987 Act).

11. The applicant bears the onus of establishing a consequential condition. In this matter, she must therefore show the symptoms and restrictions in her left knee resulted from the accepted right knee injury (see *Kumar v Royal Comfort Bedding Pty Ltd* [2012] NSWWCCPD 8 (*Kumar*), *Trustees of the Roman Catholic Church for the Diocese of Parramatta v Brennan* [2016] NSWWCCPD 23 (*Brennan*) and *Moon v Conmah Pty Limited* [2009] NSWWCCPD 134 (*Moon*)). The fact-finding exercise to establish causation in a matter such as this must be carried out on a common-sense basis (*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 (*Kooragang*)).

12. The respondent alleged a lack of causal nexus between the injury in April 2013 and the onset of left knee symptoms. For the following reasons, I reject that submission.

13. The respondent submitted that the evidence, to the extent it discloses a link between the left knee and the applicant's employment at all, establishes the nature and conditions of her job caused the problems, rather than them arising as a result of the frank right knee injury in April 2013.

14. The respondent submitted if that was the case, there may be a separate claim available other than the one which is the subject of this dispute. Mr Perry submitted that such a set of circumstances meant the applicant had failed to establish the right knee injury had contributed to the need for surgery, which need he submitted is multi-factorial.

15. The difficulty with this submission is it contradicts the contemporaneous medical records and the opinions of not one, but two treating surgeons and the applicant's general practitioner (GP), together with the applicant's Independent Medical Examiner (IME) Dr Bodel.

16. When one examines the clinical records of the applicant's GP, it is apparent the applicant suffered a sore left knee in 2011, some two years before the injury at issue. As Mr Tanner noted, the fact of pain in 2011 does not exclude potential liability in the respondent for a later injury or condition.

17. The applicant reported soreness in her left knee on two occasions before the injury at issue – on 3 August 2011 and 5 August 2011. She had an x-ray which showed mild osteoarthritic changes in her left knee at that time. There is no other entry regarding the left knee until well after the April 2013 injury. There is nothing which suggests she had ongoing issues with her left knee before the injury at issue, or that the nature and conditions of her employment were causing problems in the left knee.

18. Mr Perry submitted the GP entry on 20 April 2015 (which records left knee soreness) is consistent with the applicant's problems from 2011 persisting and being the cause of the need for surgery.

19. I reject that submission, as there was a significant intervening event, namely the April 2013 right knee injury. I also note there is no suggestion of any complaint relating to the left knee between August 2011 and April 2013. Had the applicant complained of problems in the lead up to April 2013, then a persuasive case might be available that her condition was symptomatic before the injury at issue. There is nothing to suggest this is the case.

20. Moreover, the respondent's submission flies in the face of the overwhelming medical evidence from the applicant's treating practitioners. The applicant's GP records no fewer than 37 consultations in which problems with the right knee are referred to between the injury on 22 April 2013 and 2019. Those complaints are consistent in nature.

21. The first post-injury entry involving the left knee was recorded by the GP on 2 April 2015. It is found at page 172 of the Application and also refers to ongoing problems in the right knee. Mr Tanner submitted, and I accept, that the history in the clinical records shows worsening, acute pain in the right knee after the injury at issue, causing increased reliance on the left knee.

22. Adopting a common-sense approach as required by *Kooragang*, I accept Mr Tanner's submission. It is reinforced by the reports to the GP by not one, but two treating surgeons in Professor Ireland and Dr Giblin, each of whom – without specific request – not only refer to the development of symptoms in the left knee over time, but specifically attribute those symptoms to over-reliance and compensation after the right knee injury. Moreover, the applicant's IME Dr Bodel also indicates the left knee has been aggravated by favouring the right.

23. Even setting aside the applicant's IME, there are two treating surgeons volunteering opinions stating over reliance after the right knee injury has caused the left knee condition. Those opinions are consistent with the GP's clinical records. The specialists do not provide their views to the applicant's solicitors, but to the GP. They do so unbidden. The fact they volunteer those views as to the cause of the applicant's left knee condition in the context of having treated her over a period of many years is, in my view, compelling evidence.

24. Mr Tanner submitted, and I accept, that there is no alternative explanation put forward to explain the onset of left knee problems, other than over-reliance following the right knee injury.

25. Notwithstanding Mr Perry's submission that the nature and conditions of employment may have caused the left knee problems, I find on a common-sense basis that the reliance on her left knee by the applicant after the right knee injury has led to the onset and worsening of symptoms to the left knee. In my view, the treating doctors overwhelmingly support a finding of consequential condition.

26. By contrast, the respondent's Independent Medical Examiner (IME) Dr Panjratan provides an opinion that the left knee symptoms are a result of a disease of gradual onset which is non-work related. Mr Perry rhetorically asked where the compelling evidence might be found which provides a causal nexus between the right knee injury and the left knee condition. There are several answers to that question, none of which are of assistance to the respondent.

27. Firstly, having reported some pain to the left knee in 2011 the applicant continued working without further complaint up to and beyond the April 2013 right knee injury. Her doing so is contra-indicative of any ongoing left knee symptomology before the injury at issue.

28. Secondly, the GP records clearly show dozens of consultations relating to right knee pain and limping, followed over time by entries recording left knee problems which the GP ascribes to overuse after the right knee injury.

29. Thirdly, treating specialists Dr Giblin and Professor Ireland both attribute the applicant's left knee condition to overuse following the right knee injury. They do so unbidden, and without medicolegal agenda. They state in their reports to the GP that the applicant's left knee problems relate to limping and over use. Those findings are consistent with both the GP records and with the applicant's own evidence, which is uncontested. They also support the views of Dr Bodel. The contemporaneous treating specialist opinions are in my view highly persuasive and clearly establish on a common-sense basis the link between the right knee injury and the left knee condition.

30. In his initial report, Dr Panjratan provides an opinion that the prior osteoarthritis in the applicant's left knee suggests her right knee may well have developed symptoms even if she had not suffered the frank injury in April 2013. Although not directly relevant to the issue in question, I note that opinion flies in the face of the respondent's own position regarding the right knee injury, for which it accepted liability.

31. In his second report, Dr Panjratan sets out the history of developing left knee complaints following the right knee injury. His history of those complaints is thorough. He then notes and accepts the presence of symptoms in the left knee upon examination. Having done so, Dr Panjratan next refers to the 2011 x-rays which show "mild loss of medial compartment and mild osteophyte formation."

32. Dr Panjratan then opines that the condition in the left knee is not consequential to the right knee injury because the applicant stopped working long before the left knee became worse; and because she had arthritis which would have become symptomatic "sooner or later." I reject that opinion for the following reasons.

33. The argument that symptoms and injuries suffered by a claimant cannot be work-related because they have stopped working is one frequently seen in this jurisdiction. However, the effects of an aggravation, injury or condition to a body part do not spontaneously cease and become overtaken by an underlying condition just because someone stops working. Conversely, the fact someone starts working does not of itself establish that the effects of employment have overtaken those of any pre-existing condition from which they may suffer.

34. In this matter, Dr Panjratan has simply made a sweeping statement that because the applicant stopped work before her left knee started hurting, there can be no link between that employment and her problems. That reasoning, such as it is, completely ignores the nature and cause of consequential conditions in general, and the applicant's history in particular.

35. Dr Panjratan's opinion makes no allowance for the contemporaneous evidence which overwhelmingly establishes the applicant suffered symptoms in the right leg over several years followed by left knee problems arising from overuse and over compensation. He makes no attempt to deal with issues of over use or over reliance, which I find have led to the left leg symptoms and complaints. I therefore reject Dr Panjratan's opinion.

36. In my view, the overwhelming preponderance of both treating and medicolegal evidence therefore supports a finding that the applicant's left knee condition is consequent upon her right knee injury. Adopting a common-sense approach, I find that her over-reliance and over-compensating on the left knee as a result of the accepted injury has materially caused the left knee condition which requires surgery.

SUMMARY

37. As already noted, there is no issue the proposed surgery is a medical necessity. Given this is the case, in light of the above reasons, I make findings and Orders as set out in the Certificate of Determination. The respondent is to pay the costs of and incidental to the total left knee replacement surgery as proposed by Professor Ireland. It will also pay the applicant's reasonably necessary medical and treatment expenses relating to the left knee.