

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 4488/19  
**Applicant:** Henry John Brady  
**Respondent:** Café Buzz Franchising Pty Ltd  
**Date of Determination:** 6 January 2020  
**Citation:** [2020] NSWCC 1

The Commission determines:

1. **Part 4 – Injury Details** of the Application for Assessment by an Approved Medical Specialist is amended to delete “(right total knee replacement)” from the description of “Type of injury”.
2. The matter is remitted to the Registrar for referral to an Approved Medical Specialist for assessment of whole person impairment as a result of injury on 21 August 2014 to:
  - (a) right knee: aggravation of a disease, gross degenerative osteoarthritis;
  - (b) right shoulder: damage to rotator cuff tendons with partial tearing and development of calcific tendonitis involving the supraspinatus and subscapularis tendons as well as aggravation of pre-existing degenerative changes in the acromioclavicular joint;
  - (c) right thumb and right wrist: aggravation of pre-existing degenerative changes involving carpo-metacarpal joint and scapho-trapezium joint.
3. The documents to be referred to the Approved Medical Specialist are:
  - (a) Application for Assessment by an Approved Medical Specialist and attached documents;
  - (b) Response to application for medical assessment;
  - (c) Application to Admit Late Documents dated 12 September 2019 lodged by the applicant and attached documents;
  - (d) Application to Admit Late Documents dated 24 September 2019 lodged by the respondent and attached documents;
  - (e) Application to Admit Late Documents dated 7 November 2019 lodged by the respondent and attached documents, and
  - (f) This Certificate of Determination and Statement of Reasons.

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

Brett Batchelor

**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 BRETT BATCHELOR, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

*A MacLeod*

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



## STATEMENT OF REASONS

### BACKGROUND

1. Henry John Brady (the applicant/Mr Brady) registered an Application for Assessment by an Approved Medical Specialist (the Application) in the Commission on 2 September 2019 seeking:

“Assessment as to whether the degree of permanent impairment of more than 20% (section 39 of the *Workers Compensation Act 1987* – cessation of weekly payments after 5 years)”

2. The Application is on Form 7 which:

“...is the approved form to request referral for assessment of permanent impairment where there is a threshold dispute as to the degree of permanent impairment or where there is a dispute as to an employee’s condition or fitness for employment.”

3. In Part 4 of the Application the applicant relies on a date of injury of 21 August 2014 when he “...slipped and fell on stairs sustaining injury to his right knee, right wrist and right shoulder.” The type of injury is described as:

“Right lower extremity (right total knee replacement), right upper extremity (right shoulder) and right upper extremity (right wrist injury). Personal”

4. In the Form 7A - Response to application for medical assessment (the Response) lodged by the applicant’s employer, Café Buzz Franchising Pty Ltd (the respondent), the body parts to be assessed are listed as right lower extremity and right upper extremity. No notice of dispute regarding body systems is attached to the Form.
5. The respondent does not dispute that the applicant suffered injury to his right knee, right shoulder and right wrist on 21 August 2014. Relevant to the current dispute, and not disputed by the respondent, is that the applicant also suffered injury to his right knee in about June 2008 and on 13 September 2011 while in its employ. The applicant underwent a right total knee replacement on 30 January 2015, the cost of which was met by the respondent’s insurer.
6. The matter was the subject of a telephone conference on 23 September 2019 when the terms of referral to an Approved Medical Specialist (AMS) were discussed. No resolution between the parties was achieved, and a Direction was issued standing the matter over for conciliation/arbitration in Port Macquarie on 14 November 2019. The “Notations” to the Direction are as follows:

“The issues to be determined at the conciliation/arbitration are:

1. If the Commission has jurisdiction to determine at conciliation/arbitration:
  - (a) the injuries that the applicant can rely upon, and
  - (b) the terms of referral of the matter to an Approved Medical Specialist (AMS),

in respect of the applicant’s Application for Assessment by an AMS (the Application), lodged in response to the notice dated 16 May 2019 issued to the applicant by the respondent’s insurer (GIO) (p 57 of the Application).

2. The injuries that the applicant can rely upon in any referral to an AMS.
  3. The terms of any referral of the matter to an AMS.”
7. At the conciliation/arbitration on 14 November 2019 the matters in dispute between the parties could not be resolved. Due to the inability of counsel for the applicant to attend the conciliation/arbitration (because of transport difficulties in reaching the Port Macquarie venue), the matter did not proceed to arbitration, and a further Direction in the following terms was issued:
- “1. Pursuant to notation [3] made on 23 September 2019 the parties are to lodge and serve by 28 November 2019 written submissions of no more than two pages on:
    - (a) the description of injury to the applicant’s right knee, right shoulder and right wrist/thumb on 21 August 2014 to be referred to an approved medical specialist (AMS),and
    - (b) the terms of referral of such injuries to the AMS for assessment of permanent impairment as a result of injury on 21 August 2014.
  2. At the conclusion of the time allowed for submissions the dispute will be determined ‘on the papers’.”
8. Submissions from both parties have been received and are summarised hereunder.

#### **ISSUES FOR DETERMINATION**

9. The parties agree that the issues remaining in dispute are as set out above in [7].

#### **PROCEDURE BEFORE THE COMMISSION**

10. 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.
11. The parties were informed of my intention to determine the dispute without holding a further conciliation conference or arbitration hearing.
12. The parties have agreed to the determination of the matter without a further conference or formal hearing.

#### **EVIDENCE**

##### **Documentary evidence**

13. The following documents were in evidence before the Commission and taken into account in making this determination:
- (a) the Application and attached documents;
  - (b) the Response and attached documents;

- (c) Application to Admit Late Documents dated 12 September 2019 lodged by the applicant, attachments which commence with a QBE report of injury dated 25 August 2014 in respect of the applicant's injury on 21 August 2014, and many reports from Dr Liaw, the applicant's treating orthopaedic surgeon. Included in those reports is a report on the total right knee replacement surgery carried out by Dr Liaw on 30 January 2015;
- (d) Application to Admit Late Documents dated 24 September 2019 lodged by the respondent, attachments to which commence with a notice pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) dated 23 December 2014 issued by QBE Workers Compensation (NSW) Ltd (QBE) to the applicant, and
- (e) Application to Admit Late Documents dated 7 November 2019 lodged by the respondent with reports of Dr H W Cumberland, orthopaedic surgeon, dated 5 and 25 August and 9 September 2008, and medical certificate dated 9 September 2008, attached;
- (f) Applicant's submissions dated 25 November 2019, and
- (g) Respondent's submissions.

## **SUBMISSIONS**

### **Applicant**

14. The applicant notes he initiated an application for assessment to test his entitlement under s 39 of the *Workers Compensation Act 1987* (the 1987 Act), nominating date of injury as 21 August 2014, and injury to the right knee, right wrist and right shoulder. The respondent's assertion is that the injury of 21 August 2014 had not materially contributed to the need for a total knee replacement.
15. The respondent submits that there could be no issue per se as to "injury" to the right knee, a matter made clear by Dr J Bentivoglio (the orthopaedic surgeon qualified by the respondent).
16. The applicant submits that he is seeking relief pursuant to s 39 of the 1987 Act, which mandates an assessment in accordance with s 65 of the 1987 Act, which in turn refers to Chapter 7 of the 1998 Act. That is a medical dispute within the meaning of s 319 of the 1998 Act which requires determination pursuant to ss 321 and 322 of that Act.
17. The applicant notes the apparent agreement of the respondent that the application [sic, applicant] should be referred for assessment without further determination by the Commission, save for the respondent's request for a notation recording the fact that it accepted liability for knee surgery due to an earlier accepted work injury.
18. The applicant asserts that the medical dispute is properly distilled in the medical opinions of the doctors qualified by the parties, namely Dr A Hopcroft by the applicant and Dr Bentivoglio by the respondent.
19. The applicant submits that to add a notation, as suggested, is to risk deflecting the AMS from his or her statutory task; that is set forth in the 1998 Act and the Workers Compensation Guides for Permanent Impairment. These include s 323 of the 1998 Act. It is not for the Commission to give directions to the AMS in an application such as this.

20. The applicant submits that the applicant's position is in accordance with the analysis contained in the decision of Senior Arbitrator Capel in *Clarke v State of New South Wales (Greystanes Disability Services) (Clarke)*<sup>1</sup>. It is purely a medical dispute as to the relevant threshold and within the realm of the AMS.
21. The applicant accepts that the injury description should be amended to describe it as "right knee", deleting reference to "total knee replacement", with the injury mechanism described as aggravation of disease.

## Respondent

22. The respondent submits that the description of injury to the applicant's right knee, right shoulder and right wrist thumb should be as follows:
  - a. Right knee: aggravation of gross degenerative osteoarthritis.
  - b. Right shoulder: Damage to rotator cuff tendons with partial tearing and development of calcific tendonitis involving the supraspinatus and subscapularis tendons as well as aggravation of pre-existing degenerative changes in the acromioclavicular joint.
  - c. Right thumb and right wrist: aggravation of pre-existing degenerative changes involving carpo-metacarpal joint and schapho-trapezium joint." [sic]
23. These descriptions are drawn from the reports of Dr Bentivoglio dated 24 October 2014<sup>2</sup> and 10 May 2019<sup>3</sup>.
24. The respondent requests that the terms of referral of the matter to an AMS should include a notation as follows:

"The attention of the AMS is drawn to the fact that the Respondent's insurer accepted liability for the Applicant's total knee replacement surgery performed on 30 January 2015 as a result of the injury on 13 September 2011."
25. The respondent submits that the Commission may make this notation within its general jurisdiction to determine disputes arising under the 1987 Act and the specific obligation of the Commission to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms pursuant to ss 105 and 354(3) of the 1998 Act.
26. The respondent submits that its insurer has not admitted liability for the right knee injury and subsequent medical treatment and services as a result of the incident that occurred on 21 August 2014, pointing to the s 74 notice dated 23 December 2014 declining partial liability for the right knee injury on that date. That notice contains a different claim number to the claim number under which QBE accepted liability for the total knee replacement surgery carried out on 30 January 2015 because of the accepted injury on 13 September 2011. The documents attached to the Application and the Response are not clear as to the acceptance of liability for the surgery because of the accepted injury on 13 September 2011.

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<sup>1</sup> [2019] NSWWC 11.

<sup>2</sup> Response list of documents (electronic) p 3.

<sup>3</sup> Response list of documents p 21.

27. The respondent submits that Dr Hopcroft's report dated 7 May 2019<sup>4</sup> states that the surgery "finally went forward with insurance company endorsement"<sup>5</sup>. Dr Bentivoglio's report dated 27 November 2014 attributed the need for the total knee replacement surgery to "two previous injuries" (referring to 2008 and 13 September 2011). The reports of Dr Liaw, the treating orthopaedic surgeon, do not provide an opinion as to causation of the need for the right knee surgery as a result of the fall of 21 August 2014.
28. The respondent refers the different (QBE) claim numbers for the injuries of 13 September 2013 and 21 August 2014 in reports of Dr Liaw to Dr W Wickham, the applicant's treating general practitioner, and to QBE. Among these reports is that of Dr Liaw on the total right knee surgery he carried out on 30 January 2015<sup>6</sup> addressed to Dr Wickham and cc'd to QBE. The report has included therein the claim number for the injury dated 21 August 2014. The post-operative report of Dr Liaw to Dr Wickham dated 28 April 2015<sup>7</sup>, cc'd to QBE, did not have a date of injury therein but did have the claim number for the injury dated 21 August 2014.
29. The respondent submits that there is a risk that the AMS may be under the misapprehension that the surgery of 30 January 2015 has been accepted by the insurer as resulting from the injury on 21 August 2014, which is disputed by the respondent. Dr Hopcroft's report post-dates the s 74 notice and the report is ambiguous as to which injury the insurer attributed the payment for surgery. The respondent submits that the ambiguity may be relevant for the purposes of s 323(1) of the 1998 Act, which provides for deductions for any previous injury.

## FINDINGS AND REASONS

### Terms of referral

30. The case of *Clarke* relied upon by the applicant is similar to this case in that the claim proceeded on an Application for Assessment by an Approved Medical Specialist in which the applicant applied for:
  - (a) an assessment as to whether the degree of permanent impairment is more than 20% (s 32A of the 1987 Act – worker with high needs);
  - (b) an assessment as to whether the degree of permanent impairment is more than 30% (s 32A of the 1987 Act – worker with the highest needs), and
  - (c) an assessment as to whether the degree of permanent impairment is more than 20% (s 39 of the 1987 Act – cessation of weekly payments after 5 years).
31. The Senior Arbitrator noted that what distinguished that claim from a lump sum claim, that is a claim for compensation for permanent impairment pursuant to s 66 of the 1987 Act, was that it was commenced by the filing of a Form 7 rather than a Form 2A – Application to Resolve a Dispute. In other words, there was not a claim for lump sum compensation, but rather a threshold dispute. This was notwithstanding the fact that the notice of claim served by the applicant's solicitor prior to commencement of proceedings referred to a claim for lump sum compensation pursuant to s 66.
32. The Senior Arbitrator noted that s 39 of the 1987 Act identifies the need for an assessment of whole person impairment in accordance with s 65 of the 1987 Act and referred to s 321 of the 1998 Act (as it then was) – referral of a medical dispute for assessment. He observed that the workers compensation Acts provided for the mechanism for assessment of

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<sup>4</sup> Application p 9.

<sup>5</sup> Application p 13.

<sup>6</sup> Application to Admit Late Documents dated 12.09.19 p 20.

<sup>7</sup> Response p 89.

permanent impairment of a lump sum claim as well as a threshold dispute. Those Acts require an AMS to assess the degree of whole person impairment in respect of the threshold dispute. The matter was remitted to the Registrar for referral to an AMS for assessment of whole person impairment of several body parts due to injury on a specified date for the purposes of a threshold dispute pursuant to ss 32A and 39 of the 1987 Act.

33. Quite clearly, the applicant's claim in the current proceedings is a threshold dispute and must be referred to an AMS for assessment. The applicant has chosen to rely on a date of injury, 21 August 2014, rather than the dates of any earlier injury or injuries he sustained in the course of his employment with the respondent.
34. Part 7 of the 1998 Act provides for medical assessment. An "**approved medical specialist**" is defined in s 319 as meaning "a medical practitioner appointed under this Part as an approved medical specialist." The definition of "**medical dispute**" is then set out, which means "...a dispute between a claimant and the person on whom a claim is made about any of the following matters in connection with a claim." These matters include:
  - (c) the degree of permanent impairment of a worker as a result of an injury,
  - (d) whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality, and the extent of that proportion,"
35. "**[C]laimant**" is defined in s 4 of the 1998 Act as meaning "a person who makes or is entitled to make a claim." "**[C]laim** means a claim for compensation or for work injury damages that a person has made or is entitled to make."
36. The applicant is a claimant in that he is seeking resolution of a threshold dispute as to whether the degree of permanent impairment he has suffered as a result of an injury is more than 20% for the purpose of s 39 of the 1987 Act. That section provides for the cessation of weekly payments after five years but does not apply to an injured worker whose injury results in permanent impairment if the degree of permanent impairment resulting from the injury is more than 20%.
37. The s 74 notice issued by QBE to Mr Brady on 23 December 2014 contains a statement of the matter in dispute in the following terms:

"Your right knee injury and subsequent medical treatment and services are not as a result of the incident which occurred on 21 August 2014."<sup>8</sup>
38. This assertion is based on the opinion of Dr Bentivoglio in his report dated 24 October 2014<sup>9</sup> following the doctor's examination of the applicant on 22 October 2014 in respect of injury on 21 August 2014. Dr Bentivoglio's diagnosis of the right knee injury was:

"Mr Brady has quite gross degenerative osteoarthritis involving his right knee that was present prior to the specific injury he described. He has further aggravated this. At this point in time, any aggravation caused to pre-existing degenerative changes in his knee have settled." [sic]
39. Relying on this report, QBE denied liability for the cost of the total knee replacement which Dr Liaw carried out on 30 January 2015. It did pay for the cost of that surgery under a separate claim number in respect of the injury that Mr Brady suffered to his right knee on 13 September 2011.

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<sup>8</sup> Application to Admit Late Documents dated 24.09.19 p 2.

<sup>9</sup> Response p 3.



40. The fact that a worker has undergone surgery as a result of an injury will influence the assessment of the degree of permanent impairment as a result of that injury. Dr Hopcroft has provided two reports dated 7 May 2019<sup>10</sup> and 2 July 2019<sup>11</sup> following the doctor's examination of Mr Brady on 7 May 2019. It appears from the "Re" on the first page of the principal report dated 7 May 2019 he was asked to assess the applicant in respect of a date of injury of 13 September 2011. On page 10<sup>12</sup> of that report he addresses the effects of injury to the right knee. Under "**DIAGNOSIS AND OPINION**" the doctor says:

"This patient continues to suffer from the accumulated effects of at least four injuries suffered during the course of his work, namely, in June 2008 to his right knee; on 13 September 2011 to his right knee; some time in 2012 to his right knee; but significantly in a fall dated 21 August 2014 to his right knee, right shoulder and right wrist."

...

"He has had a good result from his right total knee arthroplasty."

41. In accordance with Tables 13-33 and 17-35 of the *American Medical Association's Guides to the Evaluation of Permanent Impairment*, fifth edition, Dr Hopcroft assesses 15% whole person impairment in respect of right total knee joint replacement.
42. In his supplementary report dated 2 July 2019, again in respect of the date of injury 13 September 2011, Dr Hopcroft refers to the "many injuries suffered" which he summarises as follows:

1. 2008 Partial lateral meniscectomy right knee.
2. 2011 Second arthroscopy right knee - medial meniscectomy.
3. 2012 Second right knee arthroscopy - further medial meniscectomy.
4. 2014 Right total knee replacement.
5. 2014 Three operations of right shoulder (from the fall of 2014).
6. 2014 Right wrist surgery."

He then goes on to say that "I can then confirm that this patient's right total knee replacement surgery was triggered by the fall in 2014."

43. Dr Hopcroft also says that the applicant's whole person impairment takes into account the assessment for right total knee replacement surgery with a "good" outcome. He then says:

"Regarding his right total knee replacement surgery, as he now has an overall whole person impairment of 15%, had he not had that replacement surgery I believe that one-third relates to the pre-existing injuries of 2008, 2011 and 2012. I believe that one-third of his disability relates to accumulated effects of those injuries, as right lateral meniscectomy is a more significant injury than the medial meniscal surgeries (which he underwent twice).

Of the 5%, 3% relates to the injury of 2008, 1% to the injury of 2011 and 1% to the injury of 2012."

44. It is apparent from this report that Dr Hopcroft also assesses whole person impairment of the right knee if Mr Brady had not undergone the total right knee replacement surgery on 30 January 2015. He attributes the need for the right total knee replacement surgery was triggered by the fall in 2014; that is the fall on 21 August 2014 which is the injury relied upon in the current proceedings.

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<sup>10</sup> Application p 9.

<sup>11</sup> Application p 7.

<sup>12</sup> Application p 17.

45. The respondent submits that it is not clear from Dr Hopcroft's report of 7 May 2019 as to which injury he attributes the need for the right total knee replacement surgery (see [27] and [29] above). However, this is addressed by the doctor in his supplementary report dated 2 July 2019.
46. It will be a matter for the AMS, having regard to all the evidence in respect of injury to the right knee, to assess whole person impairment of that body part as a result of the pleaded injury of 21 August 2014. This is clearly part of the "medical dispute" in this case within the meaning of that term in s 319 of the 1998 Act that the AMS must resolve as part of his assessment of permanent impairment as a result of injury to the right knee.
47. I therefore do not see the necessity to include in the referral of this matter to the AMS the notation requested by the respondent. A copy of this Statement of Reasons together with the Certificate of Determination will be included with the other documents referred.

### **Description of injury**

48. Apart from conceding amendment to the description of injury and injury mechanism in Part 4 of the Application (see [21] above), the applicant has not made any further submissions as to the description of injury. The respondent's submissions as to the description of injury to be referred are at [22] above.
49. In my view, having regard to the evidence and submissions, the description of injury to be referred to the AMS is:
  - (a) right shoulder: aggravation of a disease, gross degenerative osteoarthritis;
  - (b) right shoulder: damage to rotator cuff tendons with partial tearing and development of calcific tendonitis involving the supraspinatus and subscapularis tendons as well as aggravation of pre-existing degenerative changes in the acromioclavicular joint.
  - (c) right thumb and right wrist: aggravation of pre-existing degenerative changes involving carpo-metacarpal joint and scapho-trapezium joint.

### **Documents to be referred**

50. The documents to be referred are:
  - (a) the Application and attached documents;
  - (b) the Response and attached documents;
  - (c) Application to Admit Late Documents dated 12 September 2019 lodged by the applicant and attached documents;
  - (d) Application to Admit Late Documents dated 24 September 2019 lodged by the respondent and attached documents;
  - (e) Application to Admit Late Documents dated 7 November 2019 lodged by the respondent and attached documents, and
  - (f) this Certificate of Determination and Statement of Reasons.

## **SUMMARY**

51. **Part 4 – Injury Details** of the Application is amended to delete “(right total knee replacement)” from the description of “Type of injury”.
52. The injuries referred to in [49] above are remitted to the Registrar for referral to an AMS assessment of whole person impairment as a result of injury on 21 August 2014.
53. The documents set out in [50] above are to be referred to the AMS.