WORKERS COMPENSATION COMMISSION

AMENDED CERTIFICATE OF DETERMINATION

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

Matter Number: **5959/20**
Applicant: **Catherine Balmer**
Respondent: **Department of Transport**
Date of Determination: **27 April 2020**
Date of Amendment: **29 April 2020**
Citation: **[2020] NSWWCC 137**

The Commission determines:

1. The applicant suffered an injury by way of an aggravation of a previously asymptomatic condition to her right lower extremity (knee) in the course of her employment with the respondent on 22 August 2019.

2. As a result of the injury referred to in (1) above, the applicant suffered a total incapacity for employment from 23 August 2019 to 29 September 2019.

3. At the date of injury, the applicant's agreed Pre-Injury Average Weekly Earnings (PIAWE) was $1,500 per week.

4. The respondent is to pay the applicant weekly compensation pursuant to section 36 of the *Workers Compensation Act 1987* for the period 23 August 2019 to 29 September 2019 at the rate of $1,403 per week, being 95% of her PIAWE.

5. As a result of the injury referred to in (1) above, the applicant has required and continues to require medical and ancillary treatment from time to time.

6. The respondent is to pay the applicant's reasonably necessary medical and treatment expenses incurred as a result of the injury referred to in (1) above, upon production of accounts, receipts and/ or Medicare Australia Notice of Charge.

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.

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Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. On the morning of 22 August 2019, Catherine Balmer (the applicant) was supervising the departure of a train from Central Railway Station in the course of her employment with the New South Wales Department of Transport (the respondent). The applicant alleges that as the train departed, she made a 180° turn to return to the control room at the station, suffering a sharp pain and injury to her right knee.

2. At the time of the incident at issue, the applicant was earning $1,500 per week, which is agreed between the parties to represent her preinjury average weekly earnings (PIAWE).

3. The applicant immediately reported the alleged injury to a co-worker, Mr Felice, who applied ice to her knee within 20 minutes of the alleged incident. That afternoon, she consulted her general practitioner Dr Raudaschi. The applicant was then referred for physiotherapy and an MRI.

4. In due course, the applicant made a claim for compensation. On 19 September 2019, the respondent issued a section 78 notice declining liability, alleging the applicant did not suffer an injury (section 4 of the *Workers Compensation Act 1987* (the 1987 Act)) and that her employment was not a substantial contributing factor to any injury which she suffered (section 9A of the 1987 Act).

ISSUES FOR DETERMINATION

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

    (a) Whether the applicant suffered an injury (section 4 of the 1987 Act);

    (b) Whether the applicant would have suffered the same or a similar injury at the same stage of her life had she not been at work (section 9A(2)(d));

    (c) The applicant's capacity for employment as a result of her knee injury; and

    (d) Whether the applicant's treatment has been reasonably necessary as a result of an injury.

PROCEDURE BEFORE THE COMMISSION

6. The parties attended a hearing by way of telephone link on 1 April 2020. The parties were given time to attempt to resolve their differences, however, they were unable to do so. Accordingly, the matter proceeded to an arbitration hearing.

7. At the hearing, Mr C Tanner of counsel appeared for the applicant and Mr F Doak of counsel appeared for the respondent.

8. Mr Doak made no submissions on the issue of whether the applicant suffered an injury (section 4 of the 1987 Act), noting the respondent's independent medical examiner (IME) Dr Bentivoglio accepted the incident at issue would have caused an aggravation of a degenerative condition in the applicant's right knee.

9. It is also noted the applicant's claim for weekly compensation is limited to the period 23 August 2019 to 29 September 2019 inclusive.

EVIDENCE

Documentary evidence

10. The following documents were in issue in the proceedings:

    (a) The Application to Resolve a Dispute (the Application);

    (b) The Reply and enclosed documentation.

Oral evidence

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

FINDINGS AND REASONS

Injury

12. I am satisfied that the balance of the evidence establishes the applicant suffered an injury to her right knee in the course of her employment with the respondent on 22 August 2019. In so finding, I note that while the respondent did not technically abandon the issue of injury, Mr Doak made no submissions on it.

13. Given the preponderance of the evidence, that was an appropriate course of action for the respondent to take. The lay evidence discloses immediate complaint of injury by the applicant consistent with the mechanism of injury (see the injury report form attached to the Application); while CCTV footage taken at the time of the injury shows the applicant turning to return to the control room in a manner perfectly consistent with her statement.

14. Moreover, both Dr Bodel, the applicant's IME and Dr Bentivoglio consider the applicant sustained an injury. In his review of the video evidence dated 30 December 2019, Dr Bentivoglio accepted the nature of the applicant's movements and observed her gait to have been altered after the alleged incident which caused her injury to take place.

15. That view is consistent with Dr Bentivoglio's stated opinion at page 4 of his report of the same date, in which he says, "*I believe she had a temporary aggravation to a pre-existing abnormality*", which Dr Bentivoglio says has resolved.

16. In my view, on the respondent's own case, the findings of Dr Bentivoglio are consistent with injury being established pursuant to section 4(b)(ii) of the 1987 Act.

17. For his part, Dr Bodel is of the view that the applicant suffered a frank injury as a result of the incident at issue. In either case, I find the fact of injury to have been established on the part of the applicant. Nevertheless, the nature of that injury is important as it affects the operation of section 9A of the 1987 Act, which the respondent also relies upon.

18. In my view, the injury is best characterised as a work-related aggravation of a pre-existing degenerative condition. In so finding, I accept the view of Dr Bentivoglio as to the nature of the incident at issue and the injury caused. I believe Dr Bentivoglio's views are consistent with the radiological evidence in the matter, which shows some pre-existing degenerative changes in the applicant's right knee, albeit I accept the evidence of the applicant that those changes were asymptomatic before the incident at issue. Dr Bentivoglio's opinion, in my view, satisfies the requirements of section 4(b)(ii), namely that the applicant's employment was the main contributing factor to the aggravation of her pre-existing right knee degenerative condition.

Whether the applicant would have suffered the same or a similar injury at the same stage of her life had she not been at work (section 9A(2)(d) of the 1987 Act)

19. Mr Doak submitted the applicant would have suffered an injury identical to or similar in nature to that which took place at work regardless of whether she was in employment (section 9A(2)(d) of the 1987 Act). In support of that submission, he relied upon the report of Dr Raudaschi, general practitioner, who at page 23 of the Application noted a similar mechanism of injury could have occurred in any context if the applicant suddenly turned around 180°. The doctor went on to say that the applicant would not normally have to turn around 180° in a southern manner unless she was at work.

20. Mr Doak referred to an email from the applicant to co-worker Mr Ghosn which made no mention of a sudden turn on her part, but simply her having turned around and the injury taking place.

21. Mr Doak submitted the requirements of section 9A(2)(d) are satisfied, because the qualification put forward by the applicant's general practitioner of a "sudden" turn is not made out. Mr Doak also drew the Commission's attention to the differences in complaints made by the applicant to Dr Bodel and Dr Bentivoglio. With respect, I place a little weight on that submission given Dr Bentivoglio's examination was approximately one month after Dr Bodel and was carried out at a time after the applicant's claim for weekly compensation had passed. I also reject that submission and accept the applicant's evidence that she "pivoted" on her right leg when she turned around. In my view, that description is consistent with a sudden turn on her part and is consistent with the movements shown in the CCTV footage.

22. Mr Doak submitted the issue of whether the applicant's aggravation to her right knee condition has passed is an important one when considering section 60 medical expenses, and the comment made at page 40 of the Reply by Dr Bentivoglio to the effect that the applicant will likely need a knee replacement at some point.

23. As Mr Doak quite rightly submitted at the hearing, if the commission accepts the view of Dr Bentivoglio, then section 9A of the 1987 Act is not an available defence. If the view of Dr Bodel is accepted, then the defence is available.

24. Having accepted Dr Bentivoglio as to the nature of the injury suffered by the applicant, I find section 9A is not an available defence in this matter. Had I found that the applicant suffered a frank injury, I would nevertheless have rejected the submission that the applicant would have suffered the same or a similar injury away from the workplace.

25. To the extent, I am required to make such a finding, I do so on the basis set forward in Mr Tanner's submissions that the applicant was working when the incident occurred. The action which caused the injury is that which the applicant carried out at her place of work. Her situation is, in my view, analogous to someone who falls down a set of steps at work. It can always be said that such person would potentially have suffered a similar or the same injury away from work, but the fact is the injury was sustained in the workplace. The applicant making a sudden 180° turn (which I accept she did) is an action which she carried out in the course of her employment and not otherwise. This being the case, I do not believe that a defence under section 9A(2)(d) would be made out had I found the applicant suffered a frank injury.

Capacity

26. The applicant makes a claim for a closed period of weekly benefits. All of the contemporaneous evidence for that period supports a finding that she was incapacitated. The applicant's treating general practitioner has provided WorkCover medical certificates indicating that she lacked capacity for employment during the period claimed. There is no evidence to contradict that standpoint. Accordingly, there will be an order that the respondent pay the applicant weekly compensation at the rate of $1,403 per week (being 95% of her PIAWE of $1,500) for the period 23 August 2019 to 29 September 2019.

Medical and Treatment Expenses

27. Whilst I accept Dr Bentivoglio's view that the applicant suffered an aggravation to a pre-existing degenerative condition in the incident at issue, I do not accept his opinion that the effects of that aggravation have passed. The applicant's statement as to the nature and extent of her ongoing symptomology is unchallenged. I accept that she continues to have ongoing difficulties and is likely to require treatment in the future because of them. There is no evidence to contradict her assertion that the condition in her right knee was asymptomatic before the incident at issue. Given the workplace incident caused the aggravation and the applicant still suffers symptoms consistent with that aggravation, I do not accept the submission the effects of the aggravation had passed by the time Dr Bentivoglio examined the applicant.

28. As Mr Tanner noted, given the applicant's condition was asymptomatic before the event at work, it is that precipitating incident which has prompted pain in her right knee and led to the treatment which she requires and has required since the incident on 22 August 2019.

29. I accept Mr Tanner's submission that the question of whether each specific visit to a practitioner is reasonably necessary does not arise in the circumstances of this matter, in which the relevant dispute related to the cause of injury/ pathology rather than the reasonable necessity of any particular proposed treatment.

30. I note the applicant has sought an order that the respondent pay reasonably necessary medical expenses and treatment in respect of the injury suffered on 22 August 2019 upon production of accounts, receipts and/or Medicare Australia notice of charge. In the circumstances, such an order will be granted for the reasons stated above.

SUMMARY

31. For the reasons set out above, I find the applicant suffered an injury by way of aggravation of a pre-existing, asymptomatic condition in her right knee in the incident on 22 August 2019, to which her employment was the main contributing factor.