WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1862/20**
Applicant: **Diane Morrissey**
Respondent: **Penrith Rugby League Club Ltd**
Date of Determination: **9 June 2020**
Citation: **[2020] NSWWCC 190**

The Commission finds:

1. On 13 September 2013 the applicant suffered injuries to her right and left lower extremities.

2. These injuries caused the applicant to adopt an altered gait, which caused the onset of a consequential condition in her lumbar spine.

The Commission orders:

1. I remit this matter to the Registrar for referral to an Approved Medical Specialist for placing in the medical assessment pending list on the following bases:

    (a) Date of injury: 13 September 2013.

    (b) Matters for assessment:
    - Left lower extremity
    - Right lower extremity
    - Lumbar spine – consequential

    (c) Evidence: Application to Resolve a Dispute and attached documents; Reply and attached documents.

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

John Wynyard
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 WYNYARD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Diane Morrissey, the applicant, brings an action against Penrith Rugby League Club Ltd, the respondent, for lump sum compensation in respect of injuries to the left knee, the right Achilles tendon and a consequential condition to the lumbar spine.

2. A section 74 notice was issued on 23 May 2016 which accepted liability for the left knee and right ankle injury but denied liability for the consequential onset of lumbar spinal symptomatology.

3. An Application to Resolve a Dispute (ARD) and Reply were duly lodged.

ISSUES FOR DETERMINATION

4. The parties agree that the following issue remains in dispute:

    (a) whether the applicant has suffered a consequential condition to her lumbar spine.

PROCEDURE BEFORE THE COMMISSION

5. This matter was heard on 11 May 2020 by way of telephone conference conciliation/arbitration hearing. The applicant was represented by Mr Ross Stanton of counsel instructed by Ms Natalie Pawlikowski and the respondent was represented by Mr Lachlan Robison of counsel instructed by Mr Mark Van der Hout. 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.

EVIDENCE

Documentary evidence

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

    (a) ARD and attached documents, and
    (b) Reply and attached documents.

Oral evidence

7. No application was made in respect of oral evidence.

FINDINGS AND REASONS

8. Mrs Morrissey was born in 1962. She is employed by the Penrith Panthers League Club as a food and beverage attendant, having commenced there in 2009.

9. On 13 September 2016, whilst she was helping her co-worker, Ms Leanne Hewson, to move tables from the back of house area behind the kitchen into the bistro bar in order to set up a self-service breakfast (which was a daily buffet), she fell as she was carrying one of the tables. The leg of the table that she and Ms Hewson were carrying came loose and her legs got caught in it mid stride so that she fell flat on her front side with the table on top of her.

The floor was tiled and the applicant said the impact was quite heavy. She felt pain in her left knee, but the right calf and ankle pain were much worse.

10. She consulted her General Practitioner, Dr Lee and was referred for scans of the right ankle on 15 September 2016.

11. The clinical notes taken by Dr Boshell, the Radiologist, recorded:

> "Fall last night 1 fracture of left patella and ? tear of right Achilles tendon."

12. The conclusion was of a partial tear of the Achilles tendon, and Achilles tendonitis[1].

13. An x-ray of the left knee was carried out by Dr Connolly, Radiologist on 14 September 2016. It noted degenerative changes in the left knee but that no fracture was identified.

14. In her statement Mrs Morrisey said that Dr Lee directed her to attend the Emergency Department at Nepean Hospital as a matter of urgency. She said at the hospital her injuries were reviewed and her right leg was plastered below the knee to support the right Achilles tendon. She said that "approximately 10 weeks later" she was placed in a Cam boot. She said "Although I appreciated that the Cam boot was meant to protect me from further injuries, the Cam boot definitely made me walk in a [lop] sided manner."[2]

15. Unfortunately, as noted by A/Prof Ryan in his report of 23 January 2020, no notes from Nepean Hospital were obtained. In any event, Ms Morrisey said that by early 2017 was she struggling to mobilise. She said:

> "While my left knee was in pain causing me to limp and favour my right side, my right leg brace and its associated tear caused the same issue, and I was required to favour the left side. This was problematic and I was required to 'balance' the two injured body parts.[3]"

16. She said that whilst her altered way of walking was simply inconvenient at first, the combined effect of the two injuries began to cause an onset of pain in both Mrs Morrisey's hips and lower back. She said:

> "These pains were quite dull and manageable. Noting that I had returned to work by this point, I was working my ordinary duties as a food and beverage attendant with a faulty left knee and a strapped up right leg."

17. She said that her duties aggravated her lower back condition at that time.

18. She said:

> "22. As I cleaned tables I was required to move the heavy chairs and tables around in order to sweep the floor under it. As I handed out food to customers, I was constantly pivoting and turning between the food pass where the chefs place the ready dishes and the customer. I would pivot and turn up to 10 times a minute during busy trade periods. As I packed away heavy boxes of wine, juices, beers and frozen foods, I was constantly lifting and bending.
>
> 23. These duties were completely doable pre-injury. However, since my injury, the altered gait I was walking with accelerated the development of my lower back issues. On most days, my lower back pain was manageable. On some other days, these pains were extreme and debilitating."

[1] ARD page 60.
[2] ARD page 3[19].
[3] At [20].

19. Mrs Morrisey said that she initially treated her lower back condition herself by taking Panadeine Forte that in fact had been prescribed for her husband. She said[4]:

> "It was enough to take the edge off and get me through long and hard days just so I could continue working."

20. Mrs Morrisey said she did not consult a doctor about her back. She said:

> "…. I am not someone who likes to complain about my problems and I already felt bad enough that I was on workers compensation for my existing injuries. I certainly felt no inclination to want to complain about my lower back injuries."

21. On about 9 January 2017, Mrs Morrisey began to see Dr Soo as her treating GP as she was unhappy that Dr Lee had "hastily rushed me back into work when I was still in a lot of pain".

22. In his report of 23 August 2019, Dr Soo confirmed that he first saw Mrs Morrisey on 9 January 2017. He took a consistent history of the injury and the subsequent treatment.

23. Further imaging was organised and Dr Soo reported that on 10 January 2017 an MRI of the right ankle showed chronic scarring, tendinosis and para-tendonitis of the Achilles tendon. There was also a cartilage fissure on the Talar Dome with adjacent synovitis. There was also tendinosis of the peroneus lungus with tear.

24. An MRI of the left knee on 1 February 2017 showed a medial meniscus tear with a grade 4 chondral tear of the medial femorotibial compartment. She was referred to Dr Anthony Kwa, Orthopaedic Surgeon for further assessment and management on 17 January 2017. She came to surgery in the form of an arthroscopic partial medial and lateral meniscectomy with him on 23 March 2017.

25. Mrs Morrisey in her statement said that when she first saw Dr Kwa on 8 February 2017 she was still wearing a Cam boot on her right leg and was dealing with very intense pains in her left knee. She said that after the surgery on her left knee at Westmead Private Hospital on 23 March 2017, she avoided using her left knee as it was very sore. She said[5]:

> "This meant that I was constantly required to hop and limp around. I was not provided with any knee brace or any support."

26. Mrs Morrisey described difficulty in recovering from the surgery. On 27 March 2017, her physiotherapist, Ms Shuichi Araoka, reported that Mrs Morrisey presented to physiotherapy on 24 March 2017, the day after her left knee arthroscopy. At that time she was mobilising with a moderate limp.

27. On 5 April 2017, Dr Kwa recommended further physiotherapy before Mrs Morrisey could return to full duties two weeks later.

28. On 28 April 2017, another physiotherapist, Ms Hai Le, reported to Dr Soo noting that Mrs Morrisey was then four weeks post-op. She said:[6]

> "[Mrs. Morrissey's] left knee pain had improved with physiotherapy and exercises. She had not returned to work. She still complained of the right calf pain that also made her walking challenging."

[4] At [24].
[5] ARD page 5 [31].
[6] ARD page 82.

29. Mrs Morrisey said that by 28 June 2017, when she again consulted with Dr Kwa, the pain in her right ankle was becoming unbearable - especially after a long shift at work.

30. On a date that was given as "30 March 2016" (which was clearly incorrect), another physiotherapist, Ms Veeral Patel, reported to Dr Kwa who had referred Mrs Morrisey for an assessment[7]. This took place on 3 July 2017. Ms Patel took a consistent history of the injury and subsequent treatment of her right ankle and left knee. She noted that Mrs Morrisey at the time of the referral had been tolerating four hours per day, four day a week at work. On examination Ms Patel said:

> "On examination, Diane displayed an antalgic gait secondary to left knee pain, Right ankle ROM was reduced secondary to stiffness. Calf length was reduced secondary to pain."

31. Under a heading "Physiotherapy Management" Ms Patel listed as one of the treatment "gait retraining exercises"[8].

32. The respondent pointed to what appeared to be an anomaly in this history. Dr Kwa reported following the 28 June 2017 consultation to Dr Soo. He took a history that Mrs Morrisey was describing pain around her right Achilles tendon region especially after a shift at work. He noted:

> "Mrs Morrisey is able to stand and walk with a normal gait".

33. She said that "some time in mid to late 2018" that she sought medical attention for her lower back injury. She said:

> "By the point of consultation, my lower back pains were no longer the same as they have been described above."

34. It would appear that her first consultation about her back was with Dr Soo on 22 November 2018, and she came to a CT scan of her lumbar sacral spine on 28 November 2018. The CT scan noted "degenerative changes, severe at L4/5 and L5/S1 levels, with severe bilateral L5 neural exit foraminal stenoses"[9].

35. In his report of 23 August 2019, Dr Soo noted:

> "On 22/11/2018, Ms Dianne Morrisey told me that since the injury at work on 12/09/2016 she experiences pain on her hips and back especially after working long hours."

36. Dr Soo diagnosed, besides the left knee and right ankle problems, "back and hip pains due to altered mechanic as a result of the two above injuries"[10].

37. As to causation, he said that the altered mechanics due to the injuries to both the left knee and the right ankle "can contribute to the pain in her hips and back".

38. Mrs Morrisey retained the services of A/Prof Ryan as her medico-legal referee. He supplied two reports, one dated 11 March 2019[11] and 23 January 2020[12].

39. A/Prof Ryan took a consistent history of the injury and reviewed the subsequent treatment and management of her conditions.

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[7] ARD page 44.
[8] ARD pages 45-46.
[9] ARD page 67.
[10] ARD page 39.
[11] ARD page 24.
[12] ARD page 35.

40. Unusually, A/Prof Ryan did not report on his examination separately. However, under "Causation"[13] he listed the examination results of the left and right knee and the right ankle. He said[14]:

> "When she flexes her spine, she develops pain radiating to the supratrochanteric area above the hips. I concluded, on the balance of evidence somatic pain radiating from the lumbar spine. She had evidence of lumbar muscle spasm on flexion and extension." (As written).

41. In considering whether Mrs Morrisey's employment had been the main contributing factor to her injury, A/Prof Ryan noted that the "physical effects of her work had been intense and the availability of assistance unpredictable." A/Prof Ryan thought there had been a "disconnect" between the number of staff required at a busy time and the number of staff available. He said:

> "This has resulted in Mr [sic] Morrisey being required to do intensive physical activities, whilst being exposed to psychological stress because of the lack of support and physical assistance. As a result, her physical abilities have declined, resulting in limitations at home…. and a decline in her capacity to cope with and carry out physical tasks at work".

42. A/Prof Ryan thought that employment was the main contributing factor. He noted that as at 11 March 2019 Mrs Morrisey was still working as a food and beverage attendant working either 5:30am to 3pm shifts or 6am to 4pm shifts.

43. A/Prof Ryan considered Mrs Morrisey's previous history, which included complaints of cervical spine and lumbar spine symptoms, and left knee pain. He also noted a motor vehicle accident on 26 December 2015 which had involved cervical symptomatology and pathology.

44. Having reviewed that history he found no portion of the present impairment that was pre-existing.[15] A/Prof Ryan, in answer to a question asking about "Disabilities consequential upon the injuries or treatment received", said:[16]

> "Ms Morrissey injured her left knee, right posterior calf and ankle, and her low back in her work injury on 13 September 2016."

45. A/Prof Ryan wrote a second report on 23 January 202017. The purpose of the report was to answer questions as to whether Mrs Morrisey's back condition was consequential on the injuries to the left knee and the right Achilles tendon.

46. A/Prof Ryan said:

> "Mrs Morrisey's consequential condition of back symptoms developed as a consequence of skeletal deformities in the sagittal plane, caused by fixed flexion of the left knee joint, which developed gradually and to a lesser extent her right Tendo Achilles' condition. These may have required Mrs Morrisey to compensate by increasing her lumbar lordosis ('the sway in her back') to maintain a normal standing posture."

[13] ARD page 30.
[14] ARD page 30.
[15] ARD page 33
[16] ARD page 29.
[17] ARD page 35.

47. For the respondent Dr Raymond Wallace, Orthopaedic Surgeon, reported on 14 May 2019.[18] He took a consistent history of the injury on 13 September 2019 and subsequent management. He noted that Mrs Morrisey's right ankle was immobilised in a Plaster of Paris slab, which immobilised her right ankle for a period of eight weeks, and that she was then placed in a Moon boot.

48. He noted that on 8 February 2017 the removal of the Moon boot was recommended by Dr Kwa. He recorded that Mrs Morrisey eventually came to surgery with Dr Kwa for the left knee on 23 March 2017 where she underwent an arthroscopic debridement of the left knee with partial medial and lateral meniscectomies.

49. Dr Wallace noted that there had been no further therapeutic intervention since the physiotherapy ceased in 2017, and that Mrs Morrisey was managing at the time of consultation with intermittent use of analgesic and anti-inflammatory medication.

50. He did not take any history of complaints about back pain when he listed Mrs Morrisey's "present complaints," neither did he examine her back. However, he noted at the end of his report that A/Prof Ryan had concluded that Mrs Morrisey had suffered an injury to her lumbar spine. Dr Wallace disagreed. He said that the CT scan of November 2018 showed evidence of "significant degenerative disc disease at the L4/5 and L5/S1 levels which was constitutional in origin and unrelated to her employment."[19] He said:

> "There is no objective medical evidence that Ms Morrisey suffered any work-related injury at her lumbar spine."

51. Dr Wallace noted at the time of consultation Mrs Morrisey was then working in the same job 38 hours per week with no work restrictions. His diagnosis was that there had been an aggravation of pre-existing degenerative tricompartmental osteoarthritis in the left knee, and traumatic Achilles tendinopathy in the right ankle.

52. In a second report dated 18 March 2020[20], Dr Wallace considered the second report of A/Prof Ryan. He was asked by the respondent's solicitors as to whether he noted an altered gait when he examined Mrs Morrisey. He said he did not, and further, he noted the report of Dr Kwa to which I have earlier referred that noted on 28 June 2017 there was no altered gait.

53. In answer to a question as to whether Dr Wallace believed that Mrs Morrisey had sustained a consequential lumbar spine condition as a result of her lower extremity injuries, Dr Wallace said:

> "Ms Morrisey has not suffered a consequential lumbar spinal condition as a result of her lower extremity injuries. Despite the fact that Mrs Morrisey has a range of motion in her left knee of 10 - 70º flexion on examination at the time of review in May 2019, she walked with a normal gait. More importantly, I note that Mrs Morrisey underwent a CT examination of her lumbar spine on 28 November 2018 which showed evidence of severe degenerative lumbar spondylosis at the L4/5 and L5/S1 levels with severe facet joint arthropathy bilaterally at the L5/S1 level and bilateral exit foraminal narrowing at this level".

[18] Reply page 6.
[19] Reply page 15.
[20] Reply page 16.

54. Dr Wallace thought that Mrs Morrisey's significant degenerative lumbar spine pathology would have pre-existed the work injuries. He said:

> "Her current lumbar spinal symptoms are due to age-related degenerative lumbar spinal pathology which is constitutional in origin and entirely unrelated to her work incident of 13 September 2016 or her employment with Penrith Rugby League Club Limited".

55. Dr Wallace thought that Mrs Morrisey would have noted the onset of lumbar spinal symptoms whether she had been at work with the respondent or not, as they would have occurred at the same stage of her life.

SUBMISSIONS

56. Mr Robison said that there was a narrow issue for determination, that being whether the back condition was a consequence of the injuries to the left knee and right ankle. Mr Robison referred to Mrs Morrisey's statement, particularly that she was struggling to mobilise at the time she had a Cam boot on in early 2017. He referred to the report of Dr Kwa of 28 June 2017 where Dr Kwa had said on examination Mrs Morrisey was standing and walking with a normal gait. He submitted that in the light of that contemporaneous evidence, Mrs Morrisey was unable to assert that she had an altered gait as a result of her left knee and right ankle injury which materially contributed to the onset of the lumbar pathology.

57. Mr Robison referred to the report of Dr Soo of 23 August 2019, and Dr Soo's comment that Mrs Morrisey's back and hip pains were due to "altered mechanic as a result of the two above injuries." Mr Robison also noted the statement later in the same report that the altered mechanics were due to the injuries which "can contribute to the pain in her hips and back".

58. Mr Robison submitted that Dr Soo's opinion did not reach the civil onus. The best that could be said about Dr Soo's report, Mr Robison maintained, was that he conceded that the two leg injuries could contribute to her back pain. He said further Dr Soo's opinion was of little weight as he did not explain what the "mechanics" were.

59. Mr Robison referred to the first report of A/Prof Ryan. He submitted that A/Prof Ryan's opinion threw up some uncertainty as to the nature of the injury. His explanation that the lumbar spine was involved in the injury because he saw muscle spasm on flexion and extension was not a clear indication of causation. Mr Robison submitted that A/Prof Ryan's reasoning, in which he discussed psychological stress and a disconnect between the staff available and the work to be done, was difficult to interpret as an opinion that the back injury was connected at all.

60. Similarly, A/Prof Ryan's review of Mrs Morrisey's previous physical problems and his conclusion thereafter that no portion of her impairment was pre-existing, was also difficult to relate to the relevant question of any connection between back pain and the initial incident.

61. It was difficult to establish from A/Prof Ryan's opinion exactly what the cause of the back injury had been.

62. This also must have occurred to A/Prof Ryan's solicitors, Mr Robison noted, because in his second report of 23 January 2020 he was asked further questions to clarify that opinion. A/Prof Ryan said that there was no direct injury to the lumbar spine, and, Mr Robison said, his explanation as to why the condition in the lumbar spine was consequential found no support in his first report of 11 March 2019. Mr Robison contended that A/Prof Ryan gave no explanation as to why there was such a radical change in his view regarding causation.

63. Mr Robison referred to A/Prof Ryan's finding in his first report that Mrs Morrisey had injured her lower back "in her work injury on 13 September 2016". This opinion A/Prof Ryan appeared to resile from in his second report, and whilst his assessment of causation was somewhat difficult to interpret, it appeared to suggest that the nature and conditions of work had also caused the lumbar spine, Mr Robison submitted.

64. Mr Robison submitted that I would prefer the opinion of Dr Wallace, as it was clear and internally consistent. Dr Wallace noted that there was no antalgic gait when he examined Mrs Morrisey in May 2019 and that indeed Dr Kwa had noted two years earlier on 28 June 2017 that Mrs Morrisey had a normal gait.

65. Mr Robison submitted that some mention might be made of the physiotherapy reports that noted some gait disturbance, but he said the evidence was that Mrs Morrisey had made a successful return to work and the probabilities were, as Dr Wallace had said, that Mrs Morrisey was simply experiencing the onset of symptoms from her constitutional degenerative disease which would have occurred at about this time in her life in any event.

66. Mr Robison submitted that the inability to establish an antalgic gait would result in a determination that Mrs Morrisey had not suffered any injury to her lumbar spine, whether by way of aggravation or causation.

67. Mr Stanton submitted that Mrs Morrisey's statement conveyed more than a simple problem in the left knee that was responsible for the altered gait. It needed to be borne in mind that there were two injuries, one to each leg and that the left knee injury was serious.

68. The operation report of Dr Kwa dated 23 March 2017[21] showed that in fact there had been two operative procedures on the left knee; a partial medical meniscectomy and a partial lateral meniscectomy. The bone scan of the Achilles tendon on 15 September 2016 showed that it had also sustained a partial tear.

69. The evidence had not been challenged that Mrs Morrisey had to contend with a Cam boot on her right foot for the Achilles tendon and that her left knee was significantly damaged. It followed that a person with double injuries like that would have some difficulty in mobility and gait, which is precisely what Mrs Morrisey alleged. He said therefore that the onset of the lumbar spine condition was not implausible at all.

70. Mr Stanton stressed that there had been a six month interval between the injury and the surgery on the left knee on 23 March 2017, and that Mrs Morrisey therefore had an extensive period of time dealing with a tear in the posterior horn of the medial meniscus and an inner lateral meniscal complex tear, which was found on operation by Dr Kwa.

71. Mr Stanton submitted that, contrary to the submission of Mr Robison, there was ample corroboration for Mrs Morrisey's assertion that she was having trouble with her gait. He referred to what Mrs Morrisey had to say herself about her mobility difficulties, and he referred to the physiotherapy material which I have considered above.

72. Mr Stanton submitted that there was no confusion in A/Prof Ryan's first report. At that stage, it was clear that A/Prof Ryan was simply noting the problem.

73. Mr Stanton submitted that A/Prof Ryan included the lumbar spine in his first report, having noted that she was suffering from a lumbar muscle spasm on examination. He did not attempt to make any considered opinion as to causation and the predominant part of that report was concerned with what he described as the "index injury" - that is, the left knee and right Achilles tendon injury suffered on 13 September 2016.

[21] ARD page 24.

74. Mr Stanton submitted that Dr Kwa's finding that there was no altered gait was contradicted by the contemporaneous reports of the three physiotherapists. Dr Kwa's opinion was concerned with the Achilles tendon injury and Mr Stanton suggested that perhaps he did not pay as much attention to Mrs Morrisey's gait in the short time of the consultation in his rooms as did the physiotherapists, who were concerned to treat the ongoing symptoms.

75. Mr Stanton submitted that Mrs Morrisey was clearly a person of a stoic character and he referred to the parts of her statement where she said she did not like to complain and where she for a while medicated as necessary using her husband's pain medication. He submitted that it was in keeping with that approach to her problems that she tried to live with it until she finally had to see Dr Soo about them in November/December 2018.

76. The opinion of Dr Wallace hinged upon whether Mrs Morrisey had suffered from an altered gait or not, Mr Stanton argued. The underlying assumption that there had been no altered gait deprived Dr Wallace's reports of any efficacy, he submitted.

77. Mr Stanton conceded that the opinion of Dr Soo of itself did have some problems when viewed in isolation. However, the "mechanics" referred to were quite obvious, as they were described by the physiotherapy evidence, and by Mrs Morrisey herself.

78. Dealing with Mr Robison's criticism of Dr A/Prof Ryan's reports, Mr Stanton submitted that A/Prof Ryan's initial report did no more than note the back problem as discovered on examination.

79. Mr Stanton said that there was no ambiguity in A/Prof Ryan's first report, but A/Prof Ryan had been "somewhat careless" in his answer to the question from his solicitors about disabilities consequential on the injuries, and his second report clarified that issue.

80. Mr Stanton submitted that Mr Robison's criticism of Dr Ryan's survey of Mrs Morrisey's previous medical history was clearly because he had been asked about whether there was any previous injury or pre-existing condition or abnormality. This was in the context of A/Prof Ryan being asked to assess the whole person impairment arising from the injuries.

81. In response Mr Robison submitted that the evidence did not demonstrate that Mrs Morrisey was using her Cam boot for an extended period of time, and the fact that Mrs Morrisey had injuries to both lower limbs did not overcome her failure to prove causation in the absence of any complaint about back pain up until November 2018.

82. Mr Robison submitted that I would not accept Mr Stanton's submission that the reason there was no complaint over that period was because Mrs Morrisey was a stoic individual. Mr Robison noted that Mrs Morrisey had complained about her heel problem, and her stoicism was accordingly in question.

83. Mr Robison repeated his submission that A/Prof Ryan's reports did not become clear when read together, and submitted I would accept Dr Wallace over A/Prof Ryan.

Discussion

84. Section 4 of the *Workers Compensation Act 1987* (the 1987 Act) provides relevantly:

> ***"injury*** —
>
> (a) means personal injury arising out of or in the course of employment,….."

85. Section 322 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) provides relevantly:

> "(1) The assessment of the degree of permanent impairment of an injured worker for the purposes of the Workers Compensation Acts is to be made in accordance with Workers Compensation Guidelines (as in force at the time the assessment is made) issued for that purpose.
>
> (2) …
>
> (3) Impairments that result from more than one injury arising out of the same incident are to be assessed together to assess the degree of permanent impairment of the injured worker."

86. *Murphy v Allity Management Services Pty Ltd*[22] concerned the question of causation when considering the phrase "results from." In that case it related to the question of whether the need for surgery resulted from the subject injury where an intervening non-related slip and fall at Coles had also befallen the worker. DP Roche said at [57]-[58]:

> "….. 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. 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 commonsense test of causation that the treatment is reasonably necessary 'as a result of' the injury. That is, she has to establish that the injury materially contributed to the need for the surgery."
>
> (Authorities omitted).

87. The commonsense test was considered recently by DP Wood in *Ozcan v Macarthur Disability Services Limited* [23]. The learned DP set out the history of the test therein, beginning with *Kooragang Cement Pty Limited v Bates*[24] and adopted the above dicta of DP Roche, noting subsequent references to it, most lately by ADP Parker in *Le Twins Pty Ltd v Luo*[25].

88. The test requires that each case must be determined on its own facts, from the viewpoint of a common sense evaluation of the causal chain. In *Kooragang*, Kirby P (as he then was) said:[26]

> "….a point will sometimes be reached where the link in the chain of causation becomes so attenuated that, for legal purposes, it will be held that the causative connection has been snapped. This may be explained in terms of the happening of a novus actus. Or it may be explained in terms of want of sufficient connection. But in each case, the judge deciding the matter, will do well to return, as McHugh JA advised, to the statutory formula and to ask the question whether the disputed incapacity or death 'resulted from' the work injury which is impugned."

89. The respondent has resisted liability on the basis that the causal chain has been snapped by there being no material contribution from the injury of 13 September 2013 to the onset of Mrs Morrisey's back condition, which was first reported to her GP on 22 November 2018.

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[22] [2015] NSWWCCPD 49 (*Murphy*).
[23] [2020] NSWWCCPD 21 (*Ozcan*).
[24] (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*).
[25] [2019] NSWWCCPD 52 (*Luo*).
[26] At [463]-[464].

90. The Commission has been invited to find that Mrs Morrisey has not met her onus. Whilst the temporal gap between the injuries of 13 September 2013 and the first report of the back condition on 22 November 2018 is a matter of fact, to find in favour of the respondent would entail the rejection of the evidence of Mrs Morrisey as being so unreliable that I would not feel a sense of persuasion that her back was indeed injured as a consequence of the subject injuries.

91. There has been nothing put before me that would suggest that Mrs Morrisey's evidence is inherently unbelievable. She has not been using her condition as an excuse not to work, and there has been no suggestion from any medical specialist that there is any co-morbid condition such as a chronic pain condition that might have been blurring the reliability of her statement.

92. Mr Stanton submitted that Mrs Morrisey has showed herself to be a stoic individual, and I accept that view of her. She got back to work as soon as she could – indeed, on her own assessment, too early. Dr Soo said that she returned to work after 10 weeks, two weeks before Christmas.[27] I accept her evidence that by early 2017 she was struggling to mobilise, and her change of GP to Dr Soo in January 2017 is some measure of corroboration for her struggle. I accept her evidence that she was still wearing her Moon boot when she saw Dr Kwa on 8 February 2017.

93. Mr Robison claimed that Mrs Morrisey's evidence was compromised by the fact that Dr Kwa said on 28 June 2017 that she stood and walked with a normal gait. I note two problems with that submission. Firstly, Dr Kwa was not then aware of Mrs Morrisey's problems with her back. Although Mrs Morrisey said that her back symptoms developed from early 2017, I accept that she self-medicated (using her husband's medication at times) and that she worked on through her back troubles. I further accept her evidence that

> "….I am not someone who likes to complain about my problems and I already felt bad enough that I was on workers compensation for my existing injuries. I certainly felt no inclination to want to complain about my lower back injuries."

94. If Dr Kwa was unaware that Mrs Morrisey's mobility problems were causing her to develop a back condition, it is unlikely that he would in any event pay particular attention to her gait – particularly in the confines of a surgeon's rooms.

95. Secondly, of course, Mrs Morrisey has ample support from her physiotherapists, who reported mobility problems on 24 March 2017, 28 April 2017 and 3 July 2017. Whilst the first report on 24 March was unsurprising, as the surgery had been the day before, the other entries confirm her evidence regarding her mobility problems.

96. This corroborative evidence also affects the weight of Dr Wallace's opinion, which was based on Dr Kwa's comment and his own observations when he assessed Mrs Morrisey on 14 May 2019, (although not recalled until Dr Wallace responded to questions on 18 March 2020). He assumed there had been no altered gait, and therefore no connection with the subject injuries. The physiotherapists supported Mrs Morrisey's account that Dr Wallace's assumption was incorrect. Accordingly I am not assisted by his opinion.

97. A further issue with Dr Wallace's opinion is his diagnosis in any event of the back injury, which he said was caused by Mrs Morrisey's constitutional degenerative condition. Dr Wallace did not engage with whether the mobility problems described by Mrs Morrisey might have aggravated those changes. Indeed Dr Wallace did not examine or question her about her back condition, as he only saw her on 14 May 2019, which was then primarily to

[27] Dr Soo's report said "Christmas 2017" which in context was clearly a typographical error. ARD page 38.

assess her left knee and right ankle. His failure to consider the question of aggravation further compromised the validity of his opinion. I also do not accept his opinion that Mrs Morrisey would have suffered the onset of back pain that she did regardless of whether her injuries had occurred or not. No explanation was made for that statement, which I find to be highly speculative and devoid of any facts or circumstances to support it.

98. Criticisms of A/Prof Ryan's reports were made. I agree that there appeared to be a change of emphasis between his first and second reports. His first report, too, did relate that the lower back was also injured on 13 September 2013, which I reproduced in the evidence above. However, when he said that, he had been asked to report on "disability", and I am not sure that he meant to convey that impression. His opinion regarding causation did not suggest that there had been a back injury at the time of the original accident. However, A/Prof Ryan's opinion did not consider the cause of the back injury in his first report, and I note that his solicitors found it necessary to specifically draw his attention to the issue.

99. His second report gave the causal nexus as being the development of skeletal deformities primarily caused by the knee injury, although to a lesser extent by the right Achilles tendon condition. That opinion, Mr Robison submitted, did not have much in common with A/Prof Ryan's opinion in his first report, which spoke of psychological stress arising from having to do intensive physical activities with not enough staff. However, when viewed in context of A/Prof Ryan's complete answer, and particularly the terms of the question he was asked, I do not find any inconsistency, as Mr Robison was comparing apples with oranges. The question A/Prof Ryan had been answering was:[28]

> "Whether our client's employment was the main contributing factor to our client's subject injury and/or condition, subsequent incapacity and need for treatment."

100. A/Prof Ryan's answer accordingly could not be seen as an opinion as to what the cause of Mrs Morrisey's back condition had been.

101. It was submitted that Dr Soo's report should be given little weight because he did not describe the qualifications and experience he possessed regarding his opinion that the cause of onset of the back condition was the "altered mechanics" as a result of the subject injuries. However, Dr Soo was Mrs Morrisey's treating GP, and had been managing her condition since January 2017. He did confirm her history, albeit on 22 November 2018, that she had been suffering back problems (relevantly) since she suffered her injuries, which confirms her evidence.

102. I accept Mr Stanton's submission that the meaning of "altered mechanics" when looking at the evidence as a whole, related to that which Mrs Morrisey herself described, as did the physiotherapists, that the nature of her injuries caused mobility problems, or an antalgic gait, or that walking was challenging, or that she was limping. Mrs Morrisey suffered simultaneous injuries to both legs which caused the conundrum she described whereby she had to balance favouring each limb whilst she was working. I also accept her evidence that the back symptoms have continued unabated since their onset, but that rather than seek treatment, she continued to put up with them, self-medicating when she needed to "take the edge off."

103. Mrs Morrisey has shown herself to be a hard worker and, as I have already indicated, she did not change her GP until she realised that she had been perhaps permitted to return to work when she was not physically fit to do so. It is to her credit that she has been working all this time and there is nothing in any of the reports that would suggest that Mrs Morrisey was not genuine in her recollection or her symptoms.

[28] ARD page 30.

SUMMARY

104. Accordingly, the Commission finds:

(a) On 13 September 2013, the applicant suffered injuries to her right and left lower extremities.

(b) These injuries caused the applicant to adopt an altered gait, which caused the onset of a consequential condition in her lumbar spine.

105. The Commission orders:

(a) I remit this matter to the Registrar for referral to an Approved Medical Specialist for placing in the medical assessment pending list on the following bases:

(i) Date of injury: 13 September 2013

(ii) Matters for assessment:
- Left lower extremity
- Right lower extremity
- Lumbar spine – consequential

(iii) Evidence: ARD and attached documents; Reply and attached documents.