WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **2582/20**
Applicant: **KARLO MAGNO MATIAS**
Respondent: **TAMBLA LIMITED**
Date of Determination: **28 July 2020**
Citation: **[2020] NSWWCC 257**

The Commission determines:

1. The need for the applicant's right knee anterior cruciate ligament reconstruction with partial lateral meniscectomy surgery proposed by Dr MacDessi results from the work injury on 21 May 2019.

2. The respondent is to pay the applicant's section 60 of the *Workers Compensation Act 1987* expenses for the above surgery proposed by Dr MacDessi and associated costs.

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

Ross Bell
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 ROSS BELL, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A MacLeod

Ann MacLeod
A/Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mr Matias (the applicant) began work with Tambla Limited (the respondent), a software company, in 2014 as a full-time IT consultant.

2. Mr Matias had injured his right knee playing basketball in the Philippines in 2001, apparently tearing his anterior cruciate ligament (ACL). He says that he does not believe this tear was significant because he did not receive treatment and it improved to the point at which he did not notice it, even though he recommenced playing basketball.

3. On 27 August 2018, when climbing on an old cannon, Mr Matias says he misjudged the height from the ground and hurt his right knee stepping down. He consulted Dr Carl Allen who referred him to Dr Stephen Rimmer. After an MRI he was told he had an ACL tear and a meniscal tear, bone bruising and a fracture. He had five physiotherapy sessions and the symptoms in the knee subsided and he resumed normal activities without pain.

4. On 21 May 2019, Mr Matias suffered injury at work when he took a hurried step backwards on an incline. His right knee twisted and gave way, and he fell down the incline. Because of the pain and instability Dr Lin referred Mr Matias to Dr MacDessi who recommended ACL reconstruction with partial lateral meniscectomy.

5. Mr Matias made a claim for s 60 of the *Workers Compensation Act 1987* (the 1987 Act) medical expenses for right knee ACL Reconstruction surgery as proposed by Dr MacDessi. The respondent insurer denied the claim in Notices issued under s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) dated 25 October 2019. This Application to Resolve a Dispute (Application) is for s 60 of the 1987 Act medical expenses in respect of the right knee surgery recommended by Dr MacDessi.

ISSUES FOR DETERMINATION

6. The following issue remains in dispute:

    (a) Does the need for right ACL reconstruction surgery with partial lateral meniscectomy as recommended by Dr MacDessi result from the injury on 21 May 2019?

PROCEDURE BEFORE THE COMMISSION

7. The parties attended a conciliation conference and arbitration hearing on 1 July 2020. 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

Oral evidence

8. There was no oral evidence adduced.

Documentary evidence

9. The following documents were in evidence before the Commission and I have taken them into account in making this determination:

    (a) Application with annexed documents;
    (b) Reply with annexed documents, and
    (c) Application to Admit Late Documents filed by the respondent comprising report of Dr Roger Pillemer 18 June 2020.

SUBMISSIONS

10. The representatives made oral submissions at the arbitration hearing. I have taken the submissions into account, and they are referred to in the discussion below.

Does the need for the right knee ACL Reconstruction surgery proposed by Dr MacDessi result from the work injury on 21 May 2019?

Evidence

Mr Matias

11. Mr Matias's statement is referred to above under "Background". In the statement he outlines the injury to the right knee in 2001 in the Philippines when plating basketball involving a tear to the ACL. He recovered from this and resumed basketball without symptoms.

12. In August 2018, Mr Matias oulines how he hurt his right knee when stepping down from an old cannon. He had several physiotherapy sessions. He says the symptoms resolved and he resumed normal activities until the incident on 21 May 2019.

13. Mr Matias says he experienced a lot of pain after the 21 May 2019 incident and he could not stand properly. He saw Dr Lin and he recommended rest and anti-inflammatory tablets. Physiotherapy treatment was given, which did not assist. Dr Lin referred Mr Matias to Dr MacDessi who recommended ACL reconstruction surgery with partial lateral meniscectomy, liability for which has been declined by the insurer. He is on the elective surgery list at Canterbury Hospital.

14. While he can walk normally for the most part he experiences pain and instability in the knee and avoids walking, squatting and lifting. There is difficulty going down stairs and he does not run. He has been told not to lift more than 10 kilograms. When he is doing nothing the pain settles. He can drive with no issues. He continued at work as it is not physical although there is difficulty on some site visits. He has been very inactive since the injury and feels "in limbo" while waiting for the surgery.

Surgery notes – Miranda Medical Centre

15. Dr Allen's clinical note of 3 September 2018 records a consultation about the incident stepping from the cannon on 27 August 2018, "on examination MRI right knee/diagnosis mCL ACL ?/ plan MRI". The 12 September 2018 note is of "presenting symptom acl TEAR". There also a record of the referral to Dr Rimmer.

16. The notes record for 8 December 2018, on this occasion by Dr Mughal, "R knee pain due to meniscal injury and ACL tear".

17. The next entry in the surgery notes is for 30 May 2019, after the work injury, this time by Dr Lin, including “came with injury to R knee again 9 days ago/ twisted and landed into the [ground] from sitting/ past h/o R knee injury – meniscus tear with ACL full thickness tear – conservative measures”.

18. On 19 August 2019, the record is of “ongoing R knee pain/ seeing physiotherapy” with reference to “Slip at meeting and then he had twisted right knee on 21 May 2019/ Would like to have another MRI scan”.

19. On 6 September 2019, the notes record, “knee still same/needs updated certificate/needs MRI/ suitable duties at moment/Examination: acl instability r knee swollen/ reduced weight bear”.

Gymea Physio Focus

20. The notes for 21 June 2019 note a history of the incident of injury. The knee was giving way, and there was pain when Mr Matias is on his feet a lot. The notes record the history of “ R knee - ? ACL tear, no surgery (in Philippines) – years ago. 1 year ago – fell twisted knee – MRI, ACL tear, partial men tear”. Also recorded are swelling, locking and noises, with giving way “rarely”.

Sutherland Physiotherapy & Sports Clinic

21. The notes for 15 June 2019 record the right knee issues from the ‘tripping” incident a month prior. It records pain on stairs and records occasional locking, giving way, clicking and grinding.

Dr Stephen Rimmer

22. In the report to Dr Allen of 18 September 2018, Dr Rimmer is addressing the outcome of the incident stepping down from the cannon on 27 August. Dr Rimmer notes,

> “MRI scan of the right knee confirms extensive bone bruising of the lateral femoral condyle and lateral tibial plateau with a full thickness rupture of the anterior cruciate ligament and lateral meniscal tear.”

23. Dr Rimmer explains the plan of management, “In the first instance we have both agreed upon conservative management to reassess once bone bruising has settled. I will reassess his progress in a month.”

Dr Samuel J MacDessi

24. In his report to Dr Lin of 16 September 2016, Dr MacDessi reports the history consistent with the other histories, apart from having Mr Matias stepping off “rocks” rather than the cannon in August 2018,

> “Karlo is 43 years of age and works in IT. In his mid twenties he tore his anterior cruciate ligament whilst playing basketball in the Philippines. He never had it treated. Over the last year, he has had two significant episodes of instability, the first in 2018 when he was stepping off some rocks in Wollongong, and then a significant injury on 21st May of this year. He was stepping backwards on site with a client and twisted his knee. His knee buckled and he has had significant pain in his knee since. His pain is lateral and aggravated by walking, twisting and weightbearing. Occasionally his knee gives way. He has no major medical co-morbidities.”

25. Under “Management” Dr MacDessi summarises,

> “Karlo has an ACL deficient knee with recurrent instability and now quite significantly lateral meniscal pathology. Because of his instability and pain I have recommended an anterior cruciate ligament reconstruction with partial lateral meniscectomy. I have explained to him that the operation will stabilise his knee but will not slow down the progression of arthritis.”

Dr Thomas Rosenthal

26. In the report of 22 April 2020, Dr Rosenthal took a full history of the incidents on 27 August 2018 and 21 May 2019. He noted the MRI showing ACL meniscal tears and the referral to Dr Rimmer,

> “He was found to have an ACL tear and also a meniscal tear from that MRI. He said he had 5 physiotherapy sessions in 2018 following this injury and the knee symptoms completely settled. He became pain-free and had resumed all of his normal activities. He was not playing any sport at that time and denied returning to any basketball.
>
> At the time of the 2019 accident, he had no symptoms immediately before the incident that occurred. He denied any other accidents, injuries or medical conditions.”

27. Dr Rosenthal noted that the medical situation after the August 2018 incident, which included bone bruising and fracture, did not require surgery. He said it can be reasonably assumed that the symptoms did resolve given the lack of any record to the contrary. He noted that the MRI of 2019 showed the damage to the tibial plateau had healed.

28. Dr Rosenthal clarified with Mr Matias the apparent error in the history recorded by the physiotherapist which was in conflict with her notes. He said Mr Matias suffered aggravation of the knee condition in the work incident of 21 May 2019 and the employment was the main contributing factor to the aggravation. Dr Rosenthal explained,

> “There is no doubt that there was pre-existing pathology in his right knee. There is documentary evidence that he still had symptoms in the right knee in December 2018 but then there is an absence of any record indicating that he had further symptoms prior to the May 2019 incident. The injury from 2018 was treated conservatively and there was no mention of surgery in Dr Rimmer’s initial report. Thus, it can be reasonably assumed that he did recover symptomatically from the 2018 injury, but the pre-existing pathology remained within the knee.

29. Dr Rosenthal went on to say,

> “Therefore, based on the available evidence, I would accept that his employment is a substantial contributing factor to his current injury by way of a substantial aggravation of the pre-existing ACL tear and meniscal tear, in addition to aggravation of pre-existing degenerative change. With the assumption that he had resumed normal activities prior to the May 2019 incident occurring, it could not be said that this injury would have occurred anyway, had he not been at that work situation at the time of his 2019 injury.”

Dr Roger Pillemer

30. Dr Pillemer's report of 20 June 2020 covers the history as recorded elsewhere, including the bone bruising after the incident of 27 August 2018. Dr Pillemer addresses the question posed by the respondent as to "what exact injury or pathology, if any, has arisen from the subject incident on 21 May 2019?" Dr Pillemer says, "In my opinion there is no identifiable pathological change in Mr Matias' right knee as a result of the incident on [21] May 2019."

31. Dr Pillemer is of the view that "the incident on 21 May 2019 would not be regarded as a substantial contributing factor to his right knee condition." This is explained as being because Mr Matias was able to get up from the ground and continue with his telephone conference after the fall; did not consult his general practitioner until nine days afterwards; the physiotherapist records an incident at basketball "4 weeks ago"; Dr MacDessi did not send a copy of his report of 16 September 2019 to the insurer, suggesting that he did not see the incident as the cause of the ongoing symptoms.

32. Also, Dr Pillemer does not agree with Dr Rosenthal that it can be "reasonably assumed" that Mr Matias's right knee symptoms had recovered after December 2018 before the injury. However, Dr Pillemer does agree with Dr Rosenthal to some extent,

> "Dr Rosenthal goes on to note that based on the available evidence he would accept that Mr Matias' employment was a substantial contributing factor to his current injury by way of a substantial aggravation of the pre-existing ACL tear and meniscal tear, in addition to aggravation of pre-existing degenerative change. I would certainly agree with this statement apart from the fact that in my opinion his employment would not be regarded as 'a substantial contributing factor', and simply an aggravation of an underlying condition and not a substantial one at that time."

33. Dr Pillemer also disagrees with Dr Rosenthal's view that the fall in May 2019 is the main contributing factor to the aggravation of the right knee condition.

MRI studies Dr Ron Shnier, 8 August 2018 and 12 September 2019

34. The first of these studies is reported as finding anterior cruciate ligament tear; lateral meniscal tearing; bone bruising of the tibia and fibula; and osteochondral fracture of the medial tibial condyle posteriorly.

35. The report of the study of 12 September 2019 is of similar findings with the addition of "Semimembranosis bursitis".

Discussion

36. The respondent submits that the need for surgery results from the incident in August 2018 and not the work injury to the right knee on 21 May 2019.

37. The applicant does not dispute injury to the right knee in the incident on 27 August 2018, but contends that the work injury in May 2019 is a material contribution to the need for the proposed right ACL surgery.

38. In the familiar case of *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452, the Court said, "The result of the cases is that each case where causation is in issue in a workers compensation claim, must be determined on its own facts. … What is required is a commonsense evaluation of the causal chain." As has since been indicated by the High Court the "commonsense" concept does not operate at large. All the evidence must be considered, with the onus of proof on the applicant throughout.[1]

[1] *March v Stramare (E & M H) Pty Limited* [1991] HCA 12; (1991) 171 CLR 506; *Flounders v Millar* [2007] NSWCA 238.

39. Roche DP in *Murphy v Allity Management Services Pty Ltd* [2015] NSWWCCPD 49 (*Murphy*), noted the established authority[2] that there may be multiple causes of an injury, and also emphasised that the test with medical expenses is whether the injury was a "material contribution" to the need for the claimed treatment, in order for it to be accepted as a result of the injury.

40. The MRI after the August 2018 incident shows right ACL tear as well as a tear to the medial meniscus, bone bruising and fracture at the medial tibial condyle. What is significant is the treatment regime followed by Dr Rimmer, which was conservative while waiting for the bone bruising to recover. All indications are that the bruising did indeed recover, including the MRI of September 2019, and that the knee symptoms generally recovered, as Mr Matias says in his statement. There is nothing to contradict Mr Matias on this, and the absence of medical consultations about the knee after 8 December 2018 is consistent with Mr Matias's evidence. I therefore do not accept the submission for the respondent that invites speculation that there may have been other reasons, such as time pressures, for the lack of medical consultations about the knee after 8 December 2018 until the injury.

41. The respondent submits that the pathology seen in the two MRIs of Dr Schnier after both incidents are similar so it should be found that the pathology is the same and it all results from the 2018 incident. As discussed above, the treatment after the 2018 incident was conservative, and there was no indication for surgery. However, the fall of May 2019 changed this approach because there was a worsening of the right knee condition and symptoms which brought about that change.

42. There is a small discrepancy between the two MRI reports, with the healed fracture of the tibial plateu being described in the latest imaging report as being on the lateral rather than medial side, but I infer this to be a simple error.

43. The respondent relies on Dr Pillemer's view that the need for surgery would have occurred at about the same time due to the long-standing tear to the ACL. However, the evidence is that there was a work incident that altered the medical treatment imperatives and brought about the need for surgery. It was not simply the natural progression of the 2018 injury leading to a need for surgery, but a specific work injury which intervened to bring about the need for surgery.

44. Dr Pillemer otherwise does agree with Dr Rosenthal that there was aggravation in the May 2019 incident but that it was "not a substantial contributing factor". It seems to me that, as submitted for the applicant, that Dr Pillemer, while not addressing the reason for the need for surgery under the relevant principles, does allow that the work injury was an aggravation of the knee condition.

45. The respondent submits that the Sutherland Physiotherapy reference to "chronic history of R knee pain" supports the need for surgery being due to the 2018 incident. I do not accept this because it is inconsistent with the other evidence canvassed above of recovery from that event after early December 2018. As the applicant submits, there is a clear history of right knee pathology, but surgery was not required until the work injury.

46. The respondent submits that Dr MacDessi does not deal with causation. However, Dr MacDessi does explain why the surgery is necessary. He says it is "Because of his instability and pain I have recommended an anterior cruciate ligament reconstruction with partial lateral meniscectomy." This indicates clearly that Dr MacDessi sees the need for the surgery is the instability and pain that were, on the evidence, not present before the fall in May 2019. Dr Lin referred Mr Matias to Dr MacDessi because of the pain and instability and after physiotherapy had been of no assistance.

[2] See *Comcare v Martin* [2016] HCA 43.

47. I do not accept the respondent's central submission that the need for the surgery is the injury in August 2018. The right knee improved after that incident. Dr Rimmer was correct in his approach that it was best to wait for the bone bruising to heal. That it did is consistent with the recovery outlined by Mr Matias. There is no doubt that at the time of the work injury there was significant right knee pathology, and that is not in dispute. However, Mr Matias found he was able to perform his work and other activities without knee pain.

48. I note that Mr Matias was not examined by Dr Pillemer for his report which is based on the papers, and as a result Mr Matias could not be questioned about the issues. For example, Dr Rosenthal was able to clear up the physiotherapist's mistake in the history regarding a non-existent basketball incident a month beforehand, whereas Dr Pillemer was left to speculate about that. Dr Pillemer was also unable to question Mr Matias about the key issue of the recovery following the cannon incident of August 2018.

49. Dr Pillemer says the fact that Mr Matias was able to get up from the ground after the May 2019 fall and continue his telephone conference indicates the injury was not serious. Similarly Dr Pillemer says the fact that Mr Matias did not consult his general practitioner for nine days after the fall indicates it was not serious. I do not accept these opinions, as the evidence is of pain and instability from the time of the fall, and Dr Matias says in his statement Mr Matias attended his general practitioner when the symptoms did not settle. The inability of Dr Pillemer to explore these assumptions with Mr Matias directly means in my view the opinions are not as soundly based as they otherwise might be.

50. For these reasons, I prefer the opinion of Dr Rosenthal supported by Dr MacDessi to that of Dr Pillemer.

51. The evidence all points in the same direction. Mr Matias had a right knee injury in 2001, apparently a tear of the ACL, which did not require treatment, and he was able to engage with normal activities, including basketball. This incident is of little importance in the current issue. The awkward step from the cannon in August 2018 caused damage to the knee including bone bruising, a fracture of the tibial plateau and meniscal tearing. Conservative treatment was followed by Dr Rimmer with no suggestion of surgery. The knee recovered very well after the healing of the bone bruising of the tibia and fibula and tibial fracture. The pathology of the torn ACL and meniscus remained, but Mr Matias was, following the consultation with the general practitioner on 8 December 2018, able to go about his activities unhindered and without treatment. Unfortunately, the fall of 21 May 2019 seriously interrupted this satisfactory medical situation, causing instability and pain of such a degree that Dr MacDessi concluded that surgery is now necessary.

52. A "commonsense" approach leads inevitably to the conclusion that the aggravation of the right knee condition on 21 May 2019 is a material contribution to the need for proposed surgery.

53. For these reasons I find that the need for the claimed right knee surgery results from the injury of 21 May 2019. Mr Matias is entitled to s 60 of the 1987 Act expenses associated with the surgery proposed by Dr MacDessi.

SUMMARY

54. The need for the surgery proposed by Dr MacDessi results from the injury in the course of Mr Matias's employment with the respondent on 21 May 2019.