WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1037/20**
Applicant: **Simo Zjalic**
Respondent: **Canterbury Bankstown Council**
Date of Determination: **11 August 2020**
Citation: **[2020] NSWWCC 271**

The Commission determines:

1. Award for the respondent in relation to the allegation that the applicant suffers from a consequential lumbar spine condition from the agreed work-related injury to his left knee on or about 4 December 2011.

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

Josephine Bamber
Senior 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 JOSEPHINE BAMBER, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mr Zjalic was employed by the respondent, Canterbury Bankstown Council, as a security guard from 2011.

2. In these proceedings Mr Zjalic alleges that on or about 4 December 2011 he sustained injury to his left knee and about six months later he developed symptoms and restriction of movement in his lumbar spine brought about by the abnormal gait pattern he has adopted from his knee injury.

3. The respondent does not dispute that Mr Zjalic sustained the injury to his left knee, but it does dispute that he sustained a lumbar condition as a consequence of his left knee injury.

4. The following amendments were made to the Application to Resolve a Dispute (ARD):

   (a) The date of injury wherever it appears was amended to "on or about 4 December 2011";
   (b) In the injury description in line 7 the word "back" was deleted, and "knee" inserted; and
   (c) Under the heading "Permanent Impairment", "lumbar spine" was added to the systems claimed.

5. A further amendment was not raised at the Arbitration Hearing, but clearly needs to be made in that against "percentage of pain and suffering" there appears "11" and against the "amount claimed for pain and suffering" the amount "$22,480" appears. Both of these appear to have been inserted by typographical errors because the percentage and amount mirrors the claim made for permanent impairment. There can be no separate claim for pain and suffering because section 67 of the *Workers Compensation Act 1987* (the 1987 Act) has been repealed, and Mr Zjalic made his lump sum claim on 30 October 2018[1].

PROCEDURE BEFORE THE COMMISSION

6. This matter was listed for conciliation conference/arbitration hearing on 30 June 2020, which was conducted by telephone. Mr Bill Carney, counsel, instructed by Mr Michael Lau, solicitor, appeared for Mr Zjalic, who was present. The respondent was represented by Mr David Saul, counsel, instructed by Ms Jessica Maiuolo, solicitor and Ms Annette Celle from the employer.

7. 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

8. 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.

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[1] ARD form p 7.

Oral Evidence

9. There was no oral evidence. Both counsel made oral submissions, which were sound recorded. A copy of the recording is available to the parties.

FINDINGS AND REASONS

10. The ARD has 573 pages of annexures, most of which relate to other conditions suffered by Mr Zjalic and are irrelevant to the left knee injury, and there are many duplicates of the records.

11. The parties agree that nowhere in the treating material is there a reference to the lumbar spine or back.

12. It was submitted by Mr Zjalic's counsel that he had sustained a significant injury to his left knee. In support of this submission, counsel pointed to the circumstances in which Mr Zjalic injured his left knee and the treatment he had for the left knee injury.

13. In his statement dated 29 April 2019[2] Mr Zjalic describes this incident and the treatment he had thereafter. On or about 4 December 2011 Mr Zjalic was working as a security guard for the respondent. He ran towards a director of the respondent to assist him as he was involved in an argument with two people. The area in which Mr Zjalic ran had a drop of about a metre and he did not anticipate this and landed awkwardly on his left knee.

14. He was taken to Liverpool Hospital that day and his left knee was swollen. It was bandaged and he was discharged to the care of his general practitioner, Dr Kris Tomka. Mr Zjalic relates that he was referred for an MRI and to Dr Matthew Giblin, orthopaedic surgeon, who recommended he undergo debridement of the left knee. On 1 May 2012 he had a left knee arthroscopy at which a horizonal tear of his meniscus was treated. Mr Zjalic recounts that he had physiotherapy treatment thereafter which involved soft tissue massage of the scar, quadricep strengthening exercise, an ultrasound and the wearing of a soft knee brace for heat retention. He states that he stopped receiving physiotherapy in August 2012 following improvement in his knee.

15. Mr Zjalic states at [20] of this statement that in or around July 2012 he experienced episodes of swelling and pain in the knee, which made weight bearing difficult on his left knee. He says he was in pain. He makes reference to undergoing a further MRI scan of his knee in July 2012.

16. He states that he continues to experience flare ups of pain and he has difficulties with kneeling, squatting, climbing stairs and running. He says he uses a knee guard on a regular basis and this provides his knee with stability.

17. Mr Zjalic states he started working with Southern Cross Security in November 2017 and he worked part-time doing static guard work at the Coles Distribution Centre at Eastern Creek. At [30] Mr Zjalic says he continues to experience pain in his left knee, lower back and left thigh. He does not actually refer to altered gait but says he experienced poor balance owing to instability and he cannot kneel, run, squat or climb. He says he cannot stand for more than 10 minutes at a time. However, he deals in more detail with his back as follows:

> "[36] I first began to experience pain in my back within the first 1 year of my injury to my knee. Owing to the pain in my knee, I have had to change the way I walk. I have to limit the pressure that I place on my left knee. Owing to this I began to experience pain, more so on the left side of my back.

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[2] ARD p 10 (note in the index, the date of the statement is incorrectly written as 29/04/2015)

[37] I can feel the pain radiating from my knee all the way up to the left side of my lower back and to the middle. At first it felt like a sudden and stabbing pain to my back. However, over time, the intensity of it has reduced and it is now a constant static ache in my back.

[38] My lower back is tender on the left side. Bending forwards and backwards aggravates the pain I experience. Bending to the right is also restricted owing to the pain and tightness on the left side.[3]"

18. Mr Zjalic also states that he has consulted his general practitioner as a result of his back pain, but he has not referred to see any specialists for the pain in his back. He does not provide any dates when he attended on his doctor for his back. The clinical records that are available from Dr Tomka and his medical certificates do not refer to Mr Zjalic's back.

19. Mr Zjalic states in his first statement that his knee has been suddenly giving way and he has fallen to the ground. In his second statement dated 9 December 2019, Mr Zjalic states that towards the end of 2012 he started to notice increasing symptoms in his back. He says in hindsight he believed this back pain was due to the change in the way he walked to minimise the pain he felt in the knee. He adds "However, at the time I did not seek substantive medical attention due to my doctor not recommending any specific treatment or referrals.[4]"

20. Mr Zjalic says that following the onset of pain in his back his medication consumption increased steadily. He does not have records to corroborate this but has attached his bank statements which refer to purchases from pharmacies. However, there is no itemisation of the products purchased.

Dr Matthew Giblin

21. Dr Giblin reported to Dr Tomka on 22 March 2012 noting that Mr Zjalic had pain and swelling in the left knee and that he had difficulty walking, squatting and climbing stairs. He noted that an MRI scan of the left knee revealed a tear of the posterior horn of his medial meniscus and recommended a diagnostic arthroscopy[5]. He reported to Dr Tomka after the surgery and said there was quite an extensive horizontal tear of the meniscus, which was repaired. Dr Giblin said the rim was quite stable after this procedure[6].

22. Patrick Cormack of Prime Physiotherapy wrote to Dr Giblin on 25 May 2012 noting that Mr Zjalic's recovery had been impressive and that he was mobilising well, and he reported very little pain. It was recommended that he return to work with a 10 to 15 minute break after every 2km walking patrol and that no further physiotherapy should be necessary[7].

23. On 28 May 2012, Dr Giblin told Dr Tomka that Mr Zjalic has done well following the surgery[8].

24. On 6 July 2012, Dr Giblin informed Dr Tomka that Mr Zjalic had recent episodes of swelling and pain in his knee, which he attributed to chondromalacia patellae[9].

25. An MRI scan was performed on 6 July 2012 and it was reported that the persisting high signal within the body/posterior horn of the meniscus may represent scarring of the previous tear. It was also queried if there was a focal grade 2 chondral defect in the lateral patellar facet, due to debridement of the prior chondral fissuring[10].

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[3] ARD p 13.
[4] ARD p 14.
[5] ARD p 34.
[6] ARD p 36.
[7] ARD p 56.
[8] ARD p 38.
[9] ARD p 39.
[10] ARD p 41.

26. On 13 August 2012, the physiotherapist again reported to Dr Giblin that there seemed to be some restriction of the medial glide of the patellae and there appeared to be some adhesion of the lateral portal to the skin. It was noted that a knee brace was provided and that Mr Zjalic said his knee had been perfect and he was very happy with the outcome of the surgery[11].

Dr Bodel

27. Dr Bodel took a history that after the surgery to his left knee that Mr Zjalic has had flare ups of pain and difficulty kneeling, squatting or climbing and he cannot run. Under "current complaints" is added poor balance. In his examination findings Dr Bodel noted that Mr Zjalic walked without a limp, when standing he cannot fully extend his left knee, there was tenderness over the medical joint line of the left knee but no effusion and no ligamentous laxity. He found tenderness on palpation at the lumbosacral junction on the left side with guarding. Dr Bodel also noted restricted range of movement in Mr Zjalic's back. Dr Bodel expresses the view that there has been gradual onset of back pain because of the abnormal gait pattern[12]. Dr Bodel assessed Mr Zjalic as having 4%WPI for his left lower extremity and 7% WPI for his lumbar spine.

Dr Powell

28. Dr Powell, orthopaedic surgeon, issued a report for the respondent dated 31 December 2018[13]. The doctor has a history of the left knee injury, the surgery and of Mr Zjalic's subsequent employment. He noted that Mr Zjalic reports ongoing symptoms involving the left knee including intermittent pain over the anterior and to a lesser extent the anterolateral aspect of the knee. He records that Mr Zjalic said he can kneel but not run and there is no swelling or clicking but that he reported subjective instability and locking flexion. He adds:

> "More recently he has also developed symptoms in the lower back, though without any specific precipitating incident. He reports intermittent sharp pain in the left paraspinal region which occurs on a daily basis. Pain extends down the posterolateral aspect of the left leg. There is no paraesthesia or pins and needles. He is aware of some stiffness and restriction in range of motion."

29. On examination of the left knee, Dr Powell said Mr Zjalic had a normal gait and there was no antalgic component. He found some minor diffuse swelling. He noted there was tenderness to palpation over the anteromedial and anterolateral joint lines. He found that the knee was ligamentously stable.

30. In relation to the lumbar spine, Dr Powell found a reduction in the normal lordosis and diffuse tenderness in the lumbar spine and there was some mild restriction of motion.

31. In his diagnosis Dr Powell stated that Mr Zjalic's left knee remains mildly symptomatic with minor tenderness and swelling. In relation to the back Dr Powell opined:

> "More recently Mr Zjalic has also complained of the development of some lower back symptoms which most likely reflect some underlying spondylitic change, though there is no evidence that this was the result of any injury sustained in the course of his employment.
> …

[11] ARD p 57.
[12] ARD p 30.
[13] Reply p 36.

> Mr Zjalic's gait today was unremarkable. The pathology identified in the left knee is fairly minor. He was subsequently able to resume his full pre-injury duties. Any minor alteration in gait associated with his left knee symptoms would not be sufficient to cause any structural pathology in the lumbar spine. As far as I am aware he has not undergone any investigations of the lumbar spine nor specific treatment. From a clinical perspective, his current lower back symptoms most likely represent some minor spondylitic changes. There is no evidence that his employment represents the main contributing factor in either the development or aggravation of any degenerative process involving the lumbar spine.
>
> …
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> I do not agree with Dr Bodel's opinion in relation to the lower back injury. I do not believe there is sufficient evidence to conclude that Mr Zjalic has suffered any significant lower back injury as a result of injury sustained in the course of his employment."

Mr Zjalic's submissions

32. Mr Zjalic's counsel submitted that it is evident from Dr Giblin's reports that after the surgery Mr Zjalic had problems with swelling in the left knee and that this is consistent with Mr Zjalic's account in his statement that he had difficulties with kneeling, squatting, climbing stairs and running. Counsel also drew attention to Mr Zjalic's evidence that he bought over the counter pain medication at the pharmacy to treat his back pain.

33. It was submitted that while Mr Zjalic did not see his doctors on a regular basis or when he did he did not mention his back pain or that he may have on one occasion, but it is not documented. It was argued that the physiotherapist's reports add some credence to Mr Zjalic's contention that he had some difficulty with the use of his knee.

34. Mr Zjalic's counsel argued that Dr Bodel notes that Mr Zjalic has poor balance and cannot kneel, squat or climb. He argues that this evidence is significant because it shows there was a change in Mr Zjalic's gait. He submitted that Dr Bodel found problems still persist in the left knee and this was six years after the work accident. It was submitted that Dr Bodel directly linked the back pain with the abnormal gait pattern.

35. Counsel also referred to Dr Powell's report and submitted that there does not seem to be a dispute as to the facts concerning the left knee injury. However, he submitted that Dr Powell has not considered the prolonged history of the left knee pain caused by the accident. He noted that Dr Powell just states that Mr Zjalic had recently developed lower back pain without any specific precipitating incident.

36. It was submitted that Dr Powell has not considered the effect of Mr Zjalic's gait on the development of back pain. It was argued that Dr Powell stated that the left knee symptoms are fairly minor, but counsel submitted that the reality is Mr Zjalic has had knee pain for six years, so the word minor does not reflect the chronic nature of the knee pain. Also, it was submitted that Dr Powell referred to Mr Zjalic being able to resume his full duties and counsel said that was not accurate, because most of the time he was working part time or on suitable duties.

37. Mr Zjalic's counsel also observed that Dr Powell considers that the back symptoms might be due to a spondylolisthesis whereas Dr Bodel approaches that matter on the basis that Mr Zjalic's back was normal before the injury. Counsel submitted that even on Dr Powell's diagnosis, it does not rule out that the altered gait aggravated underlying spondylolisthesis condition. So, it was argued that Dr Powell's opinion should not be accepted as he has not taken into account the inability to kneel, squat, climb and the poor balance and this is a deficiency in Dr Powell's report. It was argued that Dr Bodel's report should be accepted and that it is fortified by Dr Giblin's observations of Mr Zjalic's knee. In summary, Mr Zjalic's counsel sought for the Commission to find that Mr Zjalic suffered a consequential condition in his lumbar spine as a result of the work related left knee injury.

Respondent's submissions

38. The respondent's counsel submitted that Mr Zjalic has not discharged his onus of proof to establish that his lumbar condition is caused by the injury to his left knee. It was noted that the injury to the left knee was in 2011 and there is no documented reference to him suffering back pain until 2018 when he was examined by Dr Bodel and then Dr Powell.

39. It was argued that it may be that Mr Zjalic may have had at some point of time some difficulties walking. But it was submitted that difficulties walking does not necessarily assume there is altered gait. It was submitted apart from the statements of Mr Zjalic the only support is from Dr Bodel. It was further submitted that Dr Bodel's opinion is grossly deficient relying on principles in *Makita (Australia) Pty Ltd v Sprowles*[14] and *Hancock v East Coast Timber Products Pty Ltd*[15]. It was submitted that Dr Bodel does not state when the altered gait came on, how it came on, for how long it has been present and why it would lead to left-sided back pain radiating down the left thigh. The respondent's counsel emphasised that Dr Bodel found that Mr Zjalic walks without evidence of a limp. It was submitted that Dr Bodel's opinion is a very poorly presented opinion without any foundation at all.

40. Reference was made to the decision by Wood DP in *Arquero v Shannons Anti Corrosion Engineers Pty Ltd*[16]. In *Arquero* there was no mention of the left knee in medical records because the worker had not sought treatment for it. However, Wood DP found that there was evidence in the historical reports about the problems in the work injured right knee and it was these problems that presented the factual basis upon which the consequential condition relied. These factors were the right knee high level tibial ostomy, altered gait, limping and over-pronation and a deteriorating condition in the right knee. Also, it was observed that the worker's medico-legal doctor was not the first to report symptoms in the left knee, because Dr Breit had earlier taken such a history. The respondent's counsel referred to [142] of *Arquero* wherein Wood DP found the worker's medico-legal report provided a "sufficiently rational explanation for the onset of left knee symptoms". It was argued by the respondent's counsel that in Mr Zjalic's case Dr Bodel had not provided such an explanation.

41. The respondent's counsel also took issue with Mr Zjalic's counsel's submissions about Dr Powell's opinion. It was argued that Dr Powell, unlike Dr Bodel, actually considered in some detail Mr Zjalic's back complaints. He also points out that Dr Powell has a history from Mr Zjalic that the back symptoms came on "recently", whereas Mr Zjalic in his statements said back pain came on in 2012. The respondent's counsel submitted that one cannot even tell from Dr Bodel's report what Mr Zjalic's gait pattern was. It was submitted that Mr Zjalic cannot establish the medical causation issue simply from his own mouth, and cogent medical support is lacking. It was submitted that Dr Powell found Mr Zjalic had a normal gait and there was no antalgic component. It was argued that this was powerful evidence and, even if Mr Zjalic feels in his own mind he has altered gait, that has not been found on examination by Dr Powell or Dr Bodel.

42. It was submitted that Mr Zjalic cannot discharge his onus of proof, particularly without treating medicine and a more detailed report from Dr Bodel. The respondent argues that Dr Bodel has just mouthed words such as altered gait and that no matter how low the bar is to establish a consequential condition it is not low enough for Mr Zjalic to pass in his case.

43. The parties agreed at the outset that if Mr Zjalic does not succeed in establishing a consequential lumbar condition, there cannot be a referral to an Approved Medical Specialist because his assessment for the left lower extremity is lower than the threshold under section 66 of the 1987 Act. Therefore, the respondent seeks an award in its favour in relation to the lump sum claim.

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[14] (2001) 52 NSWLR 705

[15] [2011] NSWCA 11; 8 DDCR 399; 80 NSWLR 43.

[16] [2019] NSWWCCPD 3

Determination

44. While every case is determined on its own facts, the decision in *Arquero* is instructive as to the relevant evidence to be considered when determining a consequential condition. In *Arquero* the worker had not sought treatment for his consequential condition, and it was held that the absence of records about the alleged consequential condition in the treating doctors' notes was not determinative. What was examined closely by Wood DP was the evidence about the work-related injury to the right knee. These symptoms formed the factual basis upon which the medico-legal expert evidence was based about the causal connection of the alleged consequential condition in the other knee.

45. In Mr Zjalic's case his counsel pointed out the evidence about his left knee and how he had ongoing symptoms in the knee after the surgery to illustrate that his knee was compromised and to give support to Mr Zjalic's statements about his ongoing knee symptoms. However, a difficulty in Mr Zjalic's case is the paucity of medical evidence about his left knee from mid-2012 until he sees Dr Bodel in 2018. The physiotherapy reports indicate that on 25 May 2012 Mr Zjalic was mobilising well, and he reported very little pain. In July 2012 Dr Giblin informed Dr Tomka that Mr Zjalic had recent episodes of swelling and pain in his knee, which Dr Giblin attributed to chondromalacia patellae and in August 2012 the physiotherapist thought there was some restriction of the medial glide of the patellae and there appeared to be some adhesion of the lateral portal to the skin. He provided a knee brace and the physiotherapist recorded that Mr Zjalic said his knee had been perfect and he was very happy with the outcome of the surgery. There is no further treating evidence before the Commission about the left knee.

46. There are some clinical notes from Dr Tomka in the ARD covering from 11 January 2016 to 23 March 2018 but the only reference to the left knee is on 2 March 2018 which just says "report for injury to left knee in 2012"[17]. However, there is no report from Dr Tomka before the Commission.

47. Because of the paucity of medical evidence from mid-2012 until 2018 it is difficult to ascertain the factual basis upon which an expert could base his opinion about the state of the left knee and whether there has been over this period altered gait due to the knee injury.

48. Added to this paucity of evidence, the respondent's counsel argues that Dr Bodel does not give sufficient detail when providing his opinion to show his reasoning process. I accept this submission. I find that this is a further problem in Mr Zjalic's case especially because Dr Bodel says that Mr Zjalic has no limp. I accept the respondent's submission has force, that Dr Bodel does not state when the altered gait came on, how it came on, for how long it has been present and why it would lead to left-sided back pain radiating down the left thigh. On examination Dr Bodel found there was tenderness over the medical joint line of the left knee, but he also found no effusion and no ligamentous laxity. In his conclusion, he states baldly that Mr Zjalic has lumbar symptoms because of altered gait, but I find that his report is deficient due to an absence of reasoning. He does not explain how the gait is altered. I find that I cannot place weight on Dr Bodel's conclusions because of this lack of reasoning.

49. The facts in *Arquero* can be distinguished from those present in Mr Zjalic's matter, because the medico-legal opinion in that case was found to have cogent reasoning and there was ample evidence about the state of the injured knee. In Mr Zjalic's case both these factors are wanting. Mr Zjalic has attempted to bolster his case by pointing to his self-medication for lumbar pain. The bank statements, however, do not confirm that he was purchasing medication from the pharmacy. Even if he was making such purchases, that does not establish that any back pain was due to altered gait from his knee injury.

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[17] ARD pp 43 and 217.

50. Mr Zjalic had the left knee arthroscopic surgery on 1 May 2012. In his statements has given evidence that thereafter he had overall significant improvement in his symptoms. This is borne out by the physiotherapy records and that of Dr Giblin. He adds that in July 2012 he had episodes of swelling and pain in his knee and that he continues to experience flare ups of pain and he has difficulties with kneeling, squatting, climbing stairs and running. He refers to wearing the knee guard to provide his knee with stability. He says he has poor balance owing to instability. He says he has consulted his general practitioner about his knee and has been recommended to see Dr Giblin for a further opinion in relation to his knee. This appears in his statement dated 29 April 2019. However, he has not placed before the Commission any medical evidence to this effect, or about his knee, from his general practitioner or Dr Giblin post-dating July 2012.

51. Mr Zjalic's counsel was critical of Dr Powell's opinion because he did not properly consider the thesis that the back pain was causally related to the knee injury. However, Dr Powell found that Mr Zjalic did not have an antalgic gait, and, in this regard, his finding is consistent with that of Dr Bodel, that there was no limp. As the respondent submitted, Mr Zjalic has the onus of proof. So, even if there is some deficiency in Dr Powell's approach it does not necessarily follow that Mr Zjalic succeeds unless there is other persuasive evidence before the Commission which can be accepted to form the basis of a determination in his favour.

52. The legal test of causation is that discussed by the Court of Appeal in *Kooragang Cement Pty Ltd v Bates*[18] wherein Kirby P (as his Honour then was) said (at 461G) (Sheller and Powell JJA agreeing) that "[f]rom the earliest days of compensation legislation, it has been recognised that causation is not always direct and immediate". After referring to earlier English authorities, his Honour added (at 462E):

> "Since that time, it has been well recognised in this jurisdiction that an injury can set in train a series of events. If the chain is unbroken and provides the relevant causative explanation of the incapacity or death from which the claim comes, it will be open to the Compensation Court to award compensation under the Act."

53. His Honour said at 463–464:

> "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. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase 'results from', is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is a common sense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation. In each case, the question whether the incapacity or death 'results from' the impugned work injury (or in the event of a disease, the relevant aggravation of the disease), **is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions**. Applying the second principle which Hart and Honoré identify, 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." (emphasis added)

[18] (1994) 35 NSWLR; (1994) NSWCCR 796, *Kooragang.*

54. Deputy President Roche's decision in *Kumar v Royal Comfort Bedding Pty Ltd*[19] is authority for the proposition that *Kooragang* is the test to determine if a consequential condition arises from a work injury.

55. *Kooragang* refers to "a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions". However, in Mr Zjalic's case it is difficult on the evidence before the Commission to make a sound decision concerning the underlying factual matters to form the basis of a determination about whether there is a causal connection between back symptoms and the knee injury.

56. In *Nguyen v Cosmopolitan Homes (NSW) Pty Limited*[20] McDougall J stated at [44]:

> "A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336. His Honour's statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691 at 712."

57. Applying the principles in *Nguyen* to Mr Zjalic's case, I find that I cannot be satisfied as a factual matter that he has an altered gait. I find it is significant that Dr Bodel finds he has no limp and Dr Powell finds he had a normal gait and there was no antalgic component. I do not feel the actual persuasion of the existence of that fact from the medical evidence that is before the Commission. I find that Dr Bodel needed to do more than make a bald assertion that the lumbar symptoms were due to altered gait, as he needed to explain in what way the gait was altered, especially in light of his clinical finding that there was no limp. I also find that the existence of an altered gait, and the effect of that upon the lumbar spine, are matters that require medical evidence. I find that it is not sufficient for Mr Zjalic to surmise, in hindsight, that the gradual onset of back pain was due to a change in the way he walked.

58. Because of the abovementioned reasons, I find that Mr Zjalic has not discharged his onus of proof that his lumbar symptoms are as a consequence of his injured left knee. Accordingly, I find an award for the respondent in relation to the lumbar spine. As the assessment of permanent impairment for the left knee by Dr Bodel is 4%WPI, the threshold in section 66 of the 1987 Act is not reached and so a referral to an Approved Medical Specialist cannot be made.

[19] [2012] NSWWCCPD 8.
[20] [2008] NSWCA 246.