WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **6153/20**
Applicant: **Phillip Norris**
Respondent: **Shire Professionals Pty Ltd**
Date of Determination: **11 February 2021**
Citation No: **[2021] NSWWCC 46**

The Commission determines:

1. The applicant sustained a consequential condition at the lumbar spine as a result of the injury to his left knee on 1 July 2013.

The Commission orders:

1. The matter is remitted to the Registrar for referral to an Approved Medical Specialist for assessment as follows:

    Date of injury: 1 July 2013

    Body parts: Left lower extremity (knee)
    Skin (scarring)
    Lumbar spine

    Method: Whole Person Impairment

2. The materials to be referred to the Approved Medical Specialist are to include the documents admitted in these proceedings together with this Certificate of Determination and accompanying statement of reasons.

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

Rachel Homan
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 RACHEL HOMAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mr Phillip Norris (the applicant) was employed as a landscaper by Shire Professionals Pty Ltd (the respondent). On 1 July 2013, the applicant injured his left knee when he slipped whilst pushing a wheelbarrow up a ramp and fell, impacting the left knee on the ground.

2. The applicant made a claim for compensation and liability for the left knee injury was accepted by the respondent's insurer.

3. On 2 April 2020, the applicant made a claim for lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) in reliance on an assessment of permanent impairment by Dr Andrew Porteous, dated 6 March 2020. Dr Porteous assessed the applicant as having 35% whole person impairment (WPI) of the left lower extremity (knee), skin and lumbar spine as a result of the injury on 1 July 2013.

4. On 20 July 2020, the insurer issued a notice pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) disputing liability for the claimed consequential lumbar spine condition.

5. The present proceedings were commenced by an Application to Resolve a Dispute (ARD) lodged in the Commission on 22 October 2020. The applicant seeks lump sum compensation in accordance with the assessment of Dr Porteous.

PROCEDURE BEFORE THE COMMISSION

6. The parties attended a conciliation conference and arbitration hearing conducted by telephone on 18 January 2021. The applicant was represented by Mr Simon Hunt of counsel instructed by Mr Nathan Job. The respondent was represented by Mr Tony Baker of counsel instructed by Ms Katie Farrar. A representative from the insurer was also present.

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.

ISSUES FOR DETERMINATION

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

    (a) whether the applicant has sustained a consequential lumbar spine condition as a result of the left knee injury of 1 July 2013; and

    (b) the degree of permanent impairment resulting from the injury.

EVIDENCE

Documentary Evidence

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

(a) ARD and attached documents;

(b) Reply and attached documents;

(c) document attached to an Application to Admit Late Documents lodged by the respondent on 11 January 2021; and

(d) documents attached to an Application to Admit Late Documents lodged by the applicant on 18 January 2021.

10. Neither party applied to adduce oral evidence or cross examine any witness.

Applicant's evidence

11. The applicant's evidence is set out in a written statement made by him on 20 October 2020.

12. On 1 July 2013, the applicant was applying mulch to a raised garden bed. In order to get the mulch into the garden bed, which was approximately 1.5 m high, the applicant was using a timber garden sleeper as a ramp on which to push up a wheelbarrow. As the applicant neared the top of the ramp, his right foot slipped and he lost balance and fell, impacting his left knee on the ground. The applicant felt immediate pain and discomfort in his left knee.

13. The following day, the applicant noticed his knee was swollen and his pain was significant. There was a significant restriction of movement in the knee. The applicant attended his general practitioner, Dr Sharon Fisher, and was advised to take time off work and attend a physiotherapist. The applicant had approximately two weeks off work before returning on light duties.

14. The pain and discomfort in the applicant's left knee failed to resolve and he was referred for an MRI, which was performed on 23 August 2013. The MRI revealed a medial meniscus tear and the applicant was referred to orthopaedic surgeon, Dr Paul Hitchen. Dr Hitchen performed a meniscectomy on 10 October 2013. Following the surgery, the applicant underwent conservative treatment in the form of physiotherapy twice per week for several weeks.

15. The applicant's pain failed to settle, and the knee felt unstable and would often give way. The applicant underwent further investigations and decided to obtain a second opinion from Dr Simon Tan in around January 2014. The applicant continued with conservative treatment under Dr Tan. On about 26 February 2014 the applicant fell on a set of stairs as a result of his left knee giving way.

16. The applicant moved to Queensland and purchased a lawnmowing business which would allow him to set his own hours and work to his restrictions. In or around 2017, the applicant began to notice symptoms in his left knee extending into his left calf as well as pain in his right hip and lower back. The applicant's general practitioner was Dr Adrian Kenny at the time.

17. The applicant was referred to Dr Jeremy Bartlett. The consultations with Dr Bartlett primarily focused on the knee injury but the applicant would occasionally mention the symptoms in his right hip and lower back.

18. Following further investigations, Dr Bartlett recommended a left tibial osteotomy, which was approved by the insurer and performed on 5 July 2018. The applicant was required to wear a splint for approximately six to seven weeks after the surgery and attended physiotherapy for almost three months.

19. Despite the osteotomy, the pain and discomfort in the knee continued and the applicant had developing back pain. On 25 July 2019, the applicant underwent a left knee replacement approved by the insurer. The applicant remained in hospital for approximately three weeks and continued with conservative treatment afterwards.

20. The applicant said his current symptoms and disabilities included pain and discomfort in his lower back as a result of altered body mechanics. The applicant said that as a result of the ongoing symptomology in his lower back, he had been referred for radiological investigations by Dr Bartlett.

Treating medical evidence

21. The treating medical evidence before the Commission includes the clinical records of the applicant's general practitioners and reveals a history of treatment following the left knee injury that is consistent with the applicant's evidence.

22. The records of Morayfield 7 Day Medical Clinic include a functional capacity assessment from Rehabilitation Services for the insurer dated 19 March 2015. That report recorded the following observations with regard to the applicant's posture:

> "No abnormalities in posture were observed during walking, sitting and standing. Mr Norris was observed to walk with an antalgic gait during the carrying task, which was more predominant when carrying with his left upper limb."

23. A clinical note recorded by general practitioner, Dr Adrian Kenny on 28 October 2016 noted,

> "Has had more pain in L knee
> Taking more weight on R side
> Consequent pain in hips and R knee"

24. On 14 January 2017 and another general practitioner at the same practice, Dr Sami Tadros, recorded symptoms in the lumbar spine:

> "sore back since last night ... no history of trauma .... tender all over"

25. On 20 January 2017, Dr Kenny referred the applicant for a CT scan of the lumbar spine, noting:

> "1. Past week or so had· LBP.
> No specific injury, just felt something in his back as he got out of a recliner
> Examination: Tender midline L3. Loss of lordosis. SLR 20 deg
> Do CT
>
> 2. Workcover cert – ISQ"

26. The CT scan was performed on 23 January 2017. The report of the scan concluded that it showed:

> "Mild lumbar spondylotic change at the LS/S1 level with narrowing of the central canal."

27. Dr Kenny noted that CT scan showed minor degenerative changes and recorded that the applicant's lumbar pain was gradually settling in a consultation on 27 January 2017.

28. Dr Kenny referred the applicant to Dr Bartlett on 5 April 2018 following reports of increasing left knee pain.

29. On 10 April 2018, Dr Bartlett wrote to Dr Kenny noting that the applicant had undergone a new MRI and plain x-rays of his left knee. Dr Bartlett noted,

> "The MRI shows that the medial compartment is significantly worn with bone-on-bone articulation."

30. Dr Bartlett diagnosed the applicant as having medial compartment osteoarthritis consequent upon a medial meniscus tear five to six years ago consistent with the stated mechanism of injury. Dr Bartlett recommended that the applicant undergo an arthroscopy to assess the knee and high tibial osteotomy. That procedure was performed on 5 July 2018.
Dr Bartlett reported to Dr Kenny on 6 July 2018:

> "He will be non-weight bearing in a splint and on crutches for six weeks before we can commence his mobilisation."

31. On 14 August 2018, Dr Bartlett reported to the applicant's physiotherapist that the applicant could start to mobilise out of the splint and take full weight as tolerated. Dr Bartlett reported that:

> "He will need some gait training and he can build up gradually over the next few weeks."

32. On 12 February 2019, Dr Bartlett reported to Dr Kenny that the applicant had explained that his knee continued to be painful all of the time and felt it was worse than prior to the surgery.

33. On 5 March 2019, the applicant again complained of constant pain in the medial side of the knee worse with any standing or walking. Dr Bartlett discussed a total knee replacement and sought approval for the procedure from the insurer. The left total knee replacement was performed on 25 July 2019.

34. On 29 August 2019 the applicant reported to Dr Bartlett that his knee was still painful, although the applicant was back working as a gardener. The applicant was trialled on tramadol.

35. In September 2019, Dr Kenny noted that the applicant was slowly improving following his total knee replacement. The applicant was now walking without a crutch. On 16 September 2019 the applicant was described as walking better although the left knee was still swollen.

36. On 30 June 2020, Dr Bartlett performed a 12-month review of the applicant's total knee replacement and reported:

> "He is doing reasonably well although it is difficult for him to work in his former occupation. He has 0- 100° of bend and has a normal looking gait although he tells me that it aches when he works, so that makes that somewhat difficult.
> ..
> There is really not anything else for us to do at the moment other than keep watching him. I have suggested that we have a look at him again in six months."

37. On 28 July 2020, Dr Bartlett recorded that the applicant had come back to see him about his back:

> "He has been concerned about his back which has become painful in the last year or two during the process of going through the osteotomy and then the knee replacement. He gets relatively constant low back pain worse with sitting in awkward position. It does not radiate down into the legs in the form of sciatica. He doesn't take any anti-inflammatories for it.

> Examination reveals that his back has about 90˚ of flexion and he certainly can't get easily down into a fully flexed position. Lateral flexion is limited and uncomfortable. Extension is quite painful. Straight leg raising is about 90˚ on each side and there is no sign of neurological deficit."

38. Dr Bartlett said he would arrange for some x-rays of the spine and hips but noted,

> "Whether this is directly related to the accident is something that will be somewhat contentious however it is worthwhile us documenting where he is at the moment."

39. The report of an x-ray of the lumbosacral spine performed on 28 July 2020 indicated "slight relative narrowing of the L5/S1 intervertebral disc." The vertebral bodies, appendages and disc spaces otherwise appeared normal.

40. Dr Bartlett wrote to the applicant on 11 September 2020, stating:

> "I saw the x-rays of your spine which we did recently. The spine x-rays show that there is a little bit of degenerative change at your L5-S1 level, but otherwise the spine looks okay. The hip joints both look okay without any evidence of osteoarthritis.
>
> At this stage there is nothing else to do but to keep trying to recover from the knee."

41. Dr Bartlett prepared a report for the applicant's solicitors on 28 September 2020 providing an overview of his treatment of the applicant's left knee injury. With regard to the applicant's back, Dr Bartlett stated:

> "My notes reveal that he discussed his back ache which had been present for sometime prior to this. His recollection was that it had been painful for the last one to two years. He reported relatively constant low back pain worse with sitting in awkward positions and did not report that it radiated down the leg."

42. In response to questions from the solicitors, Dr Bartlett stated:

> "2. This gentleman demonstrates evidence of degenerative change in his lumbar spine at the L5-S 1 level. This is not likely to have resulted from the knee disorder.
>
> 3. He has degenerative change of his lumbosacral spine and this has not necessitated other treatment by physiotherapists and specialists. I am unable to find or recollect any previous mention of lumbar pain.
>
> 4. I am not able to confirm that the lumbar degenerative disease is a result of the left knee difficulties and abnormality.
>
> 5. I do not recall and have not recorded significant symptoms of lumbar spine problems that have necessitated me undertaking any treatment of this."

Dr Porteous

43. The applicant relies on medicolegal reports prepared by occupational physician, Dr Andrew Porteous, dated 6 March 2020 and 18 January 2021.

44. In his first report, Dr Porteous took a history of the left knee injury and subsequent treatment. Despite the knee joint replacement, the applicant had chronic left knee pain and marked restricted range of motion. Three weeks after the knee replacement the applicant was taken back to theatre for manipulation under anaesthetic but still had significantly restricted left knee range of motion and ongoing pain.

45. Dr Porteous recorded:

> "He said with walking limping favouring the left knee and with the altered posture with that he developed lumbar back pain, that then became chronic."

46. Upon examination, Dr Porteous noted that the applicant walked with a gait favouring the left knee. The applicant had reduced lumbar extension, flexion left and right lateral movement and some subtle loss of curvature and guarding but no spasms.

47. Dr Porteous made an assessment of WPI resulting from the injury on 1 July 2013 which included 6% WPI of the lumbar spine and activities of daily living.

48. In his supplementary report of 18 January 2021, Dr Porteous was asked to provide a diagnosis of the lumbar spine condition and identify its cause. Dr Porteous responded:

> "In my opinion as a result of the left knee injury and associated altered gait he has had a consequential lumbar spine injury. The diagnosis of the lumbar spine injury is chronic aggravation of pre-existing ageing related lumbar degenerative arthritis.
> …
>
> I confirm that in my opinion based on the information available that it is more likely than not that the cause of the aggravation of the lumbar back and significant symptoms there were due to the altered body mechanics and posture of the lumbar spine as a result of the knee injury."

Dr Machart

49. The respondent relies on medicolegal reports prepared by Dr Frank Machart dated 20 June 2017, 20 September 2017, 3 October 2017 and 28 June 2020.

50. In his initial report, Dr Machart took a history of the applicant's left knee injury and subsequent treatment. Dr Machart recorded that the applicant complained of locking and pain in the medial aspect of the knee. Walking capacity was restricted to 15 minutes and stairs were difficult.

51. Dr Machart's September and October 2017 reports provided assessments of the degree of permanent impairment resulting from the left knee injury.

52. In the report dated 28 June 2020, Dr Machart again provided an overview of the injury and subsequent treatment of the left knee noting that the applicant continued to suffer from pain, swelling and stiffness in the left knee. The applicant's walking tolerance was less than 500 m and he had difficulties negotiating steps. Walking caused pain. Dr Machart also noted that the applicant reported lower back pain:

> "Lower back pain was reported since the accident and was worse now. There was no specific injury. The lower back pain radiated into the left buttock. Constant and aggravated by bending."

53. Dr Machart performed an examination of the lumbar spine which revealed a tender lumbosacral junction and diminished movement by half on flexion, extension, lateral flexion and rotation. There were no neurological signs except for global reduction of sensation in the left foot since the time of the accident.

54. Dr Machart's indicated that no x-rays of the spine had been presented to him at the time of the consultation. Dr Machart did have various radiological investigations and reports relating to the left knee. Dr Machart also had Dr Porteous' report of 6 March 2020.

55. Dr Machart made a diagnosis as follows:

> "Left knee injury 1/7/2013. Medial meniscal tear on background of osteoarthritis. Accelerated osteoarthritis due to injury and partial meniscectomy. TKR middle of last year. Outcome less than optimal. Reported lumbar pain as a result of limping. Never investigated. This was consistent with structural damage. Radiculopathy not evident."

56. Dr Machart recorded that the applicant reported an onset of lower back pain as a result of limping but said this had not been investigated or documented in the medicals. Asked to consider the applicant's alleged "consequential injury" to the lumbar spine, Dr Machart said:

> "Back pain was reported. This was not corroborated in the medicals. I did not see evidence of substantial pathology. Recovering from the arthroscopy and from operations had settled by now."

57. Asked to comment on Dr Porteous' report, Dr Machart relevantly said:

> "Dr Porteous appeared to be alone in diagnosing lumbar pathology. This was not corroborated in the medicals and he has not been medically investigated. If there was substantial injury or pathology, then it would be surprising if he did not undergo at least x-rays, or there be mention in the medicals. Possibly mild, soft tissue strain, nothing structural or permanent or long lasting."

58. Dr Machart assessed the degree of permanent impairment resulting from the injury and found 0% WPI for the lumbar spine, placing it into DRE category 1.

Applicant's submissions

59. Mr Hunt noted that the applicant's knee injury was uncontroversial. Conservative treatment of the injury failed and the applicant underwent subsequent surgeries as documented in the evidence.

60. In around 2017, symptoms in the lumbar spine were first noted although an antalgic gait was previously observed in the Rehabilitation Services report in March 2015.

61. Mr Hunt said the clinical notes of Dr Kenny in October 2016 referred to altered body mechanics and in January 2017, the notes expressly referred to a "sore back" and tenderness over the lumbar spine. No specific injury was reported. Although reference was made to getting out of a recliner chair, Mr Hunt submitted that set against a history of altered body mechanics the onset of symptoms in that fashion was not unusual. Mr Hunt noted that the CT scan performed on 23 January 2017 diagnosed degenerative pathology.

62. Mr Hunt observed that the applicant had given evidence about his altered gait and posture in his written statement. The medical evidence dealing with the left knee in general terms painted a picture between 2013 and 2017 of a deteriorating left knee. The applicant underwent a series of invasive surgeries leading up to a total knee replacement.

63. Following the total knee replacement, Dr Bartlett had asked the applicant's physiotherapist to address mobilising, taking weight and building up the knee, including gait training. Mr Hunt conceded that Dr Bartlett's reports focused on the left knee but said this was not surprising given that Dr Bartlett was consulted primarily for treatment of the knee injury.

64. Mr Hunt observed that in the report of 28 July 2020, Dr Bartlett gave a history of the applicant expressing concern about his back which had become painful in the last year or two during the process of going through the osteotomy and the knee replacement. The back pain was relatively constant and worse with sitting. Dr Bartlett performed an examination of the lumbar spine and referred the applicant for x-rays. The x-rays were performed and showed degenerative changes.

65. Mr Hunt noted that Dr Bartlett had provided an opinion to the applicant's solicitors confirming the presence of degenerative change in the lumbar spine as seen from the radiological investigations. Dr Bartlett gave the opinion that the degenerative change was not caused by the knee injury. Mr Hunt submitted, however, that it was the applicant's case that symptoms of the degenerative change had appeared as a result of altered gait. The applicant was not required to establish an injury. What was required, having regard to the authority in *Kooragang Cement Pty Ltd v Bates*[1] was a commonsense evaluation of the evidence.

66. Mr Hunt submitted that there was objective evidence from the insurer and treating evidence which supported the presence of an altered gait over a period of some seven years. Mr Hunt submitted that as a matter of commonsense the applicant's altered mechanics in the context of continuing on with work would cause symptoms in the applicant's back. Mr Hunt submitted that Dr Bartlett had addressed the wrong question.

67. Mr Hunt noted that Dr Porteous' first report dealt primarily with the left knee. Dr Porteous did, however, identify back symptoms and trouble weight bearing. The applicant's lower back pain was said to have become chronic. In his supplementary report, Dr Porteous provided an opinion that a consequential condition in the nature of an aggravation of the degenerative change in the lumbar spine had occurred.

68. Mr Hunt noted that Dr Machart examined the applicant fairly early in relation to the left knee. The report dated June 2017 did not address any back symptoms. Mr Hunt said this was understandable as at that stage the applicant had not claimed to have suffered a consequential lumbar spine condition.

69. Dr Machart re-examined the applicant in June 2020. Dr Machart said Dr Porteous was alone in finding lumbar pathology and questioned why there were no radiological investigations. Mr Hunt said it was clear that Dr Machart had not been given the CT scan from 2017 or Dr Kenny and Dr Tadros' clinical notes. Those revealed investigations and reports of lumbar pain. Dr Machart was, however, prepared to concede that the applicant had symptoms in the back, albeit assessed at 0% WPI. Mr Hunt submitted that Dr Machart appeared to support a consequential condition even without the investigations.

Respondent's submissions

70. Mr Baker submitted that the applicant's lower back condition was nothing but a demonstration of degenerative changes made symptomatic by a frank episode.

71. Mr Baker noted that at the time of the s 78 notice, the only evidence of lumbar symptoms provided to the insurer was the report of Dr Porteous. Prior to Dr Porteous' first report there was no opinion from any treating specialist making reference to back symptoms. Mr Baker submitted that it was germane that a claim of consequential lumbar condition was made only after Dr Porteous' report.

72. Dr Bartlett first reported on complaints of lumbar symptoms on 28 July 2020 after the s 78 notice was issued. A report was requested from Dr Bartlett by the applicant's solicitors although the response was not relied on by the applicant. Mr Baker submitted that the timeline demonstrated that a critical examination was required to discern whether the assertions made by the applicant were made out.

73. Mr Baker noted that the applicant said he experienced increasing symptoms in 2017 and mentioned these to Dr Kenny and Dr Bartlett. Mr Baker noted that in this period the applicant had been working on his lawnmowing business. Although the applicant asserted that limping started in 2017, Dr Porteous took a history which suggested that the applicant had experienced back pain since 2013.

[1] (1994) 10 NSWCCR 796 at [810].

74. Mr Baker contrasted that history with that recorded by Dr Tadros in 2017 of being sore since the previous night. Six days later the applicant saw his usual general practitioner, Dr Kenny, and reported lower back pain for the previous week. The applicant described feeling something in his back as he got out of a recliner chair. Mr Baker submitted that on this evidence the applicant sustained a back injury due to getting out of a recliner. Mr Baker submitted that this had nothing to do with limping or favouring the left leg. Dr Kenny had been seeing the applicant regularly in relation to his workers compensation condition since October 2014. The clinical notes on 20 January 2017 dealt with the back complaints separately to the workers compensation complaints.

75. On 27 January 2017, the applicant reported that his back symptoms were settling. Mr Baker noted that there was then no further complaint or mention of lumbar symptoms despite approximately 51 further consultations. No treatment for lumbar symptoms was recorded in the general practitioner's records.

76. Mr Baker noted that the evidence before the Commission included reports from Dr Hitchen, Dr Tan, another orthopaedic specialist Dr Bill Donnelly, another general practitioner's records and WorkCover certificates. No other mention was made in any of this evidence to the lumbar spine.

77. Mr Baker noted that reference had been made in the functional report from Rehabilitation Services to an antalgic gait but submitted that the report was prepared as a functional assessment of the whole body for the insurer.

78. Mr Baker observed that Dr Bartlett first reported on the applicant's condition on 10 April 2018. There then followed eight reports with no reference to the back. On 29 August 2019, six weeks after the total knee replacement, the applicant was back at work as a gardener. On 30 June 2020, Dr Bartlett reported that there was nothing more to do in relation to the left knee. Dr Bartlett indicated that he would review the applicant again in six months. Despite this, within four weeks, the applicant had returned after the s 78 notice was issued and made a complaint about his back despite never having complained to Dr Bartlett about back symptoms on the 14 or 15 previous occasions.

79. Mr Baker submitted that the timelines and delay in reporting lumbar symptoms suggested that the applicant's claim in relation to the lumbar spine was disingenuous. There were internal inconsistencies in the histories provided to the various medical practitioners. The applicant's case was predicated on a notion picked up by Dr Porteous of a limp. The only contemporaneous evidence of a problem with the applicant's back was a strain for a week or two after getting out of a recliner. There were no other contemporaneous accounts of a sore back. Dr Bartlett had given an opinion that the symptoms in the applicant's back were due to degenerative change. As a result, Mr Baker submitted that the Commission would not be satisfied on the balance of probabilities that the applicant had sustained a consequential lumbar spine condition.

Applicant's submissions in reply

80. Mr Hunt noted that Dr Machart's final report was prepared before the s 78 notice was issued. The applicant reported a history of back pain to Dr Machart and Dr Machart conducted an assessment of impairment of the lumbar spine albeit at 0% WPI. Mr Hunt submitted that given this timing, the respondent's theory that the applicant made up a link between the back and the knee fell away.

81. Mr Hunt submitted that Dr Bartlett had been seeing the applicant primarily for his left knee problem, which explained the absence of reference to the lumbar spine. Mr Hunt submitted that the Commission would not draw any inferences from the chronology. Mr Hunt reiterated that Dr Bartlett had addressed the wrong question.

FINDINGS AND REASONS

82. Section 9 of the 1987 Act provides that a worker who has received an "injury" shall receive compensation from the worker's employer. The term "injury" is defined in s 4 of the 1987 Act as follows:

> **"4 Definition of 'injury'**
>
> In this Act:
> **injury:**
>
> (a) means personal injury arising out of or in the course of employment,
>
> (b) includes a disease injury, which means:
>
> (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and
>
> (ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease, and
>
> (c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the *Workers' Compensation (Dust Diseases) Act 1942*, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined."

83. It has been accepted by the respondent that the applicant sustained an "injury" pursuant to s 4(a) of the 1987 Act to his left knee on 1 July 2013. Consequential scarring resulting from the injury is also not disputed. There is, however, a dispute as whether the applicant has sustained a consequential condition at his lumbar spine as a result of the injury to his left knee.

84. It is not necessary for the applicant to establish that any lumbar condition is itself an 'injury' pursuant to s 4 of the 1987 Act. Deputy President Roche in *Moon v Conmah*[2] observed at [45]-[46]:

> "It is therefore not necessary for Mr Moon to establish that he suffered an 'injury' to his left shoulder within the meaning of that term in section 4 of the 1987 Act. All he has to establish is that the symptoms and restrictions in his left shoulder have resulted from his right shoulder injury. Therefore, to the extent that the Arbitrator and Dr Huntsdale approached the matter on the basis that Mr Moon had to establish that he sustained an 'injury' to his left shoulder in the course of his employment with *Conmah* they asked the wrong question."

85. In *Bouchmouni v Bakhos Matta t/as Western Red Services*[3], Roche DP commented,

> "The Commission has considered and explained the difference between an 'injury' and a condition that has resulted from an injury in several recent decisions (*Moon v Conmah Pty Ltd* [2009] NSWWCCPD 134 at [43], [45] and [50] (Moon); *Superior Formwork Pty Ltd v Livaja* [2009] NSWWCCPD 158 at [122]; *Cadbury Schweppes Pty Ltd v Davis* [2011] NSWWCCPD 4 at [28]–[32] and [39]–[42] (Davis); *North Coast Area Health Service v Felstead* [2011] NSWWCCPD 51 at [84]; *Australian*

[2] [2009] NSWWCCPD 134.
[3] [2013] NSWWCCPD 4.

Traineeship System v Turner [2012] NSWWCCPD 4 at [28] and [29] (Turner); *Kumar v Royal Comfort Bedding Pty Ltd* [2012] NSWWCCPD 8 at [35]–[49] and [61]).

….

The injury to Mr Bouchmouni's right knee caused him to seek treatment in the form of surgery and physiotherapy. The evidence suggests that it was in the course of receiving that treatment, and/or as a result of an altered gait because of his knee symptoms, Mr Bouchmouni developed back symptoms. If that is accepted, and no reason has been advanced why it should not be, it is clear beyond doubt that his back condition has resulted from the treatment he received for his accepted knee injury and his altered gait. That does not, however, make the back condition an 'injury'."

86. A commonsense evaluation of the causal chain is required. The legal test of causation is that discussed by the Court of Appeal in *Kooragang Cement Pty Ltd v Bates*[4], where Kirby P said (at 461) (Sheller and Powell JJA agreeing):

> "From the earliest days of compensation legislation, it has been recognised that causation is not always direct and immediate…
>
> 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."

87. 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 commonsense 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."

88. It is the applicant who bears the onus of establishing, on the balance of probabilities, that a consequential condition at the lumbar spine has been sustained.

[4] (1994) 10 NSWCCR 796 at [810].

89. A challenge for the applicant in discharging his onus in this case arises due to the lack of contemporaneous treating medical evidence of a lumbar spine condition. The applicant relies predominantly on the medicolegal opinion provided by Dr Porteous. Indeed, Dr Porteous was the first and remains the only doctor who has expressed a clear opinion that there is a consequential condition at the lumbar spine resulting from the left knee injury. Although Dr Machart took a history of lumbar symptoms resulting from a limp and made an assessment of the degree of permanent impairment of the lumbar spine, he did not articulate a favourable opinion for the applicant on causation, noting the lack of evidence before him of any investigations or reports of lumbar symptoms in the treating medical evidence.

90. In *Arquero v Shannons Anti Corrosion Engineers Pty Ltd*[5] , Wood DP observed with regard to the applicant's reliance on medicolegal evidence:

> "The Arbitrator approached the consideration of Dr Patrick's evidence by expressing the opinion that it was always difficult when the first reference to the condition was in a medicolegal report. It may be said that in some cases, that fact may pose a difficulty. However, it is not always the case. In this case, the factual basis upon which the consequential condition relies, that is the high tibial osteotomy, altered gait, limping and over-pronation, and a deteriorating condition in the right knee, is well made out in the historical reports."

91. It is necessary, therefore, to determine whether there is a proper factual basis on which to accept Dr Porteous' opinion as to the consequential condition.

92. I accept on the evidence before me that the applicant has since the injury on 1 July 2013 experienced pain and other restrictions in his left knee. The applicant underwent surgery performed by Dr Hitchen in October 2013 and participated in physiotherapy. The evidence indicates and I accept that the applicant continued to be troubled by pain, instability and other restrictions leading to referrals to several other orthopaedic specialists. The knee injury continued to deteriorate and a high tibial osteotomy was performed by Dr Bartlett on 5 July 2018. Dr Bartlett's reports indicate ongoing symptoms despite that procedure, culminating in a total knee replacement performed on 25 July 2019.

93. The medical evidence before me indicates that the applicant had relatively lengthy periods of non-weight bearing following the respective surgical procedures, involving the use of crutches and splints.

94. There is also reference in the contemporaneous evidence to altered body mechanics and gait issues. The Rehabilitation Services report in 2015 noted an antalgic gait during carrying exercises. Dr Kenny in October 2016 recorded that the applicant was taking weight on his right side due to increasing pain in his left knee. Following the high tibial osteotomy, Dr Bartlett advised the applicant's physiotherapist that he would require gait training. Issues with the applicant's ability to walk were identified again following the total knee replacement although at the 12-month review in June 2020 Dr Bartlett did describe a normal looking gait. The applicant had, however, reported aching and difficulty in performing his work.

95. The examinations performed by both Dr Porteous and Dr Machart revealed deteriorating walking tolerances and described alterations in the applicant's gait. Standing and walking were noted by both experts to aggravate the applicant's knee condition.

96. I am satisfied on all the evidence that there is therefore a sound factual basis for Dr Porteous's view that the applicant's left knee injury caused an alteration in his body mechanics, including his posture.

[5] [2019] NSWWCCPD 3.

97. I have considered next whether there is a proper factual foundation for Dr Porteous's view that there is a condition at the applicant's lumbar spine. Reports of symptoms in the lumbar spine first appear in the contemporaneous medical evidence in the clinical records of Dr Tadros and Dr Kenny in January 2017. This is broadly consistent with the applicant's evidence that he noticed increasing back pain around that time. The symptoms reported to Dr Kenny were sufficient to warrant radiological investigation in the form of a CT scan. The CT scan performed on 23 January 2017 confirmed the presence of pathology in the nature of mild lumbar spondylotic change at the LS/S1 level with narrowing of the central canal.

98. The applicant's lumbar symptoms were shortly afterwards reported to be gradually settling. I accept the respondent's submission that there is then an absence of any record of reported lumbar symptoms in the contemporaneous medical evidence until the applicant was examined by Dr Porteous in March 2020. The applicant claims in his written statement to have reported lumbar symptoms from time to time to Dr Bartlett although the focus of his consultations was on the left knee. This is not corroborated by Dr Bartlett who in his report to the applicant's solicitor dated 28 September 2020 said he was unable to find or recollect any previous mention of lumbar pain prior to the consultation on 28 July 2020.

99. The contemporaneous medical evidence does not corroborate the applicant's claims of worsening lumbar symptoms during this period. I do not, however, accept that this circumstance is necessarily inconsistent with the applicant's claims. It is relevant to note that the applicant was, during this period, experiencing increasing left knee difficulties and had undergone two major surgeries to that joint. It is reasonable in those circumstances that Dr Bartlett's reporting, in particular, would have focused on the knee condition.

100. Both Dr Porteous and Dr Machart in their examinations in 2020 took a history which included complaints of lumbar pain. Both performed clinical examinations which revealed restrictions in lumbar movement consistent with the applicant's complaints. The examinations performed by Dr Porteous and Dr Machart were consistent with Dr Bartlett's examination of the applicant on 28 July 2020. Dr Bartlett referred the applicant for x-rays which, consistently with the earlier CT scan, revealed degenerative change particularly at L5/S1.

101. Considering the evidence as a whole, I am satisfied that the applicant did experience an onset of lumbar symptoms in early 2017. While the evidence suggests that those symptoms may have settled for a period, I accept that by 2020, consistently with the deteriorating knee and subsequent surgeries, the symptoms had become persistent and were clinically evident. I further accept that radiological investigations of the applicant's lumbar spine have revealed pathology capable of explaining the symptoms experienced by the applicant.

102. The final question is whether the lumbar symptoms resulted from the alteration in the applicant's body mechanics caused by the left knee injury.

103. The question of causation has been considered by Dr Bartlett, Dr Porteous and Dr Machart. The applicant's treating specialist, Dr Bartlett has not expressed an opinion favourable to the applicant. It is to be noted, however, that Dr Bartlett is not a medicolegal expert, nor is he based in this jurisdiction. I accept that Dr Bartlett has directed his attention to whether the degenerative change at the applicant's lumbar spine at the L5/S1 level was caused by the knee injury rather than whether the applicant's experience of symptoms at the lumbar spine was increased or caused by the knee injury. In other words, Dr Bartlett has not expressly considered whether knee injury may have caused an aggravation of the pathology or caused the pathology to become symptomatic.

104. Dr Machart has also refrained from expressing an opinion on causation which is favourable to the applicant. Dr Machart's reticence in this regard appears to be based primarily on the lack of any evidence before him of radiological investigation of the lumbar spine or reported symptoms. I accept, however, that lumbar symptoms had been reported in 2017 and that a CT scan had been performed. Subsequently to Dr Machart's report, the applicant underwent further radiological investigation in the form of x-rays requested by Dr Bartlett which recorded similar pathology. Dr Machart does, however, appear to have allowed for the possibility of a consequential lumbar condition in the nature of a "mild, soft tissue strain, nothing structural or permanent or long lasting."

105. Reading Dr Porteous's two reports together I accept that he had before him a broadly accurate factual history, including the clinical records of Morayfield 7 Day Medical Centre and the x-rays requested by Dr Bartlett. Dr Porteous recorded his findings on clinical examination and has given a clear and reasoned opinion that the left knee injury and associated altered gait had caused a chronic aggravation of pre-existing ageing related lumbar degenerative arthritis.

106. In considering the weight to be given to Dr Porteous's opinion I have taken into account the general practitioner's clinical records and, in particular, the reference to an onset of lumbar symptoms in 2017 after rising from a recliner chair. I accept that nothing in the clinical records from 2017 related to the lumbar symptoms to the work injury to the applicant's knee. I accept the respondent's submission that the two conditions were dealt with separately in the general practitioner's notes. I also accept that there is some variation in the timing of the reported onset of lumbar symptoms.

107. It is entirely possible that there was particular aggravation of the applicant's lumbar pathology in 2017 caused by getting out of a recliner chair. The evidence does, however, suggest that the pain in that period gradually settled. The evidence further suggests that the symptoms in the applicant's lumbar spine may have fluctuated from time to time.

108. Importantly, however, I have accepted that by 2020, consistently with the deteriorating knee and subsequent knee surgeries, the symptoms in the applicant's lumbar spine had become more persistent and were clinically evident. It is well established that a loss can result from multiple causes[6]. I am satisfied, having regard to the evidence as a whole that there is a proper factual foundation for the acceptance of Dr Porteous' opinion that the left knee injury and associated altered gait had caused a chronic aggravation of pre-existing age related lumbar degenerative arthritis. The opinions of Dr Bartlett and Dr Machart do not cause me to doubt the correctness of that opinion.

109. I am satisfied, on the balance of probabilities that the applicant sustained a consequential condition at the lumbar spine as a result of the injury on 1 July 2013.

110. Having made this finding, I consider it appropriate in all the circumstances, noting in particular the considerable discrepancy between the assessments of WPI by Dr Porteous and Dr Machart, that there be an order remitting the matter to the Registrar for referral to an Approved Medical Specialist for assessment of the degree of permanent impairment of the left lower extremity (knee), skin (scarring) and lumbar spine resulting from the injury on 1 July 2013.

111. The materials to be referred to the Approved Medical Specialist are to include all of the materials admitted in the proceedings together with this Certificate of Determination and statement of reasons.

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[6] *ACQ Pty Ltd v Cook* [2009] HCA 28 at [25] and [27]*; Murphy v Allity Management Services Pty Ltd* [2015] NSWWCCPD 49.

SUMMARY

112. The applicant sustained a consequential condition at the lumbar spine as a result of the injury to his left knee on 1 July 2013.

113. The matter is remitted to the Registrar for referral to an Approved Medical Specialist for assessment as follows:

Date of injury:	1 July 2013
Body parts:	Left lower extremity (knee) Skin (scarring) Lumbar spine
Method:	Whole Person Impairment

114. The materials to be referred to the Approved Medical Specialist are to include the documents admitted in the proceedings together with the Certificate of Determination and accompanying statement of reasons.