

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 265/20  
**Applicant:** Rosemary Tilley  
**Respondent:** State of New South Wales  
**Date of Determination:** 1 May 2020  
**Citation:** [2020] NSWCC 138

The Commission determines:

1. The applicant suffered an injury in the course of her employment with the respondent on 8 July 2011.
2. The provision of Lite n' Easy meals to the applicant is a reasonably necessary medical expense as a consequence of the applicant's injury.
3. The respondent is to pay the costs of and incidental to provision of Lite n' Easy meals to the applicant.
4. Award for the respondent on the claim for injury to the applicant's teeth/mouth.

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

Cameron Burge  
**Arbitrator**

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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Lucy Golic  
Acting Senior Dispute Services Officer  
**As delegate of the Registrar**



## STATEMENT OF REASONS

### BACKGROUND

1. Rosemary Tilley (the applicant) brings proceedings seeking payment for the cost of Lite n' Easy meals and for dental treatment pursuant to s 60 of the *Workers Compensation Act 1987* (the 1987 Act).
2. The factual background to this matter is lengthy but largely uncontroversial. On 8 July 2011, the applicant was assaulted in the course of her employment at Westmead Hospital by a patient, suffering an injury to her right wrist and hand. On 4 December 2012, she suffered a fall at Harris Park railway station which was made worse by not being able to use her right hand for support. That fall occasioned a further injury to the applicant's right knee and right upper extremity. In 2019, the Commission found the applicant also suffered a consequential condition to her left knee as a result of her right knee injury.
3. In response to the applicant's claim for the provision of Lite n' Easy meals and dental treatment, the respondent has denied liability. It alleged there was no relationship between the applicant's obesity and her injury, and that the dental treatment proposed related to problems which were pre-existing and in no way caused by the injurious incident in 2011.

### ISSUES FOR DETERMINATION

4. The parties agree that the following issues remain in dispute:
  - (a) whether the applicant is entitled to claim the cost of Lite n' Easy meals, and
  - (b) whether the applicant is entitled to claim the costs of proposed dental treatment.

### PROCEDURE BEFORE THE COMMISSION

5. 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. The parties attended a hearing on 6 April 2020. On that occasion, I used my best endeavours to assist the parties to reach a resolution to the dispute 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 to the dispute.
6. At the hearing, Mr L Morgan of counsel appeared for the applicant and Ms L Goodman of counsel appeared for the respondent.

### EVIDENCE

#### Documentary evidence

7. The following documents were in evidence before the Commission and taken into account in making this determination:
  - (a) Application to Resolve a Dispute (the Application) and attached documents;
  - (b) Reply and attached documents, and
  - (c) Respondent's Application to Admit Late Documents (AALD) and attached documents dated 27 March 2020.

#### Oral evidence

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

## FINDINGS AND REASONS

### Lite n' Easy meals

9. There is no issue the respondent funded Lite n' Easy meals for the applicant for some time before issuing a s 78 notice on 17 June 2019. Mr Morgan accepted this does not constitute an admission, but submitted that on a common sense basis, the applicant's serious knee injuries would lead to a propensity to gain weight.
10. Mr Morgan submitted there was no issue the applicant's mobility was affected by her injury, and cited the reports of Dr Gehr and Dr Patrick (both independent medical examiners (IME)), the latter of whom recorded the applicant's weight at 136 kg in January 2014, down from 148 kg in 2012 but significantly greater than the 117 kg recorded by her general practitioner on 2 March 2010, over a year before the injury.
11. I accept the applicant has gained significant weight since the injury to her knees. That conclusion is self-evident from the measurements referred to in the preceding paragraph and also from the August 2017 report of Dr Patrick, where he refers to the applicant's examination with Dr Walsh in 2016 and comments:

"Dr Walsh states that 'Ms Tilley still has a lot of problem with her (right) knee and cannot walk long distances. She has a problem with stairs. She is able to drive, but only locally'. He does note that at the time of his consultation with her that Ms Tilley has been on a Lite n' Easy diet – 'her weight prior to starting this diet was 146 kg and today it was 121 kg (12 May 2016)'. He notes that at the time of his consultation that Ms Tilley 'has been on crutches for the last six months'."

12. I accept that, when one takes into account both the applicant's knee and hand injuries, the Lite n' Easy meals are reasonably necessary.
13. Although Ms Goodman quite rightly pointed out that Dr Gehr stated in his second report the applicant requires the meals because of her hand injuries. I note in his first report Dr Gehr refers to the applicant's difficulties with her activities of daily living associated with the 2011 and 2012 injuries, and provides an opinion on how the applicant is restricted owing to those injuries.
14. Ms Goodman submitted the applicant's left hand symptoms are not related to her work injury and she should therefore prepare her own meals. However, that submission does not take into account the totality of the evidence regarding the severe problems relating to the applicant's right hand which are work related, nor her consequential weight gain owing to the bilateral knee injuries.
15. Although Dr Smith says in his report dated 23 May 2019 that the applicant does not need to be supplied with Lite n' Easy meals, he in part bases that opinion on the view that:

"Based on the physical examination conducted by me on 20 February 2019, and the available other clinical information, there was no relationship between her bilateral knee problems and her right thumb injury. In my opinion, she had an unsatisfactory outcome regarding the total knee replacement. She was embellishing her condition and manufacturing physical signs.

With regard to her being overweight, she simply has to reduce the calorific intake by whatever means. There is no requirement for her to be provided with Lite n' Easy food as a result of the right thumb injury or as a result of her knee osteoarthritis."

16. The Commission has found in prior proceedings that the applicant's bilateral knee injuries are related to the right hand injury suffered in 2011. This being so, an important pillar of Dr Smith's opinion cannot stand, and accordingly I reject his conclusion as stated in that report.
17. On balance, I am of the view that the provision of Lite n' Easy meals is a reasonably necessary expense pursuant to s 60 of the 1987 Act. The meals have been shown to have aided the applicant in reducing weight notwithstanding her impaired mobility, while I also accept the view that a combination of the applicant's knee and hand injuries gives rise to her need for that treatment.
18. Although I accept Ms Goodman's submission that prior payment is not an admission, given the basis for denial is the report of Dr Smith which I have not preferred, I am of the view the applicant should have the benefit of the Lite n' Easy meals.
19. I note the dispute regarding the meals was one of causation. The respondent did not and has never said that the meals are unnecessary from a purely medical point of view. Having resolved the dispute relating to causation in favour of the applicant, I have no hesitation in ordering the respondent to pay the ongoing cost of and incidental to the provision of Lite n' Easy meals to the applicant.

## **DENTAL TREATMENT**

20. It is common ground that there is no contemporaneous complaint of facial or dental injury by the applicant at the time of the assault on 8 July 2011. Mr Morgan submitted the reason for that omission is the applicant focusing on her serious right hand injury over her dental issues.
21. The difficulty with that submission is the applicant's own incident report form, which described the patient grabbing her arm before he picked up a stool and "*attempted* to hit me again." (my emphasis) Likewise, when the applicant was seen at the Emergency Department at Westmead Hospital on the date of injury, there is no mention at all of any facial or dental injury.
22. Even if the applicant was preoccupied with her hand injury, one would expect the Emergency Department at her own work place to make at least a cursory mention of something as serious as an employee losing her teeth or being struck in the face by a patient and suffering injury in the course of her employment.
23. Mr Morgan noted that the applicant's histories concerning the circumstances of the assault provided to Drs McGlynn and Nichols are consistent with the contemporaneous accounts. Broadly speaking that is correct, however, there is no mention in any contemporaneous documentation of any facial trauma, let alone injury to the applicant's teeth.
24. Notwithstanding the usual caution taken regarding histories provided to treating practitioners, on balance I find it improbable that the applicant would made no mention of her attacker striking her face in either the incident report form or to the staff at the Emergency Department. That is especially the case if she lost teeth in the incident. Moreover, the applicant has provided two statements attached to the Application. In the first, the applicant provides a version of the assault as follows:

"He [the patient] became agitated. In an attempt to coax him out of the room in which he was, he suddenly pushed me up against the wall and bent my hand backwards. He then threw the shower chair at me. Shortly thereafter security arrived and restrained him. He was subsequently sedated."

25. In the same statement, the applicant provides a history relating to the fall she suffered on 4 December 2012. In doing so, she said she was bumped by a passenger at Harris Park Station, at which time she put out her right hand to grab onto the rail. She continues "I had no strength at all in my right hand, and as a result I fell onto my right knee, which landed on the concrete platform."
26. In her second statement, the applicant provides updated details in relation to the symptoms she continues to suffer in her knees and in her hands. As with her first statement taken in 2015, the applicant's second statement dated 30 October 2017 makes no reference of any facial or dental injury whatsoever. Moreover, there is no report in evidence from Dr Huang, who is the dental surgeon wishing to carry out the proposed treatment.
27. Ms Goodman noted, and I accept that the applicant had dental issues before the assault at issue. A general practitioner clinical note from 17 May 2011, some two months before the date of injury, reveals the applicant experienced pain in her teeth and a notation from the doctor that her two front teeth were missing.
28. I accept Ms Goodman's submission that the applicant's history to Dr McGlynn that she was struck in the face in the July 2011 assault is inconsistent with both the injury report form, the applicant's statement and the Emergency Department records.
29. I also note Dr Gehr, IME for the applicant takes a history in his report that the applicant's teeth were knocked out in the 2012 fall at Harris Park Station. That history is not consistent with the applicant's own statements and no mention of such an injury is found in any contemporaneous records or report in evidence. I therefore reject it.
30. It is trite to say the applicant has the onus of proving that she suffered an injury to her teeth/mouth in the incident at issue in July 2011 or indeed in the fall in December 2012. For the reasons advanced above, I am not satisfied the applicant has discharged that onus, and accordingly there will be an award for the respondent on the claim for dental treatment.

## **SUMMARY**

31. For the above reasons, the Commission will make the following orders:
  - (a) the respondent is to pay the costs of and incidental to the provision of Lite n' Easy meals to the applicant, and
  - (b) award for the respondent on the claim for alleged dental/mouth injury.