WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **2882/20**
Applicant: **Vittorio Cailotto**
Respondent: **Sydney Night Patrol & Inquiry Pty Ltd**
Date of Determination: **15 September 2020**
Citation: **[2020] NSWWCC 322**

The Commission determines:

1. The applicant has sustained a consequential condition in his right knee as a result of the injury to the left foot sustained in the course of his employment with the respondent on 10 May 2016 and the resulting altered gait and consequential condition which developed in his left knee.

2. The right total knee replacement surgery was reasonably necessary treatment as a result of the consequential condition to the right knee.

3. The respondent is to pay for the right total knee replacement surgery and ancillary treatment pursuant to the applicable workers compensation gazetted rates.

4. The respondent is to pay the applicant weekly compensation pursuant to section 37 of the *Workers Compensation Act 1987* at the rate of $1,115.16 per week from 6 February 2020 to 4 April 2020.

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.

L Golic

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

STATEMENT OF REASONS

BACKGROUND

1. On 10 May 2016, Vittorio Cailotto slipped on some water whilst walking into a kitchen at work and sustained an injury to his left foot. In prior proceedings before the Commission in matter 1648/18 an Arbitrator found that Mr Cailotto suffered a consequential condition at the left knee which results from the accepted injury to his left foot on 10 May 2016 and the then proposed left knee replacement surgery in turn results from that consequential condition. The Arbitrator ordered that the respondent, Sydney Night Patrol & Inquiry Co Pty Ltd, was liable to meet costs of and associated with the left total knee replacement.

2. The left total knee replacement was performed on 7 June 2018.

3. The claim for compensation in these proceedings involves a claim for the cost of proposed right total knee replacement and associated expenses. Mr Cailotto had this surgery performed on 6 February 2020. He also seeks weekly compensation from 6 February 2020 and 4 April 2020.

4. Applying the Court of Appeal's decision in *Pacific National Pty Ltd v Baldacchino*, the right knee replacement surgery was a procedure that involved the insertion of an artificial aid[1] and therefore section 59A(6) of the *Workers Compensation Act 1987* (the 1987 Act) applies, resulting in section 59A being not applicable to Mr Cailotto's claim. In any event, the claim for weekly compensation is in the section 37 period.

5. Mr Cailotto alleges in his Application to Resolve a Dispute (ARD) that he developed his right knee condition as a result of overcompensating.

6. The respondent disputes that an order should be made by the Commission in Mr Cailotto's favour because in its notice issued under section 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) on 30 December 2019 and in the review notices of 22 January 2020 and 19 February 2020 it disputes that the right knee condition is causally related to the work related left knee condition and left foot injury on 10 May 2016.

PROCEDURE BEFORE THE COMMISSION

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.

8. The matter proceeded in Arbitration hearing on 29 July 2020 by telephone due to the COVID19 situation. Mr Ross Stanton, counsel, appeared for Mr Cailotto instructed by Mr John Matthews, solicitor. The respondent was represented by Ms Lyn Goodman, counsel, instructed by Ms Christie Blake, solicitor and Ms Jenny Doyle from EML.

[1] [2018] NSWCA 281, *Baldacchino.*

EVIDENCE

Documentary Evidence

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

    (a) Application to Resolve a Dispute (ARD) and attached documents;
    (b) Reply and attached documents;
    (c) Application to Admit Late Documents (AALD-1) filed by the applicant dated 16 June 2020 and attached documents;
    (d) Application to Admit Late Documents (AALD-2) filed by the applicant dated 6 July 2020 and attached documents;
    (e) Application to Admit Late Documents (AALD-3) filed by the applicant dated 20 July 2020 and attached documents; and
    (f) Application to Admit Late Documents (AALD-R) filed by the respondent dated 23 July 2020 and attached documents.

Oral Evidence

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

FINDINGS AND REASONS

11. It is helpful to briefly summarise the evidence before the Commission before considering counsels' submissions.

Mr Cailotto's statement

12. In his statement dated 3 March 2020 Mr Cailotto describes his injury on 10 May 2016 and the treatment thereafter. He states he attended Sutherland Hospital and was given a CAM boot and crutches and was discharged. His general practitioner, Dr Brenner, referred him to Dr Martin Sullivan. He says while he was under the care of Dr Sullivan his left knee became swollen. Mr Cailotto says he wore the CAM boot for seven weeks and used crutches for four to five weeks with his left knee continuing to be swollen and painful with no improvement.

13. He does not refer to right knee symptoms at this time. Mr Cailotto says he returned to work and his work involved mainly sitting down in a control room, which he could manage as he was sitting resting his leg. He was made redundant in February /March 2017 and took four months long service leave and returned to the employer on 3 July 2017 at Sydney Airport. He said this job involved standing and walking, supervising workers who screened passenger's luggage. He says due to left knee swelling he had to stop work on about 17 July 2017. He relates that he had the left knee replacement surgery in June 2018 performed by Dr Michael Solomon.

14. Mr Cailotto says he started working for MSS Security doing control room operations on 1 April 2019. In his statement he refers to his right knee as follows:

    "[22] I have continued to have some stiffness in my left knee and pain in my left foot and occasionally swelling but my main problem is increasing pain in my right knee due to overuse of my left knee which is worse when I stand, go up and down stairs, squat or kneel.

    [23] I had an x-ray of my right knee on 19 August 2019 which revealed marked narrowing medial tibiofemoral joint space and severe degenerative changes associated with joint effusion.

[24] In Dr Solomon's report dated 28 October 2019 he has recommended a right total knee replacement even though I have pre-existing arthritis in my right knee which was without symptoms until my left foot was fractured and my irregular gait made my right knee symptomatic.

[25] I was wearing a right knee support and was walking with a pronounced limp favouring my right leg."

15. Mr Cailotto said he was in a lot of pain with his right knee and having difficulties with walking, that he could not wait any longer and went ahead with surgery paying for it himself. He adds he was having rehabilitation on a daily basis which he is paying for and has time off work with no wages.

Dr Brenner

16. Medical certificates are contained in the reply from Dr Brenner about the left foot injury and referring to the wearing of a CAM boot and using crutches. There is no mention of the right knee in those certificates. However, in the records from the Edgecliff Medical Centre Dr Brenner does add reference to the right knee in his certificate issued 19 August 2019. He states under the heading "Management plan for this period", "now pain effusion right knee due to strain subsequent to impaired left leg function"[2].

17. In Dr Brenner's referral to Dr Sullivan dated 16 May 2016 he lists the medications taken by Mr Cailotto and they include "Panadol Osteo 665mg 2 Four times a day prn ARTHRITIS". This referral was written two weeks after the work accident, so it is probable this medication was prescribed before the accident on 10 May 2016. However, the doctor does not state what part of the body it was prescribed for and when. In the Edgecliff Medical Centre clinical notes there are entries on 17 November 2015 and 23 December 2015 when prescriptions were given for this medication for arthritis but in both consultation entries the body part for which it was prescribed is not noted[3].

18. On 16 December 2016, there is reference to fluid in the left knee and that it may have been aggravated by the fractured foot and walking badly[4]. On 2 May 2017 there is a reference to strained left knee but no other details and on 22 May 2017 Dr Brenner records that the left knee is not swelling but is painful on walking especially with steps and getting in and out of buses[5]. On 5 July 2017 there is reference to fluid in the left knee, which is sore when he walks and stands for any period. On 17 July 2017 Dr Brenner writes that the problem with the left knee started when he had the fracture on 10 May 2016 and that since then there has been swelling. On 19 July 2017 Dr Brenner states that he feels that the bad walking and the cam boot put extra pressure on the already abnormal left knee and caused it to flare up[6].

19. Dr Brenner expands on these comments about the left knee in his entries for 24 and 26 July 2017 and notes they have a letter from Dr Sullivan confirming that Mr Cailotto told him about the left knee being swollen and painful since the fall at work[7]. Dr Sullivan provided the letter dated 20 July 2017 adding at the time he thought his knee may recover and if not, he would need further investigation[8].

20. Throughout the rest of 2017, Dr Brenner regularly records the problems Mr Cailotto was having with his left knee. On 8 January 2018, the doctor records that his left knee is sore, and he cannot walk for more than 20 minutes as the knee feels sore and weak[9].

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[2] AALD-2 p299.
[3] AALD-2 p 31.
[4] AALD-2 p 35.
[5] AALD-2 p 37.
[6] AALD-2 p 38.
[7] AALD-2 pp 38-39.
[8] AALD-2 p 408.
[9] AALD-2 pp 42-43.

21. On 19 January 2018, it is noted that Mr Cailotto was limping on the left knee. On 9 March 2018 it is noted his left knee is very painful. Such comments are regularly reported and on 30 April 2018 it is noted that the left knee is constantly painful, and he cannot keep it still and is constantly trying to find a comfortable position[10]. On 7 May 2018 it is recorded that he was walking with a stick[11].

22. On 30 July 2018, after the left knee replacement, Dr Brenner notes Mr Cailotto only has 175º of extension and the knee has fluid in it[12]. On 3 October 2018 it is recorded that he has pain in the left knee at night and needs cold packs on the knee[13]. Entries about problems in the left knee continue and on 16 January 2019 Dr Brenner notes the left knee was clicking a lot. On 15 February 2019 Dr Brenner also records that he is getting pain in the medial side of the right knee[14]. On 3 May 2019 it was noted that he was getting intermittent pain around the knee and some days he cannot bend it. I assume this is a reference to the left knee[15].

23. Dr Baffsky at the same practice recorded on 22 July 2019 that Mr Cailotto had a persisting click on extension of the left knee and on 19 August 2019 this doctor noted that Mr Cailotto had a sore right knee with "small effusion ? R knee from impaired L knee for x-ray.[16]" The x-ray report is in the clinical notes and refers to fairly marked degenerative changes[17]. On 16 September 2019, Dr Baffsky noted increasing pain in the right knee with effusion and on 24 September 2019, increasing pain with swelling in the right knee and gave a referral to Dr Solomon. Dr Baffsky noted the right knee was swollen on 9 October 2019 and Dr Brenner on 17 October 2019 recorded the right knee was now very sore. Dr Brenner states that Mr Cailotto was favouring the sore left knee and putting stress on the right.

24. On 21 September 2019, Dr Baffsky wrote a letter stating that Mr Cailotto is suffering from increasing pain effusion of his right knee due to strain subsequent to impaired left leg function over time and needs to consult Dr Michael Solomon who performed the surgery on his left knee[18].

25. Further complaints are recorded up to the time that Mr Cailotto had the right knee replacement surgery.

Dr Sullivan

26. Dr Sullivan, a foot and ankle surgeon, reported on 31 May 2016 that Mr Cailotto could weight bear in his cam walker boot and that he needed to wean off the crutches. He recommended he transition from the boot into a running style shoe over the following two weeks and wear that for a further three weeks. The doctor did not mention either knee. As mentioned above, Dr Sullivan provided a letter to Dr Brenner dated 20 July 2017 confirming that when he first saw Mr Cailotto he mentioned his left knee problem and Dr Sullivan added that at the time he thought his knee may recover and if not, he would need further investigation.

27. Dr Sullivan reported to Dr Brenner on 23 October 2018 that Mr Cailotto was recovering from the left total knee replacement. He reported that Mr Cailotto had noticed some flattening of the medial longitudinal arch and his foot is deformed. Dr Sullivan said he had left tibialis posterior tendon dysfunction with increased hindfoot valgus and recommended a medical longitudinal arch support[19].

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[10] AALD-2 p46.
[11] AALD-2 p 47.
[12] AALD-2 p 47.
[13] AALD-2 p 49.
[14] AALD-2 p 50.
[15] AALD-2 p 51.
[16] AALD-2 p 53.
[17] AALD-2 p 92.
[18] AALD-2 p 309.
[19] AALD-2 p 449.

Dr Solomon

28. Dr Solomon is an orthopaedic surgeon who specialises in hip and knee replacement surgery and arthroscopy. The doctor reported to Dr Brenner on 8 February 2018[20]. He advised that:

> "Clinically he stands with varus alignment. Both knee joints have quite marked medial and patellofemoral crepitus. His left knee has a large effusion and was more tender. Flexion was from 0 to 115º. Pulses are present and the hip was normal to examine.
>
> I arranged for him to have weight-bearing x-rays today. He has advanced osteoarthritic changes with significant varus alignment in both knee joints. They look very similar in appearance."

29. Dr Solomon states that Mr Cailotto's knee osteoarthritis is not related to an accident. He says the osteoarthritis is simply wear and tear that has developed over time and is present in both knee joints.

30. Dr Solomon adds that the fractured foot would have exacerbated his arthritic knee condition and ever since he has had ongoing pain and swelling. It is clear from the context that the doctor is speaking of the left knee.

31. In a further report dated 14 February 2018 Dr Solomon advises Dr Brenner:

> "Further to our discussions today (14/2/18), whilst Vittorio has had knee osteoarthritis for a long time, he was not symptomatic until he fractured his foot and need to wear a boot. This in turn resulted in excess pressures across his knee joint due to his altered gait pattern and he became symptomatic with respect to his knee arthritis.
>
> His foot injury therefore contributed to an aggravation an exacerbation of his knee arthritis symptoms.[21]"

32. In a CT scan of the lower limbs dated 12 June 2018, there is reference to severe tricompartment osteoarthritis and an effusion involving the right knee joint[22]. In a report dated 19 November 2018 Dr Solomon noted it was five months following his left knee replacement and swelling had improved but was still a little swollen. It was noted he was still having physiotherapy and was walking with a limp[23].

33. On 20 May 2019, Dr Solomon reported to Dr Brenner and advised that Mr Cailotto still experiences swelling and clicking in the left knee which he said was normal for a knee replacement. Dr Solomon added that eventually he would need to have his right knee replaced[24].

34. On 28 October 2019, Dr Solomon reported again to Dr Brenner noting it was 16 months after the left total knee replacement. He advises that Mr Cailotto has "advanced osteoarthritis affecting his right knee. These changes have been present for a long time". He adds that the right knee is now giving him significant pain and discomfort to the point where he needs to consider a right knee replacement. Dr Solomon gives his opinion about causation, stating:

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[20] ARD p 22.
[21] AALD-2 pp 429-430.
[22] Reply p 64.
[23] AALD-2 p 450.
[24] AALD-2 p 456.

> "I understand that ever since he sustained a left foot fracture requiring the need to be placed in a cam boat, his arthritic knee pain has been exacerbated. His left knee was more painful at the time and hence he had his left knee replaced. He clearly has long- standing osteoarthritis in his right knee but had minimal if any symptoms prior to his foot fracture.
>
> There is no doubt that his symptoms and signs now necessitate a right total knee replacement. It is certainly possible that his left foot injury aggravated both his left and right knee osteoarthritis. He feels that the aggravation to his right knee has remained and certainly this is understandable.
>
> It really is up to the insurance company as to whether they feel they will cover his right knee replacement and I suspect they will send him for an independent opinion which is important."

35. On 4 November 2019, Dr Solomon answered questions posed to him by the insurer, EML, as follows:

> "Vittorio has advanced osteoarthritis affecting his right knee. His osteoarthritis is long- standing and not related to a work injury.
>
> He feels that since he was required to be placed in a cam boot due to a work-related injury to his left foot, his arthritic right knee became painful and this pain has not ceased.
>
> It is certainly possible the ongoing pain that he is now experiencing has been exacerbated by his work injury and the need for a boot but as I pointed out to Vittorio, at some point he was always going to need a knee replacement as his arthritis is pre-existing.
>
> Following knee replacement surgery he will be able to return to working as a security guard. He has reached the point where nonoperative therapy is no longer affective in controlling his pain."

36. Unfortunately, Dr Solomon in this report does not really address the causation test, whether on the balance of probabilities Mr Cailotto has sustained a right knee condition being the aggravation of his previously asymptomatic right knee osteoarthritis due to the left foot injury on and secondly, if so, whether the aggravation of the osteoarthritic condition has materially contributed to the need for right total knee replacement.

37. In a further report dated 29 February 2020 addressed to Mr Cailotto's solicitors, Dr Solomon states that osteoarthritis is an extremely common condition in the general population, a progressive wear and tear disease. The doctor states that Mr Cailotto's osteoarthritic changes are long-standing and would have been present before his accident. He adds the fracture sustained in the accident, necessitating mobilisation in a cam boot, altered his weight bearing ability and this rendered his knee *joints* symptomatic, in particular his left knee.

38. He adds that there is no doubt that the foot injury at work exacerbated his knee pain and the knee replacement surgery was completely necessary to alleviate his knee joint pain. The doctor does not use the plural in this sentence, nor does he specify if he is speaking of both knee replacement surgeries.

39. The Prince of Wales Hospital records numbering 232 pages have records about the right knee replacement from page 165 but do not assist in the determination of the issues in dispute.

40. Mr Jason Tack, physiotherapist from Wolper Day Rehabilitation reported to Dr Solomon on 26 March 2020 that Mr Cailotto attended rehabilitation from 26 February 2020 to 5 March 2020. Due to COVID-19 the remaining sessions had to be cancelled and he was given a home exercise program[25].

Dr Conrad

41. Dr Conrad provided medico-legal reports for Mr Cailotto dated 27 March 2018, 21 January 2020 and 13 July 2020. In the first report Dr Conrad records that Mr Cailotto "denies having any pain in the right knee"[26]. He examined the left knee and stated that Mr Cailotto walked with a slight limp and favouring his left leg. Dr Conrad also examined the right knee and noted there was "very slight varus deformity, but full movements. Slight crepitations present."

42. Dr Conrad referred to the opinion of Dr Hitchen about the left knee and noted that Dr Hitchen said that "clinically Mr Cailotto also has moderately advanced osteoarthritis affecting his right knee, however presently this is not symptomatic".

43. Dr Conrad says he carefully questioned Mr Cailotto whether in the past he had attended any doctor complaining of knee pain and he said he had not. Dr Conrad does not otherwise deal with the right knee in the first report.

44. In the report dated 21 January 2020, Dr Conrad took the following history:

> "Due to favouring his left knee, he developed pain in his right knee over a year ago. He is not sure of the onset date but this has progressively deteriorated. He was referred back to Dr Solomon by Dr Brenner and Dr Solomon's letter to Dr Brenner, dated 28 October 2019, states that clearly he has had longstanding osteoarthritis of the right knee but had minimal if any symptoms prior to his left foot fracture. Dr Solomon has recommended a right total knee replacement…
>
> He has continued to have some stiffness in the left knee and some pain in the left foot and occasional swelling but his main problem now is increasing pain in the right knee which is worse when he is standing, walking, going up and down stairs, squatting or kneeling.[27]"

45. Dr Conrad notes that when he saw Mr Cailotto in March 2018, he was doing supervisory work at Sydney Airport doing a lot of standing and walking, which made his symptoms worse. He did this until January 2019. Dr Conrad notes also that on 1 April 2019, Mr Cailotto started a new job with MSS Security doing control room operations in a sitting down position.

46. Dr Conrad records his physical examination of Mr Cailotto, that he walked with a pronounced limp favouring his right leg. He had full extension of the right knee with flexion limited to 120º and moderate to severe crepitations present. Dr Conrad referred to a right knee x-ray dated 19 August 2019 revealing fairly marked degenerative changes, marked narrowing medial tibiofemoral joint space, severe degenerative changes associated with joint effusion.

47. Dr Conrad expressed the following opinion about causation:

> "Mr Cailotto was involved in an accident in May 2016 fracturing the left fifth metatarsal bone, which has continued to be painful, and due to irregular gait he made symptomatic previously non-symptomatic left knee, which precipitated the need for a left knee replacement. There is no doubt that also due to his irregular gait he made symptomatic a previously non-symptomatic right knee,

[25] AALD-2 p 468.
[26] ARD p 27.
[27] ARD p 15.

> which now necessitates a right total knee replacement as recommended by Dr Solomon in his report to Dr Brenner dated 28 October 2019. Dr Solomon states that although Mr Cailotto had pre-existing arthritis in the right knee this was without symptoms until the left foot was fractured and irregular gait made the right knee symptomatic."

48. At the end of his report, Dr Conrad stated that he agrees with Dr Solomon that the left foot injury aggravated both his left and right knee osteoarthritis. He adds "especially as he had no symptoms in his right knee prior to the left foot injury."

49. In relation to capacity for work, Dr Conrad says that Mr Cailotto would only be fit for a sedentary job such as in the security control room that he is doing at MSS Security. However, following the right knee replacement Dr Conrad opines that Mr Cailotto would be off work for about 10 weeks at least and will need intense physiotherapy.

50. In Dr Conrad's final report dated 13 July 2020, he commented on the reports from Dr Anthony Smith, the respondent's medico-legal specialist. Dr Conrad states there is nothing in Dr Smith's reports that would cause him to change his opinion[28].

Dr Hitchen

51. Dr Hitchen is an orthopaedic surgeon specialising in shoulders and knees. He reported to the insurer on 7 March 2018. He has a history that Mr Cailotto began to get episodes of pain in his left knee around July 2017. Dr Hitchen said that Mr Cailotto attributed this to more prolonged standing at work. He notes that Dr Brenner wrote to Dr Sullivan who responded on 20 July 2017 wherein Dr Sullivan recalled that Mr Cailotto mentioned a left knee problem. He stated an MRI of the left knee in July 2017 showed arthritis in that knee. He refers to Dr Solomon confirming that Mr Cailotto had sustained an aggravation to his left knee in the original fall.

52. Dr Hitchen took a history that at the time he saw Mr Cailotto he had constant pain in the left knee, worsening after walking 15 minutes. The knee was stiff when arising out of a chair. He also adds "He has a minor degree of discomfort in his contralateral right knee". Dr Hitchen examined both knees and said they revealed fusiform deformity consistent with clinical osteoarthritis. Of the right knee he recorded:

> "I took the opportunity to examine his less symptomatic right knee. On this side, there was a 5º fixed flexion deformity. Thereafter there was an arc of motion of 5 - 115º of flexion. There was medial pseudolaxity present when applying a valgus stress. There was moderate crepitus at both the patellofemoral and medial compartments on right knee motion. As such physical examination of the right knee was consistent with osteoarthritis.[29]"

53. In his discussion Dr Hitchen said that Mr Cailotto had moderately advanced osteoarthritis affecting his right knee however at that time it was not symptomatic. He refers to CT scan dated 8 February 2018 showing bilateral knee osteoarthritis. Dr Hitchen expresses the view that "it was only a matter of time until he began to experience symptoms in his left knee and indeed his right." However, Dr Hitchen does state in the majority of individuals osteoarthritis is of a constitutional basis with factors such as that body habitus and genetics playing a significant role. Yet Dr Hitchen expressed the view that while the left knee replacement is indicated he did not believe the left knee arthritis was caused or permanently aggravated by the work place fall in 2016. He believed it was only a matter of time that the right knee would come to knee replacement.

[28] AALD-3 p 2.
[29] Reply p 66.

Dr Anthony Smith

54. Dr Smith, orthopaedic surgeon, has provided medico-legal reports for the respondent dated 14 January 2020[30] and 6 July 2020[31]. Dr Smith sets out a lengthy history from various sources. In his examination findings he notes that Mr Cailotto had an antalgic gait, favouring the right lower limb. He also reports that the right knee has 15° of fixed flexion, 15° of varus deformity and flexes to 100°. He found crepitus about the range but said the right knee is stable. In the left knee examination, he found 5° of fixed flexion and that the left knee flexes to 110°. Dr Smith stated that the left knee is stable and there is no evidence of any loosening.

55. Dr Smith expresses the opinion that Mr Cailotto has bilateral knee, hip and ankle osteoarthritis. He said with such big joints the condition always develops bilaterally. He opines that these forms of arthritis are inherited or familial and are completely unrelated to employment. However, Mr Cailotto's contention is not whether his work caused the osteoarthritic condition in his right knee, but that it was aggravated by virtue of the altered gait following the injury in May 2016.

56. After advancing this opinion, Dr Smith answers a series of questions. Dr Smith does not seem aware that an Arbitrator of the Commission has already determined that Mr Cailotto suffered a consequential condition at the left knee which results from the accepted injury to his left foot on 10 May 2016 and the proposed left knee replacement surgery in turn results from that consequential condition. Dr Smith says any aggravation would have resolved of its own accord and left no disability at all. But then, somewhat inconsistently, he says that once a large weight bearing joint is rendered symptomatic for the first time then it continues to be rendered symptomatic from time to time.

57. Dr Smith confirms that right total knee replacement is the correct treatment for Mr Cailotto as he says he is too old at age 56 for any other treatments. In answer at point 5 he responds if there was aggravation of the right knee arthritis on that date, that is 10 May 2016, he says that has long since recovered and it is not producing any symptoms after two weeks or thereabouts. But as I have stated above that is not Mr Cailotto's contention.

58. Dr Smith was asked about Mr Cailotto's ability to return to work, but he just says he would be fit for work that is full time and he would need to be able to sit or stand as desired and not work in confined spaces or with slopes, stairs, ladders or on uneven ground. But he does not comment on how long Mr Cailotto would need off work to recover after the knee replacement surgery.

59. On 30 June 2020, the respondent's solicitors wrote to Dr Smith[32]. They inform Dr Smith that following the prior Commission proceedings liability remains accepted for the left foot injury on 10 May 2016 and consequential left knee condition as a result of altered gait and the wearing of a CAM boot and standing on the injured leg. They also note that the insurer paid for the left knee replacement surgery and that after that procedure he "continued to complain of ongoing symptoms in his left knee following surgery, as noted in the enclosed clinical records from Edgecliff Medical Centre". The solicitors add that Mr Cailotto now alleges he has suffered further consequential injury to the right knee due to overcompensating for the left knee after the surgery. They note he has had a right total knee replacement on 6 February 2020.

[30] Reply p 68.
[31] AALD-R p 1.
[32] AALD-R p 1.

60. The solicitors refer to Dr Conrad's opinion and they ask Dr Smith the following question:

> "**Are you able to clarify whether or not you are of the view the worker has sustained injury to his right knee as he has alleged, being consequential to the left knee surgery undertaken in June 2018 paid for by our client.**"

61. The solicitors enclosed a considerable number of medical reports and records, all of which are not before the Commission.

62. Dr Smith replied in report dated 6 July 2020. Dr Smith advised:

> "Aggravations to weight-bearing joint arthritis last seconds or minutes. They are relieved by taking the weight of the affected joint, or alternately by putting the affected joint, say the knee, in a gutter splint, as restricting movement will also prevent knee pain occurring.
>
> The most common presentation is for one knee to be more symptomatic than the other. It is very uncommon to have the same symptoms in both knees. Therefore, if one has bilateral knee arthritis and for example has the left knee arthritis treated by total knee replacement, the development of symptoms in the right knee is unrelated in any way to the left knee osteoarthritis treatment.
>
> The same can be said if one has a knee replacement and has bilateral hip arthritis, as well as bilateral knee osteoarthritis. The development of hip osteoarthritis after the left knee replacement does not cause the hips to become symptomatic. They will become symptomatic consequent to the pressures of time.[33]"

Mr Cailotto's submissions

63. Mr Cailotto's counsel submitted the prior findings of the Commission are important to bear in mind, that Mr Cailotto suffered a consequential condition at the left knee which resulted from the accepted injury to his left foot on 10 May 2016 and the then proposed left knee replacement surgery in turn results from that consequential condition. It was submitted that altered gait that arose after the left foot injury which caused the osteoarthritis in the left knee to become symptomatic.

64. Counsel referred to Mr Cailotto's statement which he referred to as simple and straightforward and succinct, noting how the pain in the right knee came on. It was submitted that the medical evidence is in agreement that Mr Cailotto has osteoarthritis in his right knee that was longstanding. Counsel submitted it is necessary to ascertain when the symptoms in the right knee commenced. He drew attention to Dr Hitchen's report dated 7 March 2018 wherein, in his discussion, Dr Hitchen said that Mr Cailotto had moderately advanced osteoarthritis affecting his right knee however at that time it was not symptomatic. It was submitted that even though Mr Cailotto had arthritis in this knee, it was not then symptomatic.

65. Mr Cailotto's counsel referred to the Edgecliff Medical Centre records for 15 February 2019 when Dr Brenner records that Mr Cailotto is getting pain in the medial side of the right knee. He noted that on 19 August 2019 Dr Baffsky noted that Mr Cailotto had a sore right knee with "small effusion? R knee from impaired L knee for x-ray.[34]"

[33] AALD-R p 6.
[34] AALD-2 p 53.

66. Counsel submitted that further entries in these clinical notes provide corroboration of Mr Cailotto's account that the problems he was continuing to have with the left knee put stress on the right knee. In particular the entry by Dr Baffsky noted the right knee was swollen on 9 October 2019 and Dr Brenner on 17 October 2019 recorded the right knee was now very sore and Dr Brenner states that Mr Cailotto was favouring the sore left knee and putting stress on the right.

67. The letter from Dr Baffsky of 21 September 2019 was also cited as providing support of a causal link between the right knee symptoms and the left knee condition. Counsel also drew attention to the referral from Dr Brenner to Dr Solomon about the right knee condition asking about if there was a connection between the right knee symptoms and the left knee condition. It was submitted that this shows that Dr Brenner's thought process was to connect them.

68. Mr Cailotto's counsel then addressed the reports from Dr Solomon wherein he expressed the view that the causal connection was certainly possible. He noted that in his medico-legal report he has given the issue more consideration. Counsel drew attention to the doctor's view that there is no doubt that the foot injury exacerbated the knee. Mr Cailotto says if the respondent submits that Dr Solomon only speaks of possibility not probability, Dr Solomon's opinion is strengthened by the opinion of Dr Conrad.

69. It was submitted that the Commission has already determined that gait related problems from the left foot injury caused the left knee consequential condition and the need for the left knee replacement surgery, and Dr Conrad's opinion is consistent with that. It was submitted that Dr Conrad is of the opinion that the irregular gait has made the right knee symptomatic. Counsel submits the opinion of Dr Conrad is well based because he is aware of when the symptoms in the right knee occurred. Counsel submitted that people do not need knee replacements just due to the presence of osteoarthritis, it is only when the knee becomes symptomatic that such treatment is required. Counsel submitted that Dr Conrad considered that the right knee had become symptomatic due to the altered gait.

70. Mr Cailotto's counsel submitted that the legal test to be applied is that set out in *Kooragang Cement Pty Ltd v Bates*[35]*,* has the injury set in train a series of events. Mr Cailotto's submission is that in his case this has happened. There was injury to the left foot, causing altered gait, and a consequential condition in the left knee leading to knee replacement surgery and the ongoing symptoms after that surgery. Counsel submitted that a common sense evaluation of the causal chain leads to the conclusion that the right knee has become symptomatic due to these causes. Counsel says this is supported by Dr Conrad's opinion and by Dr Solomon and Dr Brenner.

71. Counsel submitted that Dr Smith did not support the involvement of the work injury in either knee. It was submitted that his opinion on causation is inconsistent with the earlier finding of the Commission. It was argued the weight of his opinion must be questioned as it is based on a view that is inconsistent with the Commission's findings. It was noted that Dr Smith did not cavil that the surgery itself was appropriate. It was submitted that the Commission should find in Mr Cailotto's favour in relation to the presence of a consequential condition in the right knee being causally related to the left foot injury and its sequelae.

72. Orders were sought in relation to the payment of the right total knee replacement surgery and in relation to weekly compensation in the period claimed from 6 February 2020 to 4 April 2020 at the rate of $1,156 per week. It was submitted that it was not surprising that Mr Cailotto was unfit in this period as the right knee replacement took place on 6 February 2020 and Dr Brenner certified him unfit in this period and that Mr Cailotto instructed him that he returned to work on 5 April 2020.

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

Respondent's submissions

73. The respondent submitted that Mr Cailotto's right knee did not become symptomatic until 2019. It was submitted that Dr Solomon in his report of 28 October 2019 acknowledged that the osteoarthritis in the right knee was longstanding and that all the doctors were of this view. Counsel then submitted that Dr Solomon's opinion about causation was only based on a possibility and so it should not be given weight.

74. It was also submitted by the respondent that Dr Solomon does not explain the delay in the right knee being symptomatic from 2016 to 2019. It was noted the first investigation he had of the right knee was on 19 August 2019. It was submitted that if the fractured left foot had aggravated the right knee you would have expected it to be symptomatic earlier. However, the respondent does not point to any medical evidence to substantiate this submission. No doctor provides such an opinion.

75. It was submitted that Mr Cailotto only started to complain about the right knee in early to mid-2019. It was submitted that Dr Solomon seems to express doubt that there was a relationship as he queries if the insurance company will accept liability. Counsel refers to the report of Dr Solomon of 4 November 2019 to the insurer wherein he refers to Mr Cailotto's right knee and says it was due to wearing a cam boot. Counsel submits that the boot was worn in 2016 and the doctor does not explain the causal link. It was also submitted that the doctor seems to say the knee joints plural were affected by the wearing of the cam boot. It was further submitted that Dr Solomon's views do not help in resolving the dispute.

76. In relation to Dr Conrad, counsel notes in the March 2018 report it is recorded that Mr Cailotto denied symptoms in the right knee. However, I note that Dr Conrad did say he was favouring his left leg. In Dr Conrad's report dated 21 January 2020 he refers to the fractured foot in 2016 and irregular gait he made symptomatic the left knee and then the right knee. It was submitted that Dr Conrad relies on Dr Solomon, but that Dr Solomon's opinion is flawed as he was of the view that the right knee symptoms came on after the wearing of the boot. It was argued that Dr Conrad does not sheet home the irregular gait to the left knee, but to the wearing of the cam boot. So, it was submitted that Dr Conrad's report does not explain the development of symptoms in 2019 as opposed to 2016.

77. The respondent agrees there is an estoppel from the findings of the prior arbitrator.

78. It was submitted that Dr Hitchen has an appropriate history, but Mr Cailotto attributed the left knee pain to more prolonged standing at work. Dr Hitchen noted minor discomfort in contralateral knee but said the right knee was not symptomatic.

79. Counsel accepted that Dr Smith does not accept that the Commission has found the consequential condition in the left knee. The respondent relied upon Dr Smith's opinion that osteoarthritis develops bilaterally, and he would be in the same position even if the work injury did not occur. It was acknowledged that he does not consider that there could have been aggravation in the fall. Counsel says Dr Smith is of the view that the aggravation would have resolved after a number of days and his condition is not related to his work and the operation is not caused by the work injury. Counsel referred to his last report wherein Dr Smith says aggravations to weight bearing joints last second or minutes and are relieved when weight comes off the knee.

80. The respondent submitted that the Commission would not be satisfied on the medical reports of Mr Cailotto that the incident of 10 May 2016 has caused aggravation of the right knee. It was submitted if the Commission finds for Mr Cailotto, then no submission are made by the respondent in relation to the entitlement regarding the weekly compensation or need for the surgery.

Determination

81. The legal test of causation is that discussed by the Court of Appeal in *Kooragang* 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."

82. 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."

83. In *Nguyen v Cosmopolitan Homes (NSW) Pty Limited*[36] 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."

84. All the doctors agree that Mr Cailotto had long-standing osteoarthritis in his right knee, that was asymptomatic before Mr Cailotto injured his left foot at work on 10 May 2016. The Commission has found previously that this injury to the left foot caused Mr Cailotto to walk with an altered gait and this in turn caused the asymptomatic left knee osteoarthritis to become symptomatic and that the left knee replacement surgery was reasonably necessary as a result of the injury on 10 May 2016.

[36] [2008] NSWCA 246.

85. I find that I cannot place weight on Dr Smith's opinion because he does not accept these findings of the Commission, which are binding on me and which the respondent's counsel agrees create an estoppel. In addition to the comments I have made about Dr Smith's assertions when summarising his reports, the thesis of Dr Smith is if there was any aggravation from the foot injury on 10 May 2016, it would have resolved of its own accord. Yet this is not what the Commission found. Then when dealing with the right knee, Dr Smith makes the same assertion that if there was an aggravation of the right knee arthritis it would not have produced any symptoms after about two weeks.

86. In the respondent's solicitors letter dated 30 June 2020, they sought to direct Dr Smith to the correct question. They informed him of the Commission's finding about the left knee and that the insurer had paid for the left knee replacement surgery and they added that following the surgery Mr Cailotto "continued to complain of ongoing symptoms in his left knee". The solicitors advised Dr Smith that the claim now brought by Mr Cailotto was that he suffered a further consequential condition to his right knee due to overcompensating for the left knee after the surgery. Dr Smith asserts that if one has bilateral osteoarthritis and one knee is treated with left knee replacement surgery, the development of symptoms in the right knee is unrelated in any way to the left knee arthritis. But the doctor does not deal with the facts put to him, that Mr Cailotto continued to complain of ongoing symptoms in the left knee after the surgery and the ongoing altered gait which started with the left foot injury on 10 May 2016.

87. Dr Smith does not deal with the contention of Dr Baffsky that the right knee symptoms were due to strain subsequent to the impaired left leg function over time. Because of Dr Smith's views about the left knee, I find cannot place weight on his opinion and I prefer the opinions of Drs Brenner, Baffsky, Conrad and Solomon. Even though Dr Solomon expresses his opinion in terms of possibility, I find there is a consistent thread running through these doctors' opinions regarding causation.

88. Drs Brenner and Baffsky, while not being specialists, have had the advantage of seeing Mr Cailotto over a period of time and their records give a good insight into the sequelae of the left foot injury, as to its effects on Mr Cailotto's left knee and the development of his altered gait. I have carefully read the records from the Edgecliff Medical Centre and they detail that over time the left knee started to swell, had fluid, was sore on walking and that Mr Cailotto developed a limp. On 19 July 2017, Dr Brenner expressed the view that the bad walking and the cam boot placed extra pressure on the already abnormal left knee and caused it to flare up. It is relevant to note that Dr Brenner recorded in January 2018, that Mr Cailotto was limping on the left leg. In April and May 2018, the doctor described the left knee as very painful and Mr Cailotto needed to use a stick. I find that clearly the altered gait was ongoing from 10 May 2016, and the aggravation of the underlying osteoarthritis had not ceased.

89. Even though Dr Hitchen in March 2018 says the right knee was not presently symptomatic, in his history he did state that Mr Cailotto "has a minor degree of discomfort in his contralateral right knee" and in his examination findings he says he took the opportunity "to examine his less symptomatic right knee". Also, in the CT scan of 12 June 2018, effusion was noted in the right knee. On 15 February 2019 Dr Brenner recorded Mr Cailotto was getting pain in the medial side of the right knee. On 17 October 2019 Dr Brenner states that Mr Cailotto was favouring the sore left knee and putting stress on the right knee. Dr Conrad supports such a diagnosis because in his report dated 21 January 2020 he opined that due to favouring his left knee Mr Cailotto developed pain in his right knee over a year ago.

90. Dr Conrad opined that the fractured foot on 10 May 2016 continued to be painful and Mr Cailotto developed irregular gait making the left knee symptomatic precipitating the need for the left knee replacement. He added "There is no doubt due to his irregular gait he made symptomatic a previously non -symptomatic right knee…" The respondent submitted that

Dr Conrad, and the other doctors, had not explained the delay in onset of the right knee symptoms. It was argued that if the left foot injury had caused the onset of symptoms in the left knee, and if it had also caused the right knee to be symptomatic, symptoms would have come on sooner. However, I reject such a submission as no doctor has expressed such a view. As Mr Cailotto's counsel submitted, the Edgecliff Medical Centre records provide corroboration of Mr Cailotto's account that the problems he was continuing to have with the left knee put stress on the right knee.

91. I accept Mr Cailotto's submission that Justice Kirby's comment in *Kooragang* "that an injury can set in train a series of events" is apt and I find that it what has happened in Mr Cailotto's case. I accept the further submission that the injury to the left knee caused altered gait and the left knee problems leading to the knee replacement and ongoing symptoms following that surgery. I find that the treating medical evidence from Drs Brenner and Baffsky establishes this. I also accept counsel's submission that a common sense evaluation of the causal chain leads to the conclusion that the right knee has become symptomatic because of these causes.

92. I do not accept the respondent's submission that Dr Conrad does not sheet home the irregular gait to the left knee but the wearing of the cam boot, because Dr Conrad does not express his opinion in this restrictive way. Dr Conrad opines that the irregular gait after the fracture of the left foot made the left knee symptomatic and "that also due to his irregular gait he made symptomatic a previously non-symptomatic right knee…" I find that the respondent's submission tries to dissect Dr Conrad's opinion and give a restrictive reading to what he means by "irregular gait". Earlier in his report Dr Conrad stated "[d]ue to favouring his left knee, he developed pain in his right knee over a year ago." I find there is a clear causal nexus between the injury to the left foot involving the wearing of the boot, development of irregular gait in the left knee and this ongoing irregular gait (as evidenced by Dr Brenner's and Dr Baffsky's notes) causing the right knee to become symptomatic.

93. Applying the principles in *Kooragang* and *Nguyen* I am satisfied, on the balance of probabilities, that Mr Cailotto has established that the symptoms he has complained of in the right knee are due to the aggravation of his underlying osteoarthritic condition and that the aggravation was caused because of him compensating after he developed an altered gait following the injury to his left foot on 10 May 2016, and its sequelae being the consequential condition in his left knee.

94. Accordingly, I find that Mr Cailotto has sustained a consequential condition in his right knee as a result of the condition in his left knee which has previously been found to be as result of the injury to his left foot on 10 May 2016.

Reasonably necessary

95. The case of *Murphy v Allity Management Services Pty Ltd*[37] is authority for the proposition that a condition can have multiple causes and the work injury does not have to be the only, or even a substantial cause, before the treatment is recoverable under section 60 of the 1987 Act. Deputy President Roche stated in *Murphy* that a worker only has to establish that the treatment is reasonably necessary as a result of the injury; that is, did the work-injury materially contribute to the need for surgery. I find that the work-related injury on 10 May 2016 materially contributed to the need for the right total knee replacement surgery because the aggravation to the right knee had not ceased, necessitating the right knee replacement surgery to alleviate his symptoms.

[37] [2015] NSWWCCPD 49, *Murphy.*

96. The legal test to be applied when determining whether proposed treatment is *reasonably necessary* as a result of a work place injury as required by section 60 of the 1987 Act was considered in *Diab v NRMA Ltd* (*Diab*)[38] wherein Deputy President Roche cited the decision of Judge Burke in *Rose* with approval. However, there is no real dispute between the doctors that the right total knee replacement was reasonably necessary treatment. Causation was the main dispute and I have found in favour of Mr Cailotto. The respondent did not wish to make submissions, apart from on causation, which I have dealt with.

97. Accordingly, I find that the right knee replacement surgery was reasonably necessary treatment as a result of the sequelae of the injury on 10 May 2016.

98. I order that the respondent is to pay for the right total knee replacement surgery pursuant to the applicable workers compensation gazetted rates.

Weekly compensation

99. The respondent advised that Mr Cailotto had been paid 99 weeks of weekly compensation benefits up to when he was last paid on 14 April 2019. Therefore, the claim made in these proceedings for weekly compensation, from 6 February 2020 to 4 April 2020, is within the section 37 period. The respondent agrees the PIAWE figure is $1,445.20 and 80% of that is $1,115.16. The respondent did not wish to make submissions about Mr Cailotto's claim if he succeeded on the causation argument. I am satisfied that the evidence from Dr Brenner and Wolper Rehabilitation confirms that Mr Cailotto was unable to work in the period claimed which was the two months after his right knee replacement surgery.

100. Accordingly, I order that the respondent pay Mr Cailotto weekly compensation pursuant to section 37 of the 1987 Act at the rate of $1,115.16 per week from 6 February 2020 to 4 April 2020.

[38] [2014] NSWWCCPD 72, *Diab.*