

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 1263/20
Applicant: Maria Garcia
Respondent: Level 4 Health Club Pty Ltd
Date of Determination: 19 May 2020
Citation: [2020] NSWCC 162

The Commission determines:

1. As a consequence of the agreed injury to the applicant's left knee sustained in the course of her employment with the respondent on or about 1 March 2015, the applicant developed lumbar spine and right hip conditions.
2. The lump sum claim is remitted to the Registrar for referral to an Approved Medical Specialist to assess permanent impairment of the left lower extremity (knee), scarring, left breast, lumbar spine, and right lower extremity (hip) from the date of injury on or about 1 March 2015.
3. The documents to be referred to the Approved Medical Specialist are to include those attached to the Application to Resolve a Dispute and the Reply, report of Dr Brittain dated 5 April 2020, referral of Dr D'Souza to Dr de Jesus dated 11 February 2016 and a copy of this Certificate of Determination/Statement of Reasons.

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.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Maria Garcia was born in Spain and obtained a bachelor's degree in physiotherapy. She worked there for eight years as a physiotherapist. In 2007, Ms Garcia sustained an injury to her left knee when snowboarding, which required aspiration and she says recovered after two to three months. In 2008 while playing tennis she sustained a meniscal tear and recovered after surgery.
2. Ms Garcia migrated to Australia in 2010 and after some study and part-time work she commenced employment with the respondent, Level 4 Health Club Pty Ltd, in 2014 as a full-time remedial therapist. In 2014 she competed in Iron Woman type competitions.
3. On or about 1 March 2015, she slipped on a wet tiled floor when walking to the bathroom at work. She ruptured her anterior cruciate ligament (ACL) of her left knee. She underwent surgery to her left knee on 15 June 2015. Following the surgery, she was provided with crutches to mobilise and Ms Garcia developed a left breast seroma. The respondent's workers compensation insurer accepts that this seroma was due to the use of the crutches.
4. On 22 February 2016, Ms Garcia underwent a left knee arthroscopy. Ms Garcia says her left knee continued to trouble her and was prone to giving way. She says on 24 January 2019 it gave way as she was walking down some stairs and she further injured her left knee. In March 2019 she underwent a left knee, high tibial osteotomy.
5. Ms Garcia alleges that as a result of her left knee injury she has sustained consequential conditions in her right knee, right hip and lumbar spine.
6. The claim for compensation brought by Ms Garcia in these proceedings is confined to lump sum compensation under section 66 of the *Workers Compensation Act 1987* (the 1987 Act). She relies on an assessment by Dr Dias who has assessed the permanent impairment in the left knee at 10% whole person impairment (WPI), lumbar spine 7%WPI, right hip 4%WPI, and scarring 2%. The impairment of the breast has been assessed by Dr de Torres at 5%WPI. These assessments have been combined, using the AMA Guides to the Evaluation of Permanent Impairment Fifth Edition, to a total of 25%WPI.
7. The respondent's assessment of the permanent impairment of these body part differs, and it disputes that Ms Garcia has sustained consequential conditions to her right knee, right hip and lumbar spine. It is not necessary that I determine causation of the right knee condition since no lump sum claim for compensation is made in relation to it.
8. Ms Garcia's Application to Resolve a Dispute (ARD) was amended to alter the pleaded date of injury to "on or about 1 March 2015", this was because the date of injury that is referred to in the documents differs. This amendment was made by consent. The reference to "right knee" was also deleted. I also note that Ms Garcia is referred to in some of the medical records as "Maria Del Mar Garcia Carbonell". As she has used the name "Maria Garcia" in her statement and on her ARD, that is the name that I will use in these reasons.

PROCEDURE BEFORE THE COMMISSION

9. The matter was listed for conciliation conference/ arbitration hearing on 29 April 2020. Mr Jon Trainor, counsel, instructed by Mr Kushal Kant, solicitor, appeared for Ms Garcia. Mr Thomas Grimes, counsel, instructed by Mr Nicholas Studdert appeared for the respondent.

10. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary Evidence

11. The following documents were in evidence before the Commission and taken into account in making this determination:
- (a) The ARD and attached documents;
 - (b) Reply and attached documents;
 - (c) Report of Dr Brittain dated 5 April 2020; and
 - (d) Referral from Dr Eric D'Souza to Dr Daniel De Jesus, chiropractor dated 11 February 2016.

Oral Evidence

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

FINDINGS AND REASONS

13. It is convenient to summarise the evidence before the Commission before turning to counsels' submissions.

Ms Garcia's statement

14. In addition to the facts related in the background above, Ms Garcia states that she had not injured or had problems with her right hip or lumbar spine before sustaining the injury to her left knee on 1 March 2015. She advises that she had a very active physical life before that injury. She also states that she was involved in a minor motor vehicle accident on 13 February 2018, which resolved fairly quickly.
15. In her statement, Ms Garcia states at [37]:

"I carried on with my life despite the unsteadiness of my left knee and relied more on the right side of my body. This included relying more on my right side whilst doing massages as part of my employment. As a consequence, I developed pain and discomfort in my right knee, right hip and lower back.¹"

Dr Broe

16. Dr Broe is an orthopaedic surgeon specialising in knees and hips. On 6 May 2015, he examined Ms Garcia at the request of Dr Mervyn Garber from the Royal Randwick Medical Centre. He diagnosed that in the fall at work, Ms Garcia sustained a complete ACL rupture of her left knee².

¹ ARD p 5.

² ARD p 164.

17. On 12 May 2015, Dr Broe reported to Dr Eric D'Souza, from the Bondi Junction Medical Centre, noting her left knee was unstable. On 7 August 2015, Dr Broe noted she was very compliant with the use of crutches and non-weightbearing. Dr Broe says she was mobilising independently, and her gait was normal. She had not returned to running³. On 18 September 2015, Dr Broe examined Ms Garcia again and recorded that with more vigorous work her knee swelled significantly, and she still had some mild effusion. Dr Broe recommended that Ms Garcia be restricted to working four hours per day for the next two months and then gradually build up to six hours per day and then to a normal day. She was prescribed a course of anti-inflammatories⁴.
18. In December 2015, Dr Broe noted that "[h]er main issue has been the full thickness chondral lesion to the medial femoral condyle. This continues to give her intermittent irritation with a sharp pain and some swelling if she overdoes it." Dr Broe anticipated that in the mid to long term Ms Garcia would need an offloading procedure in the form of a high tibial osteotomy⁵.
19. Dr Broe performed an arthroscopy on 22 February 2016 and reported on 4 March 2016 that she was fully weight bearing and had no evidence of a limp. He recommended that Ms Garcia return to work gradually, but she would need to avoid running and impact sports⁶.
20. On 15 June 2016, Dr Broe noted it was one year since her original surgery. He recorded that Ms Garcia had some significant patellofemoral symptoms that were irritating particularly popping. He noted she had been involved in a gym based strengthening programme which would need to continue; however, she was back at full time work⁷.
21. On 21 May 2019, Dr Broe reported that it was eight weeks after the left knee realignment surgery with a medial opening wedge high tibial osteotomy. He recorded that she was fully weight bearing and had no limp. He noted she had been very vigilant with her rehabilitation and had return to full work duties⁸.

General practitioners' records

22. On 13 February 2018, Dr Ahmed recorded in his clinical notes that Ms Garcia had a motor vehicle accident. This entry is very brief and just refers to letter to ED POWH, which I infer means Emergency Department Prince of Wales Hospital⁹. A copy of this letter is in the medical practice's records and it states that Ms Garcia was in a motor vehicle accident on 13 February 2018 when her motor bike was hit by a reversing truck and she fell onto her left side. Dr Ahmed says the pain was on the left side of her neck, left wrist and left ankle¹⁰.
23. On 16 February 2018, Dr Ahmed noted there were no fractures on x-ray and wrote a referral for physiotherapy. Celebrex and Panadeine Forte were prescribed. The referral to Patrick Lyons, physiotherapist, refers to the car accident injuries of the neck, left wrist and left ankle.¹¹ On 3 March 2018 there is reference to an insurance form being filled out for the car accident.

³ ARD p168.

⁴ ARD p 169.

⁵ ARD p171.

⁶ ARD p173.

⁷ ARD p 166.

⁸ ARD p175.

⁹ ARD p190.

¹⁰ ARD p207.

¹¹ ARD p 208.

24. In the next entry on 30 April 2018 it is noted:
- “low back pain last 2 days
unsure how pain started
works as massage therapist ?? work related
feels in her attempt to protect herself from straining neck and wrist ended
up straining lower back.
SLR neg
Can walk on toes/heels¹²”
25. Panadeine Forte and Celebrex were prescribed. A chiropractor referral was given on the same day to treat the low back¹³.
26. On 7 May 2018, Dr Ahmed notes that back pain is still there but improved. He notes Ms Garcia had to cancel a flight due to the same. He gave her a medical certificate. The copy of the certificate refers to back pain¹⁴. On 31 May 2018 Dr Ahmed notes that he filled out the insurance forms. A referral to Stuart Baptist, physiotherapist, refers to the neck, left wrist and left ankle from the MVA.¹⁵
27. The next consultation was on 2 August 2018. Dr Ahmed noted the reason for the visit was “MVA- ongoing symptoms”. Dr Ahmed states he was writing a letter for the insurance company. He referred her to Dr Jill McDonell for assessment as the physiotherapist was requesting another three to four months of treatment¹⁶. A medical certificate issued that day refers to Ms Garcia having a “grade 3 whiplash in Feb 2018 and has ongoing symptoms---- pain and tightness rt of lumbar spine, some neck discomfort and pain in weight bearing tasks in left wrist, forearm and elbow”¹⁷. The referral to Dr Jill McDonell was in relation to the wrist¹⁸.
28. On 3 August 2018, Dr Ahmed had a long consultation with Ms Garcia and records she had hand numbness along the median nerve distribution which she mostly feels at night. She has no symptoms during the day. A letter was written to request neurophysiology¹⁹.
29. On 31 August 2018, Dr Ahmed noted that the numbness has settled, and Ms Garcia now experiences it once every two to three weeks and she was well otherwise. He adds “nil further complaints wrt injury-all settled²⁰”.
30. On 20 November 2018, Dr Brittain saw Ms Garcia at the same practice as Dr Ahmed. He noted that the reason for her visit was knee pain²¹. On 22 November 2018 Dr Brittain records in his clinical notes that Ms Garcia has been compensating for her left knee pain by altering her stance and the doctor requested an ultrasound guided Celestone injection be given to Ms Garcia’s right trochanteric bursa²². In the referral he stated that Ms Garcia had been compensating for her left knee pain by altering her stance and had sudden onset of right trochanteric bursitis yesterday and that she was exquisitely tender over the bursa. He noted his impression that the bursitis was secondary to the left knee pain²³.

¹² ARD p190.

¹³ ARD p210.

¹⁴ ARD p 212.

¹⁵ ARD p213

¹⁶ ARD p191.

¹⁷ ARD p216.

¹⁸ ARD p217.

¹⁹ ARD p191.

²⁰ ARD p191.

²¹ ARD p192.

²² ARD p192.

²³ ARD p178.

31. On 29 November 2018, Dr Brittain examined Ms Garcia and records the reason for her visit was lumbar pain. A referral was written for physiotherapy noting Ms Garcia had “recurring lumbar pain and clinical right trochanteric bursitis”.²⁴
32. On 8 July 2019, Alan Davies, sports physiotherapist, reported to EML about the left knee and also about right sided lower back pain which he said developed during time on crutches. It was said this was the biggest barrier to work at that time²⁵.
33. On 11 September 2019, Alan Davies reported to Dr Brittain about Ms Garcia’s left knee, right knee, right shoulder pain and right sided lumbar pain. In relation to the lumbar pain, he said there was recurrence when she resumed work as massage therapist several months ago, which had largely settled. It was noted there was ongoing restriction into side flexion bilaterally and reduced tolerance to standing and working, she struggles with three hours continuous massaging²⁶.
34. On 24 February 2020, Dr Gonzalvez, a doctor located in Spain, has issued a report stating,

“The patient has developed painful syndrome and severe functional limitation in the lumbar area, right hip and knee, secondary to the clinical situation of her surgically intervened knee, which prevents her from maintaining a correct ergonomic posture and remaining long periods of standing in the development of his professional activity as a massage therapist.”²⁷”
35. On 5 April 2020, Dr Brittain supplied a report to Ms Garcia’s solicitors. He noted that Ms Garcia saw Dr Gerber for the left knee injury on 23 April 2015 reporting that she had fallen at work one week earlier. In relation to right hip and lumbar spine he states:

“From my records of 29/11/2018 and 22/11/2018, right hip trochanteric bursitis was diagnosed and again attributed to altered posture and gait secondary to her left knee injury. From my record of 29/11/2018 and the record of my colleague, Dr Fazia Ahmed of 30/04/2018 lumbar back pain occurring at work again attributed to mechanical factors secondary to her left knee injury. I note that I failed to add these injuries to the WorkCover certificates when those were provided by this practice. Maria Garcia was referred for physiotherapy for both secondary injuries, no investigations were ordered. I opine that these injuries did not require radiological investigations to be a genuine component of the Work Injury Claim. I admit that I was remiss in not altering the work cover form to include them.”
36. Dr Brittain also writes that Ms Garcia had 18 consultations at the medical practice from 21 August 2014 to 15 November 2018, and thereafter 21 consultations with him. He says he assesses her as a person who enjoys working hard and he believes she has recounted details of her impairment honestly.

Dr Dias

37. Dr Dias is a consultant occupational physician who had provided a medico-legal report dated 17 September 2019 to Ms Garcia’s solicitors²⁸. Dr Dias’ diagnosis is that Ms Garcia has developed consequential chronic non-specific lumbar spine pain and consequential chronic right hip trochanteric bursitis, secondary to prolonged altered gait mechanics and overcompensation over four and a half years, as a consequence of her left knee condition. The doctor also states that the employment with the respondent has been the main

²⁴ ARD p192.

²⁵ ARD p233.

²⁶ ARD p232.

²⁷ ARD p163.

²⁸ ARD p15.

contributing factor to these conditions and notes that Ms Garcia had no prior lumbar or right hip issues before the left knee injury with the respondent.

Dr Machart

38. Dr Frank Machart, orthopaedic surgeon, has provided a medico-legal report for the respondent dated 7 November 2019²⁹. He has a history that after Ms Garcia returned to work she developed pain in her lower back through remedial massage and in 2016 developed right hip pain during massage work. Dr Machart sets out his examination findings and summarises the GP records including the reports of Dr Broe.
39. Dr Machart expresses the view that he did not see evidence of pathology in the right hip or lumbar spine that relates to the workplace injury. He noted Dr Dias' view that the "lumbar spine, right hip, and right knee due to 'overcompensation of altered gait pattern stemming from chronic left knee condition over the course of four and a half years'".
40. Dr Machart states that he did not see evidence of a consequential injury to the lumbar spine. He stated that Ms Garcia was doing less work while recovering from the left knee condition. He added that the spine was probably subjected to less strain that would have been otherwise.
41. However, having stated that he did not see evidence of pathology in the hip, he later states that,

"right hip trochanteric bursitis is evident, however this condition does not cause diminution of movement and is rated under Table 17-33 at 3% only if there is association with chronic abnormal gait. Trochanteric bursitis in this situation does not cause gait abnormality. Rating of 3% does not apply."
42. Dr Machart concludes that he could not see a relationship between right hip trochanteric bursitis and the left knee injury.
43. One of the documents which Dr Machart mentions is a referral by Dr Eric D'Souza to Dr Daniel De Jesus dated 11 February 2016. Very late in the Arbitration Hearing Mr Trainor sought to tender this referral. Initially I ruled against this as I was concerned that the admission of the document so late, noting it had not been previously served, would be prejudicial to the respondent. In making this ruling I was focused on the references made by Dr Machart of the clinical notes, which appear in his report at the top of page 4 of the Reply as follows:

"-11/02/2016. Wanted to see a psychologist, depression following left knee injury and complication in the left breast. Also, a letter to a chiropractor.

"-01/02/2016. Depressed and teary. Works in massage therapy. Pain in the back after massage at work. Treatment: remedial massage. Several consultations about breast problems."
44. The respondent had argued if the referral itself was tendered it would seek to have Dr Machart consider it and also would wish to obtain the records from Dr D'Souza's practice and from the chiropractor.
45. However, Mr Trainor drew to my attention the fact that Dr Machart actually mentioned this referral in detail in the middle of page 4 of the Reply.

²⁹ Reply p1.

46. Dr Machart states:

“• 11/02/2016 Dr Souza. Referral to Dr de Jesus, Chiropractor, for opinion and management of lower back pain, complication due to injury to the left knee following incident. Works as massage therapist. Developed pain due to inability to stand properly secondary to knee injury.

47. Excluding the formal parts, the actual referral dated 11 February 2016 from Dr D'Souza, which was sought to be tendered, states:

“Thank you for seeing Maria Garcia Carbonell, aged 36y, for an opinion and management of low back pains, as a sec. complication due to her injury to L knee following an accident. Works as a massage therapist and has developed pains due to her inability to stand properly sec. to her knee injuries.”

48. It was then apparent to me that Dr Machart had considered the contents of the actual referral and that there would be no prejudice to the respondent by admitting that document. Accordingly, I reversed my ruling and admitted the document into evidence. The document admitted, while late, does no more than mirror what Dr Machart records of its contents. While the respondent's counsel submitted the records from Dr D'Souza and the chiropractor should be obtained, I am not satisfied that any perceived need for such records to be obtained is occasioned by just admitting into evidence the actual referral. I observed that had the respondent wished to obtain those records it could have done so upon receipt of Dr Machart's report, and, as Ms Garcia's counsel submitted, it appears from the first page of Dr Machart's report he was sent by the respondent the clinical records from the medical practice, Primary Bondi.

49. The reports from Dr McGlynn, Dr De Torres and Dr Boorer have been read by me but have not been summarised as they deal with the injury to the breast for which liability has been conceded.

Submissions

50. Ms Garcia's counsel said there was a development of lumbar and right hip symptoms, he referred to the various entries summarised above from the general practitioner's records as support for her case. He drew attention to the surgeries undertaken by Ms Garcia. He referred to the third operation and submitted that Ms Garcia was on crutches for some time and she was having physiotherapy treatment. Counsel referred to the history taken by Alan Davies the physiotherapist, that there was right sided low back pain developed while on crutches after the third operation. It was submitted that this is a straight forward causal connection.

51. It was submitted that Dr Dias and the report of Dr Brittain are supportive of Ms Garcia's case and that consequential conditions did develop in the lumbar spine and right hip.

52. Ms Garcia's counsel submitted that the only evidence to the contrary was from Dr Machart. Counsel drew attention to his reasoning process, which he described as insufficient to displace the opinion of Dr Dias. Counsel said a point made by Dr Machart was that Ms Garcia could not have developed lumbar spine issues on her return to work because she worked less hours, and the history the doctor had was that she went back to work after a period on restricted duties. However, it was submitted that Ms Garcia's evidence is that she went back to full time work. Her counsel submitted that Dr Broe's report of 15 June 2016 reveals she went back to full time duties. It is argued by Ms Garcia's counsel that this factual difference undermines Dr Machart's opinion regarding the lumbar spine.

53. In relation to the right hip, counsel submits that Dr Machart's reasoning process is non-existent and he relies on the decision of the Court of Appeal in *Makita (Australia) Pty Ltd v Sprowles*³⁰, and says the opinion is only an *ipse dixit*. It was submitted that the evidence of the general practitioner and Dr Dias should be accepted in preference to that of Dr Machart.
54. The respondent's counsel submitted that one needed to examine the evidence about causation and that Ms Garcia's statement does not assist such a determination as it is too vague as to matters such as the onset of the consequential conditions. It was also submitted that the motor vehicle accident is extremely significant, especially in relation to the lumbar spine. It was further submitted that Ms Garcia's credit cannot be relied upon because her history describing the motor vehicle accident as minor, and that it resolved fairly quickly, is inaccurate. The respondent's counsel was critical of Ms Garcia's statement wherein she says due to her left knee she had to rely more on the right side of her body when she was doing massages. It was submitted that there is nothing in her statement that the lumbar and hip conditions were due to her using crutches.
55. The respondent's counsel submitted that Dr Dias does not refer to the motor vehicle accident. It was submitted that this was significant, and counsel argued this was a glaring omission when one looks at the clinical notes and the lumbar spine condition. Parts of Dr Broe's reports were relied upon to argue that Ms Garcia had a good recovery after her surgery. Specifically, it was noted that after the first surgery, on 15 June 2015, Dr Broe referred to Ms Garcia doing well although it was noted that by end of that year Dr Broe was referring to need for further surgery in the New Year. The respondent's counsel submitted that there is no mention of the lumbar spine or right hip in Dr Broe's reports despite him being the primary care giver. The absence of complaints in general practitioner's notes was also submitted as being of significance.
56. The respondent's counsel argued that even though Dr Dias says the pain in lumbar spine came on from early 2016 is not supported because it is not reported to the general practitioner or orthopaedic surgeon despite numerous treatments being provided to Ms Garcia. The respondent submitted that the Commission cannot rely on Ms Garcia's statement because it is too vague, and she did not fully disclose details of motor vehicle accident. It was also submitted that one cannot rely on Dr Dias, as the contemporaneous evidence does not bear out Ms Garcia's statement that she had back pain from 2016.
57. Attention was also drawn to Dr Broe's report dated 9 February 2016 wherein he states her knee was stable. However, that report did refer to Ms Garcia getting some intermittent mechanical symptoms in the knee³¹. The respondent's counsel also referred to Dr Broe's report dated 4 March 2016 wherein the doctor noted Ms Garcia had further surgery in February 2016 with good recovery, and that 10 days after the arthroscopy, she could fully weight bear with no limp.
58. The respondent's counsel submitted that this report of Dr Broe had no record of referred pain. However, Ms Garcia's case is not one of referred pain but because of the injury to her left knee she avoided weight bearing on her left knee, particularly when working and so she had altered her stance.
59. In relation to the motor vehicle accident it was submitted by the respondent that it was not minor, and it did not resolve within two weeks, as alleged by Ms Garcia. It was submitted that it went on until March 2018 and the general practitioner's notes mentioned that physiotherapy was required for three to four months. It was argued that this was not disclosed to Dr Machart or Dr Dias.

³⁰ [2001] NSWCA 305

³¹ ARD p 172.

60. These factors led the respondent to submit that Ms Garcia is not witness of truth and failure to provided records from Dr McDonnell and the chiropractor have meant that the Commission cannot be sure what was caused by motor vehicle accident, except for the recently admitted evidence of Dr D'Souza.
61. It was also argued that the report of Dr Brittain dated 5 April 2020 specifically under heading 7 cannot be accepted and counsel pointed to the entry on 30 April 2018 that the lumbar spine was painful as Ms Garcia thought she was protecting her neck and wrist which had been injured in the car accident. It was noted that in the medical certificate dated 2 August 2018³² Dr Ahmed referred to tightness in the lumbar spine and some neck and left wrist and arm pain due to motor vehicle accident.
62. It was submitted the history of Dr Brittain is completely contradicted by the clinical notes, and therefore should not be accepted. Counsel drew attention to the imaging request dated 22 November 2018, which referred to Ms Garcia compensating for the left knee pain by altering her stance and the sudden onset of right trochanteric bursitis³³. It was argued that this was inconsistent with her history of problems from 2016 and inconsistent with history given to Dr Dias. It was noted that there was a huge delay of onset recorded in the general practitioner's notes. The respondent referred to Dr Broe's report dated 21 May 2019³⁴ who recorded after most recent surgery Ms Garcia could fully weight bear with no limp and had returned to full duties. Counsel submitted that Dr Broe did not mention any other problems, and if Ms Garcia had significant problems one would expect she would have referred to them with her treating orthopaedic specialist, and that this has not happened.
63. The respondent submitted that Dr de Torres does not have a correct history and cannot be relied upon in relation to the issues in dispute regarding the lumbar spine and the right hip. It was acknowledged that Alan Davies referred to right knee pain due to crutches, but Dr Dias does not deal with use of crutches, but altered gait. This was given as another reason why Dr Dias' opinion should not be accepted. It was argued that Dr Dias considers that all consequential conditions are due to altered gait over 4.5 years. However, counsel submits the reports of Dr Broe do not support that Ms Garcia had altered gait.
64. The respondent submits that Ms Garcia has not established her case.
65. In reply, Ms Garcia's counsel submitted that the respondent's submission about her credit cannot be properly be made, as it has not been made out that she intended to mislead; there had been no attempt to question her.
66. In relation to Ms Garcia's reliability, it was submitted that it is not remarkable that her statement was not precise when in her statement she was describing symptoms over three and a half years to four years, over which time she had undergone multiple operations. Ms Garcia's counsel submitted that she has consistently said she had low back pain before the car accident, and that has been borne out by Dr De Souza. Counsel notes the insurer says Ms Garcia has understated the effects of the car accident, but counsel submits this a matter of degree. He argues that the car accident resulted in short course of pain medication as the Panadeine Forte ended after a short time and compared to left knee injury, with three operations including an ACL reconstruction, Ms Garcia in her mind thought the car accident was minor. Also, the injuries from that accident resolved. So, counsel submitted her evidence should not be disavowed.
67. Furthermore, her counsel argued little weight can be placed on the fact that Dr Broe did not record complaints regarding the back because at the same time she was seeing Dr Broe she informed Dr D'Souza of that pain. It was submitted that an inference should be drawn that Dr Broe was confining himself to deal with the left knee.

³² ARD p216.

³³ ARD p178.

³⁴ ARD p175.

68. In relation to the respondent's submission regarding the entry on 30 April 2018 that she had back pain for two days, Ms Garcia's counsel submitted that this is consistent with her low back pain being intermittent. It was also argued that the fact that she says she was trying to protect her neck and wrist is not medical opinion. It was argued that even if she did injure her back in the car accident this does not negate the proposition that she injured her back also as result of left knee injury.
69. In terms of right hip, counsel submitted that the evidence from Dr Dias should be accepted and the Commission would be satisfied of the fact it occurred as a consequence of left knee injury.
70. In relation to the right hip it was argued that the entry on 18 November 2018 regarding sudden onset of bursitis should be understood in the context of an ongoing and evolving problem since 2015 or 2016, consistent with Ms Garcia's assertion that she altered her stance.
71. Finally, Ms Garcia's counsel concluded by submitting that she had evolving symptoms after the work accident and the extent that her statement is in short form is not necessarily fatal to her case as it is necessary to consider all of the evidence. It was argued that Dr Machart's opinion is unconvincing as he had Dr D'Souza evidence but did not deal with the same in his reasoning process.

Determination

72. A significant portion of the respondent's submissions was an attack on Ms Garcia's credit and reliability as a witness of truth. This submission was based on the view that her statement was too vague and that she understated the effects of the 2018 car accident in which she was involved. I do not accept this line of argument. On the contrary, Ms Garcia has impressed me as a witness of integrity, who was very hard working as evidenced by her attempts to return to her work between each of her three surgeries. It is common ground that before her work-related injury she did not have issues with her lumbar spine or right hip. It is evident from her statement and the medical histories that she was a very physically active person before her injury and was involved in many sports including Iron Woman competitions.
73. The reports of Dr Broe speak about her dedicated efforts at rehabilitation after her left knee injury and surgeries, for instance on 7 August 2015 Dr Broe commented that she was very compliant with the use of crutches and non-weightbearing.
74. The respondent, in my view, has failed to really appreciate the serious nature of her left knee injury and significant nature of the surgeries she has undergone. I have no reason to doubt Ms Garcia's statement at [37] that she carried on with her life despite the unsteadiness of her left knee and relied more on the right side of her body. The respondent's submissions also do not show a consideration of the nature of Ms Garcia's work as a remedial massage therapist. This is a physical job clearly involving her being on her feet for periods of time. She states that when she was doing massages as part of her employment she relied more on the right side of her body. Just because Dr Broe referred to her at times not having a limp and having normal gait, does not mean she had a full recovery. For instance, in the report of 7 August 2015 the doctor while making such findings noted she had not returned to running and in the next report on 18 September 2015 he expressly states that with more vigorous work her knee swelled significantly.

75. Ms Garcia was involved in the motor vehicle accident on 13 February 2018. In her statement, she says this was minor and the effects of it resolved fairly quickly. The respondent was critical of both these statements, but I accept Ms Garcia's counsel's argument that such descriptors are a matter of degree. As was argued on her behalf, compared to her three serious left knee surgeries over a number of years by comparison the car accident was of a lesser nature.
76. The medical evidence regarding the car accident has been summarised by me when dealing with the general practitioner's records. The Prince of Wales Hospital Emergency Department record says Ms Garcia was on her motor bike when hit by a reversing truck and she fell onto her left side. Dr Ahmed recorded that her pain was on the left side of her neck, left wrist and left ankle. No fractures were detected. There is no mention of a lumbar or right hip injury. On 16 February 2018 a referral was given for physiotherapy with Patrick Lyons and it stated that her injuries were to her neck, left wrist and left ankle. A further referral was given on 31 May 2018 for physiotherapy with Stuart Baptist which again refers to the neck, left wrist and left ankle from the motor vehicle accident.
77. The only query as to the involvement of the car accident in the lumbar spine is in Dr Ahmed's entry on 30 April 2018 which I have reproduced earlier in these reasons. The doctor notes Ms Garcia had low back pain for the last two days, that she was unsure how it started and he queried if it was work related as she works as a massage therapist. Then he adds "feels in her attempt to protect herself from straining her neck and wrist ended up straining her back". Dr Ahmed recorded on 2 August 2018 that Ms Garcia had ongoing symptoms involving a grade 3 whiplash, pain in weight bearing tasks of the left wrist, forearm and elbow and some tightness on right of lumbar spine.
78. After this entry there are only two more consultations referring to the car accident and none refer to the lumbar spine and by 31 August 2018 Dr Ahmed notes that Ms Garcia had nil further complaints about the wrist, and it was "all settled".
79. Ms Garcia's counsel submitted that her car accident injuries having settled within this approximately six-month time frame could fairly be termed "minor". I agree. There were no fractures and the treatment was not extensive. Counsel also submitted that even if the lumbar spine had been affected as Ms Garcia had speculated to the doctor, that does not mean that she did not sustain a consequential condition to her lumbar spine because of her left knee injury. I accept this submission because of the evidence, which is recounted in the report of Dr Machart, which refers to complaints by Ms Garcia about her lumbar spine in February 2016.
80. Dr Machart quotes from "GP records" which clearly are not the records in evidence before the Commission and were sent to him by the respondent's solicitors. Dr Machart on page 1 of his report thanks them for sending him the documents and he refers to the "clinical records of Primary Bondi". On page 4 of his report he sets out the entries from the "GP records" in reverse order. He notes on 1 February 2016 that Ms Garcia works in massage therapy and states "pain in back after massage at work. Treatment: remedial massage" and then he refers to an entry on 11 February 2016, which includes "Also, a letter to a chiropractor".
81. Further down page 4 Dr Machart sets out the details of the referral on 11 February 2016 from Dr D'Souza to Dr De Jesus, chiropractor, "for opinion and management of lower back pain, complication due to injury to the left knee following incident. Works as massage therapist. Developed pain due to inability to stand properly secondary to knee injury."
82. The actual referral was tendered, but it says no more than that recounted by Dr Machart.

83. This evidence establishes that Ms Garcia did complain of lower back pain two years before being involved in the car accident and it establishes that she gave a history of developing the lumbar pain due to inability to stand properly secondary to her left knee injury. I find that the date of this referral is of some significance. In December 2015 Dr Broe noted her left knee was giving Ms Garcia some intermittent irritation with a sharp pain and some swelling if she overdoes it. I find it is not surprising, with such issues, that Ms Garcia would have done as she has said, to try to place more weight on her right side to avoid placing weight on her left knee, particularly when she was performing massages at work.
84. The legal test of causation is that discussed by the Court of Appeal in *Kooragang Cement Pty Ltd v Bates*³⁵ 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.”

85. 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.”

86. 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.”

³⁵ (1994) 35 NSWLR; (1994) NSWCCR 796, *Kooragang*

³⁶ [2008] NSWCA 246

87. Applying the principles in *Kooragang* and *Nguyen* I am satisfied, on the balance of probabilities, that Ms Garcia has established that the symptoms she has complained of in the lumbar spine in 2016 were causally related to the work-related left knee injury.
88. I do not accept Dr Machart's opinion about the lack of a causal connection of the lumbar spine complaints and the left knee injury. Having specifically quoted Dr D'Souza's referral, Dr Machart did not further engage with its contents. He says he did not see evidence of a consequential injury to the lumbar spine, which seems totally at odds with the referral that he quoted. The only reason he gives for his opinion is that Ms Garcia was doing less work when recovering from her knee injury. The respondent's counsel criticised Ms Garcia's statement for being vague, yet Dr Machart is making an extremely vague observation, in the sense it is a broad-brush statement. Ms Garcia had three surgical procedures, after each she did have periods of lesser work and recovery, however, she also had periods where she did return to full hours. Also, Dr Machart overlooks that even when she was working fewer hours she was still performing massages and so having to stand for periods of time while she worked.
89. The respondent also submitted that I should not make a finding in Ms Garcia's favour because Dr Broe did not refer to her suffering lumbar or right hip symptoms. It is the case that Dr Broe is silent about these complaints, however I consider the evidence that Dr Machart quotes from Dr D'Souza's records is powerful and supports Ms Garcia, notwithstanding the absence of record by Dr Broe. I accept her counsel's submission that it is most likely on the balance of probabilities that Dr Broe was focused on the left knee treatment and so was Ms Garcia when she saw him.
90. It was also argued that Ms Garcia's case is flawed because Dr Dias did not deal with the car accident. While it would have been ideal for him to do so, I find having closely considered Dr Ahmed's records the accident was, as described by Ms Garcia, minor. I accept Mr Trainor's submission that even if there was some involvement of the lumbar spine because Ms Garcia was trying to protect her neck and wrist, this does not mean earlier in 2016 when she was trying to protect her left knee, she did not also develop symptoms in her back. Therefore, I find that the fact Dr Dias does not refer to the effects of the car accident is not fatal to Ms Garcia's claim.
91. In relation to the right hip, Dr Brittain records in his clinical notes on 22 November 2018 that Ms Garcia has been compensating for her left knee pain by altering her stance and she had a sudden onset of right trochanteric bursitis the day before. On examination the doctor noted she was exquisitely tender over the bursa. He requested an ultrasound guided injection be given into the bursa. A few days later he recommended physiotherapy for her hip and lumbar regions. The physiotherapist recorded that Ms Garcia struggled with performing three hours continuous massage.
92. Dr Machart states in one part of his report that he could not see evidence of pathology in the right hip, yet elsewhere he states right hip trochanteric bursitis is evident. In light of this seeming inconsistency and the doctors failure to explain why he formed the opinion that there was no relationship between the development of hip pain after the left knee injury, I find I cannot place weight on Dr Machart's opinion.
93. While there is not extensive clinical material in relation to the right hip symptoms, what is available, in my view, supports the opinion of Dr Dias. Therefore, I accept Ms Garcia's contention that the injury to the left knee has caused her at times to alter her posture, particularly when performing massages and this has given rise to symptoms in her right hip. Whether Ms Garcia symptoms in her right hip and lumbar spine are sufficient to give rise to an assessable permanent impairment is perhaps a moot point, but is not for me to decide, being a matter for the Approved Medical Specialist (AMS).

SUMMARY

94. As a consequence of the agreed injury to Ms Garcia's left knee sustained in the course of her employment with the respondent on or about 1 March 2015, she developed lumbar spine and right hip conditions.
95. The lump sum claim is remitted to the Registrar for referral to an AMS to assess permanent impairment of the left lower extremity (knee), scarring, left breast, lumbar spine, and right lower extremity (hip) from the date of injury on or about 1 March 2015.
96. The documents to be referred to the AMS are to include those attached to the ARD and the Reply, report of Dr Brittain dated 5 April 2020, referral of Dr D'Souza to Dr de Jesus dated 11 February 2016 and a copy of this Certificate of Determination/Statement of Reasons.