WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1030/20**
Applicant: **Monique Newson**
Respondent: **New South Wales Police Force**
Date of Determination: **28 May 2020**
Citation: **[2020] NSWWCC 179**

The Commission determines:

1. The applicant suffered an injury by way of aggravation to a pre-existing degenerative condition in her left knee on 8 February 2016.

2. The effect of the aggravation which forms the basis for the injury referred to in paragraph 1 above is ongoing.

3. The total left knee replacement surgery proposed by Dr Sunner is reasonably necessary as a result of the injury referred to in (1) above.

4. The respondent is to pay the costs of and incidental to the proposed total left knee replacement surgery.

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

Cameron Burge
Arbitrator

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

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. On 8 February 2016, the applicant returned from her lunchbreak and sat at her desk in the respondent's call centre. During the break, her chair had been lowered such that when she sat down, she began to fall. As she did so, she moved to correct the fall and suffered an injury to her left knee.

2. The applicant made a claim in relation to the injury which was accepted and in June 2016 she underwent left knee arthroscopy at the hands of Dr Sunner, orthopaedic surgeon. She had a further arthroscopy the following year, again by Dr Sunner.

3. The applicant's left knee has continued to trouble her and in 2019, approval for a total knee replacement was sought by Dr Sunner. By section 78 notice dated 28 August 2019, approval was refused on the basis that the 8 February 2016 injury was an aggravation of pre-existing degenerative changes which had been cured by the arthroscopy. The respondent alleges any need for the knee replacement surgery arises from constitutional factors, and that the surgery in any event is not a medical necessity.

ISSUES FOR DETERMINATION

4. The parties agree that the only issue for determination is whether the proposed left knee replacement surgery is reasonably necessary.

PROCEDURE

5. The parties attended a conciliation/arbitration hearing by way of telephone hook-up before me on 4 May 2020. I have attempted to use my best endeavours to conciliate the dispute, however, the parties have been unable to reach a resolution. I am satisfied they each know the ramifications of the matters asserted in the proceedings.

6. At the hearing, Mr L Morgan instructed by Mr L Power appeared for the applicant and Mr D Baran instructed by Ms S Jan appeared for the respondent.

EVIDENCE

Documentary evidence

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

    (a) Application to Resolve a Dispute (the Application) and attached documents; and

    (b) Reply and attached documents

Oral evidence

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

FINDINGS AND REASONS

The reasonable necessity of the proposed surgery

9. Although the issue between the parties is categorised as one of reasonable necessity, the basis for denial by the respondent includes an assertion that the applicant's ongoing left knee problems are not work-related; in other words, that there is no longer a workplace injury causing the applicant’s difficulties which give rise to the need for surgery.

10. The applicant bears the onus of proving the ongoing problems are work-related. In determining the cause of an alleged injury, the Commission must apply a common-sense test of causation. In the worker's compensation context, the appropriate test for causation was set out in the oft-cited passage of Kirby P (as he then was) in *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 (*Kooragang*) where his Honour said:

> "Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions and approximate cause by the use of phrases 'results from', is now not accepted. By the same token, the mere proof that certain events occurred which predisposed the worker to subsequent death or injury 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."

11. In the context of a claim such as this, where the applicant alleges her injury is an aggravation of a pre-existing condition, she must prove that the main contributing factor to the aggravation was her employment. That is, whether the experience of the disease by the applicant has been increased or intensified by an increase of symptoms brought about by her work (see Roche DP *Kelly v Western Institute NSW TAFE Commission* [2010] NSWWCCPD 71 at [66]).

12. The question of "main contributing factor" in claims surrounding injuries involving a disease process was also considered by Arbitrator Harris in *Ariton Mitic v Rail Corporation NSW* (Matter number 8497 of 2013, 8 April 2014). In considering the terms of section 4(b)(ii) of the *Workers Compensation Act 1987* (the 1987 Act), the Arbitrator said:

> "The opening words of the amended section 4(b)(ii) relate to the aggravation, acceleration, exacerbation or deterioration 'in the course of employment of any disease'. In my view, those opening words therefore direct attention to the work-related component of the 'aggravation, acceleration, exacerbation or deterioration.' The following words of clause (ii) then state 'but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease.' The concluding words of clause (ii) requires an examination of whether the employment was the main contributing factor 'to the aggravation, acceleration, exacerbation or deterioration of that disease' and not to the overall pathology or the overall disease process…
>
> In my view, the amended to section 4(b)(ii) does not require the applicant to establish that the employment must be the main contributing factor to the overall disease process or pathology but simply that the employment must be the main contributing factor to the injury, that is, the aggravation, acceleration, exacerbation or deterioration of such disease."

13. Similar approaches have been taken by other arbitrators in matters such as *Mylonas v The Star Pty Ltd* [2014] NSWWCC 174, *Egan v Woolworths Limited* [2014] NSWWCC 281; *Harrison v Central Coast Local Health District* [2015] NSWWCC 86.

14. That line of authority follows the High Court decision in *Federal Broom Company Pty Ltd v Semlitch* (1963) 110 CLR 626 (*Semlitch*). In that matter, Kitto J said:

> “There is an exacerbation of a disease *where the experience of the disease by the patient is increased or intensified by an increased or intensifying of symptoms.* The word is directed to the individual and the effect of the disease upon him rather than being concerned with the underlying mechanism" (emphasis added).

15. It can therefore be said that the proper test is whether the work-related aggravation to the pathology in the applicant's left knee has continued to impact her, as opposed to whether the pathology itself was caused by work. For the reasons set out below, I am of the view that it has.

16. In the section 78 notice found at page one of the Reply, the respondent acknowledges the aggravation to the underlying condition. The notice refers to the arthroscopic investigation with lateral release performed by Dr Sunner in May 2016 and confirms post-surgery reports that she enjoyed a remission of her symptoms, however, she subsequently suffered a "gross idiopathic onset of pain in both knees in May 2017".

17. At page three of the Reply, the section 78 notice said:

> "Looking at the mater holistically, there is no medical evidence which establishes, on the balance of probabilities as opposed to possibilities, that the total knee replacement proposed is reasonably necessary treatment which results from your injury on 8 February 2016 as distinct from other pre-existing constitutional and/or idiopathic factors."

18. Mr Morgan submitted, and I accept, that the respondent in framing its section 78 notice in such a matter has misconstrued the appropriate test. It is noteworthy the respondent paid for the lateral release in the applicant's left knee in 2016, and in this matter I am faced with consistent reporting by treating surgeon Dr Sunner, who clearly states that the aggravation caused in the incident at issue is the main contributing factor to the need for the surgery and to the applicant's injury.

19. As a treating doctor, I attribute substantial weight to Dr Sunner's opinion, particularly when he has had the benefit of treating the applicant over a long period, including carrying out the exploratory arthroscopies in 2016 and 2017. In my view, such a lengthy period of treatment of the applicant affords Dr Sunner a unique position in this matter with regards to the causation of the applicant's ongoing problems.

20. There is no question the applicant had pre-existing problems in her left knee. That much is accepted by Dr Sunner, and as noted by Mr Baran is borne out by the clinical records of the applicant's general practitioner. There is no question that from time to time the applicant consulted her GP in relation to problems with her knees.

21. The respondent relies on the reports of independent medical examiner (IME) Dr Bosanquet, who indicates that the injury in February 2016 was nothing more than a temporary aggravation which has passed. The respondent relies on Dr Bosanquet's report dated 12 July 2016, in which he says:

> "Ms Newson is a 40-year-old woman who is currently working in a 000 call centre for the NSW Police. She injured her left knee during the course of her work on 8 February 2016.
>
> She has aggravated underlying degenerative conditions in the knee, where she has had a tight lateral patellar retinaculum and chondromalacia patella.
>
> She has undergone an arthroscopic lateral release which has greatly improved her symptoms."

Dr Bosanquet therefore accepted the applicant's injury in February 2016 had aggravated underlying degenerative conditions in her left knee.

22. In a second report dated 17 October 2017, Dr Bosanquet noted a further onset of bilateral knee symptoms in May 2017 without any apparent precipitating cause. He diagnosed bilateral patellofemoral chondromalacia, greater on the left than the right and said:

> "It is my opinion that the pain in this woman's knees is now unrelated to any specific injury. The pain came on at night in May 2017 and is due to pre-existing degenerative changes in the patellofemoral joint with problems of tracking and possible lateral pressure syndrome in both knees."

Dr Bosanquet then opined that the applicant's employment was no longer a contributing factor to her recurrent pain in the left knee, from which she said had "completely recovered" following the arthroscopic surgery by Dr Sunner.

23. That opinion was confirmed by Dr Bosanquet in his report of 13 August 2018. When specifically asked to consider the appropriateness or otherwise of the proposed total knee replacement surgery, Dr Bosanquet confirmed the appearance of the knee was consistent with patella chondromalacia with fissuring of the patellar cartilage and associated change in the subcortical bone of the patella. In another report, dated 27 December 2019, Dr Bosanquet provided the following commentary under the heading "Opinion":

> "A left total knee replacement is anticipated. She has had similar changes in her right uninjured knee for which she has had a right total knee replacement....
>
> This injury was when she hyperflexed the knee, aggravating the underlying degenerative changes in her patellofemoral joint....
>
> It is my opinion that the injury on 8/2/2016 was a minor injury to her knee from which she would have recovered. She has aggravated those pre-existing degenerative changes that had led to o a similar knee replacement on the right uninjured knee."

I have some difficulty with that opinion, as the aggravation which Dr Bosanquet referred to as “minor” was sufficiently serious to warrant arthroscopic surgery in 2016 and again in 2017.

24. In his final report dated 12 March 2020, Dr Bosanquet again reiterated that the effect of any aggravation on 8 February 2016 had passed. That view contrasts with treating surgeon Dr Sunner, who noted there was no definable injury in February 2016, "but the injury to Monique's knee on 8 February 2016 aggravated and exacerbated her injury and since then the knee has never settled down."

25. On balance, I accept the view of Dr Sunner over Dr Bosanquet. Dr Sunner has the benefit of consulting with and treating the applicant frequently over many years and I accept the history contained in his report that following the incident in February 2016, the applicant's left knee symptoms had never fully settled. Having accepted this to be the case, I find the aggravation and exacerbation of the underlying degenerative changes in the applicant's left knee caused in the incident on 8 February 2016 remain ongoing and the main contributing factor to the need for any total knee replacement surgery. As Dr Sunner noted in his report dated 14 February 2020 "the knee was improving and it is a possibility that she may not have required a total knee replacement by now."

26. Dr Gehr, IME, for the applicant is supportive of the ongoing nature of the applicant's symptoms in her left knee after the incident in issue where he says at page 25 of the Application:

> "It has now been over three and half years since the subject accident and non-operative management of the left knee has not produced a reasonable result, and it is now time to seriously consider having a left total knee replacement. That would be a benefit in terms of alleviating the consequences of the injury."

27. In a supplementary report dated 14 February 2020, Dr Gehr further insists the applicant's need for total knee replacement arises solely from the injury on 8 February 2016. Mr Baran criticised that opinion as being inconsistent with the medical evidence, however, I reject that submission. It is apparent from the comments of Dr Gehr in the following paragraphs of his supplementary report that he took into account a previous injury to the applicant's left knee in 2003, which had "largely settled down and at that time, she had been seen by her GP and an orthopaedic surgeon, Dr Sunner, and no surgery was recommended." Dr Gehr went on to say that if the incident of 2016 had not occurred, the status of the applicant's pre-existing condition is such that the need for the recommendation of total left knee replacement would not have arisen.

28. Notwithstanding the variance in the wording between Dr Sunner and Dr Gehr, I find their opinions to be broadly consistent and persuasive. Although, as Mr Baran pointed out, Dr Gehr did not refer to the history of intermittent but consistent complaint in relation to the applicant's knees before the incident in February 2016, Dr Sunner has that history having been the applicant's treating surgeon all along and his opinion accords with Dr Gehr's.

29. On balance, I find the preponderance of the medical evidence supports a finding that the accepted aggravation of the applicant's left knee condition arising from the incident on 8 February 2016 is ongoing and is causative of the need for total left knee replacement.

30. The applicant also bears the onus of proving that the proposed left knee replacement surgery is reasonably necessary. The relevant test for establishing reasonable necessity is set out in the decision of Deputy President Roche in *Diab v NRMA Ltd* [2014] NSWWCCPD 72 (*Diab*). In that matter, the Deputy President cited with approval the test articulated by his Honour Judge Burke in *Bartolo v Western Sydney Area Health Service* [1997] 14 NSWCCR 233. Thus, treatment will be considered reasonably necessary if the Commission finds that it is preferable that the worker should have the treatment than it be forborne.

31. There are several considerations which are also relevant to deciding whether treatment is reasonably necessary. These include, but are not limited to, the appropriateness of the treatment, the availability of alternative treatments and the potential effectiveness of the alternatives, the cost of the proposed treatment, the actual potential effectiveness of the proposed treatment and the acceptance by medical experts of the treatment as being appropriate and likely to be effective.

32. In *Diab*, Roche DP also noted that the word "reasonably" operates to qualify the effect of "necessary", such that the injured worker does not need to prove the treatment is absolutely necessary.

33. Dr Bosanquet indicates the proposed operation is not a medical necessity, and he would instead recommend an isolated patellofemoral replacement rather than total knee replacement. In his report at page 77 of the Reply, Dr Bosanquet says:

> "With regard to.....performing a total knee replacement in woman at 44 years old goes against current orthopaedic thinking. The National AOA Joint Registry shows that knee replacements in people under the age of 60 have a much higher failure rate than in a later group. 20% of these have a poor result. Secondly, the medial and lateral compartments of her left knee are relatively unaffected so the question arises, why not perform an isolated patellofemoral replacement, rather than replacing a relatively normal joint?"

34. I do not accept the view of Dr Bosanquet in relation to this issue, and instead prefer the opinion of Dr Sunner. He noted the applicant has had excellent pain relief and result from a right total knee replacement and is of the view she will get a similar positive result from a replacement on the left-hand side. Moreover, Dr Sunner's opinion as to the reasonable necessity of the operation is supported by Dr Gehr, IME for the applicant.

35. I also take into account Dr Sunner's report dated 27 July 2017 found at page 65 of the Application in which he notes the applicant had an MRI, following which he recommended a course of physiotherapy, quadriceps strengthening and stretching of the ilio-tibial band and hamstrings. He also said the applicant would benefit from hydrotherapy as well as patellar taping and/or bracing. He recommended the applicant should try this treatment for three months then come back and see him to consider further options.

36. When the applicant returned to see Dr Sunner in October 2017, he noted the conservative treatment had helped her with some improvements but altogether those improvements were insubstantial. At that point, the applicant then underwent bilateral knee arthroscopy. The applicant has therefore had two left knee arthroscopies, the second of which completely rebuts the respondent's assertion that the initial arthroscopy in June 2016 had resolved the left knee symptoms. Instead, it is apparent the applicant's symptoms were ongoing and had never fully resolved after the incident on 8 February 2016.

37. Overall, I am of the view that the left knee replacement surgery is treatment which the applicant should be afforded and not denied. Although Dr Bosanquet says a total knee replacement is not clinically warranted, the treating surgeon whose views carry substantial weight is of the view it is. Even if Dr Bosanquet's opinion was preferred, he only states there is a 20% chance of a poor outcome on total knee replacement. In other words, even the respondent's IME concedes there is an 80% chance of a reasonable outcome. In my view, the treatment is therefore reasonably necessary.

38. I have also taken into account that the applicant has undergone extensive conservative treatment including two arthroscopies and prolonged periods of physical therapy. They have been unsuccessful. Moreover, I do not consider the cost of the proposed treatment to be prohibitive, given that a total knee replacement is common and accepted form of treatment for longstanding knee conditions.

39. The potential effectiveness of the treatment should, in my opinion, also be weighed against the position in which the applicant currently finds herself. She is in a great deal of pain and has undergone both arthroscopic and conservative treatment to little benefit. She states, and I accept, that the pain in her left knee has not improved despite lengthy periods of conservative management and two arthroscopies.

40. After considering all of the medical evidence, the applicant's symptoms and the submissions on behalf of both parties, I consider that, after "exercising prudence, sound judgement and good sense,....the treatment is reasonably necessary" (see *Roche v Health Commission* NSW [1986] 2 NSWCCR 32 at paragraph 47).

SUMMARY

41. For the above reasons, the Commission will order that the respondent pay the costs of an incidental to the proposed total left knee replacement surgery contemplated by Dr Sunner.