

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 1397/20
Applicant: Brad Corkery
Respondent: Onesteel Wire Pty Ltd
Date of Determination: 12 June 2020
Citation: [2020] NSWCC 196

The Commission determines:

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

1. The Respondent pay the Applicant weekly compensation as follows:
 - (a) From 20 December 2019 to 28 February 2020 at the rate of \$1763.08 per week;
 - (b) From 29 February 2020 to date and continuing at the rate of \$1484.70 per week.
2. The Respondent to have credit for payments made.
3. The Respondent pay the Applicant's section 60 expenses on production of accounts, receipts and/or Medicare Charge.
4. The Respondent pay the Applicant's section 60 expenses in respect of the surgery proposed by Dr McGrath to the left knee in the form of arthroscopic repair of the medial meniscus.

Jane Peacock
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 JANE PEACOCK, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. By Application to Resolve a Dispute (the Application) Mr Brad Corkery seeks weekly compensation and compensation for medical expenses as a result of injury on to his left knee on 29 November 2019.
2. The Respondent is Onesteel Wire Pty Ltd (Onesteel). Onesteel was insured at the relevant time for the purposes of workers compensation by GFG Alliance Australia a Workers Compensation (the insurer).

ISSUES FOR DETERMINATION

3. There is no dispute that Mr Corkery injured his left knee at work on 29 November 2019. There is no dispute that he was in the course of his employment with Onesteel as a machine operator at the time of injury.
4. Onesteel disputes that Mr Corkery's employment was a substantial contributing factor to his injury.
5. There is no dispute about incapacity as a result of injury on 29 November 2019.
6. There is no dispute about Mr Corkery's Pre-Injury Average Wage Earnings (PIAWE) which is agreed at \$1855.87 per week.
7. Mr Corkery seeks weekly compensation as follows:
 - (a) From 20 December 2019 to 28 February 2020 at the rate of \$1763.08 per week;
 - (b) From 29 February 2020 to date and continuing at the rate of \$1484.70 per week.
8. In the event Mr Corkery is successful on the liability question, there is no dispute that Mr Corkery would be awarded weekly compensation as sought, with Onesteel to have credit for any payments made.
9. In the event Mr Corkery is successful on the liability question, there is no dispute that Mr Corkery would receive compensation for section 60 expenses and that a general order should be made in this regard.
10. Mr Corkery seeks to have the surgery proposed by Dr McGrath in the form of arthroscopic repair of the medial meniscus.
11. There is no dispute that the proposed surgery is reasonably necessary and that an order should be made that the Respondent pay the costs of the surgery in the event that Mr Corkery is successful on the liability question.
12. In short, the dispute is confined to whether Mr Corkery's employment was a substantial contributing factor to his left knee injury on 29 November 2019 and my reasons for determination will be confined to a determination of this dispute.

PROCEDURE BEFORE THE COMMISSION

13. The parties attended a conciliation arbitration which took place by telephone on 1 May 2020. Both parties were represented by counsel with Mr Hunt appearing for Mr Corkery instructed by Mr Dever solicitor and Mr Guest, solicitor, appearing for Onesteel. 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

14. The following documents were in evidence before the Commission being admitted by consent, and taken into account in making this determination:

For Mr Corkery:

- (a) Application and attached documents.

For Onesteel:

- (a) The Reply and attached documents.

Oral evidence

15. Mr Corkery did not seek leave to adduce further oral evidence.
16. Mr Guest for Onesteel sought leave to cross-examine Mr Corkery and this was granted by consent.

FINDINGS AND REASONS

17. There is no dispute that Mr Corkery injured his left knee at work on 29 November 2019. The injury is described in the Application as occurring as follows:

“On 29 November 2019, I grabbed the handrail and pivoted to go up the stairs when I twisted my left knee and immediately experienced pain.”

18. There is no dispute that the injury occurred during the course of Mr Corkery’s employment with Onesteel.
19. Onesteel disputes that Mr Corkery’s employment was a substantial contributing factor to his injury. This represents the sole compass of the dispute before me, all other matters being agreed as set out above.
20. In summary, Onesteel submitted that I would not be able to find that employment was a substantial contributing factor to Mr Corkery’s left knee injury because the connection to employment must be real and of substance. It was submitted that whilst the connection to employment was real because the injury happened at work, the connection to employment could not be found to be of substance. It was submitted that because the injury happened while Mr Corkery was ascending the stairs this could have happened anywhere. It was submitted that climbing stairs is an everyday activity. It was submitted that the injury happened while Mr Corkery was just moving around the workplace so the connection to employment is not of substance.

21. I must make a determination on the balance of probabilities on the evidence in this case in accordance with the law.
22. The applicable law is set out in section 9A of the *Workers Compensation Act 1987* which provides as follows:

“No compensation payable unless employment substantial contributing factor to injury

- (1) No compensation is payable under this Act in respect of an injury (other than a disease injury) unless the employment concerned was a substantial contributing factor to the injury.

Note: In the case of a disease injury, the worker's employment must be the main contributing factor. See section 4.

- (2) The following are examples of matters to be taken into account for the purposes of determining whether a worker's employment was a substantial contributing factor to an injury (but this subsection does not limit the kinds of matters that can be taken into account for the purposes of such a determination):
 - (a) the time and place of the injury,
 - (b) the nature of the work performed and the particular tasks of that work,
 - (c) the duration of the employment,
 - (d) the probability that the injury or a similar injury would have happened anyway, at about the same time or at the same stage of the worker's life, if he or she had not been at work or had not worked in that employment,
 - (e) the worker's state of health before the injury and the existence of any hereditary risks,
 - (f) the worker's lifestyle and his or her activities outside the workplace.
- (3) A worker's employment is not to be regarded as a substantial contributing factor to a worker's injury merely because of either or both of the following:
 - (a) the injury arose out of or in the course of, or arose both out of and in the course of, the worker's employment,
 - (b) the worker's incapacity for work, loss as referred to in Division 4 of Part 3, need for medical or related treatment, hospital treatment, ambulance service or workplace rehabilitation service as referred to in Division 3 of Part 3, or the worker's death, resulted from the injury.
- (4) This section does not apply in respect of an injury to which section 10, 11 or 12 applies.”

23. The leading case on section 9A is the decision of the Court of Appeal in *Badawai v Nexon Asia Pacific Pty Ltd t/as Commander Australia Pty Ltd* [2009] NSWCA 324 (*Badawai*).

24. In *Badawai*, the majority of the Court of Appeal said that section 9A requires a causative element and that the connection to employment must be real and of substance. The majority observed as follows:

“First, and perhaps most importantly, the word ‘*substantial*’, must be given effect. It is a word of ordinary English meaning. It is a word of evaluative concept. The word *substantial* has been said to be not only susceptible of ambiguity, but also to be a word calculated to conceal a lack of precision. Which of the various possible shades of meaning the word bears is determined by the context. Here, the concept and purpose of the introduction of s 9A was to remove the possibility of compensation for injury with only a ‘*remote or tenuous connection with work*’. This was the purpose [of] the amendment:…We would endorse the separate comments of Meagher JA and Davies AJA in *Dayton v Coles Supermarket*. As Meagher JA said, something which is minor is not *substantial*, or, as Davies AJA said, ‘*substantial*’ as it appears in s 9A means ‘*in a manner that is real and of substance*’ and does not apply where, as a matter of practical reality, the contribution of the employment to the injury was of, or had, ‘*little substance*’. We agree with his Honour that it is not useful to search for or use other terms, such as ‘*large*’, or ‘*weighty*’, or by way of further example, other concepts such as ‘*predominant*’. We consider that to do so may carry the vice of introducing concepts with different nuances from the words used by the legislature and which would take the meaning of the word beyond that needed to fulfil the purpose of the provision in its legislative context. In this respect, we prefer the views of Davies AJA in *Dayton* to the views in the *extempore* judgment in *Bulga*, which did not refer to *Dayton* and to the views of Mason P in *Mercer*. The words of the statute should be adhered to: ‘*a substantial contributing factor*’. The ‘*proper link*’ in the legislative context was a causal connection expressed by the words ‘*a substantial contributing factor*’, meaning one that was real and of substance. Given the conflict in the existing authority (*Mercer*, *Bulga* and *Dayton*), we think it important to clarify this issue.” (emphasis in original)

25. As the Court of Appeal said in *Badawai*, the purpose of s 9A was to remove the possibility of compensation for injury with only a “remote or tenuous connection with work”. The connection with work must be real and of substance. Onesteel submitted that the connection with work was real but not of substance.
26. Each case will turn on its own facts. Mr Corkery injured his left knee when attempting to climb a set of stairs at work. This happened when he was in the course of his employment. This is not enough by itself to satisfy the terms of section 9A. His employment must be a substantial contributing factor to his injury. However, it does not have to be *the* substantial contributing factor to injury but *a* substantial contributing factor. To be a substantial contributing factor to injury the connection to employment must be real and of substance.
27. Turning then to an examination of the evidence in this case.
28. Mr Corkery is a machine operator at Onesteel. He gave evidence in a statement dated 11 March 2020 as to his injury on 29 November 2019 and treatment and medical investigation that followed: (emphasis in original)
 - “1. On 29 November 2019 I sustained injury to my left knee by way of a tear of the medial meniscus.
 2. I came under the care of Dr Owen Boyd, the company doctor.
 3. I underwent radiological investigations by way of an x-ray and an MRI scan on 2 December 2019.
 4. He referred me to Dr Peter Berton on 5 December 2019. My employer and its insurer formed the view that Dr Berton was not the best doctor for my injury. Accordingly a second opinion was sought and the company doctor arranged for this to occur.

5. He referred me to orthopaedic surgeon Dr Benjamin McGrath on 17 December 2019.
 6. Dr McGrath considered the required surgical intervention by way arthroscopic repair of the medial meniscus. A quote was given in the amount of \$4342 for this procedure and hospitalisation
 7. I also underwent physiotherapy in those accounts have not been paid and they are now in excess of \$800.
 8. The insurer referred me to IME Dr Anil Nair who provided a report dated 15 January 2020 who on page 3 at paragraph 3 of Summary where he formed the opinion *that the current presentation is consistent with the described work-related injury.*"
29. Mr Corkery went on to give evidence about the use he is required to make of the stairs in his workplace as follows, including frequency of that use:
- "9. On the basis of their interpreted opinion the workers compensation insurer denied liability on 24 January 2020 on the basis that employment was not a substantial contributing factor to the injury and that it would have happened anyway.
 10. I dispute the suggestion that it would have happened anyway. Because the factual circumstances are that I was ascending a set of stairs at my place of employment. I had cause to use those stairs as they lead to the lunch room. The flight of stairs have eight treads. It would be common practice in the course of a shift and in particular the day shift I worked on 29 November 2019 when this injury occurred to ascend and descend that particular set of stairs approximately 12 times per shift. My work bag is placed in the lunchroom; I rotate bottles of water from the freezer during the shift; make coffee and tea in the lunchroom; go for meals and meal breaks in the lunchroom; have meetings and the lunchroom all the which add up to approximately 12 times a shift on average I would utilise that set of stairs. Hence in all probability I would on average walk 192 times on the steps.
 11. It is only in the environment of my workplace that I would have cause or reason to utilise a set of stairs that often. In my own home I have 4 steps the rear and 1 of the front. These would only be used three or four times a day on average. There is no other regular or consistent part of my usual life where I am required to regularly use stairs other than in my workplace where this injury occurred."
30. Mr Corkery gave evidence about the mechanism of his injury as follows:
- "12. The actual mechanism of injury was that I grabbed the handrail and pivoted to go up the stairs when I twisted my left knee and immediately experienced pain."
31. Mr Corkery was cross-examined about his evidence.
32. He was asked to consider the photos of the stairs in the Application. He confirmed he was coming from the left-hand side of the stairs as opposed to approaching the stairs head on.

33. Mr Corkery's veracity in giving evidence was not challenged by the cross-examination.
34. Onesteel submitted that the evidence under cross-examination showed that the left leg was not under load at the time of injury. However, I note that according to the medical opinions from both orthopaedic specialists Dr McGrath (to whom Mr Corkery was referred by the Onesteel doctor) and Dr Nair (the IME qualified on behalf of Onesteel), Mr Corkery tore the medial meniscus when he twisted or pivoted the left knee when he attempted to climb the stairs. Whether or not the knee was under load is not expressed as a relevant factor in either of the specialist's opinion. In both specialist opinions, the relevant factor is the twisting or pivoting mechanism of injury.
35. After the injury Dr Corkery saw Onesteel's company doctor, Dr Boyd, who referred him to orthopaedic surgeon Dr McGrath. Dr McGrath wrote back to Dr Boyd on 17 December 2019.
36. I note that Dr McGrath took a consistent history of the twisting of his left knee going up the stair well. He notes the immediate onset of pain experienced by Mr Corkery and the problem weight bearing since the injury. He notes ongoing pain on the medial side of the knee since injury. He notes the knee was normal prior to injury permitting Mr Corkery to undertake a full range of activities which he can't now do since the injury. He considers the findings on MRI to be consistent with the mechanism of injury. He considers the position of Onesteel in their denial of liability on the basis that the injury could have happened at any time to be "ridiculous". Dr McGrath reported back to Dr Boyd as follows:

"Thank you very much for referring Brad to see me. As you know Brad is a healthy 41-year-old steel worker who gives a history of on 29 November 2019 at work, going up a stairwell and twisting his left knee. He felt an immediate pop on the medial side of his knee and had trouble weight bearing after this period.

He has been off work since this time because of an ongoing pain on the medial side of his knee.

Brad reports that prior to this incident his knee was normal and he was able to undertake all of the rigours of his current employment which involves repeated deep squatting and twisting as well as moving heavy objects.

Brad reports at this stage he is struggling with squatting. He has posterior and medial pain. His knee has caught a couple of times.

Brad has attended physiotherapy which has shown some improvement in his range of motion.

On examination today Brad is wearing a neoprene knee guard. His knee comes out completely straight. He flexes to approximately 130 degrees. His McMurray's is positive. He has posteromedial joint line tenderness. He has a small effusion. His knee is stable in the coronal and sagittal planes.

On review of his MRI, he has a posterior horn medial meniscus tear which corresponds with his area of discomfort.

I think given the rigours of Brad's job he is going to struggle to be able to squat under load with this problem. I think this will persist and I think the chance of this sorting itself out naturally is quite unlikely given that he is young.

I have had a discussion with Brad about the options involved. They can be an extended period of non-operative management, trying to strengthen his quadriceps, work on regaining his capacity and see how he goes and if he fails to progress then he would require a surgical debridement. The most hasty way is to debride this and then get him working on a recovery programme. My

impression is that given his age, given the site of the injury, and the rigours of his employment, I think the most reliable option is to debride that meniscus and then engage in a strengthening programme.

At this stage Brad is very mindful of not wanting to take too much time off work. He wants this sorted out as hastily as possible. I am going to leave it with him with how he would like to proceed, but there is no doubt that prior to this injury his knee was completely normal.

Brad reports to me that liability for this has been denied based on the fact that this injury could have happened at any time out in the community. That point is true, but it did not, it happened at work, and as such is a work related injury. That is just like saying that if you get hit by a bus at work it is not a work related injury because you could have got hit by a bus out in the public, that is how ridiculous that comment is.”

37. Mr Corkery attended Mr Stephen Gillard, physiotherapist of Broadmeadow Physiotherapy for physiotherapy after his injury. He considers that Mr Corkery’s injury in the form of a tear of the medial meniscus is consistent with the mechanism of injury which he describes as a twisting injury resulting in the immediate onset of knee pain. Mr Gillard reports in a letter dated 4 February 2020 as follows:

“Brad Corkery has been attending Broadmeadow Physiotherapy for rehabilitation of a left knee injury sustained on 29th November 2019 when he was stepping on a step at work and twisted, experiencing the immediate onset of knee pain. Brad went on to MRI examination revealing a complex tear to the body and posterior horn of his medial meniscus.

On initial presentation there was a large joint effusion, restricted knee flexion to 80 degrees, extension to -10 degrees with pain and pain on quadriceps contraction. Brad was walking with a limp and lacked full extension in gait.

Brad has improved with Physiotherapy with a reduction in swelling and restoration of full ROM. There continues to be pain with over pressure at end range flexion and with a McMurrays grind test of his meniscus.

Functionally Brad is unable to perform a deep squat or to twist in his knee under load. Both tasks are required for his pre-injury employment.

Regarding tears to the medial meniscus it is unlikely that these occur from normal every-day activities. They require a twisting force under load, and Brad's injury is consistent with the workplace event.”

38. Dr Nair, consultant orthopaedic surgeon, is the IME qualified on behalf of Onesteel. Dr Nair saw Mr Corkery on 10 January 2020 and he provided a report to the insurer on 15 January 2020. Dr Nair took a consistent history of injury as follows:

“Mechanism of Alleged Injury/Sequence of Events:

On 29 November 2019, Mr Corkery was at work performing his normal duties when he injured his left knee. He was stepping on a step when he pivoted and sustained an injury to his left knee. He presented to

the work doctor on 2 December 2019 and medical imaging was performed on 2 December 2019.

He was subsequently reviewed by an orthopaedic surgeon Dr Benjamin McGrath. Non-operative care was recommended however Mr Corkery was advised that surgery may be required if non-operative care did not improve his symptoms. Mr Corkery underwent physical therapy approximately twice weekly. There has been significant improvement.

Current Status:

Current symptoms are medial-sided left knee pain. There are lateral-sided mechanical symptoms in the left knee. The pain is provoked by squatting. There are occasional episodes of catching of the left knee.”

39. Dr Nair conducted a physical examination of which he noted no inconsistencies and findings were consistent with injury. He reviewed the MRI of the left knee undertaken shortly after injury on 2 December 2019 noting as follows:

“MRI - Left Knee (2 December 2019): Complex tear involving the body and posterior horn of the medial meniscus. Osteochondral lesion to the lateral femoral condyle.”

40. Consistent with the other medical opinion, Dr Nair concluded as follows:

“Mr Corkery is a gentleman with clinical and radiological features of a left knee medial meniscus tear as well as an osteochondral lesion.”

41. Dr Nair went onto answer a series of questions posed to him by the insurer as follows:

“1. Please provide a current diagnosis based on information received and presentation at your appointment.

He has clinical and radiological features of left knee medial meniscal tear and osteochondral lesion.

2. Is it possible that Brad could develop the same signs and symptoms without a provoking event or frank incident?

Yes, it is possible that Mr Corkery could develop the same symptoms and signs; however, it is my opinion that the current presentation is consistent with the described work-related incident.

3. Do you feel that any of Brad's current symptoms relate to other degenerative or non-work-related factors or conditions? If so, please advise your medical reasoning for this.

I found no overt tendency towards the development of degenerative arthrosis on assessment.

4. **Could this Injury have reasonably occurred to Brad at a similar time or age if he had not been at work or not worked in employment with our insured?**

Yes, it could.

5. **Please describe what other non-work related, lifestyle factors (weight, diabetes, family Issues) may be contributing to the ongoing presentation? Please Indicate what they are and how they are affecting recovery.**

None identified, although Mr Corkery has a body mass index which is suboptimal. There is no robust body of evidence to support that the current injuries or presentation is related to an increased body mass index”

42. I note that Dr Nair does not consider that any other factor such as degeneration or non-work related factors or Mr Corkery’s body mass index or any other non-work related factor has contributed to the injury. He tore his meniscus. Dr Nair notes that the injury suffered to the left knee is consistent with the described work related incident. The injury happened when Mr Corkery pivoted when he attempted to climb the stairs. He considers the injury could have happened elsewhere but he notes that the “injury is consistent with the work-related incident described”.
43. The Court of Appeal pointed out in *Badawai* that section 9A was introduced to prevent compensation for injuries where the connection to work was remote or tenuous. The Court of Appeal held that to satisfy s 9A the connection of the injury to employment must be real and of substance. When all of the evidence is weighed in the balance and regard is had to the factors in s 9A in the context of the evidence in this case, I am satisfied on the balance of probabilities that the connection between Mr Corkery’s injury to his employment is not remote or tenuous. Onesteel conceded the connection to work to be real but says it is not of substance. Onesteel says Mr Corkery was just moving around the workplace and that means the connection to work is not of substance and therefore he should not be compensated for his injury. When I weigh all of the evidence in the balance, Mr Corkery was required to move around the workplace in the discharge of his daily duties. On his evidence he has to go up and down the stairs approximately 12 times per working day. It is an inherent part of his working day that he use the stairs multiple times. This doesn’t mean it is misunderstood as a disease injury. The solicitor for Onesteel submitted that it was irrelevant how many times he has to climb the stairs because it is not a disease case. The multiplicity of times Mr Corkery has to use the stairs illustrates that the use of the stairs is an inherent part of his working day. He suffered injury to his left knee when he twisted his left knee or pivoted when attempting to climb the stairs. He tore his medial meniscus when so doing, When I weigh all of the evidence in the balance, including Mr Corkery’s statement of evidence, the evidence given under cross-examination, the consensus between the specialists whose medical opinions are before me as I have set out above, I am satisfied on the balance of probabilities, that the connection between the injury and Mr Corkery’s employment was real and of substance. I am satisfied when I weigh all of the evidence in the balance, on the balance of probabilities, that the employment concerned was a substantial contributing factor to the injury to the left knee on 29 November 2019.
44. As there was no dispute before me about the weekly compensation sought, I will make orders for weekly compensation as sought by Mr Corkery, with Onesteel to have credit for payments made.
45. As there was no dispute before me about the compensation for past medical expenses, I will make a general order in that regard as sought.

46. As there was no dispute that the proposed surgery was reasonably necessary as a result of injury, I will accordingly order that Onesteel pay for the proposed surgery as sought.
47. Accordingly, the only liability dispute that was before me has been determined in Mr Corkery's favour and the orders which flow from that determination were not the subject of dispute and are made on this basis as follows:
- (a) The Respondent pay the Applicant weekly compensation as follows:
 - (i) From 20 December 2019 to 28 February 2020 at the rate of \$1763.08 per week;
 - (ii) From 29 February 2020 to date and continuing at the rate of \$1484.70 per week.
 - (b) The Respondent to have credit for payments made.
 - (c) The Respondent pay the Applicant's section 60 expenses on production of accounts, receipts and/or Medicare Charge.
 - (d) The Respondent pay the Applicant's section 60 expenses in respect of the surgery proposed by Dr McGrath to the left knee in the form of arthroscopic repair of the medial meniscus.

