

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 6136/20
Applicant: Simon Anthony Jones
Respondent: Hamnavy Pty Ltd t/as Pattison's Patisserie Fine Bakery & Café
Date of Determination: 27 January 2021
Citation No: [2021] NSWCC 30

1. Award for the Respondent.

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

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 Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. By Application to Resolve a Dispute (the Application), Mr Simon Jones (the applicant), seeks orders in respect of proposed surgery to his left knee under section 60 of the *Workers Compensation Act 1987* (the 1987 Act) as a result of a consequential condition in his left knee alleged to result from an undisputed injury to his right knee at work on 5 November 2016.
2. The respondent is Hamnavy Pty Ltd t/as Pattison's Patisserie Fine Bakery & Cafe (the respondent). AAI Limited t/as GIO is the relevant insurer for the purposes of workers compensation.
3. The respondent denied liability for the claim.

ISSUES IN DISPUTE

4. There is no dispute that on 5 November 2016 the applicant injured his right knee.
5. The applicant alleges that he suffered a consequential condition in his left knee on or about 5 March 2019 (as per the amendment made to his application) when he alleges he slipped on a gutter on the way to an appointment with his rehabilitation provider Karrios for the purposes of assistance with job seeking.
6. Liability for injury to the left knee is disputed. The respondent disputes that the left knee was injured as alleged.
7. If successful on the question of injury, the applicant seeks orders in respect of surgery to the left knee as proposed by Dr Patterson, orthopaedic and trauma surgeon in the form of arthroscopy.

PROCEDURE BEFORE THE COMMISSION

8. The parties attended a conciliation arbitration by telephone. The parties were both legally represented by counsel. The applicant was represented by Mr Carney of counsel and the respondent was represented by Mr Beran of counsel. Conciliation took place however the parties were unable to come to a resolution of the matter. 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 entire dispute.

EVIDENCE

Documentary evidence

9. The following documents filed on behalf of each party were admitted into evidence before the Commission by consent and taken into account in making this determination:

For the applicant:

- (a) The Application and all documents attached.
- (b) The late document being a supplementary statement of the applicant dated 24 November 2020 filed with an Application to Admit Late Documents.

For the respondent:

- (a) The Reply and all documents attached.
- (b) The late document being a medical report of Dr Hale dated 7 December 2020 filed with an Application to Admit Late Documents.

Oral evidence

- 10. The applicant did not seek leave to adduce further oral evidence.
- 11. The respondent did not seek leave to cross-examine the applicant.

FINDINGS AND REASONS

- 12. The applicant seeks orders under section 60 of the 1987 in respect of proposed surgery to his left knee. The surgery is alleged to be reasonably necessary as a result of a consequential condition in his left knee alleged to result from the undisputed right knee injury on 5 November 2016.
- 13. The applicant alleges he suffered a consequential condition in his left knee on a date in either March 2019 or September 2019 when he slipped on a gutter on the way to a job seeking appointment with his nominated rehabilitation provider. It is not alleged that his injured right knee gave way causing him to fall. It is alleged that he slipped on the gutter and the consequential condition is alleged to arise from the allegation that the slip on the gutter occurred when he was on his way to a job seeking appointment with his rehabilitation provider.
- 14. The alleged consequential condition in the left knee is disputed. The respondent disputes that the fall occurred at all, or on the way to a job seeking appointment. The respondent contends there is insufficient evidence for me to be satisfied on the balance of probabilities that the consequential condition in the left knee arose as alleged. If found to have occurred, the respondent would dispute that injury can be found to be a consequential condition because it was in respect of job seeking.
- 15. The applicant gave evidence in his statement dated as follows:

“In September 2019 I was walking from my place in Wyong to Tuggerah Library to meet with the rehab provider from Kairros, Mr Patrick Heanue for the purposes of a job-seeking session. I was nearing the overpass to the Westfield Shopping centre and I slipped on the gutter. My left foot slipped down off the gutter and my left knee hyper flexed backwards with my entire body weight on it. I had immediate pain in the left knee. I had to stop walking and told the rehab provider that I was going to be late. Upon arrival, he noticed I was limping and realised that the left knee was red and swollen. My left knee was very swollen and sore for around 7 days. I later went to go and see my local GP Jemma Hall at Family Care GP in Kanwal regarding the condition with my left knee and I informed her how it happened.”

16. The applicant went on to give evidence as follows:

- “13. I was managing with the injuries to the left knee because I was seeing a physiotherapist and doing my own exercises. Due to COVID and the restrictions, I was no longer able to do these exercises at the gym and during COVID the pain in the left knee intensified greatly.
14. Upon informing my GPs about this, I was referred off for medical imaging and referred to orthopaedic surgeon.
15. Dr Paterson has recommended that I undergo a left knee arthroscopy to deal with the problems with my left knee. I wish to have this surgery that has been recommended.”

17. The applicant also relies on a supplementary statement dated 24 November 2020 in which he gives evidence as follows:

- “2. I wish to provide more information as to how the injuries to my left knee came about and the events that followed.
3. In my earlier statement, I stated that I injured myself around September 2019. I have always maintained that that is an estimate. I cannot remember the exact date when I did injure myself however I clearly recall how it happened.
4. What I do remember for certain is that I was on my way to an appointment with Patrick Heanue. He was employed by the rehab company Kairros and this was a job seeking/rehab appointment organised by the insurer.
5. After injuring myself on the way to the appointment, I sent Patrick a text message to let him know I would be late. This was sent to what I assume was his work mobile number.
6. I have not been able to obtain a copy of that text message as I do no longer have that mobile number nor that mobile. It was a prepaid mobile phone that I no longer have. I have not been able to contact Patrick Heanue. I have tried and have been told that he is now in Ireland pursuing his own career in what he wanted to do and he is no longer employed by Kairros.
7. I have also since preparing my last statement reviewed the notes of the rehab company Kairros. There is a reference to a left knee injury in the notes inserted on 5 March 2019. I do not recall that the injury happened on my way to an appointment with the Patrick Heanue that early on in the year (ie 5 March 2019). I thought it happened closer to September. I do not recall the exact date. Nonetheless Patrick Heanue 100% knew that I injured myself on the way to an appointment with him as I sent the text message that I was going to be late to our meeting because I injured myself on the way to see him and informed him of what happened when I eventually got to the meeting.”

18. The applicant was not cross-examined about his evidence.

19. The applicant gave evidence in his first statement that he thought the injury to his left knee occurred in September 2019 but on review of the rehabilitation provider's case notes he now considers that the injury may have occurred in March 2019.

20. The rehabilitation provider's (Kairros) case notes are filed with the Reply. Review of the case notes in their entirety lead me to the view that the case notes appear to be a fairly comprehensive record of each interactions in the management of the applicant's case by the rehabilitation provider. Each note is identified by date, time and the case manager. If the interaction is a phone call it is identified as PC. Emails and messages are recorded. If the interview is in person, the date and time are recorded.

21. There is no record to be found in the case notes that supports the evidence given by the applicant that he notified his case manager Patrick Heanue that he was running late to attend a job seeking (referred to in the notes as JS) appointment because of an injury to his left knee on the way or that when he attended he was observed to be limping on his left leg. There is no case note to confirm this account in either March 2019 or September 2019 or on any date in between.
22. The case notes show Patrick Heanue was the case manager up until 29 August 2019 when it appears he left the employ of Karrios.
23. The applicant relies on a case note of 5 March 2019 in his further statement. There is a case note on 5 March 2019 that refers "5/03/2019 7.38pm – File Handover (Patrick Heanue)." This appears to be a file handover in circumstances where Patrick Heanue was going to be away on leave. This is evident from the following entries wherein the notes refer to Patrick being away and variously other case managers Felipe Riquelme, and Georgia Stone have made entries until Patrick Heanue returns to make notes from 26 March 2019.
24. The file handover notes of 5 March 2019 refer to the following:

"I/W has left knee injury.
I/W based in central coast.
Main barriers are psych components unrelated to WC injury.
I/W has criminal history, so not safe for female to attend any appointment alone.
I/W agreed to RC to f/u re a material handling position that he has been offered.
I/W was also due to hand out resumes to bars in his areas, as well as leagues clubs. I/W is to contact RC re assisting with RCA or RCG is I/W secures a job.

Main action: call IW to check in to see if any update in positions applied. Ask I/W if he had any success with canvassing with resumes provided to RC. Ask I/W if friend got back to him re materials handler position."
25. It is clear, when regard is had to the totality of the notes and this note of 5 March 2019 in context, that it is not an entry reporting an injury to the left knee. The notes show that what occurred on 5 March 2019 was not a job seeking appointment. It was notes of a file handover undertaken by Patrick Heanue at 7.38pm informing the case manager who was taking over while Patrick Heanue was to be on leave, the status of the matter and what actions to undertake. This reference to the left knee, when regard is had to the totality of the case notes which I have reviewed in detail, would appear to be an error as at the rehabilitation provider was managing the applicant in respect of his right knee injury.
26. The notes show that Patrick Heanue was on leave after 5 March 2019 until 26 March 2019. The notes show that Patrick Heanue is the case manager up until 29 August 2019. On 29 August 2019 Patrick Heanue records "29 August 2019 1.52pm – File Handover (Patrick Heanue). The purpose is noted to be "to discuss with all parties regarding handover of file to alternate case manager." This time the file handover is necessary because Patrick Heanue is leaving his employment with the rehabilitation provider.
27. Again, the case status is summarised and again, in error, the reference is made to the left knee, the first part of the summary being exactly the same as the 5 March 2019 entry as follows:

"I/W has left knee injury.
I/W based in central coast.
Main barriers are psych components unrelated to WC injury.
I/W has criminal history, so not safe for female to attend any appointment alone.
I/W agreed to RC to f/u re a material handling position that he has been offered.
I/W was also due to hand out resume to bars in his area, as well as leagues clubs.
I/W is to contact RC re assisting with RCA or RCG is I/W secures a job."

28. Additional information is then added bringing the handover notes up to date.
29. Following from this handover, the next note is on 4 September 2019 when the new case manager Chevy Teixeira (CT) records a "PC to IW" to "CT intro self ? wellbeing of IW. The worker is noted to have been in paid due to exacerbation of pain following steroid injection."
30. Arrangements are made to meet at 1pm on 10 September 2019 for JS at Lakehaven library.
31. On 10 September 2019 ,the job seeking appointment is noted to take place with Chevy Teixeira and the worker is noted to present his JS log and that the "IW and CT applied for 2 suitable roles".
32. Otherwise, the notes in September 2019 are limited to agent contact by CT by phone at 2.33pm on 12 September 2019 and another agent contact by CT by way of phone call on 25 September 2019.
33. The notes in September 2019 are all from the new case manager chevy Teixeira, Patrick Heanue having completed his last note on 29 August 2019.
34. The notes in September 2019 do not support a report made to Patrick Heanue or the new case manager of a fall injuring his left knee on the way to a job seeking appointment.
35. There are no other notes to be found either on or from March 2019, to September 2019 that support the allegation of injury to the left knee.
36. There are a number of entries in the case notes where the applicant has cancelled job seeking appointments due to illness or for other reasons unrelated to any allegation of injury to the left knee. These reasons are duly recorded.
37. The first reference in the case notes to a fall causing injury to the left knee is recorded on 18 May 2020 when the applicant emailed Ms Ashley skinner as follows:

"Yeah Wednesday at 11am should be fine at this stage? I will confirm tomorrow as my counsin needs help with something on Wed but I will speak with him tomorrow? Things are okay except my left knee is paying up?? I fell over while on my way to see Patrick Heanue last year and hadn't noticed anything wrong with it until now [sic] that its gotten colder in the mornings I'm experiencing a lot of pain in the joint and experiencing a lot of pain while walking???"
38. This is the first reference in time that appears in any of the evidence before me to the allegation of injury to the left knee. That is, the first reference that appears in the case note occurs on 18 May 2020, some 14 months after the left knee is alleged to have been injured in March 2019 or some 8 months if the allegation of injury is that the fall occurred in September 2019.
39. The applicant gave evidence that he managed the left knee condition himself by attending physiotherapy. There is nothing from the physiotherapist in evidence.
40. The applicant gave evidence in his first statement that after the fall:

"My left knee was very swollen and sore for around 7 days. I later went to go and see my local GP Jemma Hall at Family Care GP in Kanwal regarding the condition with my left knee and I informed her how it happened."

41. The clinical records of Dr Hall at Family Care GP are in evidence. They show the first report of a left knee condition on 4 June 2020 being some 15 months later, if the fall occurred in March 2019 or some 9 months later if the fall occurred in September 2019. The GP does not record the history that the left knee was injured in a fall on the way to a job seeking appointment.
42. The clinical records of Dr Hall record a consultation on 4 June 2020 where the reason for visit is left knee pain. Dr Hall records the history as follows:

“left knee pain for one month

Previous right MCL repair

c/o medial aspect left knee pain affecting squatting fell over Sep 19 – pain and swelling at time the n settled

one month woke up and pain intermittent

no locking grinding giving way.”
43. An examination is conducted. The plan is noted as “MRI left knee-r/o ACL tear”.
44. The action is noted as: “imaging request printed to IMED radiology. MRU scan- knee.left injury one month ago, occ locking, ant drawer positive? ACL tear”.
45. The notes of 4 June 2020 record a history of a fall in September 2019 although not the detail that it occurred on the way to a job seeking appointment.
46. The MRI is undertaken on 30 June 2020. The report repeats the clinical history recorded by Dr Hall as “clinical indication; injury one month ago with occasional locking. Anterior drawer positive. ? ACL tear>” The MRI findings are recorded as”: “Large medial meniscal tear with parameniscal cysts formation.”
47. On 1 July 2020, the applicant returned to Dr Hall in respect of the left knee. The record notes:

“Left knee meniscus tear
Discussed recent MRI scan
Previous knee surgery in 2009 – wishes to see same consultant.
Dr Hall referred the applicant to Professor Papantoniou.”
48. The appointment with Professor Papantoniou did not take place. Rather the applicant saw Dr Patterson on referral from another GP Dr Lim from a different practice, namely Wyong Doctors.
49. The clinical records from Wyong Doctors are in evidence.
50. The records from Wyong Doctors show the first mention of the left knee on 25 May 2020. When left knee complaints are reported to Dr Calvache-Rubio.
51. The first attendance on the GP in relation to the left knee is on 25 May 2020. This is approximately 14 months after the incident if it occurred in March 2019 or some 10 months later months if it occurred in September 2019. There is no record in the GP’s notes on 25 May 2020 of the circumstances of injury, that is a fall on the way to the job seeking appointment.

52. The notes from Wyong Doctors record on 25 May 2020 consultation with Dr S Calvache-Rubio where record is made for the first time in relation to left knee pain. This is recorded as:
- “left knee pain ongoing difficulties having issues difficulty walking limping.
Sharp pain
Difficulty walking and standing <5mins.
Taking simple analgesics”.
53. On 22 June 2020 Dr S Calvache-Rubio notes that the applicant has seen a GP and the MRI for left knee is pending. Dr Calvache-Rubio notes:
- “WC v1
R) knee injury
- Is having L) knee issues stiffness swelling has seen GP pending MRI
Slowing improving will send reports”.
54. The reference to the other GP is a reference to Dr Hall from Family Care GP who saw the applicant on 4 June 2020 and ordered the MRI of the left knee.
55. On 22 July 2020, Dr Lim of the Wyong Doctors practice records a telehealth video consultation as follows:
- “R) knee strain; R) knee meniscal tear DOI 5/11/2016
- L)knee discomfort
Has improving
- Did MRI on L) knee
On the way to job seeking appointment
Hurt L) knee tear”
56. This is the first record in a GP’s notes that the left knee was injured in a fall on the way to a job seeking appointment. This record in the GP’s notes that the left knee was injured on the way to a job seeking appointment occurs some 16 months after the alleged injury if it occurred in March 2019 or some 10 months later if it occurred in September 2019.
57. Dr Lim by referral letter dated 22 July 2020 referred the applicant to specialist Dr Patterson with a referral request as follows:
- “Herewith Mr Simon A Jones who has sustained a L0 knee injury whilst walking to a job seeking appointment and now has a large tear.”
58. Dr Patterson, orthopaedic and trauma surgeon, saw the applicant and provided a report back to Dr Lim dated 27 July 2020. He noted presentation with left knee medially based pain with a history recorded as follows:
- “he has a background history of a right knee injury about 4 years ago whilst working as a delivery truck driver. He underwent a procedure under the care of Dr Peter Papantoniou at that stage and has made a satisfactory recovery from that. He had an injury whilst going to a work appointment ins September 2019 and developed some pain and swelling which settled somewhat and then became exacerbated during the Covid lockdown in 2020. He takes simple analgesic and anti inflammatories”.

59. Dr Patterson noted positive findings on examination, had regard to the MRI findings and recommended surgery in the form of arthroscopy.
60. The independent medical experts. Dr Endrey-Waller qualified on behalf of the applicant and Dr Hale qualified on behalf of the Respondent provide reports dated 22 September 2020 and 7 December 2020 respectively. They both rely on a history of a fall on the way to a job seeking appointment. This history is disputed by the respondent. The respondent disputes that the applicant suffers a consequential condition in his left knee that arose from a fall on the way to a job seeking appointment.
61. I have to make a decision on the balance of probabilities as to whether the applicant has suffered a consequential condition in his left knee as a result of injury to his right knee.
62. I have to have regard to the totality of the evidence before me. Whilst the applicant was not cross-examined about his evidence, I have to weigh his evidence in the balance with all of the other evidence that is before me. I have to weigh the applicant's evidence in the balance with all of the other evidence which I have referred to above and includes the following:
- (a) the absence of any contemporaneous record of the fall in the rehabilitation provider's notes which otherwise detail the various interactions in the management of the applicant's case;
 - (b) the first record about the left knee and the fall in the rehabilitation provider's case note is an email from the applicant dated 18 May 2020;
 - (c) the lack of any evidence in support from the physiotherapist noting the applicant gives evidence in his first statement that he managed his left knee condition by seeing a physiotherapist;
 - (d) the first mention of left knee complaints to a GP occurs on 25 May 2020;
 - (e) the first mention of left knee complaints being related to a fall occurs on 22 July 2020;
 - (f) The first report to GP Dr Hall, who the applicant says he saw about the left knee injury, occurs on 4 June 2020 although her notes do not record a report of a fall.
63. The applicant's counsel submitted that I could take into account the other medical conditions the applicant suffers from when weighing the applicant's evidence. However, there is no expert evidence that would assist me to that view and absent expert medical opinion, I simply cannot speculate on the effect of these other conditions on the applicant's memory or otherwise.
64. When I weigh all of the evidence in the balance I am not satisfied on the balance of probabilities that the applicant suffers a consequential condition in his left knee as a result of his undisputed right knee injury of 5 November 2016 in circumstance where the consequential condition is alleged to result from a fall on his way to a job seeking appointment either in March 2019 or September 2019 or at any other time.
65. Accordingly, there will be an award for the respondent.

