

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 4009/19
Applicant: Sandra Marie Cosgrove
Respondent: Coles Supermarkets Australia Pty Ltd
Date of Determination: 18 February 2020
Citation: [2020] NSWCC 49

The Commission determines:

1. The applicant sustained a condition in her left lower extremity (knee) consequent upon injury to the lumbar spine deemed to have occurred on 19 June 2015.
2. The total knee replacement surgery carried out by Dr Rohsheim in 14 November 2017 was reasonably necessary as a result of injury to the lumbar spine deemed to have occurred on 19 June 2015.
3. The respondent is to pay the applicant's costs and expenses pursuant to s 60 of the *Workers Compensation Act 1987*.

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

Brett Batchelor

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 BRETT BATCHELOR, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. In an Application to Resolve a Dispute dated 8 August 2019, (the Application) Sandra Marie Cosgrove (the applicant/Mrs Cosgrove) claims weekly benefits from 17 June 2017 to date and continuing pursuant to ss 36 and 37 of the *Workers Compensation Act 1987* (the 1987 Act) arising out of or in the course of her employment with Coles Supermarkets Australia Pty Ltd (the respondent).
2. Mrs Cosgrove commenced work for the respondent as a customer service operator on 17 March 2011. She was initially employed in the bakery carrying out work that involved a lot of repetitive lifting and carrying tasks, involving use of her arms, back and legs. The bakery floors were concrete, and shifts were often long, when Mrs Cosgrove was on her feet for hours at a time.
3. Over a period of about two to three months prior to June 2013 the applicant began to develop pain in her right shoulder while working for the respondent. She reported the problem to her store manager and sought treatment from her general practitioner. This extended over 2013 and 2014.
4. Mrs Cosgrove at some stage moved to checkout work. She says that in doing this work, standing for hours on end, her back and neck felt very sore. By the end of her shifts she was experiencing pain in her back, feet and neck. She again sought general practitioner treatment and was referred for radiological investigation. A claim for compensation was lodged which was initially accepted by the respondent on 4 August 2015. An injury management dated 25 August 2015 plan was prepared with which the applicant endeavoured to comply. The applicant continued to receive treatment from her general practitioner.
5. On 1 September 2015, the respondent issued to the applicant a notice under s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) denying liability for the claim. A request for review of the decision was unsuccessful.
6. The applicant continued to work for the respondent with restrictions, but by May 2017 says that the pain in her back, neck, right shoulder, both feet and left knee became so painful that on 16 June 2017 she resigned her employment with the respondent. The general practitioner then treating Mrs Cosgrove, Dr Pragya Budhulia, referred her to Dr James Rohrsheim, hip and knee orthopaedic surgeon, who recommended a left total knee replacement. This was carried at Grafton Base Hospital on 14 November 2017.
7. The applicant has been unable to obtain work since leaving the respondent.
8. On 27 July 2017, the respondent issued a further s 74 notice¹ referring to two earlier such notices and confirming that liability for the applicant's claim for weekly payments of compensation and medical expenses was denied. In that notice the respondent denied liability for injury to the lower back and/or right shoulder, relying on ss 4, 4(b)(i) and (ii), 9A, 15, 16, 33, 60 and 66 of the 1987 Act. Relevantly the respondent also denied liability for any consequential injuries to the applicant's right shoulder and/or both legs as a result of the alleged lower back injury. In denying liability the respondent relied on an opinion of independent medical examiner, Dr Alan Hopcroft, to whom Mrs Cosgrove had been referred by the respondent initially on 11 August 2015.

¹ Application p 39.

9. Reports of Dr Hopcroft dated 11 August 2015², 27 June 2016³, 19 July 2017 (x2)⁴ and 21 November 2019⁵ are in evidence.
10. The matter was the subject of a telephone conference on 9 September 2019 when no resolution of the applicant's claim was reached. Directions for production of records from the applicant's general practitioner and treating physiotherapist were issued, and the matter was stood over for conciliation/arbitration in Coffs Harbour.
11. The matter was the subject of conciliation/arbitration in Coffs Harbour on 13 December 2019. All but one of the applicant's claims were resolved on that day, and the following Certificate of Determination – Consent Orders dated 13 December 2019 (the 2019 Consent Orders) signed by the applicant and counsel for both parties was lodged with the Commission:

“Consent Orders

1. Amend Part 4 of the ARD to add claims in respect of the Applicant's right and left upper extremities cervical spine.
2. Award for the Respondent in respect of injury and/or consequential condition to the right and left extremities and cervical spine.
3. The Respondent pay the Applicant weekly compensation pursuant to s37 at the rate of \$200.00 p week from 17/6/2017 to 13/12/2019 and an award for the Respondent thereafter.
4. The Respondent pay the Applicant's reasonably necessary s60 expenses up to \$12,500.00 in res her lumbar spine upon production of accounts and receipts and/or Medicare Notice of Charge and award for the Respondent thereafter.

Notations:

5. Upon payment of the above amounts in orders 3 and 4 the Applicant agrees and admits that she received all her entitlements under the *Workers Compensation Act* to weekly compensation in respect of her lumbar spine, left knee and left and right lower extremities to date.

6. The following issues shall be listed for determination by the Arbitrator:

- a) Whether the Applicant developed a consequential condition in her left knee as a result of back injury;
- b) Alternatively, whether the Applicant aggravated accelerated or exacerbated a degenerative disease in her legs and her left knee as a result of the nature and conditions of her employment with the Respondent.

7. The Applicant shall file and serve written outline of submissions by 27 January 2020.

8. The Respondent shall file and serve a written outline of submissions by 9 February 2020.

9. The matter be further determined by Arbitrator Batchelor on the papers after close of submissions.”

12. Submissions dated 28 January 2020 have been received from the applicant and dated 7 February 2020 from the respondent.

² Reply p 7.

³ Reply p 12.

⁴ Reply pp 16 & 18.

⁵ AALD (respondent) dated 09.12.19.

ISSUES FOR DETERMINATION

13. The parties agree that the following issues remain in dispute:
- (a) Has the applicant developed a condition in her left knee consequent upon injury to her back?
 - (b) Alternatively, has the applicant aggravated, accelerated or exacerbated a degenerative disease in her legs and her left knee as a result of the nature and conditions of her employment with the respondent?
 - (c) Was the total knee replacement surgery carried out by Dr Rohsheim on 14 November 2017 reasonably necessary as a result of injury to the lumbar spine deemed to have occurred on 19 June 2015.

PROCEDURE BEFORE THE COMMISSION

14. 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 matters in dispute referred to in [13] above. The parties have agreed to the determination of the matter 'on the papers' without a further conciliation conference or arbitration hearing.

EVIDENCE

Documentary evidence

15. The following documents were in evidence before the Commission and taken into account in making this determination:
- (a) the Application and attached documents;
 - (b) Reply and attached documents;
 - (c) Application to Admit Late Documents dated 18 October 2019 lodged by the applicant with the following attachments:
 - (i) clinical records produced by Duke Street Medical Centre in response to direction for production, and
 - (ii) clinical records produced by Grafton Physiotherapy Clinic in response to direction for production;
 - (d) Application to Admit Late Documents dated 9 December 2019 lodged by the respondent with report of Dr Alan Hopcroft dated 21 November 2019 attached;
 - (e) transcript (T) of conciliation/arbitration in Coffs Harbour on 13 December 2019, and
 - (f) the applicant's written submissions dated 28 January 2020.

SUBMISSIONS

Applicant (in summary)

16. In respect of the remaining issues to be determined, the applicant relies upon the opinions expressed by specialist surgeon, Dr Geoffrey Miller, and the applicant's treating doctors, Dr Budhaulia and Dr Rohrsheim.
17. The applicant notes the following from the evidence:
 - (a) on 7 February 2017 Dr Budhaulia recorded a history of knee pain worsening as a consequence of favouring the right side⁶;
 - (b) on 30 January 2017 she complained to physiotherapist, Mrs E Nash at Grafton Physiotherapy, of "2 year history of L/S pain (L) knee pain with general OA since L/S flare"⁷. The applicant submits that it is sufficiently clear from these notes that "L/S" stand for lumbar spine. Under aggravating factors in that clinical note, the first reference is to "work";
 - (c) on 7 March 2017 she complained of left knee pain to Dr Rohrsheim and he noted that "she walks with an antalgic gait"⁸, and
 - (d) in his report dated 20 May 2018 Dr Miller records a history that she complained to him that "she developed pain in her left knee, which she thought was due to her altered gait, as a result of her back pain"⁹.
18. The applicant relies upon the opinion of Dr Miller that "*Her left knee problems are related to compensatory gait and aggravation of degenerative changes as a result of her back problem*" and "*Her compensatory gait as a result of back pain has also aggravated a degenerative change in her left knee and has led to a left knee replacement.*" (emphasis in original)
19. The applicant also relies upon a critique of Dr Hopcroft's opinions as set out in the reports of Dr Miller.
20. The applicant notes that Dr Hopcroft, who examined the applicant on one occasion on, 11 August 2015, has repeatedly expressed the opinion that her employment is not a substantial contributing factor to the reported back pain incidents of 26 May 2015 and 19 June 2015.
21. The applicant submits that she has never asserted a frank incident and has always relied upon the nature and conditions of her employment as aggravating an underlying degenerative condition. She submits that Dr Hopcroft in his reports has never grappled with the factual history of her complaints.
22. The applicant notes that by virtue of the 2019 Consent Orders the respondent has accepted that she suffered incapacity stemming from injury to the lumbar spine.
23. The applicant submits that the respondent was afforded the opportunity of obtaining a further report from Dr Hopcroft dealing specifically with the claimed nexus between the back injury, the antalgic gait and the need for surgery to the left knee. In his report dated 21 November 2019, despite a specific request to do so by the respondent's solicitors dated 6 November 2019, Dr Hopcroft does not comment on this remaining issue. He simply reasserts that there is no causal nexus between the applicant's work, her symptoms and consequent incapacity.

⁶ AALD (applicant) 18.10.19 p 23.

⁷ AALD (applicant) 18.10.19 p 491.

⁸ AALD (applicant) 18.10.19 p 316.

⁹ Application p 53.

That is consistent with an opinion expressed earlier, in his report dated 19 June 2017, that the applicant is simply suffering age-related lumbar degenerative changes.

24. The applicant submits that in the circumstances, particularly the binding admissions made by the respondent in the 2019 Consent Orders, the opinions of Dr Miller who has examined the applicant on two occasions on 14 March 2016 and 8 May 2018, should be preferred.
25. The applicant submits that the totality of the evidence clearly supports a finding that the surgery to the left knee was the result of a consequential condition occasioned to that knee as a result of the accepted injury to her lumbar spine.

Respondent (in summary)

26. The respondent notes that the only remaining issue for determination is whether the applicant suffered a consequential condition in her left knee either:
 - (a) as a result of her back injury, or
 - (b) in the form of aggravation, acceleration or exacerbation of a degenerative disease in her knee as a result of the nature and conditions of her employment.
27. The respondent submits that there is no evidence to support a consequential condition in the applicant's left knee as a result of the aggravation, acceleration or exacerbation by the nature and conditions of her employment. There should therefore be an award for the respondent in respect of this allegation.
28. The respondent notes that the applicant first saw Dr. Budhaulia, her general practitioner, on 26 May 2015¹⁰ complaining of lower back pain radiating to her buttocks and the back of her thigh. At this time there was no complaint of pain in the left knee. The applicant also complained that the pain was gradually getting worse after her work due to prolonged standing and repetitive back movements. Dr Budhaulia ordered a CT scan of her lumbosacral spine, which was carried out on 9 June 2015¹¹. In the medical report provided by Dr Budhaulia dated 23 May 2016¹², there was however no mention of pain in the left knee at this stage.
29. The respondent notes that the first time the applicant complained to Dr Budhaulia about left knee pain was on 6 December 2016¹³. Dr Budhaulia ordered an x-ray which was carried out on 12 December 2016¹⁴. In consultations following the left knee x-ray Dr Budhaulia noted that the applicant had advanced osteoarthritis of her left knee and on 7 February 2017 noted that "*knee pain worsening, as a consequence of favouring Right side*"¹⁵ (emphasis in original).
30. The respondent notes that Dr Budhaulia referred the applicant to Dr Rohshein who she saw on 7 March 2017. Dr Rohshein opined that that the applicant had symptomatic osteoarthritis of the left lateral compartment of the left knee and that she would benefit from a knee replacement. The applicant underwent this surgery on 14 November 2017¹⁶.

¹⁰ Application pp 64 & 75.

¹¹ Application p 66.

¹² Application p 64.

¹³ Application p 135.

¹⁴ Application p 67.

¹⁵ Application p 136.

¹⁶ AALD (applicant) 18.10.19 pp 315 & 316.

31. The respondent submits that as Dr Rohsheim did not express an opinion regarding causation and no claim was made on the insurer in respect of the knee replacement, the inference to be drawn is that the applicant's condition was not a work-related one.
32. The respondent notes that Dr Miller, who was qualified by the applicant's legal advisors, expressed the opinion in his report dated 14 March 2016 that the applicant had aggravated previously asymptomatic degenerative change in her lumbar sacral spine. At that stage there was no complaint of left knee pain.
33. The respondent refers to the subsequent consultation with Dr Miller on 8 May 2018 and his report dated 20 May 2018. On that occasion Dr Miller noted that the applicant had developed pain in her left knee which she thought was due to altered gait as a result of her back pain. He also noted that a total knee replacement carried out by Dr Rohsheim on 14 November 2017¹⁷.
34. The respondent noted the history provided by the applicant to Dr Miller on 8 May 2018 of pain in her back radiating to her leg and occasional pain in her left leg to the level of her left ankle. This pain was aggravated by bending, stooping and lifting. The applicant avoided these activities. There was no mention of pain in the left knee. Reference to the history provided by the applicant as to who carried out domestic duties (mostly the applicant's husband) was also noted by Dr Miller. The respondent submits that as the applicant would appear not to be doing most of these duties, there was no reason for her altered gait.
35. Reference is made by the respondent to the applicant's statement evidence that, because of the pain in the back, right leg and buttock, she was favouring her left side and tended to carry her weight on her left leg when walking.
36. The respondent notes Dr Miller's opinion in his report dated 20 May 2018 that the applicant's compensatory gait as a result of her back pain has also aggravated degenerative change in her left knee which has led to a total left knee replacement.
37. The respondent relies upon the reports and opinion of Dr Hopcroft, in particular the opinion in report dated 21 November 2019 that the deterioration in the applicant's knee joint was inevitable in a patient with a significantly elevated body mass and having regard to her activities of daily living. These were not matters taken into account by Dr Miller, according to the respondent.
38. The respondent submits that Dr Hopcroft was of the view that it was extremely unlikely that the lumbar spine pathology could contribute unilaterally to the left knee symptoms and pathology unless that applicant had an injury to her left knee at some stage in her life, of a significant degree. The applicant submits that the opinion of Dr Hopcroft ought to be preferred to that of Dr Miller.
39. The respondent notes the commonsense test of causation of a consequential condition referred to in *Kooragang Cement Pty Ltd v Bates*¹⁸ (*Kooragang v Bates*). It is submitted that the Commission must feel an actual sense of persuasion that the applicant has developed a consequential condition in her left knee which went on to require surgical treatment, citing *Nguyen v Cosmopolitan Homes*¹⁹ (*Nguyen*) and *Department of Education and Training v Ireland*²⁰ (*Ireland*). In the circumstances of this case, it is submitted that the Commission will not feel so persuaded.

¹⁷ Application p 54.

¹⁸ (1994) 35 NSWLR 10.

¹⁹ [2008] NSWCA 246.

²⁰ [2008] NSWCCPD 134.

40. The respondent submits that an award should be entered for the respondent in respect of any consequential condition in the applicant's left knee.

FINDINGS AND REASONS

Consequential left knee condition

41. Determination of whether the applicant's condition in her left knee is consequent upon the injury to the lumbar spine, which the respondent does not put in issue, requires a commonsense evaluation of the causal chain of evidence said to give rise to the left knee condition (*Kooragang v Bates*). It is a question of fact in this case as to whether a causal link exists between the injury to the applicant's lumbar spine, deemed to have occurred on 19 June 2015, and the left knee condition, for which the applicant has to undergo surgery in the form of a total knee replacement at the hands of Dr Rhoshein on 14 November 2017.
42. The applicant claims in Part 4 of the Application that:
- (a) as a result of the nature and conditions of her work with the respondent referred to above at [2]-[4] she suffered a series of micro traumata to her lower back and both legs and in the alternative aggravated, accelerated or exacerbated degenerative disease in her lower back and both legs;
 - (b) further or in the alternative as a result of her compensatory gait from her back injury she also aggravated, accelerated or exacerbated degenerative in her left knee, and
 - (c) the injury to the back and both legs is a disease of such a nature as to be contracted by gradual process and the respondent was the employer who last employed the applicant in employment to the nature of which the disease was due.
43. The applicant's written submissions are directed towards [42(b)], that is as a result of the compensatory gait adopted by the applicant, she suffered a condition in her left knee. In respect of [42(c)], I note that the applicant worked for the respondent for just over six years and has not worked since she resigned that employment in May 2017.
44. The applicant in submissions referred to three occasions in January, February and March 2017 where there is a record of either complaint of left knee pain because of altered gait, favouring the right side because of left knee pain, or observation of altered gait (see 17(a)-(c) above). These submissions are confirmed by looking at the clinical notes (of Dr Budhulia and Mrs E Nash) and the report (of Dr Rohrsheim) referred to.
45. Dr Geoffrey Miller, specialist surgeon, examined the applicant as an independent medical examiner on two occasions, 14 March 2016 and 8 May 2018. In his first two reports dated 14 March 2016 and 9 June 2017, he addresses injury to the lumbar spine only. In the second report he addresses the opinion expressed by Dr Hopcroft in his reports dated 11 August 2015 and 27 June 2016. He disagrees with that doctor's opinion that the applicant's lumbar spinal condition is due to age related degenerative change, is pre-existing and is not related to her work with the respondent. He does not agree with the proposition of Dr Hopcroft that the applicant would have inevitably developed back pain with her normal lifestyle. Dr Miller also takes issue with the history, apparently given to Dr Hopcroft by the applicant, that she had suffered a "self-diagnosed episode of sciatica many years ago." He notes Mrs Cosgrove's statement that, prior to joining Coles, she did not have any problems with her lower back and that this was corroborated to him by the applicant.
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46. Dr Miller similarly does not agree with Dr Hopcroft that a fall in which the applicant was involved in July 2014 aggravated her back pain.
47. In his reports, Dr Hopcroft focusses on the back injury claimed by the applicant. In his first report he notes that the applicant does not refer to any specific incident at work, that her employment is not a substantial contributing factor to the reported back pain incident of 19 June 2015, or of 26 May 2015, and that she is not suffering from any medical condition caused solely by work or aggravated by work. In the second supplementary report dated 19 July 2017 Dr Hopcroft is asked that if he was to accept that the applicant suffered an injury to her lumbar spine as a result of the nature and conditions of her employment, if he considered that she had suffered consequential injuries to both legs and right shoulder as a result of that lumbar spinal injury. Dr Hopcroft replied in the negative, saying that in the absence of a recorded traumatic incident, there can be no connection anatomically, physiologically or pathologically.
48. At the conciliation/arbitration on 13 December 2019, the respondent asked that the matter be stood over for a short time to enable it to obtain a further report from Dr Hopcroft as it contended that it had not been put properly on notice of the claim in respect of the left knee. Whilst the applicant did not agree with this contention, she nevertheless agreed to the applicant's request²¹.
49. In his latest report dated 21 November 2019 Dr Hopcroft reviews the evidence before him at the time when he examined Mrs Cosgrove on 11 August 2015 and also Dr Miller's report dated 9 June 2017, which contains a critique of the doctor's opinion. Not surprisingly Dr Hopcroft takes issue with a number of contentions of Dr Miller. This report is directed towards what he says is the causation of the applicant's lumbar spinal condition. In the report Dr Hopcroft also addresses the issue of a condition in the applicant's left knee consequent upon injury to the lumbar spine, which the applicant had by that time accepted, and also the issue of surgery on the left knee. He says:

"It is extremely unlikely that the lumbar spine pathology could contribute unilaterally to the left knee symptoms and pathology unless the patient had had an injury to the left knee at some time in her life, of significant degree, and along with protracted body mass index increases it is well accepted and proven that advancing osteoarthritis in the knees of such patients is far more probable than in the general population with normal body mass index."²²

At the end of the report Dr Hopcroft says:

"Regarding her left knee total arthroplasty procedure performed on 14 November 2017 I would once again state that the deterioration of one knee joint is inevitable in a patient with a significantly elevated body mass index when, in the absence of similar changes in the contralateral knee, her left knee has at some time in her past medical history been injured and deteriorated to the point of requiring arthroplasty, which was inevitable taking into account her body mass index and activities of daily living, thereby excluding any substantial contribution from her work-related activities."

²¹ T pp 2-3.

²² P 3 of the report.

50. Dr Hopcroft addresses the wrong test in the last comment above when he says "...excluding any substantial contribution from her work related activities." The applicant submits, based on Dr Miller's opinion, that she suffers a condition in her left knee consequent upon the accepted injury to the lumbar spine. As a result of altered gait due to this back injury, Mrs Cosgrove says that she adopted a compensatory gait which aggravated degenerative changes in her left knee. A "substantial contributing factor" would have to be considered if the applicant was alleging that she suffered injury to her left knee arising out of or in the course of her employment with the respondent.
51. The question is if there is sufficient evidence, evaluated on a commonsense basis, to find that the condition in the left knee is causally related to the injury in the lumbar spine. Complaints to treating practitioners in early 2017 are referred to above. Dr Miller, who has seen the applicant on two occasions, unequivocally states in his report dated 20 May 2018 that:

"Her left knee problems are related to compensatory gait and aggravation of degenerative changes as a result of her back problem."²³

52. It is necessary to examine what the treating practitioners, Dr Budhulia and Dr Rohsheim found in respect of complaints about the left knee. The respondent's submissions at [28]-[30] above summarise correctly the applicant's relevant attendances on Dr Budhulia, with the exception of an attendance on 10 January 2017 when the doctor recorded: "severe OA, needs to have [sic] hydro and physio before TKR."
53. In his report to Dr Budhulia dated 7 March 2017 (the first day on which he saw the applicant), Dr Rohsheim notes that Mrs Cosgrove, on examination, is:
- (a) is overweight;
 - (b) has a valgus deformity of the left knee, and
 - (c) walks with an antalgic gait.

He notes that x-rays show osteoarthritis to the left lateral compartment and that the applicant would benefit from a knee replacement. He placed her on his waiting list for Grafton Base Hospital.

54. Dr Miller in his report of 20 May 2018 says:

"Her compensatory gait as a result of her back pain has also aggravated degenerative change in her left knee which has led to a left total knee replacement."²⁴

The indication for surgery carried out by Dr Rohsheim on 14 November 2017 is:

"Valgus knee osteoarthritis"²⁵

55. Dr Hopcroft does not dispute that arthroplasty is inevitable for the condition of the applicant's left knee (see the second excerpt from the report of Dr Hopcroft dated 21 November 2019 referred to in [49] above).

²³ Application p 57.

²⁴ Application p 58.

²⁵ AALD (applicant) 18.10.19 p 315.

56. If, assessed on a commonsense basis, the aggravation of the “severe OA” (osteoarthritis) was caused by the altered gait, I accept that there is sufficient evidence from Dr Budhulia, Dr Rohsheim and Dr Miller to find that the total left knee replacement was reasonably necessary as a result of injury to the lumbar spine, deemed to have occurred on 19 June 2015.
57. At [89] in *Ireland Keating DCJ* stated, with reference to *Nguyen*:
- “The principles relevant to the discharge of the onus of proof were discussed in *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246 (16 October 2008) (*‘Nguyen’*) where McDougall J (McColl and Bell JJA agreeing) said at [44]-[48]:
- ‘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.’”
58. I do not regard it as significant that Dr Rohsheim does not comment upon causation of the left knee condition. He was the surgeon charged with treating a significant condition in the applicant’s left knee. He recommended a total left knee replacement. He was not asked for an opinion on causation.
59. Similarly, I do not regard it as significant the respondent’s assertion that a claim was not made earlier in respect of the left knee. The applicant did not concede this at the conciliation/arbitration on 1 November 2019 but was prepared to allow the matter to be adjourned to allow the respondent to obtain an opinion from Dr Hopcroft on the issue. Apart from the second supplementary report of Dr Hopcroft dated 19 July 2017 referred to above at [47], where the doctor is asked to consider if the applicant suffered consequential injuries to both legs and right shoulder as a result of the lumbar spinal injury, Dr Hopcroft had not previously commented specifically upon the left knee condition or surgery thereon.
60. It appears from the evidence that the left knee condition became symptomatic towards the end of 2016 when the applicant first complained to Dr Budhulia on 6 December 2016 of left knee pain, prompting the referral to Dr Rohsheim. He found that the applicant had a valgus condition in the knee and walked with an antalgic gait. X-rays showed severe osteoarthritis. These symptoms became apparent as a result of the applicant adopting an altered gait because of the condition in the lumbar spine.
61. Dr Hopcroft refers to the absence of similar changes in the right knee. There is no radiological investigation of this knee in evidence to compare it with the left knee. Further, he refers to the applicant’s significantly increased body mass index and the apparent assumption that the applicant has, at some time in her past medical history, injured her left knee following which it deteriorated to the extent of requiring arthroplasty. The applicant says that, prior to her joining the respondent, she did not have any problems that she could recall with her lower back or left knee. Her increased body mass may be a factor in respect of the left knee osteoarthritis.
62. Nevertheless, am persuaded that, having regard to all of the evidence, on the balance of probabilities the applicant did adopt an altered gait as a result of injury to her lumbar spine, and that this, over time, aggravated the severe osteoarthritis in her left knee.
63. There will be a finding that the applicant suffered a condition in her left knee consequent upon injury to the lumbar spine, deemed to have occurred on 19 June 2015, and that the total knee replacement carried out by Dr Rohsheim on 14 November 2017 was reasonably necessary as a result of such injury.

64. The applicant did not make submissions which addresses the issue referred to in [13(b)] above.

Section 60 expenses

65. The applicant seeks an order for the payment of medical, hospital and rehabilitation expenses pursuant to s 60 of the 1987 Act, including future treatment, care or related expenses. The claim for past expenses is in respect of general practitioner consultations, radiological investigations, physiotherapy expenses, chemist's expenses and travel. The claim for future expenses is in respect of general practitioner consultations, specialist consultations, physiotherapy expenses and medication. It appears that applicant underwent her right knee replacement surgery at the Grafton Base Hospital as a public patient.
66. The respondent is to pay the applicant's costs and expenses pursuant to s 60 of the 1987 Act

SUMMARY

67. The applicant sustained a condition in her left lower extremity (knee) consequent upon injury to the lumbar spine deemed to have occurred on 19 June 2015.
68. The total knee replacement surgery carried out by Dr Rohsheim in 14 November 2017 was reasonably necessary as a result of injury to the lumbar spine deemed to have occurred on 19 June 2015.
69. The respondent is to pay the applicant's costs and expenses pursuant to s 60 of the 1987 Act.