WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **4339/20**
Applicant: **David Charles Foody**
Respondent: **W Dick & Co Removals**
Date of Determination: **13 November 2020**
Citation: **[2020] NSWWCC 388**

The Commission determines:

1. The applicant sustained injury to his right knee on 18 August 2004 arising out of or in the course of his employment with the respondent.

2. As a result of the injury to his right knee the applicant developed consequential conditions of his left shoulder, left knee and lumbar spine.

3. Award for the respondent in the claim for a consequential condition of the cervical spine.

The Commission orders:

4. The matter is remitted to the Registrar for referral to an Approved Medical Specialist pursuant to section 321 of the *Workplace Injury Management and Workers Compensation Act 1998* for assessment of whole person impairment, if any, of the following body parts:

    (a) Right lower extremity (knee);
    (b) Left lower extremity (knee);
    (c) Left upper extremity (shoulder), and
    (d) Lumbar spine.

5. The documents to be referred to the Approved Medical Specialist are:

    (a) Application to Resolve a Dispute and attachments,
    (b) Reply and attachments, and
    (c) A copy of this Certificate of Determination and attached Statement of \Reasons.

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

Jill Toohey
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 JILL TOOHEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. On 18 August 2004, the applicant, David Foody, was working as a furniture removalist for the respondent, W Dick and Co Removalists, when he fell backwards while pulling a trolley laden with books. The trolley and books fell directly onto his right knee.

2. Mr Foody was placed on suitable duties after the fall and was referred for physiotherapy. He was unable to continue with his duties on account of the pain and went off work in late 2004 or early 2005. He has not worked since in any capacity.

3. In January 2005, Mr Foody underwent a right knee arthroscopy for a partial medial meniscectomy and debridement. The pain continued and he underwent another arthroscopy in September 2006. In February 2008, he underwent a right total knee replacement. It did not relieve the pain.

4. Mr Foody's right knee has given way on a number of occasions and he has fallen. He claims lump sum compensation for consequential conditions of his left shoulder, left knee, lumbar spine and cervical spine sustained in falls when his right knee gave way.

5. The respondent accepts liability for the original injury to Mr Foody's right knee on 18 August 2004. On 23 June 2009, the parties entered a Complying Agreement by which the respondent agreed to pay compensation for whole person impairment of 27 per cent in respect of Mr Foody's right knee.

6. The respondent also accepts liability in respect of a consequential condition of Mr Foody's left shoulder sustained in a fall on 15 April 2011.

7. By notices issued on 3 September 2019, 9 December 2019 and 27 June 2020, the respondent denies liability to compensate Mr Foody in respect of his left knee, lumbar spine and cervical spine. The respondent maintains those conditions are the result of degenerative osteoarthritis and are not causally related to the original injury.

ISSUES FOR DETERMINATION

8. The parties agree that the issues remaining in dispute are whether, as a result of the injury to his right knee on 18 August 2004, Mr Foody has a consequential condition to his:

    (a) Left knee;
    (b) Lumbar spine, and
    (c) Cervical spine.

PROCEDURE BEFORE THE COMMISSION

9. The parties attended a conciliation conference/hearing on 21 September 2020. Ms Nicole Compton of counsel appeared for the applicant. Mr Phillip Perry of counsel appeared for the respondent.

10. Parties agreed at the conciliation conference that Mr Foody has five per cent whole person impairment of his left upper extremity (shoulder) as a consequence of the injury to his right knee. Further that, if the Commission determines in favour of Mr Foody in respect of any other condition, the combined assessment by an Approved Medical Specialist will include the agreed percentage for the left upper extremity.

11. 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.

12. It was agreed there was insufficient time after their efforts to resolve the matter for parties to complete oral submissions. Directions were therefore made for filing and serving written submissions.

EVIDENCE

Documentary evidence

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

    (a) Application to Resolve a Dispute (ARD) and attached documents, and
    (b) Reply and attached documents.

14. The respondent's documents include medico-legal reports from orthopaedic surgeons Dr Charles New and Dr John Bosanquet. Mr Perry confirmed at the hearing that the respondent relies on the opinion of Dr Bosanquet, and only relies on Dr Powell with respect to the history taken.

Oral evidence

15. Neither party sought leave to adduce oral evidence or to cross-examine any witness.

FINDINGS AND REASONS

Mr Foody's evidence

16. Mr Foody is 62 years old. In a written statement dated 22 July 2020, he describes the injury to his right knee on 18 August 2004, the circumstances of which are not in dispute. He states he was placed on suitable duties for several weeks but could not cope, and he went off work in late 2004 or early 2005. He has not worked since in any capacity.

17. In January 2005, Mr Foody underwent a right knee arthroscopy under Dr Robert Breit for a partial medial meniscectomy and debridement. The pain continued and he had another arthroscopy in September 2006. Physiotherapy and injections into the knee did not help. In February 2008, Dr Breit performed a right total knee replacement. It did not provide relief from the pain. In April 2010, pain specialist, Dr Sundaraj, inserted a nerve stimulator which provided some relief up until 2014. It was removed in December 2017.

18. Mr Foody states that the movement in his right knee is extremely limited and he cannot kneel or squat on it. It is very unstable and on numerous occasions has simply given way and he has fallen. Some of these falls have resulted in injury.

19. On 15 April 2011, Mr Foody states, he fell down six steps at home, resulting in injury to his left shoulder and back. He landed directly onto his left shoulder, fracturing his collar bone. He also sustained injury to his back which he noticed in the weeks following the fall. He underwent hydrotherapy and had nerve root blocks in his lower back which provided little relief. He also had nerve conduction studies done.

20. Mr Foody states that his left shoulder has not been any good since the fall. It continues to cause discomfort and pain and he has noticed pain in his neck as well. As already noted, the left shoulder condition is not in dispute.

21. Mr Foody states that the pain in his lower back is worse with standing and walking. It radiates down to both feet and feels like electrical sensations. He also experiences cold sensations in his legs. His back specialist, Dr Charles New, has recommended surgery but Mr Foody does not wish to undergo any surgery to his back.

22. Mr Foody states that, on 8 February 2012, he had another fall down some steps at home when his right knee collapsed from under him. He landed on his left knee. He underwent a left total knee replacement in July 2016 under Dr Eli Olschewski. The surgery gave him a great deal of relief and he now has minimal pain in the left knee.

23. Mr Foody states that, in late 2019, he fell at home and fractured his right wrist. Since then, the pain in his right shoulder and neck has increased. He now uses a walking stick to avoid further falls. No claim is made with respect to this fall.

Dr Freeman

24. On 2 September 2011, Dr Freeman reported to the insurer that Mr Foody consulted him on 27 April 2011 about a fall at home two to three weeks earlier when his injured knee "collapsed" and he fell onto his left shoulder. On 6 May 2011, he presented with back pain, more left-sided than right or central, which he recalled became excruciating and was preceded by no immediate incident; the only thing he could recall was that it related to the fall approximately four weeks earlier.

25. Dr Freeman said:

> "It appears quite possible that the back injury was related to the heavy fall onto his left shoulder, despite that fall occurring 4 weeks prior to his presentation. Because the fall was due to his injured leg giving way, this secondary injury could be then inferred to be due to the original work injury."[1]

26. Dr Freeman reported to Mr Foody's solicitors on 13 November 2013. He said he first saw Mr Foody in relation to his right knee on 31 August 2004, his left shoulder on 27 April 2011, his back on 6 May 2011, and his left knee on 15 February 2012. With respect to the disputed conditions, Dr Freeman said the cause as obtained from his history taking was as follows.

27. With respect to the back, Dr Freeman reported:

> "Sudden onset, apparently unprovoked, but temporally related to heavy fall onto left shoulder 3 weeks earlier. Due to lack of other possible causitive [sic] factors, the likelihood is very high that the fall onto the shoulder destabilized the back and allowed the disc herniation to occur."[2]

28. Dr Freeman noted that a suspected disc injury at L4-L5 was confirmed on CT lumbar spine.

29. With respect to Mr Foody's left knee, Dr Freeman reported:

> "[A]nother fall - right leg gave way in the backyard on 8/2/2012. Leg just gave way and left knee hyperflexed up behind buttock during the fall - causing medial joint line pain and discomfort. Left knee and left ankle were affected from this fall - secondary to right knee instability."[3]

[1] ARD page 298.
[2] ARD page 85.
[3] ARD page 85.

30. Dr Freeman noted that x-ray of the left knee revealed "moderate to severe tricompartmental degenerative changes, most marked in the medial joint compartment, and a varus alignment to the knee joint."[4]

31. Dr Freeman said in his opinion the fall on 15 April 2011 caused destabilisation of the lower back which allowed for the rupture of the disc three weeks later when it was reported to him. The cause of the left knee injury was the fall on 8 February 2012, again caused by the unstable right knee.

32. On 12 April 2019, Dr Freeman reported to Mr Foody's solicitors. He confirmed the history taken and radiological investigations. He confirmed his diagnoses in respect of the right knee, left knee, back and left shoulder. He confirmed that, on 8 February 2012, Mr Foody fell awkwardly when his right leg just gave way:

> "His left knee hyperflexed up behind his buttock in the fall, causing immediate pain. His left ankle was also injured in this fall. Subsequent imaging revealed the left knee to have a markedly deranged (macerated) medial meniscus and grade 4 chondral wear, together with some degenerative changes."[5]

33. In response to the question whether Mr Foody's employment was "a substantial contributing factor to the injuries", Dr Freeman said it was. The subsequent injuries occurred because the initial injury to the right knee left it weak, painful and prone to unpredictable instability. It left his balance vulnerable and appeared to be "clearly the contributing factor responsible for the subsequent injuries".[6]

Dr Sundaraj

34. Dr S Raj Sundaraj, pain physician, reported to Dr Freeman on 20 September 2012. He said Mr Foody continued to be troubled with pain in his right knee and lower limb, and on the left side, worse on the right. He also had "ongoing significant low back pain with radiation into bilateral gluteals".[7] He said a recent nuclear scan showed evidence of right L4/5 significant joint inflammation which, more than likely was the main reason for his back pain, which in turn would have an impact on his posture, gait and the non-dermatomal radiating pain to his lower limbs particularly the gluteal region. Part of the problem was more than likely as a result of the right knee pain and the neuropathic component. It was a "compensatory problem affecting his lower back as a consequence of the above."

35. On 7 February 2014, Dr Sundaraj reported that Mr Foody's weight had increased, putting further strain on his right knee, and as a consequence the left knee had been causing him pain as well.

Dr Olschewski

36. Dr Eli Olschewski, orthopaedic surgeon who performed the left knee replacement in 2016, provided a number of reports to Mr Foody's general practitioner, Dr Mark Freeman, before and after surgery. In a report dated 1 February 2016, Dr Olschewski said Mr Foody had been having increasing left knee pain for at least eight years; there was "no history of injury to the left knee."[8]

37. On 8 March 2016, Dr Olschewski said Mr Foody had "significant pain in his left knee related to his arthritis."[9]

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[4] ARD page 86.
[5] ARD page 316.
[6] ARD page 317.
[7] ARD page 261.
[8] ARD page 303.
[9] ARD page 306.

38. On 20 February 2019, Dr Olschewski said he had no problems with his left knee following the surgery in 2016 and he was “quite happy with it”. Unfortunately, however, he had had ongoing problems with his right knee since the injury in 2004 and had never been pain free since. The knee has been more and more unstable recently. He had very limited motion and trouble bending the knee. Dr Olschewski did not comment on any consequential condition.

39. On 20 March 2019, Dr Olschewski reported to Dr Freeman following an MRI of Mr Foody’s right hip which he believed was referring pain to the right knee. Dr Olschewski did not comment on any consequential condition.

Dr New

40. On 19 July 2019, Dr Charles New, orthopaedic and spinal surgeon, reported to Dr Olschewski. He said Mr Foody had not had any back problems before the 2004 injury and had been off work since that time. He presented with debilitating back pain and bilateral leg pain. A recent nerve conduction study confirmed the LS/SI radiculopathy, and an MRI confirmed significant stenosis from L4 to SI consistent with his clinical presentation. Dr New did not comment on any consequential condition.

Dr Lahz

41. Dr Sophia Lahz, rehabilitation physician, first saw Mr Foody in March 2009. On 16 March 2009, she reported to Mr Foody’s solicitors. Her report pre-dates the falls in 2011 and 2012 but it documents worsening pain in the right knee and difficulty negotiating steps, and that it continued to give way causing him to fall.

42. On 4 March 2014, Dr Lahz reported to Mr Foody’s solicitors. She noted reports from a number of treating and assessing doctors. She took a history that his right knee had been persistently unstable and gave way two to three times each week, causing multiple falls. She recorded that he fell on 15 April 2011 and felt immediate pain in the left shoulder. He thought he had injured his collar bone although she noted that Dr Freeman “referred to a displaced fracture of the left greater tuberosity in his report”.[10] She noted he reported low back pain three weeks later. She recorded the fall in August 2012 in which Mr Foody injured his left knee.

43. Dr Lahz noted that Mr Foody denied any problems in his lower back until the fall in April 2011. She noted advanced osteoarthritis in his left knee which she said was a constitutional condition. She said there was no evidence on medical grounds to support the contention that the state of the left knee was due to excessive burden imposed by the right knee injury. She said degenerative changes were noted on plain x-rays of the left knee 2004. However, she said she accepted that the fall in December 2012 “aggravated the hitherto minimally symptomatic underlying degenerative condition of the left knee.”[11]

44. On 20 February 2020, Dr Lahz reported to Mr Foody’s solicitors that she last saw him in 2014. She again took a detailed history from Mr Foody, and she reviewed extensive documentation.

45. Dr Lahz reported that, approximately three weeks after the 2011 fall, the low back pain that Mr Foody felt immediately at the time intensified to the level at which he could not get out of bed. At the same time, he developed generalised numbness and "cold" sensations in the lower limbs associated with severe burning sensations involving the genital area. The ambulance attended and he was admitted overnight to the hospital where he was given analgesia. His lower back pain had persisted since she saw him in 2014.

[10] ARD page 37.
[11] ARD page 84.

46. Dr Lahz recorded presenting symptoms in the cervical spine and right shoulder, left shoulder, lumbar spine and right knee (and that Mr Foody was satisfied with the outcome of the left knee replacement). With respect to his cervical spine and right shoulder, Dr Lahz said he reported "right-sided neck pain with symptom spread to the right shoulder girdle over the trapezius"[12]. There was asymmetrical range of neck motion and cervical spine tenderness.

47. With respect to the lower back, Dr Lahz said:

> "I am prepared to accept that underlying spinal degenerative changes have been aggravated by serial falls caused by mobility troubles secondary to right knee symptoms. However, the predominant pathology is the constitutional condition of lumbar-spondylosis causing severe spinal canal stenosis, and in turn, the lower limb claudicant symptoms of which he complains."

Dr Bosanquet

48. Dr John Bosanquet, orthopaedic surgeon, saw Mr Foody for assessment on 12 May 2020. He had reports from Dr Lahz, Dr Powell, Dr Olschewski and Dr Freeman and MRI of Mr Foody's right hip.

49. Dr Bosanquet took a history of the original injury and subsequent treatment and complaints consistent with the other doctors. He noted pain in both shoulders radiating into Mr Foody's neck, particularly on the right side. He noted reports of radiological investigations in 2018 and 2019.

50. Dr Bosanquet reported that Mr Foody had ongoing pain in the right knee with restricted movement and giving way, which had resulted in falls where he had injured his left shoulder. He had widespread osteoarthritic changes involving his lumbar spine, cervical spine and shoulders and left knee.

51. As to causation, Dr Bosanquet said Mr Foody's left knee condition was not causally related to the original injury in 2004. He said Mr Foody had a pre-existing condition in that knee requiring a meniscectomy and had developed osteoarthritis unrelated to the right knee.

52. Dr Bosanquet accepted the injury to the left shoulder in the fall was causally related to the original injury. He said the cervical spine and lumbar spine conditions were not causally related to the injury in 2004 but were due to the deterioration of underlying widespread osteoarthritis. Nor had there been any further aggravation of the right knee.

53. With respect to Dr Lahz's assessment of percentage of whole person impairment, Dr Bosanquet said he disagreed with the percentages deducted for pre-existing conditions but he did not otherwise disagree with her report.

Dr Powell

54. Dr Powell saw Mr Foody in October 2019 for assessment on behalf of the respondent. According to his report dated 29 October 2019, he was asked to focus on the right lower limb and lower back symptoms. There is reference to both knees but none to the cervical spine, probably because his attention was directed to other body parts.

55. Dr Powell took a history that Mr Foody developed left knee symptoms around 2016, with investigations confirming the presence of degenerative pathology. He noted that Mr Foody was referred to Dr Olschewski who performed the total knee replacement in July 2016.

56. There is reference to both knees in Dr Powell's report but none to the cervical spine, possibly because his attention was directed to other body parts.

[12] ARD page 46.

Submissions for the applicant

57. Ms Compton refers to Dr Olschewski's report of 20 February 2019 and the history of the matter with regards to the significance of the right knee injury. She cited Dr Olschewski's record that Mr Foody's pain remained despite various treatments.

58. Ms Compton cites Dr Bosanquet's diagnosis of right knee injury, the total knee replacement and restricted movement causing falls. Ms Compton submits that it is relevant that Mr Foody continues to have significant pain and restriction in right knee and, within that setting, he sustained his consequential injuries.

59. With respect to consequential conditions, Ms Compton relies on *State of New South Wales v Bishop*[13] in which Basten JA opined that the question of whether the worker's fall at home resulted from the accepted lumbar injury was "purely a question of fact for the arbitrator."

60. Ms Compton also relies on *Australian Traineeship System v Turner*[14] concerning a claim for lump sum compensation for consequential loss to the worker's left shoulder following an accepted injury to his right shoulder. Deputy President Roche rejected the employer's submission that there was no evidence corroborating a causal connection because it failed to acknowledge that corroboration is not a requirement in a civil case.

61. Ms Compton refers to the decision of the High Court in *Comcare v Martin*[15] in which the Court cautioned about the applicability of the common-sense notion of causation, and to *Stolk v State of New South Wales (Department of Justice, Courts & Tribunal Services*)[16] in which Senior Arbitrator Capel observed that *Martin* "does not mean that the common-sense approach has no place in the application of the legislation to the facts of the case". She refers also to *Crosland v Gregelle Michory Pty Limited*[17] in which Arbitrator Sweeney summarised the effect of the decision in *Martin* and said he thought it unlikely that the decision in *Martin* alters the principles applicable to causation under the 1987 Act.

62. Ms Compton submits that Mr Foody's evidence assists in conducting a common-sense evaluation of the causal chain that would lead to a determination that the left knee, and lumbar and cervical spine conditions have resulted from the accepted injury.

63. Ms Compton submits that the opinions of Mr Foody's treating doctors and Dr Lahz support his claim. She refers to Dr Freeman's opinion that there was a clear relationship between the work-related knee injury and the fall which caused the left knee injury. Further, that the fall caused by the instability of the right knee was the triggering factor for the back injury. Ms Compton points to Dr New's report that Mr Foody had not had any back problems prior to the injury in 2004.

64. With respect to Dr Bosanquet, Ms Compton submits that he noted that Mr Foody had ongoing pain and restricted movement causing falls after the right total knee replacement, and there is clear evidence from which to conclude his right knee condition caused significant falls as a result of which Mr Foody has sustained the claimed consequential losses.

65. Ms Compton submits that Dr Bosanquet applied the incorrect test in saying the conditions of the cervical and lumbar spines were due to a pre-existing condition, and merely because there was pre-existing condition does not prevent that condition being aggravated. The issue of pre-existing conditions and their involvement in assessing permanent impairment are for an Approved Medical Specialist.

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[13] *State of New South Wales v Bishop* [2014] NSWCA 354.
[14] *Australian Traineeship System v Turner* [2012] NSWWCCPD 4.
[15] *Comcare v Martin* [2016] HCA 43 (*Martin*).
[16] *Stolk v State of New South Wales (Department of Justice, Courts & Tribunal Services)* [2016] NSWWCC 302.
[17] *Crosland v Gregelle Michory Pty Limited* [2017] NSWWCC 17.

66. Ms Compton submits that Dr Lahz took the most comprehensive history as well as reviewing all of the treating reports. She submits that Dr Lahz was in the best position to consider Mr Foody's conditions. She took a consistent history of injury to his left shoulder and lower back in April 2011, and she accepted that the fall in December 2012 aggravated the previously minimally symptomatic underlying degenerative condition of the left knee.

67. With respect to the cervical spine, Ms Compton acknowledges there is limited evidence but submits that Dr Lahz's specific reference to pain in the cervical region is sufficient to constitute a consequential injury.

Submissions for the respondent

68. Mr Perry agrees with Arbitrator Sweeney's comments cited by Ms Compton with respect to *Martin*. Mr Perry submits that the Commission will be guided, on the issue of causation, by the determination of Deputy President Roche in *Murphy v Allity Management Services Limited*[18] at [58].

69. Mr Perry submits that Mr Foody retains the onus and must satisfy the Commission, on balance, that the injury of 18 August 2004 has made a material contribution to each of the contested consequential conditions.

70. With respect to the lumbar spine, Mr Perry submits that Mr Foody has not made out his claim, and notes that it was 26 days after the 2011 fall before he reported lower back symptoms to Dr Freeman. Mr Perry submits that, had he indeed injured his low back in the fall, he would have experienced pain at the time; alternatively, that pain would have manifested itself before Mr Foody saw Dr Freeman on 27 April 2011. Dr Freeman suggests there is a temporal link but an inference *post hoc ergo procter hoc* is a fallacy. It is also significant that Mr Foody saw Dr Sundaraj one day after seeing Dr Freeman and complained of bilateral knee pain but said nothing about problems in his neck or his back.

71. Mr Perry submits that the fact that Mr Foody attributes the low back pain to the fall is not evidence, and he cites *South Western Sydney Area Health Service v Edmonds*[19] especially at [129] to [131].

72. Mr Perry submits that the connection between the instability of the right knee and the allegedly consequential conditions is said to be the falls, but there is an entire lack of evidence that the fall of 15 April 2011 caused injury to any body part other than the left shoulder, which is not in dispute.

73. In Mr Perry's submission, Dr Lahz does not assist Mr Foody. She reported that the predominant pathology was the constitutional condition of lumbar spondylosis causing severe spinal stenosis, and in turn, the lower limb claudicant symptoms of which Mr Foody complained.

74. To the extent that Dr Lahz makes a connection, Mr Perry submits she does so based on an incorrect history, that the underlying degenerative lower back condition had been rendered symptomatic. Mr Perry submits there is no acceptable evidence supporting that proposition. Rather, it is clear that the low back was asymptomatic following the fall in April 2011 and remained so until 5 May 2016 when Mr Foody had excruciating back pain which preceded by no immediate incident. This, is entirely in keeping with the constitutional condition identified by Dr Lahz as lumbar spondylosis and severe spinal canal stenosis, and Dr Bosanquet agrees. The cause of the lumbar pain is underlying widespread osteoarthritis.

[18] *Murphy v Allity Management Services Limited* [2015] NSWWCCPD 49.
[19] *South Western Sydney Area Health Service v Edmonds* [2007] NSWCA 16 (*Edmonds*).

75. With respect to Mr Foody's left knee, Mr Perry submits that, whereas Dr Lahz's opinion was that the fall in December 2012 aggravated the previously minimally symptomatic underlying degenerative condition of the left knee, the only history she recorded was of knee pain at work eight to nine years previously for which Mr Foody had successful arthroscopy with nearly complete resolution until the fall in December 2012.

76. Mr Perry acknowledges that Dr Freeman supports the proposition that the left knee hyperflexed in the fall in December 2012. In contrast, Dr Powell took a history that Mr Foody developed left knee symptoms around 2016, investigations confirmed the degenerative pathology, and he had a total knee replacement in July 2016. Mr Perry submits there may be a condition in the left knee but it is another thing entirely to make the causal connection contended for. Dr Olschewski, like Dr Powell, took a detailed history when he saw Mr Foody in February 2016 and it is reasonable to conclude that Mr Foody would have recounted an injury to his left knee in a fall.

77. With respect to the cervical spine, Mr Perry submits that there is simply no case presented by Mr Foody to suggest that the degenerative condition in his cervical spine has been advanced to any degree by the injury to the right knee, or that any symptoms in the neck are causally related to that injury.

78. Mr Perry submits the matter should be referred to an Approved Medical Specialist for whole person impairment of Mr Foody's right lower extremity (knee) and left upper extremity (shoulder), and the Commission ought to find that he has not established a consequential condition in his cervical spine, lumbar spine, or left lower extremity.

Consideration

79. The injury to Mr Foody's right knee in the fall on 18 August 2004, and that he developed a consequential condition of his left shoulder as a result, are not in dispute. It falls to Mr Foody to establish, on the balance of probabilities, that he developed consequential conditions of his left knee, lumbar spine and cervical spine as a result of the accepted injury.[20]

80. Mr Foody does not have to establish that he suffered "injury" to his left knee, lumbar spine or cervical spine within the meaning of s 4 of the *Workers Compensation Act* 1987 (the Act) and that his employment was a substantial contributing factor within the meaning of s 9A of the Act.

81. Whether a consequential injury results from an injury arising out of and in the course of the worker's employment is ultimately a factual question for determination in the light of all the evidence before the Commission.

82. In *Moon v Conmah Pty Limited*[21], DP Roche said:

> "It is therefore not necessary for Mr Moon to establish that he suffered an 'injury' to his left shoulder within the meaning of that term in section 4 of the 1987 Act. All he has to establish is that the symptoms and restrictions in his left shoulder have resulted from his right shoulder injury. […] The test of causation in a claim for lump sum compensation is the same as it is in a claim for weekly compensation, namely, has the loss 'resulted from' the relevant work injury (see *Sidiropoulos v Able Placements Pty Limited* [1998] NSWCC 7; (1998) 16 NSWCCR 123; *Rail Services Australia v Dimovski & Anor* [2004] NSWCA 267; (2004) 1 DDCR 648)."

[20] *Department of Education and Training v Ireland* [2008] NSWWCCPD 134; *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246.
[21] *Moon v Conmah Pty Limited* [2009] NSWWCCPD 134.

83. Deputy President Roche said the expression "results from" should be applied using the principles set out by Kirby P in *Kooragang Cement Pty Ltd v Bates*[22] (*Kooragang*) where he said at [462]:

> "It has been well recognised in this jurisdiction that an injury can set in train a series of events. If the chain is unbroken and provides the relevant causative explanation of the incapacity or death from which the claim comes, it will be open to the Compensation Court to award compensation under the Act".

84. Kirby P said at [463-464]:

> "...What is required is a common sense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation. In each case, the question whether the incapacity or death 'results from' the impugned work injury... is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions".

85. Since the decision of the High Court in *Comcare v Martin* [2016] HCA 43, doubts have been expressed as to whether the "common sense" approach to causation described in *Kooragang* is still applicable. In *Stolk v State of New South Wales (Department of Justice, Courts & Tribunal Services)*[23], Senior Arbitrator Capel noted at [96-97] the High Court's view that causation in a legal context is always purposive and it was "doubtful whether there is any 'common sense' approach to causation which can provide a useful, still less universal, legal norm." However, he said at [97], that did not mean "that the common sense approach has no place in the application of the legislation to the facts of the case."

86. In *Crosland v Gregelle Michory Pty Limited*[24], Arbitrator Sweeney said he thought it unlikely that the decision in *Martin* alters the principles applicable to causation under the Act. While the phrase "results from" appears in both the NSW and commonwealth legislation, it must be read in its statutory context.

Is Mr Foody's lumbar spine condition a consequence of the accepted injury to his right knee?

87. Mr Foody does not claim to have felt pain in his lower back at the time of the fall on 15 April 2011, rather that he noticed it in the weeks following the fall. There is no dispute that the fall occurred. Despite evidence of underlying widespread osteoarthritis, there is no evidence that he experienced any symptoms in his lower back before that time.

88. The first record of complaint of lower back pain was when Mr Foody saw Dr Freeman on 6 May 2011. He had seen Dr Freeman in the meantime, on 27 April 2011, complaining only of his left shoulder.

89. Dr Freeman recorded that Mr Foody said the lower back pain became excruciating and was not preceded by any immediate incident. The only thing he could recall was that it related to the fall approximately four weeks earlier. (It was actually closer to three weeks).

90. I agree with Mr Perry's submission that Mr Foody's attribution of his lower back pain to the fall because he could think of no other explanation is not evidence. In *Edmonds*, cited by Mr Perry, the Court of Appeal said at [131] that "unqualified opinions are not acceptable." Mr Foody's opinion in this regard carries no weight.

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[22] *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*).
[23] *Stolk v State of New South Wales (Department of Justice, Courts & Tribunal Services)* [2016] NSWWCC 302.
[24] *Crosland v Gregelle Michory Pty Limited* [2017] NSWWCC 17.

91. However, Dr Freeman is qualified to give an opinion. On 2 September 2011, he reported to the insurer that it was "quite possible" that the back injury was related to the heavy fall onto his left shoulder, even though it occurred some weeks earlier.

92. In his report dated 13 November 2013, Dr Freeman was more definitive. He said

> "Sudden onset, apparently unprovoked, but temporally related to heavy fall onto left shoulder 3 weeks earlier. Due to lack of other possible causitive [sic] factors, the likelihood is very high that the fall onto the shoulder destabilized the back and allowed the disc herniation to occur."[25]

93. Dr Freeman said in his opinion the fall on 15 April 2011 caused destabilisation of the lower back which allowed for the rupture of the disc three weeks later when it was reported to him.

94. Of the other doctors, only Dr Lahz and Dr Bosanquet offered an opinion as to causation of Mr Foody's lower back symptoms.

95. It is clear from her report dated 4 March 2014 that Dr Lahz was aware that Mr Foody did not complain of lower back pain until three weeks after the fall on 15 April 2011. She was also aware of underlying degenerative changes in Mr Foody's spine. While she said "the predominant pathology [was] the constitutional condition of lumbar-spondylosis causing severe spinal canal stenosis", Dr Lahz was nevertheless prepared to accept that the underlying changes had been "aggravated by serial falls caused by mobility troubles secondary to right knee symptoms."

96. Dr Lahz took a comprehensive history from Mr Foody and she thoroughly reviewed all of the treating reports. I agree with Ms Compton's submission that she was well-placed to consider Mr Foody's conditions. She had Dr Freeman's reports of 13 November 2013 and 12 April 2019. She does not appear to have had his first report but nothing turns on this because the history is repeated in the late reports and by other doctors whose reports she had. Dr Lahz does not suggest that the lapse of three weeks or lack of "preceding incident" immediately before the onset of pain were significant.

97. Dr Bosanquet said that Mr Foody's lumbar spine condition was not causally related to the original injury but was due to the deterioration of underlying widespread osteoarthritis. He noted scans confirmed osteoarthritis in the hip, lumbar spine and right knee. It is not clear why he accepted that the condition of the left shoulder was related to the original injury and the others were not.

98. Dr Bosanquet had Dr Freeman's report of 12 April 2019 and Dr Lahz's reports from 2009 and 2014. He disagreed with Dr Lahz's assessment of whole person impairment of the disputed body parts because he said they were wholly attributable to the pre-existing condition. He does not appear to have considered whether the fall in April 2011 could have aggravated the underlying condition and Dr Freeman and Dr Lahz opined.

99. I accept the opinion of Dr Freeman and Dr Lahz and prefer them to the opinion of Dr Bosanquet. I am satisfied, on the balance of probabilities, that Mr Foody developed a consequential condition of his lumbar spine in the fall on 15 April 2011 and that it was as a consequence of the accepted injury to his right knee.

[25] ARD page 85.

Is Mr Foody's left knee condition a consequence of the accepted injury to his right knee?

100. Mr Foody claims to have injured his left knee in the fall on 8 February 2012. He saw Dr Freeman several days later, on 15 February 2012 complaining of pain in his left knee. Dr Freeman reports that his records show that Mr Foody's left knee "hyperflexed up behind buttock during the fall - causing medial joint line pain and discomfort." His left knee and left ankle were affected in the fall, secondary to the instability in his right knee.

101. Dr Sundaraj considered that Mr Foody's left knee condition was as a result of strain on the right knee and because he had put on weight. That is not the claim and does not appear to be the view of other doctors who expressed an opinion, and Dr Lahz said she found no evidence to that effect.

102. Mr Perry acknowledges that Dr Freeman supports the proposition that the left knee hyperflexed in the fall in December 2012 but submits it is reasonable to conclude that Mr Foody would have told Dr Olschewski in 2016 that he injured to his left knee in a fall in 2012. I do not agree that follows.

103. It is true that Dr Olschewski reported to Dr Freeman on 1 February 2016 that there had been "no history of injury to the left knee". However, Dr Freeman's contemporaneous records are clear and, in my view, represent more reliable history than the report of a treating surgeon prepared approximately four years later.

104. Dr Freeman took a history from Mr Foody three days after the second fall that his left knee hyperflexed up behind his buttock in the fall, causing immediate pain. Subsequent imaging revealed the left knee to have a markedly deranged medial meniscus and grade 4 chondral wear, together with some degenerative changes. He was asked whether Mr Foody's employment was "a substantial contributing factor to the injuries". Although that is not the test of a consequential condition, Dr Freeman was clear that the subsequent injuries were due to the unpredictable instability in his right knee.

105. Dr Lahz noted the degenerative changes were on plain x-rays of Mr Foody's left knee in 2004. However, she said she accepted that the fall in December 2012 "aggravated the hitherto minimally symptomatic underlying degenerative condition of the left knee."

106. I accept Dr Freeman's and Dr Lahz's opinions. For the same reasons as above, I prefer their opinions to the opinion of Dr Bosanquet who I do not think has carefully considered the effects of the fall in February 2012.

107. I am satisfied on the balance of probabilities that Mr Foody developed a consequential condition of his left knee as a result of the accepted injury in 2004.

Is Mr Foody's cervical spine condition a consequence of the accepted injury to his right knee?

108. I accept that Mr Foody has symptoms in his cervical spine but I am not satisfied on the evidence that he has developed a condition of his cervical spine as a result of the original injury.

109. I agree with Mr Perry's submission that there is no case presented by Mr Foody to suggest that the degenerative condition in his cervical spine has been advanced to any degree by the original injury to the right knee, or that any symptoms in his neck are causally related to that injury.

110. Dr Lahz recorded in February 2020 that Mr Foody presented with symptoms including “right-sided neck pain with symptom spread to the right shoulder girdle over the trapezius”. Nothing in her report or any of the other evidence relied on by Mr Foody supports the conclusion that any symptoms in his cervical spine related to the injury to his right knee in 2004.

111. I am not satisfied that Mr Foody has met the onus of proof required to establish that he has a consequential condition affecting his cervical spine. There will be an award for the respondent in respect of that condition.

Conclusion

112. For these reasons, there will be a determination and orders as set out in the attached Certificate of Determination.