

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2950/20
Applicant: Akram Zahedian
Respondents: Empire Hospitality Australia Pty Ltd
Date of Determination: 31 August 2020
Citation: [2020] NSWCC 295

The findings of the Commission are as follows:

1. Award in favour of the respondent in respect of the applicant's allegation of a consequential condition to the applicant's right knee resulting from injury to the applicant's left knee in the course of her employment with the respondent with a deemed date of injury of 21 November 2017.
2. The matter is remitted to the Registrar for referral to an Approved Medical Specialist - orthopaedic surgeon (AMS) to determine the extent of the applicant's whole person impairment, if any, which results from the following:
 - (a) cervical spine
 - (b) lumbar spine
 - (c) right upper extremity (shoulder, elbow and carpal tunnel/wrist)
 - (d) left upper extremity (shoulder, elbow and carpal tunnel/wrist)
 - (e) right hip
 - (f) left lower extremity (knee)
 - (g) scarring (from bilateral carpal tunnel procedures)

with deemed date of injury 21 November 2017.

3. The Registrar is requested to place the matter in the pending list for face-to-face medical examination having regard to the extent of the body parts concerned. An interpreter in the Farsi language is requested.
4. The Registrar is requested to place before the AMS a copy of the Application and annexures, a copy of the Reply and annexures and a copy of these Reasons for Decision.

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

PHILIP YOUNG
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 PHILIP YOUNG, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Akram Zahedian (the applicant) is a 43 year old lady who was employed by Empire Hospitality Australia Pty Ltd (the respondent) as a cleaning attendant. There is no dispute that the applicant as a result of the nature and conditions of her employment between 7 February 2013 and 21 November 2017 suffered injuries to her cervical spine, lumbar spine, elbows, right hip, left knee, bilateral carpal tunnel syndrome and scarring (from bilateral carpal tunnel release). Additionally, the applicant suffered injuries to her left and right shoulders.
2. The point of contention is whether as a result of over-compensating because of the injury to her left knee, the applicant also suffered a consequential condition affecting her right knee. The applicant presses this consequential right knee condition and the respondent disputes it.
3. There is an additional matter to be considered and that concerns an assessment of the right knee condition by Dr Dias, the applicant's independent medical examiner. First, the respondent complains that the applicant has never made a claim in respect of her right knee condition. Second, any claim she could make has been assessed by Dr Dias at zero percent (0%) whole person impairment, so that this body part cannot be referred to an Approved Medical Specialist (AMS).

ISSUES FOR DETERMINATION

4. The issues in this matter are quite limited. They are:
 - (a) Has the applicant suffered a consequential condition to her right knee which results from her left knee injury?
 - (b) If so, can the applicant be referred to assessment by an AMS in respect of her right knee condition (if any) in circumstances where a formal claim has not been made in respect of the right knee condition and the only assessment is a zero percent assessment provided by Dr Dias?

PROCEDURE BEFORE THE COMMISSION

5. This matter came for conciliation and arbitration hearing on 20 July 2020 by telephone conference. Mr R Stanton of counsel instructed by Ms M Azer, solicitor, appeared for and with the applicant. Mr D Mobini attended as interpreter. Ms L Goodman of counsel instructed by Mr R Orr, solicitor, appeared for the respondent. Ms J Mallard was present representing the insurer.
6. The matter proceeded to conciliation but regrettably was not capable of settlement. Extensive discussions occurred to the point that there was insufficient time to commence and complete counsel's submissions. Accordingly, a Direction for written submissions was made.
7. I am satisfied that the parties to the dispute understand the nature of the dispute, the procedure which was adopted and the implications of proceeding to arbitration hearing. I have used my best endeavours to attempt to bring the parties to mutual resolution of the outstanding issues.
8. The matter proceeded to arbitration hearing.

EVIDENCE

Documentary evidence

9. The following documents were before the Commission and were taken into account in making this determination:
 - (a) Application to Resolve a Dispute (Application) dated 28 May 2020 and attachments, and
 - (b) Reply dated 18 June 2020 and attachments (Reply).
10. Written submissions were provided by the parties, namely by the applicant dated 21 July 2020 and by the respondent dated 17 August 2020. The applicant did not file any further submissions in Reply.

Oral evidence

11. No oral evidence was given.

SUBMISSIONS

12. It is unnecessary to summarise in detail the submissions provided in this matter as both parties prepared written submissions. The Commission is grateful to both counsel for the brevity of these submissions and their concise application to all relevant issues, which in the circumstances was entirely appropriate.

DISCUSSION, FINDINGS AND REASONS

Issue (a) - Did the applicant suffer a consequential injury to her right knee?

13. The deemed date of injury in this matter is 21 November 2017 being the last day of work of the applicant for the purposes of section 16 of the 1987 Act. The applicant started employment with the respondent on 7 February 2013 and in her statement of 5 May 2020 she outlines the physically demanding nature of her work as a room attendant, involving vacuuming, cleaning, sweeping, changing bed linen, rubbish removal and pushing heavy trolleys.
14. In approximately 2014 the applicant says she “experienced discomfort” in both of her hands and wrists, elbows, shoulders, knees as well as neck and low back pain.¹ The applicant commenced treatment in late 2014, mainly concerning her bilateral carpal tunnel syndrome, but also in relation to left knee pain and back and neck pain.²
15. It is of some significance to note at this point that the applicant states that in 2014 her pain included knees, meaning (I interpret) both her left and her right knee.
16. The applicant has stated as at 5 May 2020 that she suffers daily from pain and stiffness and discomfort to various body parts (namely those parts accepted by the insurer) but also says:
 - “26. ...I have also developed right knee pain over time. I have been relying on my right knee when I walk to protect my left knee from any further injury. I do this by placing my body weight on my right knee”.³

¹ Applicant’s statement 5 May 2020 at [15].

² Ibid at [18]-[25].

³ Ibid at [26].

17. The applicant does not specifically mention her right knee disabilities elsewhere in her statement, although in fairness at paragraphs 28 and 30 she makes mention of “knee pain” without identifying whether her current disabilities in this regard concern the left knee, the right knee or both.
18. It must I think be concluded from the applicant’s statement of 5 May 2020 that in relation to her right knee, she says that she had pain in 2014 and as a consequence of her left knee problems her right knee deteriorated over time.
19. The applicant’s general practitioner, Dr I Khan, referred her to Dr J Herald, orthopaedic surgeon. Dr Herald saw the applicant on 23 November 2017 at which time the applicant gave Dr Herald a history of bilateral wrist pain and numbness and tingling, the development of back pain with sciatic symptoms in 2016, neck pain and pain down the left and right shoulder blades. No mention of right knee pain was given at that time.
20. The applicant returned to see Dr Herald on 25 January 2018 and attention was given to the applicant’s shoulders, back and carpal tunnel syndrome. There is again no mention of right knee pain.
21. The applicant saw Dr Herald again on 10 May 2018 complaining of three months of left knee pain and swelling. She returned on 21 June 2018 continuing to complain of left knee pain. There is still no mention of right knee pain.
22. Further consultation with Dr Herald occurred 23 August 2018 concerning the applicant’s left knee, bilateral carpal tunnel and shoulders. The next visit was 6 September 2018 when knee swelling was noted. In the absence of any earlier reference to the right knee, this swelling must be, I infer, related solely to the left knee.
23. Consultations with Dr Herald concerning the applicant’s wrist occurred on 27 September 2018 and 15 November 2018. On 6 December 2018 attention was given to recent left wrist surgery and an MRI of left knee. At consultation on 13 December 2018 the applicant complained of left knee and right shoulder pain.
24. The complaints then widened when on 31 January 2019 Dr Herald reported that on examination the applicant had “ITB tightness in both knees”. I take this abbreviation (ITB) to refer to iliotibial band syndrome. I would observe that there was no explanatory medical evidence before the Commission in this matter concerning the significance of this specific condition or syndrome in the right knee, nor in particular whether it was in any way medically plausible that this right knee “tightness” observation supported an argument that it was caused or materially contributed to by the applicant’s left knee condition.
25. The applicant saw Dr Herald again on 11 April 2019 with the areas of concern being the applicant’s neck, back and hand and then on 23 May 2019 back pain and right hip pain and tenderness of scar tissue of her hand. Again there is no mention of right knee pain or disability.
26. On 19 September 2019 Dr Herald reported to Dr Khan that “she says she started developing over-compensation right knee pain”.⁴ It would seem that both knees were examined, but Dr Herald only recorded patellofemoral irritability. No treatment plan was organised concerning right knee treatment.

⁴ Application at page 69.

27. Dr Herald's report of 10 October 2019 would appear to be the most significant in terms of the development of right knee pain. The applicant gave a history that since 22 November 2017 when she stopped working "she has had ongoing pain in both knees, particularly her left knee".⁵ At this time a plan of "similar treatment" was proposed for the applicant's right knee.
28. Dr Brian Stephenson, orthopaedic surgeon, saw the applicant at the request of the insurer on 3 April 2018. There was no mention in the history concerning right knee pain or disability. Dr Stephenson re-examined the applicant on 7 April 2020. His overall opinion is unsatisfactory because he comments⁶ that right knee impairment due to chondromalacia patellae "cannot be claimed for the right knee as there is no history of direct impact injury". However, the report of Dr Stephenson is of some assistance in that on examination he noted a full range of movement of both knees.
29. Dr I Khan provided a report to Allianz dated 11 October 2018. The report does not mention the applicant's right knee. This observation is not made critically because it would seem to be the applicant's position that the consequential right knee condition occurred somewhat later. Dr Dias has provided a report dated 4 February 2020.⁷ Under "History of Injuries" again the right knee is not mentioned.⁸ The right knee is referred to by Dr Dias under "Subsequent Progress"⁹ in terms of pain, stiffness and discomfort "...and more recently her right knee".
30. A significant difficulty for the applicant in terms of the right knee allegation arises because of the absence of earlier complaint of right knee pain in any substantive sense until Dr Herald's report of 19 September 2019. I am mindful of the communication difficulties which the applicant suffers because of her limitations in the English language and the clear fact that this sort of disadvantage can very often mean that full and complete histories are not obtained by busy medical practitioners, especially where communications and cultural differences are difficult¹⁰ But I am concerned that by 19 September 2019 the applicant had been able to navigate (through her Solicitors) her claim and record her disabilities to include the pain and disabilities she experienced in respect of a large number of "body parts", yet there was no earlier recorded mention of trouble with her right knee.
31. That is only the first part of my reasoning. The second part relates to medical opinion. Dr Dias' opinion comes very late in the day. It highly relies upon the applicant's history. It represents an opinion based on that history alone. Dr Dias' report does not, in my view, sufficiently explain how medically and in a chronological sense the applicant's right knee was consequentially affected by the applicant's left knee injury.
32. It is clear that Dr Stephenson has not approached the appropriate test in terms of the applicant's alleged consequential condition to her right knee in the correct way. It is of course unnecessary for the applicant to establish that the right knee condition resulted directly from any "impact injury". Having said that, I am not persuaded that the applicant's right knee condition was a consequential condition resulting from her left knee injury¹¹ for the following reasons:
 - (a) The applicant's statement does not identify, even generally, the time at which she first suffered right knee pain except for a broad and uncorroborated allegation of discomfort in her "knees" in approximately 2014.

⁵ Ibid at page 70.

⁶ Reply at page 19.

⁷ Application pp. 5-30.

⁸ Ibid at pp. 10-11.

⁹ Ibid at page 11.

¹⁰ *Mason v Demasi* [2009] NSWCA 227 per Basten JA.

¹¹ On a common sense causation approach; *Kooragang Cement Pty Limited v Bates* (1994) 35 NSWLR 452.

- (b) The applicant was able to persist with heavy cleaning work from 2014 until November 2017 without any recorded complaint concerning her right knee.
- (c) The applicant failed to complain of any significant problems with her right knee until about 19 September 2019 when she saw Dr Herald.
- (d) The only opinion supporting the applicant's consequential right knee condition is contained in Dr Dias' report following his assessment of the applicant on 4 February 2020, over two years after the applicant stopped work.
- (e) Dr Dias' examination of the applicant's left knee on 4 February 2020 was normal, thereby negating the need for the applicant to favour the left knee and put strain on the right knee, at least at that time.
- (f) On examination of the applicant's knees on 7 April 2020¹² Dr Stephenson found that both knees had a full range of motion.

33. In the circumstances, there will be an award for the respondent in respect of the applicant's allegation of consequential condition to her right knee.

Issue (b): Referral to an AMS

34. Having regard to the conclusion concerning Issue (a), it is unnecessary to consider Issue (b).

35. However, some obiter follows:

- (a) Because of the amendments made on 19 June 2012, in order for a claim to be considered for referral to an AMS, a specific permanent impairment claim form is required. The procedure is discussed by Roche DP in *O'Callaghan*.¹³
- (b) That procedure includes the making of a claim by use of the form which includes the **specific** body part sought to be assessed, in this case to include whole person impairment in respect of a consequential condition regarding the right lower extremity (right knee) with deemed date of injury 21 November 2017.
- (c) In the present case there seems to be no evidence that any permanent impairment claim form served included reference to the consequential condition to the applicant's right knee.
- (d) It would seem to be unfortunate that a body part which may not have been earlier discovered as a consequential condition and could not be later included on the form meant that it could not be later submitted for assessment.
- (e) In many cases, consequential conditions can develop over considerable periods of time and this restriction on referral to an AMS (i.e. the body part must be identified in the claim form) may seem somewhat unfair, however, as identified by Arbitrator Harris¹⁴ (with which I agree) some of the 2012 amendments were described by the High Court¹⁵ as having a "non-beneficial operation".
- (f) But in this matter, in view of my finding concerning the absence of a consequential condition in respect of the applicant's right knee, these procedural matters are unnecessary to further consider.

¹² Reply pp. 10-21.

¹³ *O'Callaghan v Energy World Corporation Ltd* [2016] NSWCCPD 1 at [77]-[82].

¹⁴ *Maria Galea v Colourwise Nursery (NSW) Pty Ltd* [2019] NSWCC 362 at [52].

¹⁵ *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18 at [29].

Determination

36. The determination of the Commission is as follows:

- (a) Award in favour of the respondent in respect of the applicant's allegation of a consequential condition to the applicant's right knee resulting from injury to the applicant's left knee in the course of her employment with the respondent with a deemed date of injury of 21 November 2017.
- (b) The matter is remitted to the Registrar for referral to an AMS-orthopaedic surgeon to determine the extent of the applicant's whole person impairment, if any, which results from the following:
 - (i) Cervical spine
 - (ii) Lumbar spine
 - (iii) Right upper extremity (shoulder, elbow and carpal tunnel/wrist)
 - (iv) Left upper extremity (shoulder, elbow and carpal tunnel/wrist)
 - (v) Right hip
 - (vi) Left lower extremity (knee)
 - (vii) Scarring (from bilateral carpal tunnel procedures)

with deemed date of injury 21 November 2017.

- (c) The Registrar is requested to place the matter in the pending list for face-to-face medical examination having regard to the extent of the body parts concerned. An interpreter in the Farsi language is requested.
- (d) The Registrar is requested to place before the AMS a copy of the Application and annexures, a copy of the Reply and annexures and a copy of these Reasons for Decision.

