



Workplace Injury Commission

DETERMINATION AND REASONS FOR DETERMINATION

CITATION:	[2024] VWIC 1
ARBITRATION REFERENCE NUMBER	[Number]
PARTIES	
WORKER	[Worker's name] (The Worker)
WORKSAFE AGENT	[Agent's name] (The Agent)
EMPLOYER	[Employer's name] (The Employer)
ARBITRATION OFFICER	Ms Sarah Scorrar
DATE(S) OF HEARING(S)	22 November 2023 and 17 January 2024
DATE OF DETERMINATION	30 January 2024

DETERMINATION

1. I determine that the Agent's decision dated 7 March 2023 under review is revoked. This means that the determination is in favour of the Worker.
2. I determine that the Worker is entitled to compensation payable from 24 November 2022 in accordance with the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) (the Act). I direct the Agent to pay the amount of compensation to which the Worker is entitled, in accordance with the Act.
3. This determination comes into effect immediately. I certify that each party is bound by this result.

COSTS

4. As this determination is in favour of the Worker, I award the Worker's costs as fixed under section 301W of the Act to be paid by the Agent.
5. If the parties cannot agree on the monetary amount of costs that are payable, a party may submit a *Request for Costs Decision* form to the Workplace Injury Commission (WIC) within 30 days of this determination.

REASONS FOR DETERMINATION

DISPUTE REFERRED TO ARBITRATION

1. This arbitration is about whether the Worker has an entitlement to compensation for a claimed injury pursuant to the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) (the Act).
2. The Worker lodged a claim for compensation dated 1 February 2023 (the Claim) for an injury described as 'aggregated [sic] L4 and torn ligaments on right Sacroiliac'. The Worker submits that this occurred because of being 'required to do a squat and walk in that squat (duck waddle)' (duck waddle) when attending a pre-employment medical examination for the Employer on 24 November 2022.
3. On 7 March 2023, the Agent rejected the Worker's claim for compensation on the basis that the Worker had not sustained an injury arising out of or in the course of his employment and/or the Worker's employment was not a significant contributing factor to the claimed injury.
4. The Worker lodged an application for conciliation with the Workplace Injury Commission (WIC) to appeal the Agent's decision and a Genuine Dispute Certificate was issued by a Conciliation Officer on 4 July 2023.
5. The Worker subsequently lodged a referral for arbitration which WIC accepted on 5 September 2023.
6. The Worker had also applied to the Workers Compensation Independent Review Service (WCIRS) on 4 August 2023 for a review of the Agent's decision. The arbitration was adjourned while WCIRS reviewed the Agent's decision. WCIRS provided its decision dated 20 October 2023, which affirmed the Agent's decision.
7. WIC held an initial hearing by MS Teams on 22 November 2023, attended by the Worker, the Worker's assistant [named], the Agent's representative [named]; and the Employer representative [named]. A further hearing was held in person on 17 January 2024, attended by the same people.

EVIDENCE

8. In making this determination, I have considered all the material included in the Arbitration Book (pages 1 to 69), and Schedule B of the Arbitration Book (pages 70 to 538), and the evidence and submissions presented at the arbitration hearings.
9. At the further hearing on 17 January 2024, the Worker gave oral evidence under oath.

Preliminary Matters

10. On 20 December 2023 the Agent requested that I make a determination on the papers. I denied that request because I required direct evidence and submissions from the Worker at a hearing to address the relevant issues.
11. At the hearing on 17 January 2024, the Worker's representative requested that medical questions be referred to the Medical Panel. The Agent confirmed that there are no facts in dispute that prevent a referral; however, they asked that I proceed to a determination. Based on the information before me, and taking into consideration the principles of the Act that I must ensure that the dispute is conducted in an informal, inexpensive and timely manner, I am satisfied on the material presented at the hearing that a determination can be made without a referral to a Medical Panel.

ISSUES

12. At the initial and subsequent hearing, the Agent confirmed that it no longer relies on the ground that the Worker did not sustain an injury arising out of or in the course of his employment to reject the claim, and relies solely on the ground that the Worker's employment was not a significant contributing factor to the claimed injury. I address this further below.
13. Therefore, the only issue for determination in this dispute is whether the Worker's employment was a significant contributing factor to his claimed injury or condition.
14. This will require me to determine whether:
 - there is a pre-existing injury or condition and
 - there was a recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or condition; and
 - employment was a significant contributing factor to any recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or condition.

CONSIDERATION OF ISSUES

Burden and standard of proof

15. The Worker must establish, on the balance of probabilities, that he has sustained an injury arising out of or in the course of employment, pursuant to section 39(1) of the WIRC Act: *Pulling v. Shire of Yarra Ranges* [2018] VSC 248.

Background Evidence

16. The following facts are not in dispute:

- The Worker commenced employment with the Employer on 21 November 2022 on a casual basis.
- The Worker attended a pre-employment medical assessment with Workforce Health Assessors on 24 November 2022 and as part of the assessment, he was required to perform a duck waddle.
- The Worker had a pre-existing physical condition of the lower back and right hip.

Has the Worker sustained an injury as defined in the WIRC Act?

17. The Worker must establish that he has suffered an injury arising out of or in the course of employment with the Employer to be entitled to compensation under section 39(1) of the Act. Section 3 of the Act defines 'injury' as 'any physical or mental injury and includes a recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease. The parties agree that the Worker has a pre-existing lower back and right hip condition and that he is claiming that as a result of the pre-employment medical assessment on 24 November 2022, specifically the performance of the duck waddle, there was an 'aggravation, acceleration, exacerbation or deterioration' of this condition.

The Worker's pre-existing condition

18. In the Worker's statement dated 7 December 2023, he confirmed that he had prior injuries to his lower back in 1997 and 2003. He stated that over the years, every couple of months he attended chiropractic maintenance and treatment for flare-ups of his back and hip condition and that he also wore a back brace when required.

19. The Worker's clinical records from 1 May 2008 to 27 October 2023 demonstrate a long-standing history of lower back and right hip conditions.

20. On 27 February 2023, the Worker attended an independent medical examination with Dr [L] (the IME) arranged by the Agent. The IME report dated 2 March 2023, stated that the Worker 'outlined his history of recurrent/longstanding back discomfort concerns'. The IME accepted the Worker suffered from a long-standing pre-existing condition of the lower back and hip.

21. Based on the Worker's evidence, the IME's medical opinion, and the medical evidence of the Worker's treating health practitioners, I find that the Worker had a pre-existing lower back and hip condition.

Has there been a recurrence, aggravation, acceleration, exacerbation or deterioration of the Worker's pre-existing injury or condition?

22. I consider that the medical evidence about the Worker's diagnosis is broadly consistent across a range of treating health providers who examined the Worker after the duck waddle incident on 24 November 2022 as follows:

- [Dr GM] (Chiropractor 1) in her report dated 5 December 2022 advised that the Worker presented with acute left sacroiliac joint pain. In her later report dated 11 July 2023 she clarified that she made an error in her initial report and that the Worker had presented with pain and an unstable sacroiliac joint on his right side.
- [Dr VM] (Chiropractor 2) in her report dated 27 January 2023 advised that the Worker presented with acute right sacroiliac joint pain.
- [Dr LK] (Chiropractor 3) in her reports dated 28 March 2023 and 21 June 2023 advised that the Worker presented with a constant aching pain mainly in his right hip and bilateral lumbar spine. She stated that the Worker has been a long-term patient of the clinic as a result of extensive osteoarthritis in the Worker's L3/4 and L4/5 facet joints and C4-C7.
- [Mr W] (Physiotherapist) in his report dated 11 May 2023 diagnosed an acute flare-up of degenerative hip joint disease, noting that it is likely the Worker had a degenerative hip joint well before the onset of pain in November 2022.
- [Dr T] (Chiropractor 4) in his report dated 24 July 2023 diagnosed right trochanteric bursitis, minor degenerative arthritic disease of the right hip that he does not believe is a major contributor to the Workers' pain. He considered the Worker's lumbosacral and right sacroiliac joint tenderness at L4 and L5 indicates an acute sprain of these joints and suggests impingement syndrome of the right hip with possible tearing of the anterior labrum of the right hip.

23. The IME diagnosed mechanical spine pain and imaging indicated mild hip degenerative disease and also trochanteric bursitis. In response to the question 'Is this a new injury or medical condition or an aggravation, acceleration, exacerbation or deterioration or a pre-existing injury or medical condition?', he opined that the 'Indicated symptom awareness may be reasonably viewed as an exacerbation of an underlying condition'.

24. I therefore find that there are consistent medical and treating health practitioner opinions as to the Worker's diagnosis and there is consistent evidence that the Worker had an increase in symptoms in the lower back and right hip following the pre-employment medical examination and specifically the duck waddle. Therefore, based on the medical evidence described above, I find that the Worker has suffered from a recurrence, aggravation, acceleration, exacerbation or deterioration of a pre-existing lower back and right hip condition.

Whether the injury to the Worker arose out of or in the course of employment?

25. The case of *Henderson v Commissioner of Railways (WA) [1937] HCA 67* (Henderson) is authority for the principle that an employee suffers an injury in the course of employment if the injury was suffered in the course of doing something he or she was 'reasonably required, expected or authorized to do in order to carry out his [or her] actual duties.' (see Henderson at 294).
26. The Agent initially submitted that the injury did not arise out of or in the course of employment. Subsequently it withdrew this ground and now agrees that the pre-employment medical assessment on 24 November 2022 and the duck waddle, were in the course of employment.
27. The Offer of Employment with the [Employer] (the offer) was dated 9 November 2022. The Worker signed and accepted the offer on 12 November 2022. The Worker's employment commencement date was 21 November 2022. His employment was conditional upon him undergoing a pre-employment medical assessment to certify he was fit to carry out the duties of the role. Following acceptance of the offer, the Employer could terminate the employment contract should the Worker not be certified as fit to carry out the duties of the role, by the pre-employment medical assessor. The Worker had also undertaken 3.45 hours of paid induction with the Employer on 23 November 2022; confirmed by the pay advice for the pay period 12 November 2022 to 25 November 2022.
28. There is no dispute that that the Worker was reasonably required, expected or authorised to participate (re Henderson) in the pre-employment medical assessment on 24 November 2022 in order to carry out his duties, which has been accepted by the parties as having occurred in the course of his employment.

Was the Worker's employment a significant contributing factor to his claimed injury?

29. Section 40(3) of the WIRC Act provides that there is no entitlement to compensation in respect of a recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease, unless the worker's employment was a significant contributing factor to the injury.
30. I have found the Worker has suffered from a recurrence, aggravation, acceleration, exacerbation or deterioration of a pre-existing lower back and right hip condition. To be entitled to compensation, he must also establish that employment was a significant contributing factor to this claimed injury.
31. 'Significant' means 'more than de minimus but less than a major or dominant factor' (*Meddis v Victoria WorkCover Authority* (CCV, 24 April 1996, unreported) and requires a worker to demonstrate a strong connection between employment and the injury as a pre-requisite to a compensation entitlement, (*TGT Transport v Zammit* (2000) 2 VR 312).

32. An injury may be caused by more than one 'significant' factor. Therefore, employment may be a significant contributing factor, even where there are other factors which are more significant (*Popovski v. Ericsson Australia Pty Ltd* [1998] VSC 61) (Popovski).
33. In determining whether a worker's employment was a significant contributing factor to an injury, clause 25 of Schedule 1 of the WIRC Act lists the following considerations which must be taken into account:
- a. *The duration of the worker's current employment.*
 - b. *The nature of the work performed.*
 - c. *The particular tasks of the employment.*
 - d. *The probable development of the injury occurring if that employment had not taken place.*
 - e. *The existence of any hereditary risks.*
 - f. *The lifestyle of the worker.*
 - g. *The activities of the worker outside the workplace.*

The duration of the Worker's employment

34. I have found the Worker commenced employment on a casual basis with the Employer on 21 November 2022. He had attended a paid induction session on 23 November 2022 and was examined by a medical practitioner appointed by the Employer on 24 November 2022 as part of his contracted pre-employment conditions.
35. As the Worker was employed for three days prior to the claimed date of injury, I am satisfied that the duration of his employment with the Employer can be regarded as being of little, if any effect to the Worker's recurrence, aggravation, acceleration, exacerbation or deterioration of his pre-existing lower back and right hip condition.

The nature of the work performed

36. I find that the Worker was employed as a casual [customer service role]. The position description states that the Worker's role was to 'provide the primary contact for visitors to the [Name of] facility and handle all enquiries in a professional and proactive manner.'
37. As part of his pre-employment conditions, Workforce Health Assessors medically assessed the Worker. The assessment report completed on 24 November 2022 confirms that he was assessed for an 'Office based role, mostly sitting at desk completing administrative duties'.
38. I found that the Worker had not yet commenced a shift in this role and he does not claim to have sustained an injury in the performance of his casual [customer service role]. I have found that the Worker undertook pre-employment medical assessment on 24 November 2022 and in undertaking a duck waddle as part of this assessment, he sustained a

recurrence, aggravation, acceleration, exacerbation or deterioration of his pre-existing lower back and right hip condition.

39. Therefore, it was not the nature of his duties as a [customer service role] that was a significant contributing factor to his injury and nor is it claimed by the Worker.

The particular tasks of the employment

40. I found on 24 November 2022, the Worker attended a pre-employment medical examination with Workforce Health Assessors. For clarity, it is agreed by the parties and I have accepted that this was incidental to employment. I have found that during the assessment he was required to walk in a squatted position (duck waddle).

41. The Worker provided detailed evidence which was consistent, thorough and reflective of medical evidence. It was logical and I found the evidence persuasive. On the basis of the Worker's evidence and submissions I found:

- On 25 November 2022, he had discomfort in his back as he was lifting and packing his car for a weeks' holiday, he described and I accept that he had problems getting in and out of the car throughout the day. After the nine-hour drive to [suburb], having arrived at his accommodation, he was unable to unpack his car.
- On 26 November 2022, he had unbearable pain and had trouble getting out of bed and walking. He attended Chiropractor 1. He presented as being unable to move and had to either sit in a fixed, firm chair or lay on the bed/floor.
- On 27 November 2022 when he woke up, he was unable to move in bed or get up. He dialled 000, who arranged for an emergency doctor to talk to him. The doctor prescribed strong painkillers.
- The Worker sought ongoing and regular medical treatment for his claimed injury between December 2022 and 30 July 2023, on the on the following dates:
 - 1 December 2022, 8 December 2022, 12 December 2022, 19 December 2022, 28 December 2022, 9 January 2023, 16 January 2023, 31 January 2023, 8 February 2023, 10 February 2023, 15 February 2023, 28 February 2023, 7 March 2023, 21 March 2023, 31 March 2023, 4 April 2023, 18 April 2023, 5 May 2023, 26 May 2023, 9 June 2023, 23 June 2023, 8 July 2023, 10 July 2023, 17 July 2023, 22 July 2023, 28 July 2023, 30 July 2023.

42. There is consistent medical evidence across a range of treating health providers, in relation to the causation of the Workers condition as follows:

- [Dr GM] (Chiropractor 1) states the Worker first presented on 26 November 2022 with acute right sacroiliac joint pain. She was of the opinion that the onset of pain was following a duck walk, which she believes was the initial aggravation of the problem.

She confirms that the Worker saw her again to follow up on 28 November 2022 and 1 December 2022.

- [Dr VM] (Chiropractor 2) advised that the Worker presented to her on 8 December 2022 with acute right sacroiliac joint pain following performing a duck walk during a physical examination.
- [Mr M] (The physiotherapist) advised that the Worker presented to him on 1 February 2023, and diagnosed an acute flare of degenerative hip joint disease, noting the pain onset was on 25 November 2022 following the duck walk test. He opined that prior to the workplace assessment, the Worker was physically capable of employment but was not after the assessment.

43. The IME accepted the Worker's history of events and opined that the 'Indicated symptom awareness may be reasonably viewed as an exacerbation of an underlying condition'. He also opined that the Worker has a restricted capacity for employment. The IME states "indications of significant new pathology on imaging with which to reasonably attribute incident significance appear limited".
44. Whilst [the IME] states 'indications of significant new pathology on imaging with which to reasonably attribute incident significance appear limited'. This appears to contradict his earlier statement that symptom awareness is 'an exacerbation of an underlying condition'. The treating health practitioners' consistent view as described above is that the pre-employment medical examination aggravated or exacerbated the Worker's condition. On balance, I am satisfied that employment was a significant contributing factor to the claimed injury.
45. Based upon these consistent medical opinions as to the causation of the Worker's recurrence, aggravation, acceleration, exacerbation or deterioration of his pre-existing lower back and right hip condition, I accept that the Worker has suffered a recurrence, aggravation, acceleration, exacerbation or deterioration of a pre-existing of a pre-existing lower back and right hip condition as a direct result of the duck waddle undertaken on 24 November 2022.
46. I accept that following the duck waddle, the Worker experienced significant symptoms which resulted in pain, and restrictions in *both* his mobility and ability to undertake his normal activities such as driving, sitting and standing; and *that* he required treatment including emergency care and regular ongoing follow-up treatment for several months thereafter.

The probable development of the injury occurring if that employment had not taken place

47. I accept the Worker had vulnerabilities as indicated by his evidence of a long-standing condition, which has required careful management and treatment from time to time. However, I find that based upon the above medical evidence, if not for the duck waddle, his condition would not have been aggravated or exacerbated.

48. A relevant consideration is that an employer must take the worker as it finds them, which includes a worker who suffers from a pre-existing condition or vulnerability.
49. The Worker was frank and clear in explaining his pre-existing condition to the medical assessor and the assessment was undertaken by someone who had knowledge of that pre-existing condition. The worker was assessed as fit to undertake the role with the Employer albeit he had pre-existing lower back and hip conditions, and it was subsequent to the assessment, in particular, the duck waddle, that the worker's condition flared-up such that he sought treatment and was incapacitated for work.

The existence of any hereditary risks

50. There is no evidence before me which addresses any hereditary risks.

The lifestyle of the Worker and the Worker's activities outside of the workplace.

51. The Agent submitted that the Worker's daily activities outside of the workplace have previously contributed to the exacerbation of flare-ups. The Agent submitted that the Worker had sought treatment as demonstrated in the clinical records from [Medical Facility], on six occasions prior to the pre-employment medical of 24 November 2022, in October and November 2022 as follows:

- 10 October 2022 - attended for a niggle in his lower back.
- 14 October 2022 - attended for a sore right hip following sandbagging due to rain.
- 21 October 2022 - attended as he woke up startled out of bed, twinging in bed when he got out.
- 24 October 2022 - attended for right hand side of lower back after rushing to get out of bed to answer the phone.
- 28 October 2022 - attended after having niggling pain in the hip area following a drive and getting out of the car.
- 21 November 2022 - attended for a niggle in the right hand side of his back in general.

52. The Agent submitted that the Worker had previously sought treatment following a long drive and, therefore, the nine-hour drive that he undertook on 25 November 2022 may be the cause of his claimed injury rather than the duck waddle.

53. I am not satisfied that the evidence supports the Agent's assertion. I consider the medical evidence links the cause of the claimed injury to the duck waddle. I refer to *Popovski* which provides that employment may be a significant contributing factor, even where there are other factors which are more significant. I do not accept the Agent's submission on this point, noting that I have found that the Worker has suffered a recurrence, aggravation, acceleration, exacerbation or deterioration of a pre-existing lower back and right hip condition as a direct result of the duck waddle undertaken on 24 November 2022.

Other issues

Delay in claim lodgement

54. The Agent acknowledges that the injury occurred on 24 November 2022, however the Worker:

- did not go to the doctor immediately and,
- did not lodge a claim for compensation for 69 days therefore:
 - there is no knowledge of what occurred between the date of the claimed injury and the claim lodgement, and
 - the decision to lodge the claim was an afterthought.

55. I have found that the Worker first sought treatment for the claimed injury on 26 November 2022, two days after the pre-employment medical assessment (on 24 November 2022). I accept the Worker's explanation that the injury was not immediately apparent following the pre-employment medical assessment and he first became aware of symptoms on the morning of 25 November 2022. I also accept that he sought medical treatment as soon as practicable.

56. I have detailed a timeline of events above which includes dates between 24 November 2022 and the lodgement of the claim for compensation on 1 February 2023. I accepted the timeline as presented by the Worker for the reasons outlined above.

57. I accept the Worker's evidence that he communicated with the Employer in relation to his claimed injury and the lodgement of a claim on the following dates:

- 28 November 2022, 8 December 2022, 13 December 2022, 18 December 2022, 19 December 2022, 22 December 2022, 8 January 2023, 10 January 2023, 13 January 2023, 16 January 2023, 18 January 2023, 23 January 2023, 24 January 2023.

58. I am therefore satisfied that the Worker has provided a reasonable explanation for the delay of 69 days between the claimed date of injury and the lodgement of the claim for compensation.

59. I note that section 18 of the Act covers the notification provisions, and the Agent did not cite them as a ground for rejecting the claim.

Lack of contemporaneous medical evidence

60. The Agent has submitted that there is a lack of contemporaneous medical evidence and that the Worker has not discharged his onus of proof. They further submit that the evidence presented, 'does not allow a positive conclusion to be drawn about the onset of symptoms'. The Agent submitted that even though the Worker claims the incident occurred out of or in the course of employment, it was not severe enough to seek first aid or attend a GP

immediately and, therefore, it is likely that employment was not a significant contributing factor; rather, the incident was a temporary flare up (*Allardyce v Esso Australia (Workcover)* [2019] VMC 7).

61. The Worker has provided evidence that following the incident, he experienced severe lower back and hip pain, which was significant enough to require emergency and regular ongoing follow-up treatment for several months, including chiropractic treatment, physiotherapy, specialist referral and imaging. I have found that the injury was not a temporary flare up. I am therefore satisfied that the Worker's pre-employment medical was a significant contributing factor to his injury.

Conclusions

62. For the reasons outlined above, I find that the Worker has suffered a recurrence, aggravation, acceleration, exacerbation or deterioration of a pre-existing lower back and right hip condition in the course of his employment, as a direct result of a duck waddle undertaken on 24 November 2022 during a pre-employment medical examination.

63. On the balance of probabilities, I find that employment was a significant contributing factor to the recurrence, aggravation, acceleration, exacerbation or deterioration of a pre-existing lower back and right hip condition. The Worker is therefore entitled to compensation in accordance with the Act.

DETERMINATION

64. I determine that the Agent's decision dated 7 March 2023 under review is revoked. This means that the determination is in favour of the Worker.

65. I determine that the Worker is entitled to compensation payable from 24 November 2022 in accordance with *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) (the WIRC Act). I direct the Agent to pay the amount of compensation to which the Worker is entitled, in accordance with the Act.

66. This determination comes into effect immediately. I certify that each party is bound by this result.

COSTS

67. As this determination is in favour of the Worker, I award the Worker's costs as fixed under section 301W of the Act to be paid by the Agent.

68. If the parties cannot agree on the monetary amount of costs that are payable, a party may submit a *Request for Costs Decision* form to the Workplace Injury Commission (WIC) within 30 days of this determination.

[signature]

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Sarah Scorrar
Arbitration Officer