

**RECENT DECISIONS**

## Worker loses the race but wins the case

*Shauna O'Carroll v Pacific Magazines Pty Limited* [2018] NSWWC 265

[Link to decision](#)

### Summary

On 1 November 2018, Arbitrator Burge found that an editorial coordinator at a prominent magazine company suffered an injury to her right knee while running a half marathon in the course of her employment for the purposes of section 4 and 9A of the *Workers Compensation Act 1987* (NSW) ('1987 Act').

### Background

The worker was employed by Pacific Magazines Pty Limited ('Pacific Magazines') as an editorial coordinator for Women's Health Magazine.

In April 2016, the worker was approached by an advertising agency enquiring whether anyone from Pacific Magazines would be interested in participating in the Nike Women's Half Marathon.

The worker discussed the proposition with her manager who agreed to the worker participating in the event. It was agreed that a series of online articles would be written and posts made about the event on the Pacific Magazines social media channels.

On 3 July 2016, following a 12-week training program, the worker took part in the marathon. The worker noticed pain particularly in her hips, knees and feet during the run but completed the race.

On 4 July 2016, the worker's right knee in particular was not improving. She consulted a physiotherapist who diagnosed 'runner's knee' and recommended some physiotherapy.

In November 2016, the worker was advised that she could return to playing basketball and commence light jogging. The worker returned to basketball, although her game time was restricted as her right knee would flare up.

On 19 September 2017, the worker consulted Dr Rimmer who recommended that she undergo surgery to file a chip on her knee cap and to drill small holes to allow blood flow and recovery. The worker underwent this procedure three days later.

The worker made a claim for weekly compensation and the costs of medical treatment in response to which the insurer of Pacific Magazines served a section 74 notice declining liability on the basis that the worker had not sustained a workplace injury (s4) and that her employment was not a substantial contributing factor to her injury (s9A).

The insurer admitted that the event was work-related and responsible for an ITB (iliotibial band) injury but contended that any lateral or medial ligament injuries that required surgery were not work-related and had been caused by the worker's sporting activities after the half-marathon.

### Decision

Arbitrator Burge was satisfied that the worker had met her onus of proof that the half-marathon caused her knee injury that was later diagnosed and treated by Dr Rimmer by way of surgical intervention. Further, he formed the view that the worker's knee injury did not resolve between the half-marathon and her arthroscopy, nor was it superseded by any injury suffered between the race and her arthroscopy.

In reaching his decision, Arbitrator Burge reaffirmed the common sense evaluation of the causal chain approach as set out by Kirby P in *Kooragang Cement Pty Ltd v Bates* (1994) 10 NSWCCR 796 despite some scrutiny of its application in recent times (see *Comcare v Martin* [2016] HCA 43). Arbitrator Burge referred to *Crosland v Gregelle Michory Pty Limited* [2017] NSWWC 17 as good authority to confirm the approach.

Arbitrator Burge was also satisfied that the worker's employment with Pacific Magazines was a substantial contributing factor to the injury which he found was suffered on 3 July 2016. He noted that the employer conceded the half-marathon was a work related event which required the

[back to top](#)

worker to undergo a training regime. He also reiterated that employment must only be a substantial contributing factor to the injury, as distinct from any incapacity, need for treatment or loss (see *Rootsey v Tiger Nominees Pty Ltd* [2012] NSWCC 48 & *Mercer v ANZ Banking Corporation* [2000] NSWCA 138).

Arbitrator Burge ordered the employer to pay weekly compensation and reasonably necessary medical expenses.

### For more information, please contact:



**Sean Patterson**

Associate

[sean.patterson@turkslegal.com.au](mailto:sean.patterson@turkslegal.com.au)



**Craig Bell**

Partner

[craig.bell@turkslegal.com.au](mailto:craig.bell@turkslegal.com.au)