WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **2554/20**
Applicant: **Anthony Green**
Respondent: **Woolworths Group Limited**
Date of Determination: **15 July 2020**
Citation: **[2020] NSWWCC 239**

The Commission determines:

1. The applicant has a consequential condition affecting his right hip as a result of the injury he sustained to his left hip in the course of his employment with the respondent on 12 May 2015.

2. The injury that the applicant sustained to his left hip on 12 May 2015 does not materially contribute to the need for a total right hip replacement.

3. An award for the respondent on the claim made by the applicant for an order pursuant to section 60 (5) of the *Workers Compensation Act 1987* (the 1987 Act) that the respondent meet the cost of a total right hip replacement as proposed by Dr Brighton.

4. The applicant has had a partial incapacity for work since 12 December 2019 as a result of the injury to the left hip on 12 May 2015 and a consequential condition affecting his right hip.

The Commission orders:

1. The respondent is to pay the applicant $596.80 per week from 12 December 2019 to date and continuing pursuant to section 37 of the 1987 Act.

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

John Isaksen
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 JOHN ISAKSEN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. The applicant, Anthony Green, sustained an injury to his left hip on 12 May 2015 whilst employed with the respondent, Woolworths Group Limited.

2. The respondent has admitted liability for this injury.

3. The applicant underwent a total left hip replacement, performed by Dr Brighton, on 13 September 2016. The respondent has accepted that the applicant has 30% permanent impairment as a result of this injury to the left hip.

4. The applicant claims that as a result of the injury to his left hip he has sustained a consequential condition affecting his right hip.

5. The applicant seeks an order pursuant to section 60 (5) of the *Workers Compensation Act 1987* (the 1987 Act) that the respondent meet the cost of a total hip replacement proposed by Dr Brighton.

6. The applicant ceased work on 11 December 2019, which he claims was due to the increasing pain he was experiencing in his right hip and also ongoing pain in his left hip. The applicant claims weekly payments of compensation from 12 December 2019.

7. The solicitors for the respondent issued a section 78 notice dated 17 December 2019 wherein the respondent disputed liability for the cost of a total right hip replacement on the grounds that the applicant did not sustain an injury to his right hip in the course of his employment and that the surgery was not reasonably necessary.

8. The solicitors for the respondent issued a further section 78 notice dated 5 February 2020 wherein the respondent denied ongoing liability for the injury to the left hip as the injury had resolved and the applicant had returned to his pre-injury duties.

ISSUES FOR DETERMINATION

9. The parties agree that the following issues remain in dispute:

    (a) Whether the applicant's right hip condition is a consequence of the injury to his left hip;

    (b) Whether the applicant's need for a total right hip replacement results from the injury to his left hip;

    (c) Whether the total right hip replacement recommended by the applicant's treating specialist, Dr Brighton, is reasonably necessary (section 60 of the 1987 Act);

    (d) Whether the applicant has any total or partial incapacity for work which results from the injury the applicant sustained to his left hip (sections 32A, 33, 36 and 37 of the 1987 Act).

PROCEDURE BEFORE THE COMMISSION

10. The parties attended a conference and hearing on 2 July 2020. 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.

11. Mr Horan appeared for the applicant, instructed by Mr Morson. Mr Beran appeared for the respondent.

12. The hearing was conducted by telephone in accordance with the protocols set out by the Commission due to the coronavirus pandemic.

13. At the commencement of his submissions, Mr Horan stated that he would not be making any submissions that the applicant sustained an injury to his right hip on 12 May 2015, and proceeded to make submissions only on a claim that the right hip condition is a consequence of the injury sustained to the left hip.

14. Mr Beran advised that the applicant has been paid 43 weeks of weekly payments of compensation to date, and that the respondent accepted the applicant's claim that 80% of pre-injury average weekly earnings (PIAWE) is $960.

15. It was agreed that two Certificates of Capacity from Dr Soo dated 22 December 2019 and 24 January 2020 would be accepted into evidence and filed as late documents, but only on the issue of incapacity, and not on the issue of diagnosis of any injury or condition.

EVIDENCE

Documentary Evidence

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

    (a) Application to Resolve a Dispute and attached documents;

    (b) Reply and attached documents;

    (c) Application to Admit Late Documents filed by the applicant on 16 June 2020;

    (d) Application to Admit Late Documents filed by the applicant on 3 July 2020 (in accordance with a direction made at the conclusion of the hearing).

Oral Evidence

17. There was no application to cross examine the applicant or adduce oral evidence.

FINDINGS AND REASONS

Whether the applicant's right hip condition is as a consequence of the injury he sustained to his left hip on 12 May 2015

18. The applicant states that his role with the respondent was as a team member at its distribution centre in Erskine Park. The applicant was assigned a forklift to operate as well as doing picking and packing.

19. The applicant states that he injured his left hip on 12 May 2015 when the forklift that he was driving stopped suddenly and he was flung from his seat and his body twisted.

20. The applicant states that following the injury on 12 May 2015, he had difficulty placing weight on his left leg and began to limp and favour his right hip.

21. The applicant states that he underwent a total left hip replacement on 13 September 2016 and returned to work on restricted duties with the respondent about 12 weeks after this surgery.

22. The applicant states that although he returned to work on restricted duties, he would work long hours and would be required to lift and pick up heavy items. He states that he continued to walk with a limp. He states that he was barely able to walk and stand for long periods of time as pain would shoot down from his hips. The applicant states that he would constantly favour his right side to bear weight because the pain he was experiencing was worse on the left side than on the right.

23. The applicant states that in August 2018 he felt a sharp pain in his right groin when lifting a carton of liquor. He was diagnosed with a hernia and underwent repair surgery on 15 October 2018. The applicant states that he had six weeks off work.

24. The applicant states that the pain in his right hip and right groin region returned after working for two weeks following the hernia repair surgery. He states that he underwent scans on his right hip in February 2019. The applicant then states:

> "I continued to work throughout, only till on the 11 December 2019 whilst at work, when I was walking my right hip froze and I could not walk. I had to ask 2 managers to come and help me and take me to my car.
>
> I sat in my car for 10 minutes before making the courage and strength to drive to my GP who saw me and certified me unfit and told me I could not continue work any longer. I have been advised that I require a right hip replacement."

25. The applicant states that he has problems in his right hip, lower back, hamstrings, left hip and groin region. He states that he now requires the aid of crutches to walk and can only walk and stand for small periods. He states that he lost strength in his back and movement to his hips and legs. He states that he is unable to walk, sit, stand and drive for prolonged periods of time.

26. The applicant states that he needs the assistance of his wife to dress and undress him. He states that he cannot undertake any domestic tasks around the home or any gardening. He states that he has limited mobility and needs the aid of crutches to do simple tasks.

27. The applicant returned to see Dr Brighton in May 2019 due to the pain that he was experiencing in his right hip. Dr Brighton records in a report dated 28 May 2019 that the applicant is very comfortable on his left side and continues to work in his previous occupation.

28. Dr Brighton finds that a review of scans of the right hip show appearances consistent with chronic AVN (avascular necrosis). Dr Brighton writes:

> "Anthony *may be heading for a second total hip replacement.* His AVN is obviously of long-standing, probably relating back to his original work place accident, but symptoms are already moderate. If this goes on to bony collapse, a further hip replacement will be required, but *only time will tell* and he is keen to put this off if at all possible."

29. In a further report dated 29 October 2019, Dr Brighton records that the applicant is taking regular Panadol Osteo to help him cope with his work duties, but that the applicant finds everything a struggle and he is clearly at the end of his pain tolerance. He records that the hip is irritable to examination and limited in all planes of movement.

30. Dr Brighton writes that a new CT scan shows "a further diminution of the hip space (developing degeneration) with probable subchondral fracture in the femoral head now, the end-stage osteonecrosis before rapid deterioration." Dr Brighton now recommends a right total hip replacement.

31. Dr New, orthopaedic surgeon, has provided three reports at the request of the applicant's solicitors. The first report dated 18 September 2017 concentrates on the effects of the injury to the applicant's left hip. There is no reference in that report to the applicant having any problems with his right hip. Dr New records the applicant having pain in his left groin, thigh and knee. Dr New opines that the applicant is fit to return to forklift driving work but this will diminish over time, particularly as the applicant has chronic pain.

32. Dr New does record that on examination he found that the applicant bore weight solely on his right side when getting dressed and undressed. He also found short leg gait on the left side with a 3 cm difference in leg length between the left and right lower limbs.

33. In his next report dated 25 July 2019, Dr New records that the applicant is having considerable problems with both hips. He writes that investigations confirm avascular necrosis without collapse. Dr New considers that a right total hip replacement is required but that timing should be left to Dr Brighton.

34. Dr New writes:

> "He certainly has good causation with regard to the left side hip and the forklift accident. Since that time he has been placing a lot of pressure on his right hip to help with ambulation but there has been no particular incident at work with regard to the right hip."

35. The final report from Dr New dated 11 March 2020 is prepared after the applicant has ceased work due to a significant increase of pain and restriction of movement in the right hip. Dr New records that a physical examination of the right hip is quite difficult due to pain. Dr New notes that the applicant needs the support of two Canadian crutches.

36. Dr New refers to a MRI scan report of the right hip dated 6 May 2019 which: "confirms a vascular necrosis in the right head with a moderate sized effusion, which is certainly consistent with his clinical presentation."

37. Dr New also refers to a x-ray dated 29 October 2019 which shows "some narrowing of the right hip joint consistent with the possible diagnosis of a vascular necrosis."

38. Dr New writes that the applicant's gait is now profoundly compromised by the right hip. Dr New confirms his previous opinion that the applicant requires a total right hip replacement and that the applicant has had a consequential injury to the right hip because of the applicant favouring his left hip.

39. Dr New is provided with a copy of a report from Dr Powell, orthopaedic surgeon, at the request of the respondent. Dr New writes:

> "Obviously Dr James Powell is entitled to his opinion, however in my experience many patients have a contralateral compromise of particular joints because of substantially altered gait, and I note that this patient has quite debilitating low back pain as a result of his altered gait."

40. Dr Powell, orthopaedic surgeon, has provided a report dated 28 August 2019, at the request of the respondent.

41. Dr Powell records the history of injury and treatment of the left hip. He records that symptoms have developed in recent months in the right hip and that investigations have now identified avascular necrosis. Dr Powell opines that the applicant suffers from a disease process in both hips and it is largely idiopathic in nature.

42. Dr Powell writes:

> "…Minor trauma incidents are not the cause of AVN. While they may be associated with the initial development of symptoms, and therefore associated in the patient's mind with the incident, the disease process has been present for many months prior to becoming symptomatic.
>
> The disease process proceeds through a natural history which is by initial interruption of blood supply, resulting in cell death and bone necrosis in the region affected.
>
> There is then a process of revascularisation and laying down of new bone. It is often the revascularisation process that is the first sign of symptoms."

43. Dr Powell then addresses the cause of the initial symptoms which the applicant had in the left hip and writes:

> "Given the patient's initial presentation and the minor nature of the incident, it is most likely that he caused a microtrabecular fracture through the weakened bone, developing secondary synovitis. Following this, his pathology was identified, leading onto surgical management.
>
> His current presentation is one of the natural history of this disease process and is not associated with any form of injury."

44. Dr Powell opines that there is no association between the applicant's employment and his right hip condition, and that even with respect to the left hip, the relationship to the applicant's work was minor.

45. The determination of whether a pathological condition suffered by a worker is as a consequence of a work injury was considered by DP Roche in *Moon v Conmah Pty Limited* [2009] NSWWCCPD 134 (*Moon*). In that matter the worker claimed whole person impairment from symptoms experienced in the left shoulder as a consequence of an accepted injury to the right shoulder. DP Roche said at [45-46]:

> "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. Therefore, to the extent that the Arbitrator and Dr Huntsdale approached the matter on the basis that Mr Moon had to establish that he sustained an 'injury' to his left shoulder in the course of his employment with *Conmah* they asked the wrong question.
>
> 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)."

46. Deputy President Roche then proceeded to state that the expression "results from" should be applied using the principles set out by Kirby P in *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*). In *Kooragang* Kirby P 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".

47. Kirby P then said at [463-4]:

> "…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".

48. Mr Beran for the respondent refers to a report of Dr Brighton dated 21 October 2016, being one month after the total left hip replacement, wherein Dr Brighton writes that the applicant is feeling comfortable today and "All is well" and that he will see the applicant in a year's time.

49. Mr Beran also refers to the report of Dr Brighton dated 28 May 2019 wherein Dr Brighton writes that the left hip replacement continues to function well and that the applicant is comfortable on his left side.

50. Mr Beran also refers to there being no contemporaneous records of treatment from mid-2017 to mid-2019 which might assist in the determination of whether the applicant has a consequential condition affecting his right hip. The clinical notes from Mount Druitt Medical Centre up until May 2017 do not record any problems that the applicant was having with his right hip.

51. Dr Brighton does not provide an opinion as to the cause of the applicant's symptoms in his right hip. When he first sees the applicant for treatment of the right hip, he does write that the avascular necrosis is long-standing and probably related back to the original work accident, but Mr Horan did not make any submissions in support of a claim that the applicant sustained a frank injury to the right hip on 12 May 2015.

52. An opinion from Dr Brighton would have been most helpful given his role as the applicant's treating specialist and the important role he has had to play with diagnosis and treatment.

53. The reports from Dr New provide a comparison between a time some 12 months after the applicant had the total left hip replacement, and then two years later. When Dr New saw the applicant in September 2017 he found that the applicant bore weight solely on his right side when getting dressed and undressed, and that there was a short leg gait on the left side. Although not stated at the time by Dr New, the warning signs were there for potential problems with the right hip. Two years later the applicant returns to Dr New with considerable problems with both hips and Dr New concludes that there is "good causation" regarding the cause of the applicant's right hip problems being due to his left hip and placing a lot of pressure on the right hip.

54. In support of a finding that the applicant was having ongoing problems with his left hip, which caused him to place pressure on his right hip, is a record made by A/Prof Hope in a report dated 18 December 2017. A/Prof Hope does not record any observations of the applicant's gait but does record a walking limit of 500 metres and the need to use a hand rail to climb stairs. A/Prof Hope records the applicant having left hip pain and stiffness, and concludes that the applicant has had a poor result from his total left hip replacement.

55. It is apparent that Dr Brighton did not see the applicant between a consultation one month after the left total hip replacement in September 2016 and May 2019 when the applicant returned with problems with his right hip. I would therefore discount Dr Brighton's view that "All is well" when he saw the applicant one month after the surgery and prefer the observations made by Dr New and A/Prof Hope. Although Dr Brighton writes in May 2019 that the applicant is very comfortable on his left side, that does not really address the issue of whether the ongoing effects of the left hip injury and the effects of the total hip replacement, in particular the applicant's altered gait, is a cause of the applicant's right hip symptoms.

56. Dr Powell does not engage in a consideration of whether the applicant's symptoms in the right hip are as a consequence of the injury to his left hip. He concentrates on whether the avascular necrosis which the applicant has suffered from in the left hip and is now suffering from in the right hip are related to the applicant's work.

57. I prefer the opinion of Dr New, which supports a finding that the applicant's right hip condition is as a consequence of the left hip injury, in particular due to the applicant's altered gait and placing additional pressure on the right hip, because he has had the opportunity of comparing the applicant's condition over a period of two years. Furthermore, there is support for findings of ongoing problems in the left hip in the report of A/Prof Hope in December 2017.

58. The test in *Moon* is whether "symptoms and restrictions" result from the compensable injury, after applying the "common sense evaluation" referred to in *Kooragang.* I am satisfied that the applicant has restrictions and symptoms in the right hip which result from the left hip injury. However, the more difficult issue to determine is whether the effects of the left hip injury materially contribute to the need for the right total hip replacement that is proposed by Dr Brighton.

Whether the applicant's need for a right total hip replacement results from the injury of 12 May 2015

59. The test to be applied on this issue is set out in *Murphy v Allity Management Services Pty Limited* [2015] NSWWCCPD 49 (*Murphy*). DP Roche said at [57-58]:

> "Moreover, even if the fall at Coles contributed to the need for surgery, that would not necessarily defeat Ms Murphy's claim. That is because a condition can have multiple causes (*Migge v Wormald Bros Industries Ltd* (1973) 47 ALJR 236; *Pyrmont Publishing Co Pty Ltd v Peters* (1972) 46 WCR 27; *Cluff v Dorahy Bros (Wholesale) Pty Ltd* (1979) 53 WCR 167; *ACQ Pty Ltd v Cook* [2009] HCA 28 at [25] and [27]; [2009] HCA 28; 237 CLR 656). The work injury does not have to be the only, or even a substantial, cause of the need for the relevant treatment before the cost of that treatment is recoverable under s 60 of the 1987 Act.

> Ms Murphy only has to establish, applying the commonsense test of causation (*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796), that the treatment is reasonably necessary "as a result of" the injury (see *Taxis Combined Services (Victoria) Pty Ltd v Schokman* [2014] NSWWCCPD 18 at [40]–[55]). That is, she has to establish that the injury materially contributed to the need for the surgery (see the discussion on the test of causation in *Sutherland Shire Council v Baltica General Insurance Co Ltd* (1996) 12 NSWCCR 716)."

60. Dr Brighton's first report following the applicant returning to see him in May 2019 suggests that the need for a right total hip replacement is due to worsening avascular necrosis. Dr Brighton writes: "If this goes on to bony collapse, a further hip replacement will be required." Dr Brighton had previously opined in a report dated 3 May 2016 that the need for the left total hip replacement in 2016 was due to the injury of 12 May 2015 precipitating avascular necrosis.

61. Mr Beran submits that Dr New does not provide any reasons as to how the applicant's altered gait has contributed to the avascular necrosis, given that it is the progression of the avascular necrosis which is the basis for the right total hip replacement proposed by Dr Brighton.

62. I have accepted the opinion of Dr New that the applicant has symptoms and restrictions in his right hip due to altered gait and placing additional pressure on his right side. I also agree with the submission made by Mr Horan that there are multiple causes for the applicant's right hip condition and, as was stated in *Murphy,* the work injury does not have to be the sole or even substantial cause for the need for surgery.

63. However, it is incumbent upon the applicant to establish that any condition caused by work materially contributes to the need for surgery. Dr Brighton identifies that it is the progression of the avascular necrosis which brings about the need for a right total hip replacement, but there is no opinion from Dr Brighton as to whether the injury to the left hip has in any way contributed to this need for surgery.

64. Dr New considers that a right total hip replacement is necessary for the applicant but does not provide his reasons as to what has caused this need for surgery. Dr New concludes that the applicant has symptoms as a result of altered gait but does not explain if those symptoms require treatment by way of a total hip replacement. Dr New confirms that the applicant has avascular necrosis but does not address how the injury to the applicant's left hip, in particular his altered gait and putting additional pressure on the right hip, has contributed to this particular condition.

65. In his report dated 29 October 2019, Dr Brighton refers to a new CT scan which shows "a further diminution of the hip space (developing degeneration) with probable subchondral fracture in the femoral head now, the end-stage osteonecrosis before rapid deterioration." That statement suggests that degeneration of the right hip joint, which might at least be partly caused by an altered gait, is a reason for the need for a total hip replacement, but there is no further evidence or opinion from Dr Brighton which might assist the applicant.

66. Dr New refers to x-rays of the right hip (as opposed to a CT scan) dated 29 October 2019, and opines that the narrowing of the right hip joint is "consistent with the possible diagnosis of a vascular necrosis." Dr New provides no further opinion as to the cause or causes of the developing degeneration in the right hip joint. As I have already observed, Dr New does not provide an opinion as to how the left hip injury has contributed to the avascular necrosis.

67. McColl JA (Mason P and Beazley JA agreeing) said in *Hevi Lift (PNG) Ltd v Etherington* [2005] NSWCA 42 (*Hevi Lift*) at [84]:

> "It has been long been the case that a court cannot be expected to, and should not, act upon an expert opinion the basis for which is not explained by the witness expressing it."

68. Dr Brighton does not provide an opinion as to whether the applicant's injury to the left hip materially contributes to the need for surgery, and Dr New fails to adequately explain how the applicant's injury to the left hip materially contributes to the need for surgery.

69. Mr Horan submits that the applicant's situation fits the 'eggshell skull' rule whereby employers must take workers as they find them. He submits that it is likely that the applicant was prone to the development of avascular necrosis and that it is sufficient to establish that the applicant's work has contributed to the progression of this condition.

70. I accept that the medical evidence in regard to the initial injury to the left hip in 2015 supports that argument. However, the medical evidence in regard to the development of avascular necrosis in the right hip is not sufficient to establish on the balance of probabilities that the consequential condition affecting the right hip, which results from the injury to the left hip, materially contributes to the need for a total hip replacement.

71. The evidence from Dr Brighton and the opinion of Dr New do not identify how restrictions and symptoms from an altered gait and additional pressure being placed upon the right hip contribute to the need for a total hip replacement. Nor how an altered gait or additional pressure on the right hip has caused a progression of the avascular necrosis, which is the only apparent reason for the need for a total hip replacement.

72. It follows that there will be an award for the respondent for the claim made by the applicant that the respondent meets the cost of a proposed right total hip replacement.

The claim for weekly payments

73. The applicant claims that he has had no current work capacity since 12 December 2019 due to the injury to his left hip and the consequential condition affecting his right hip.

74. The applicant claims that right hip and right groin pain returned about two weeks after he returned to work with the respondent in December 2018. He states that he continued to work but on 11 December 2019 his right hip froze and he could not walk. The applicant has provided evidence of some significant restrictions in his activities of daily living. The applicant states that he needs the aid of crutches to do simple tasks.

75. In July 2019 Dr New records that the applicant had considerable problems with both hips. Dr New writes:

> "It is my opinion that his current medical restrictions are appropriate but if his pain increases and on the opinion of his treating surgeon then that may need to be significantly changed."

76. There is a report from Kris Caloia, physiotherapist, dated 22 July 2019, which was prepared at the request of the applicant's solicitors for "an objective assessment" of the applicant's functional capacity. The report records the applicant having bilateral hip pain, restriction of movement of both hips, and weakness of both legs. The report records that the applicant is undertaking forklift driving duties with a limit of 13 kilograms for lifting, and sitting, standing and squatting as tolerated.

77. Mr Caloia concludes:

> "Mr Green is likely to be able to sustain his employment, however it must be noted that his current duties are performed below his recommendations, so should he require to perform duties beyond what is current he will likely be unable to sustain this."

78. Mr Caloia also opines:

> "Mr Green is currently able to work, but based on his functional capacity it is of my opinion it seems highly likely he will not be able to sustain this long term should he be required to perform more strenuous physical tasks."

79. There is a statement from Samuel Taylor dated 23 August 2019. Mr Taylor states that he is employed as a team leader in the warehouse receiving area and is familiar with the applicant. He states that the applicant operates a forklift and does some light cleaning duties, but does not undertake picking duties. He states that as far as he is aware, the applicant is working well within certain parameters.

80. There is an earning capacity assessment report from Dr Hall, occupational physician, and Geraldine Nelson, rehabilitation counsellor, dated 20 September 2019, which was prepared at the request of the respondent's solicitors. The report states the date of assessment for the report was 29 August 2019.

81. That report records the applicant having continuous back and hip pain, much worse on the right. The report sets out current restrictions on the applicant's work capacity, including a 10 kilogram lifting limit, avoiding bending and twisting actions, and no picking work.

82. In his report dated 28 August 2019, Dr Powell records that the applicant "is essentially doing his normal work with care."

83. Dr Powell provides an opinion on the applicant's likely work capacity if the avascular necrosis was to take its natural course without the intervention of surgery. Dr Powell writes that the revascularisation and laying of new bone can take around two years to complete itself, and during that time the applicant would need to be in a sedentary and seated job, and in an environment where he could move around on crutches.

84. There are two Certificates of Capacity from Dr Soo dated 22 December 2019 and 24 January 2020 which were admitted as late documents, but only on the issue of incapacity and not on any issue as to the diagnosis of injury. Those certificates certify the applicant as having no current work capacity.

85. When the applicant last sees Dr New in March 2020, Dr New opines: "At this point in time the patient has no capacity for which he is reasonably educated, experienced and trained."

86. There is a considerable amount of evidence available in July and August 2019 which records the applicant having significant pain in both hips, but still being able to undertake his modified work duties, which were mostly forklift driving. I accept from a review of the medical evidence from that period of time that the applicant was having ongoing pain and restriction of movements in both hips. I accept that this was due to the ongoing effects of the injury to the left hip and subsequent total hip replacement, a consequential condition affecting the right hip due to altered gait, and the development of avascular necrosis in the right hip. However, I am not satisfied from the expert opinion relied upon by the applicant that the injury to the left hip has contributed to the progression of the avascular necrosis in the right hip because no explanation for this has been provided by Dr Brighton or Dr New.

87. I do accept that the medical evidence supports a finding that the applicant was experiencing ongoing pain across his lower back due to the problems that he was having with both hips.

88. The evidence reveals a significant deterioration in the condition of the applicant's right hip in late 2019. Dr Brighton records in late October 2019 that the applicant is clearly at the end of his pain tolerance. It is therefore not surprising that about six weeks later the applicant has reached a level of pain and disability that he can no longer work.

89. The medical evidence from Dr Brighton and Dr New supports a finding that the significant deterioration in the condition of the applicant's right hip is due to the development of the avascular necrosis in the right hip. However, just as there can be multiple causes for a condition, there can be multiple causes for incapacity. As DP Roche said in *State of New South Wales v Rattenbury* [2015] NSWWCCPD 46 (*Rattenbury*) at [91]:

> "The attack on the Arbitrator's conclusion at [116] fails to acknowledge one of the most fundamental principles of workers' compensation law, namely, that a claimant only has to establish that his or her incapacity has resulted from the relevant injury (*Kooragang*) and, as the Arbitrator noted (at [117]), that there can be multiple causes of an incapacity (*Calman v Commissioner of Police* [1999] HCA 60; (1999) 73 ALJR 1609; *Conkey & Sons Ltd v Miller* (1977) 51 ALJR 583 at 585; *Cluff v Dorahy Bros. (Wholesale) Pty Ltd* [1979] 2 NSWLR 435). It is not necessary that employment be the main (or substantial) contributing factor to the incapacity. It only has to be the main contributing factor to contracting the disease."

90. In making a determination on incapacity, what was said by Campbell JA in *Ric Developments t/as Lane Cove Poolmart v Muir* [2008] NSWCA 155; 71 NSWLR 593 (*Muir*) at [32-33] continues to be relevant:

> "The Deputy President identified the proper question to be asked, in deciding whether there is an incapacity, by citing the following from CP Mills, *Workers Compensation (New South Wales)*, 2nd ed (1979) Butterworths at 285:
>
> 'The question is whether the injury has left the worker in such a position that in the open labour market his earning capacity is less than it was before the injury (*Williams v Metropolitan Coal Co Ltd* [1948] HCA 8; (1948) 76 CLR 431 per Starke J), and it is not limited to the effect on his capacity for his former work (per Dixon J). In *Ball v Hunt* [1912] AC 496, Lord Loreburn had said that there is incapacity when a man has a physical defect which makes his labour unsaleable in any market reasonably accessible to him, and there is partial incapacity when such a defect makes his labour saleable for less than it would otherwise fetch: see *Commissioner for Railways v Agalianos* [1955] HCA 27; (1955) 92 CLR 390 per Dixon CJ.'
>
> He referred to the statement of Hutley JA in *Alexander v Ashfield Municipal Council* (Court of Appeal, 27 October 1982, unreported) at 2, that:
>
> 'Capacity is diminished, even though in selected instances the worker can earn as much as he did before, if there are fields from which he is excluded, by reason of the injury, in which he laboured at the time of injury'."

91. During the course of 2019 the applicant was partially incapacitated for work due to ongoing pain and restriction of movement in the left hip. He had also developed a consequential condition affecting the right hip due to altered gait. The applicant ceased work due to those conditions and the significant deterioration of the right hip due to avascular necrosis. Although I have not been satisfied that the injury to the left hip has contributed to the progression of the avascular necrosis in the right hip, the applicant has an earning capacity that is less than it had been before the injury to the left hip because of the ongoing pain and restriction of movement in the left hip and consequential condition affecting the right hip.

92. Mr Beran submits that the applicant is fit for full time sedentary duties and that there are sedentary jobs which would equate to earnings that are at least the equivalent of 80% of PIAWE, being $960.

93. The earning capacity assessment report from Dr Hall and Geraldine Nelson dated 20 September 2019, includes a history of the applicant's pre-injury employment. The report records that the applicant left school in Year 9. The report also records that the applicant worked for almost 10 years as a store manager for Pizza Haven from 1994 to 2004. Those duties included the day to day running of the store, wage control, stock control, supervision of staff, and sales.

94. Given that past work experience, I cannot accept Dr New's opinion that the applicant has no capacity for work for which he is reasonably educated, experienced and trained. There is nothing to indicate from the reports of Dr New that he was aware of the applicant's pre-injury employment.

95. "Suitable employment in relation to a worker" is defined in section 32A of the 1987 Act as:

> "means employment in work for which the worker is currently suited:
>
> (a) having regard to:
>
> (i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and
> (ii) the worker's age, education, skills and work experience, and
> (iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and
> (iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and
> (v) such other matters as the Workers Compensation Guidelines may specify, and
>
> (b) regardless of:
>
> (i) whether the work or the employment is available, and
> (ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and
> (iii) the nature of the worker's pre-injury employment, and
> (iv) the worker's place of residence."

96. Although a man using crutches and exhibiting pain is unlikely to be appealing to a prospective employer, the applicant's past experience as a store manager means he is currently suited to at least some part time work as a store manager. The test imposed by section 32A is not whether the employment is available but whether an injured worker can undertake a certain type of employment.

97. I accept that some store manager jobs involve being “on the floor”, which would be difficult for the applicant to undertake. However, there are duties such as stock control and management that can be done from a desk. The Certificates of Capacity issued by Dr Soo place no restrictions on sitting or driving.

98. Given the ongoing problems which the applicant is having with both hips and lower back, I do not consider that the applicant could undertake a full 38 hour week as a retail employee. In exercising my discretion, I consider that four hours of work per day for four days per week would be reasonable given the applicant’s disabilities, so that the applicant is not working a full shift and is able to have one full day off work each week.

99. The duties of a Retail Employee Level 4 under the General Retail Industry Award include stock control, buying and ordering which requires the exercise of discretion, and management of a defined section. The minimum wage rate for that level since 12 December 2019 has been $862.50 per week, or $22.70 per hour for a 38 hour week.

100. Allowing a capacity to earn in suitable employment of $363.20 (being $22.70 per hour for 16 hours per week), the applicant will be awarded $596.80 per week from 12 December 2019 to date and continuing pursuant to section 37 of the 1987 Act.