WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **2211/20**
Applicant: **Mary Hannan**
Respondent: **P & I Pty Limited**
Date of Determination: **4 August 2020**
Citation: **[2020] NSWWCC 264**

The Commission determines:

1. The applicant did not suffer injury to the left hip arising out of or in the course of her employment with the respondent on 7 March 2005 within the meaning of sections 4(a) and 9A of the *Workers Compensation Act 1987*.

2. The applicant did not suffer an aggravation, acceleration, exacerbation or deterioration of any disease process in the left hip within the meaning of section 4(b)(ii) of the *Workers Compensation Act 1987* arising out of or in the course of her employment with the respondent on 7 March 2005.

3. The applicant did not suffer a consequential injury to her left hip as a result of the accepted injury to her lumbar spine in the course of her employment with the respondent on 7 March 2005.

The Commission orders:

4. Award for the respondent in respect of the applicant's claimed injury to the left hip on 7 March 2005.

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

Anthony Scarcella
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 ANTHONY SCARCELLA, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. The applicant, Mrs Mary Hannan, is a 72-year-old woman who was employed by P & I Pty Limited (the respondent) as a process worker.

2. On 7 March 2005, at the respondent's premises, Mrs Hannan alleges that, she slipped on the wet floor between two machines and landed heavily on her buttocks.

3. On 15 January 2007, Mrs Hannan settled a claim for permanent impairment compensation under section 66 of *Workers Compensation Act 1987* (the 1987 Act) in respect of 13% whole person impairment of her lumbar spine and settled a claim for pain and suffering under section 67 of the 1987 Act by way of a Complying Agreement.[1]

4. On 16 March 2011, the respondent issued a Dispute Notice pursuant to section 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) denying liability for the applicant's proposed left hip replacement surgery.[2]

5. On 20 March 2012, Mrs Hannan underwent a left total hip arthroplasty by Dr Geoffrey Rosenberg, Orthopaedic Surgeon.

6. On 10 August 2012, the respondent issued a Dispute Notice pursuant to section 74 of the 1998 Act denying liability for the payment of weekly benefits and medical expenses and denying that, amongst other things, the applicant's progressive osteoarthritis in her hips were related to the injury on 7 March 2005.[3]

7. On 24 June 2013, Mrs Hannan underwent a right total hip replacement by Dr Y Kai Lee, Orthopaedic Surgeon.

8. On 20 November 2019, Mrs Hannan claimed permanent impairment compensation under section 66 of the 1987 Act in respect of her spine (lumbar spine), left lower extremity (left hip) and the skin (scarring – TEMSKI).[4]

9. On 17 March 2020, the respondent issued a Dispute Notice pursuant to section 78 of the 1998 Act disputing liability for the applicant's permanent impairment claim under section 66 of the 1987 Act for the alleged left hip injury and disputing that the claim for the lumbar spine impairment exceeded the statutory threshold.[5]

10. Mrs Hannan lodged an Application to Resolve a Dispute (ARD) dated 23 April 2020 in the Workers Compensation Commission (the Commission) claiming lump sum compensation under section 66 of the 1987 Act as a result of the injury sustained in the course of her employment with the respondent on 7 March 2005.

ISSUES FOR DETERMINATION

11. The parties agreed that the following issues remained for determination:

    (a) Did Mrs Hannan suffer an injury to her left hip on 7 March 2005 within the meaning of sections 4(a) and 9A of the 1987 Act?

[1] Application to Resolve a Dispute at pages 1-4.
[2] Reply at pages 1-5.
[3] Reply at pages 6-9.
[4] Application to Resolve a Dispute at pages 26-30.
[5] Reply at pages 9-18.

(b) Did Mrs Hannan suffer an aggravation, acceleration, exacerbation or deterioration of any disease process to her left hip deemed to have occurred on 7 March 2005 within the meaning of section 4(b)(ii) of the 1987 Act?

(c) Did Mrs Hannan suffer a consequential injury to her left hip as a result of the accepted lumbar spine injury in the course of her employment with the respondent on 7 March 2005?

(d) Is Mrs Hannan entitled to further lump sum compensation within the meaning of section 66 of the 1987 Act?

Matters previously notified as disputed

12. The issues in dispute were notified in the Dispute Notices referred to above.

Matters not previously notified

13. No other issues were raised.

PROCEDURE BEFORE THE COMMISSION

14. The parties participated in a telephone conciliation conference/arbitration on 23 June 2020. Ms Eraine Grotte of counsel appeared for Mrs Hannan and Mr Fraser Doak of counsel appeared for the respondent.

15. During the conciliation phase the parties agreed that, in the event that there is an award for the respondent in relation to the claimed left hip injury, then there is to be no referral to an Approved Medical Specialist for the assessment of her lumbar spine, as Ms Hannan's own forensic medical specialist, Dr Sheikh Habib, assessed a 13% whole person impairment of the lumbar spine and she was compensated for that level of impairment in 2007.

16. I am satisfied that the parties to the dispute understood the nature of the application and the legal implications of any assertion made in the information supplied. I 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.

EVIDENCE

Documentary evidence

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

(a) ARD dated 23 April 2020 and attached documents, and
(b) Reply dated 13 May 2020 and attached documents.

Oral evidence

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

SUBMISSIONS

19. The parties made oral submissions at the arbitration hearing which were sound recorded. The sound recording is available to the parties. I will refer to the parties' submissions under each relevant issue for determination set out below.

FINDINGS AND REASONS

Did Mrs Hannan suffer an injury to her left hip at work on 7 March 2005?

20. Section 9 of the 1987 Act provides that a worker who has received an 'injury' shall receive compensation from the worker's employer in accordance with the Act.

21. The onus of establishing injury falls on Mrs Hannan and the standard of proof is on the balance of probabilities, meaning that I must be satisfied to a degree of actual persuasion or affirmative satisfaction: *Department of Education and Training v Ireland*[6] (*Ireland*) and *Nguyen v Cosmopolitan Homes*[7] (*Nguyen*).

22. Mrs Hannan's primary submission was that she suffered an injury to her left hip on 7 March 2005 within the meaning of sections 4(a) and 9A of the 1987 Act. Section 4(a) of the 1987 Act defines "injury" as a personal injury arising out of or in the course of employment.

23. The issue of causation must be based and determined on the facts in each case and requires a common sense evaluation of the causal chain: *Kooragang Cement Pty Ltd v Bates*[8] (*Kooragang*). As I understand it, when referring to applying "common sense", Kirby, P in *Kooragang* was not suggesting that it be applied "at large" or that issues were to be determined by "common sense" alone but by a careful analysis of the evidence, including a careful analysis of the expert evidence: *Kirunda v State of New South Wales (No 4)*[9] (*Kirunda*). The legislation must be interpreted by reference to the terms of the statute and its context in a fashion that best effects its purpose.

24. In order to establish that a "personal injury" has been suffered within the meaning of section 4(a) of the 1987 Act, Mrs Hannan must establish, on the balance of probabilities, that there has been a definite or distinct "physiological change" or "physiological disturbance" in her left hip for the worse which, if not sudden, is at least, identifiable: *Kennedy Cleaning Services Pty Ltd v Petkoska*[10] (*Kennedy*) and *Military Rehabilitation and Compensation Commission v May*[11] (*May*). The word "injury" refers to both the event and the pathology arising from it: *Lyons v Master Builders Association of NSW Pty Ltd*[12] (*Lyons*). While pain may be indicative of such physiological change, it is not itself a "personal injury".

25. *Castro v State Transit Authority*[13] (*Castro*) provides a useful review of the authorities and makes it clear that what is required to constitute "injury" is a "sudden or identifiable pathological change". In *Castro*, a temporary physiological change in the body's functioning (atrial fibrillation: irregular rhythm of the heart), without pathological change, did not constitute injury.

26. *Zickar v MGH Plastic Industries Pty Ltd*[14] (*Zickar*) highlighted that a worker can rely on injury simpliciter despite the existence of a disease. In *Zickar*, the High Court of Australia held that the presence of a disease did not preclude reliance upon that event as a personal injury. The terms "personal injury" and "disease" are not mutually exclusive categories. A sudden identifiable physiological (pathological) change to the body brought about by an internal or an external event can be a personal injury and the fact that the change is connected to an underlying disease process does not prevent the injury being a personal injury: *North Coast Area Health Service v Felstead*.[15]

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[6] *Department of Education and Training v Ireland* [2008] NSWWCCPD 134.
[7] *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246.
[8] *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796.
[9] *Kirunda v State of New South Wales (No 4)* [2018] NSWWCCPD 45 at [136].
[10] *Kennedy Cleaning Services Pty Ltd v Petkoska* [2000] HCA 45.
[11] *Military Rehabilitation and Compensation Commission v May* [2016] HCA 19.
[12] *Lyons v Master Builders Association of NSW Pty Ltd* (2003) 25NSWCCR 496.
[13] *Castro v State Transit Authority* [2000] NSWCC 12; (2000) 19 NSWCCR 496.
[14] *Zickar v MGH Plastic Industries Pty Ltd* [1996] HCA 31; 187 CLR 310.
[15] *North Coast Area Health Service v Felstead* [2011] NSWWCCPD 51 at [77].

27. Mrs Hannan's secondary submission was that she suffered an aggravation, acceleration, exacerbation or deterioration of any disease process to her left hip within the meaning of section 4(b)(ii) of the 1987 Act. On this argument, the deemed date of injury is 7 March 2005 and consequently, section 9A of the 1987 Act, as it applied after 12 January 1997 and prior to 19 June 2012, is applicable, that is, that no compensation is payable under the 1987 Act in respect of an injury unless the employment concerned was a substantial contributing factor to the injury, rather than the current and more onerous requirement of "the main contributing factor" in section 4(b)(ii) of the 1987 Act. However, both counsel in these proceedings made short submissions in relation to "the main contributing factor" on the basis that the post 19 June 2012 amended version of section 4(b)(ii) of the 1987 Act applied. The latter is of no consequence in this case because of the findings I have made on the evidence.

28. As to the meaning of disease, in *Federal Broom Co Pty Ltd v Semlitch*[16] (*Semlitch*), Kitto J said:

> "In its ordinary meaning 'disease' is a word of very wide import, comprehending any form of illness; and there is no reason I can see for reading it in the present context as not extending to mental illness."[17]

This decision was applied by the Court of Appeal in *Cook v Midpart Pty Ltd t/as McDonalds Foster*[18].

29. In *Commissioner for Railways v Bain*[19] Windeyer J stated:

> "The word 'disease' seems to me apt to describe any abnormal physical or mental condition that is not purely transient …"[20]

30. In *Perry v Tanine Pty Ltd t/as Ermington Hotel*[21] (*Perry*), Burke CCJ held carpal tunnel syndrome to be a "disease," saying:

> "In general it seems to me that carpal tunnel syndrome is a failure of an area of the body to cope with repeated stress imposed upon it and reacts to that stress by developing swelling, pain and loss of function as a consequence. That seems to me to be classically a disease process. Where work is the source of the relevant stress it connotes to me that the worker has received injury either by the contraction or aggravation of a disease."[22]

Perry was referred to with approval in the Court of Appeal by Mason P in *Fletcher International Exports Pty Ltd v Barrow*.[23]

31. In *Semlitch*, Kitto J said:

> "There is an exacerbation of a disease where the experience of the disease by the patient is increased or intensified by an increase or intensifying of symptoms. The word is directed to the individual and the effect of the disease upon him rather than being concerned with the underlying mechanism".[24]

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[16] *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626.
[17] *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626 at 632.
[18] *Cook v Midpart Pty Ltd t/as McDonalds Foster* [2008] NSWCA 151.
[19] *Commissioner for Railways v Bain* [1968] HCA 5; 112 CLR 246.
[20] *Commissioner for Railways v Bain* [1968] HCA 5; 112 CLR 246 at 272.
[21] *Perry v Tanine Pty Ltd t/as Ermington Hotel* [1998] NSWCC 14; (1998) 16 NSWCCR 253.
[22] *Perry v Tanine Pty Ltd t/as Ermington Hotel* [1998] NSWCC 14; (1998) 16 NSWCCR 253 at [57].
[23] *Fletcher International Exports Pty Ltd v Barrow* [2007] NSWCA 244; (2007) 5 DDCR 247.
[24] *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626.

32. In *Semlitch*, Windeyer J said:

> "The question that each [aggravation; acceleration; exacerbation; deterioration] poses is, it seems to me, whether the disease has been made worse in the sense of more grave, more grievous or more serious in its effects upon the patient."[25]

33. In *Semlitch*, Windeyer J also posed the following questions:

> "Was the applicant suffering from a disease? If so, was there an aggravation, acceleration, exacerbation or deterioration of it? If so, was her (or his) employment a contributing factor? If so, did a total or partial incapacity for work result from such aggravation, acceleration, exacerbation or deterioration?"[26]

Discussing whether there was "aggravation, acceleration, exacerbation or deterioration" Windeyer J said:

> "… the answer depends upon whether for the sufferer the consequences of his affliction have become more serious".[27]

34. Burke CCJ, applying *Semlitch* in *Cant v Catholic Schools Office*[28] (*Cant*) said:

> "The thrust of these comments is that irrespective of whether the pathology has been accelerated there is a relevant aggravation or exacerbation of the disease if the symptoms and restrictions emanating from it have increased and become more serious to the injured worker."[29]

35. The proper test is whether the aggravation impacted the individual concerned. It is not necessary for the particular disease to be made worse: *Cabramatta Motor Body Repairers (NSW) Pty Ltd v Raymond*[30] (*Raymond*) applying *Semlitch* and *Cant*.

36. Roche DP in *Kelly v Western Institute NSW TAFE Commission*[31] (*Kelly*), citing *Semlitch*, said:

> "An aggravation or exacerbation of a disease occurs where the experience of the disease by the applicant is increased or intensified by an increase or intensifying of symptoms."[32]

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[25] *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626 at 639.
[26] *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626 at 638.
[27] *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626 at 637.
[28] *Cant v Catholic Schools Office* [2000] NSWCC 37; (2000) 20 NSWCCR 88.
[29] *Cant v Catholic Schools Office* [2000] NSWCC 37; (2000) 20 NSWCCR 88 at [17].
[30] *Cabramatta Motor Body Repairers (NSW) Pty Ltd v Raymond* [2006] NSWWCCPD 132; (2006) 6 DDCR 79.
[31] *Kelly v Western Institute NSW TAFE Commission* [2010] NSWWCCPD 71.
[32] *Kelly v Western Institute NSW TAFE Commission* [2010] NSWWCCPD 71 at [66].

37. Mrs Hannan’s third submission was that she suffered a consequential injury to her left hip as a result of the accepted lumbar spine injury on 7 March 2005. In this alternative argument, it is unnecessary for me to determine whether Mrs Hannan’s left hip symptoms are in themselves ‘injuries’ pursuant to section 4 of the 1987 Act: *Moon v Conmah Pty Ltd* (*Moon*),[33] *Kumar v Royal Comfort Bedding Pty Ltd*[34] (*Kumar*) and *Bouchmouni v Bakos Matta t/as Western Red Services*[35]. Further, section 9A of the 1987 Act does not apply to a condition that has resulted from an injury: *Tiritabua v Bartter Enterprises Pty Ltd*[36]. I am required to conduct a *Kooragang* common sense evaluation of the causal chain to determine whether the left hip symptoms complained of by Mrs Hannan have resulted from the accepted injury to her lumbar spine on 7 March 2005.

38. Mrs Hannan submitted that the three submissions referred to above are put not only in the alternative, but also together. They are not inconsistent propositions. There was an injury to the left hip at the time of the fall, which was further aggravated. One can have a frank injury which is an aggravation of a disease type injury and such injury can be further aggravated by an altered gait because of the earlier injury to either the back or the left hip.

39. I now turn to the application of the relevant legislation and the legal principles referred to above to the available evidence in this matter.

40. The parties made oral submissions at the arbitration hearing which were sound recorded. The sound recording is available to the parties.

41. Mrs Hannan’s principal submissions may be summarised as follows:

    (a) There is no issue in relation to the injurious event on 7 March 2005. The injury to Mrs Hannan’s lumbar spine has been accepted. Mrs Hannan’s evidence is that she slipped and landed heavily onto her bottom and when attempting to brace herself, she also hit her right elbow on the ground. She immediately felt pain in her elbow and back. The focus of Mrs Hannan’s treatment was on her back. All the attention and investigations were in relation to her lumbar spine. She then began to experience referred pain down her left leg, which was considered to be evidence of radiculopathy.

    (b) In Mrs Hannan’s statement dated 9 April 2019, she “filled in some of the blanks” in her earlier two statements in evidence. She confirmed that she injured her lower back when she fell on her buttocks and experienced pain down her left leg and her left groin/hip area. She had not experienced any problems with those parts of her body before the accident on 7 March 2005. She experienced a lot of pain in her left leg that caused her to limp for many years and use a walking stick for a few months following the injury. Mrs Hannan believed that her low back injury and left hip became worse over time since 2007 and led to her left hip replacement in 2012. The contemporaneous medical evidence supports Mrs Hannan’s evidence in this regard.

    (c) Mrs Hannan’s case is stated in the report by Dr Sheikh Habib, Orthopaedic Surgeon dated 1 November 2019. Dr Habib carried out a comprehensive analysis of the mechanism of injury and a comprehensive analysis of the treatment material provided to him, prior to providing his impression and opinion. Dr Habib opined that the severe jarring of Mrs Hannan’s low back in the fall, that resulted in left-sided low back, buttock, left groin and left lower limb pain,

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[33] *Moon v Conmah Pty Ltd* [2009] NSWWCCPD 134 at [43], [45] and [50].
[34] *Kumar v Royal Comfort Bedding Pty Ltd* [2012] NSWWCCPD 8 at [35]–[49] and [61]).
[35] *Bouchmouni v Bakos Matta t/as Western Red Services* [2013] NSWWCCPD 4.
[36] *Tiritabua v Bartter Enterprises Pty Ltd* [2008] NSWWCCPD 145 at [47].

also jarred her asymptomatic osteoarthritic left hip condition. The latter condition gradually deteriorated with the limping associated with her low back condition and referred left lower limb pain.

(d) As Mrs Hannan fell onto her buttocks and not onto her back, it is logical that common sense would support the fact that there was jarring of the asymptomatic left hip condition, which consequentially gradually deteriorated as a result of the limping caused by her lower back and left leg condition.

(e) Mrs Hannan sustained an aggravation injury within the meaning of section 4(b)(ii) of the 1987 Act. There is sufficient evidence from Dr Habib to prove that the fall was the main contributing factor to the aggravation injury to her left hip, even though Dr Habib did not use the words "main contributing factor".

(f) Dr Max Ellis' report dated 17 May 2006 is important. Mrs Hannan provided a consistent history of the mechanism of injury to Dr Ellis. Dr Ellis was provided with clear contemporaneous evidence of persisting back pain and referred left leg pain to the foot that caused Mrs Hannan to limp. This supports the consequential condition in the left hip opined by Dr Habib. However, the focus of Dr Ellis' report was on the low back and symptoms of left-sided radiculopathy.

(g) On 4 July 2005, Dr Rosenberg took a consistent history of the mechanism of injury from Mrs Hannan, namely that, she slipped at work landing heavily on her backside. He reported her as failing to improve and continuing to suffer with left sacro-iliac pain radiating into her buttock and groin. So, at an early point in time, there is a reference to pain in the left groin. Dr Rosenberg was led astray when he concluded that Mrs Hannan's left hip was unaffected.

(h) By 2 August 2005, Dr Rosenberg seemed perplexed by the fact that Mrs Hannan's symptoms were not supported by the diagnostic imaging.

(i) On 19 May 2006, Dr Rosenberg opined that Mrs Hannan had some age-related wear and tear in her lower back that had been significantly stirred up by the fall. So, by parity of reasoning, it is submitted that it could be concluded that there was a similar significant jarring of the left hip with the pre-existing degenerative changes within it. Such a conclusion would be consistent with Dr Habib's opinion.

(j) On 18 April 2008, following a negative lumbar discogram, Dr Rosenberg reported that at all levels there was some reproduction of pain but that it was not typical of Mrs Hannan's usual pain. Indirectly, this supports the fact that her pain was not necessarily limited to her back and that there was also pain coming from somewhere else, namely, the left hip.

(k) On 14 July 2008, Dr David Manohar, Consultant Physician, reported that it would be reasonable to assume that Mrs Hannan did not have discogenic pain because of the negative discogram but that she could have pain arising from the L4/L5 and L5/S1 facets. Dr Manohar's focus was on Mrs Hannan's back.

(l) On 28 May 2010, Dr A J Sanki, General Surgeon, reported that Mrs Hannan consulted him in relation to the injury to her lower back. He noted that she also had marked pain in the left hip area. On examination she had a moderate reduction in the movements of her left hip with moderate restrictions.

(m) On 2 July 2010, following a left hip CT scan, Dr Sanki reported that the scan indicated the presence of moderate to severe osteoarthritic changes and the presence of an effusion in the hip joint. Dr Sanki opined that the arthritis in Mrs Hannan's left hip was caused by the fall that she sustained. Such opinion is not inconsistent with a section 4(b)(ii) injury to the left hip.

(n) On 21 December 2010, in response to a questionnaire from Employers Mutual NSW Limited (EML), Dr Rosenberg opined that the proposed left hip replacement surgery was not directly related to the frank incident on 7 March 2005. He explained that Mrs Hannan fell, hurt her back, altered her gait and increased the load on an osteoarthritic hip. Such opinion confirms the fact that Mrs Hannan fell, hurt her back, had an altered gait and was limping and is consistent with Dr Habib's opinion.

(o) On 6 June 2012, following bilateral hip MRI scans, Dr Sanki reported that the scans revealed severe arthritic changes in both hip joints. By this time, Mrs Hannan had already undergone a left hip replacement.

(p) The respondent relies primarily on the opinion of Dr John Bentivoglio, Orthopaedic Surgeon. Dr Bentivoglio's opinion ought not be accepted because he did not take a proper and correct history from Mrs Hannan. Dr Bentivoglio's expert opinion failed the tests espoused in *Makita (Australia) Pty Ltd v Sprowles*[37] (*Makita*) and *Hancock v East Coast Timbers Products Pty Ltd*[38] (*Hancock*). He had an incomplete history of the injurious event and the opinion of Dr Habib should be preferred. The history of injury taken by Dr Bentivoglio on 6 September 2006 was less expansive and inconsistent with other histories taken by those who examined Mrs Hannan. He took an uninformative history of the injurious event. Whilst Dr Bentivoglio noted in his clinical examination that Mrs Hannan walked without a limp, there is evidence from her treating doctors that she walked with a limp. He reported that Mrs Hannan had constitutional degenerative osteoarthritic changes in both hips.

(q) On 20 February 2008, Dr Bentivoglio reported that on clinical examination of Mrs Hannan's left hip, she had an almost full range of movement but that she did have pain on extremes of movement in her hip region. Dr Bentivoglio opined that a significant proportion, if not all, of Mrs Hannan's lower limb symptoms and possibly, some of her lumbar spine symptoms, were as a result of degenerative changes involving her left hip region.

[37] *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; 52 NSWLR 705.

[38] *Hancock v East Coast Timbers Products Pty Ltd* [2011] NSWCA 11; 80 NSWLR 43.

(r) On 3 February 2020, Dr Bentivoglio's reported history of injury was again lacking and incomplete. He did note that Mrs Hannan sustained a jarring injury to her back and that her symptoms worsened overnight, and she started to experience symptoms radiating down her left lower limb. It is not too far of a stretch to say that it is probable that the left hip was also jarred in that injurious event when one looks at the entire history. Dr Bentivoglio opined that he did not consider that the degenerative changes present in Mrs Hannan's left hip were caused by or accelerated by the specific incident she described at work in 2005. He considered her hip pathology to be entirely constitutional in origin.

(s) On 11 March 2011, Dr Julien Ginsberg, Orthopaedic Surgeon, reported that Mrs Hannan had slipped and fallen at work on a wet soapy floor landing on her buttocks and injuring her right elbow. Dr Ginsberg diagnosed a combination of age-related degenerative change in the axial skeleton and left hip and that the relationship to the fall was probably a contribution of less than 20%. He opined that she may well have aggravated her spinal condition on falling but that since she injured her right elbow, it was unlikely that the left hip pathology was related to the fall. Dr Ginsberg appears to have assumed that Mrs Hannan has fallen towards her right side because she injured her right elbow and incorrectly concluded that, therefore, it was unlikely that her left hip pathology was related to the fall. It was an incorrect assumption of the mechanism of the fall and inconsistent with Mrs Hannan's statements. Dr Ginsberg's opinion should not be accepted for this reason.

(t) On 13 July 2012, Professor Frederick Ehrlich reported Mrs Hannan's history of injury without dealing with the mechanism of injury. He opined that Mrs Hannan had degenerative changes in numerous joints and obvious substantial degenerative change in her hips and most likely in her spine. Professor Ehrlich concluded that Mrs Hannan had initially suffered strains and contusions of her spine and that her incapacities were now unrelated to past workplace injury. In relation to the lumbar spine, this was not correct because Mrs Hannan was compensated for 13% whole person impairment in relation to her lumbar spine injury with the respondent. For these reasons, Professor Ehrlich's opinion should be given little weight.

(u) The opinion of Dr Habib ought to be preferred in terms of diagnosis and causation because it was based on a complete history, including the mechanism of injury, and a review of all the materials. Mrs Hannan's case is also supported by Dr Sanki's opinion and Dr Rosenberg's response to the EML questionnaire.

(v) On the balance of probabilities, there would be no hesitation in accepting Mrs Hannan as a genuine applicant, who has injured her left hip in a jarring incident in the same way that she jarred her back. The left hip injury was an aggravation of her osteoarthritis and such injury was further aggravated in terms of a consequential condition based on her altered gait due to the lumbar spine injury.

42. The respondent's principal submissions may be summarised as follows:

(a) Mrs Hannan states her case in several ways. It is put that there is a frank injury to the left hip on 7 March 2005. It appears from Dr Habib's report that there was a jarring injury at the time of the fall, consistent with Mrs Hannan's third statement made some 12 years after the incident.

It is also put that there is an aggravation of the pre-existing degenerative condition of the left hip. It is not clear whether the latter is put in the alternative. It is also put that there is a consequential condition to the left hip, which is given some support by Dr Rosenberg and stands in contradistinction to the claim based on a frank injury. It is not both. It either occurs at the time of the incident and there are symptoms as a result, or it is a consequential condition due to the limping referred to by Dr Rosenberg.

(b) Mrs Hannan's evidence was quite clear, in that, she was limping and using a walking stick within a few months of the incident in 2005. At no point, did Dr Rosenberg demonstrate as at 2010, that he provided a reasoned opinion as to why the limping had led to osteoarthritis in the left hip at some point in time to a standard that would come close to satisfying the relevant tests in *Hancock* and *Makita* as to weight of evidence. Particularly, noting that, as at July 2005, where Mrs Hannan was already using a walking stick, Dr Rosenberg observed that she had no clinical signs in her left hip at all.

(c) The respondent disputes that there was a frank injury to the left hip in the fall. The respondent's position is quite clearly supported by the absence of any contemporaneous history of insult or injury to the left hip or complaint of symptoms in the left hip for years after the fall.

(d) In relation to the alleged consequential condition, on Mrs Hannan's own evidence in her third statement, she was using a walking stick shortly after the date of the fall. The third statement was made in 2019 in support of a claim for further compensation and it necessarily needs to be viewed somewhat critically in order to assess the weight to be given to it. It also must be viewed in the context of Dr Rosenberg's assessment on clinical examination on 4 July 2005, that Mrs Hannan's left hip was unaffected; and viewed in the context of the complete absence of complaints about the left hip on her attendances on various doctors over the years leading up to 2010. Further, in her second statement, Mrs Hannan gave clear and unambiguous evidence of prolonged periods of standing whilst working for Coles as a cashier between 2006 and 2007, which caused her significant problems and led to her ceasing work. The significant problems were not explained by Mrs Hannan. No one has considered that history.

(e) In Mrs Hannan's first statement dated 27 October 2006, she made no reference to any symptoms in her left hip or any insult to her left hip. Mrs Hannan invited the drawing of an inference that the jarring caused a problem with the left hip and/or the left leg symptoms as being somehow related to the left hip. Those are not matters for inference but are matters for medical opinion. One cannot accept either version of Mrs Hannan's case, namely, a specific frank injury on 7 March 2005 or a consequential condition, whether it be due to limping or due to some other unexplained mechanism resulting from landing on her buttocks.

(f) Mrs Hannan's statement dated 27 October 2006 must be contrasted with the history of the incident taken by Dr Habib. Dr Habib referred to Mrs Hannan hitting the back of her left elbow heavily against the floor. The submission that the reference to the left elbow rather than the right elbow was simply an error cannot easily be accepted. It was what Dr Habib recorded and he was engaged by Mrs Hannan to provide a medicolegal report and one must assume he was briefed with all the relevant information. The reference to the left elbow suggests that Dr Habib had an impression that there was a fall onto the left side of the body or that there was heavier jarring on the left side of the body. And that is very important because Dr Habib reported that because of the presence of low back pain radiating in the left lower limb, Mrs Hannan was referred to Dr Rosenberg for advice, who found a tender low back and left sacroiliac joint and some weakness in the left foot. One can see an emphasis on the left side of the body.

(g) The opinion expressed by Dr Habib in relation to Mrs Hannan's left hip is nothing more than a compendium of ideas. Firstly, in relation to the jarring injury of an asymptomatic left hip condition, there was no evidence of that until Mrs Hannan's statement dated 9 April 2019. Further, there is no doubt that Mrs Hannan had pre-existing osteoarthritis of the left hip, confirmed by her general practitioner's clinical records and the left hip was not asymptomatic. Dr Habib did not explain as to why it would take 18 months or more for the osteoarthritis in the left hip to be stirred up. Dr Habib also failed to explain why Mrs Hannan had an almost identical problem with her right hip, but Dr Bentivoglio does, in that, he says that it was a constitutional condition. Dr Habib and Mrs Hannan's treating doctors do not engage with these matters. Secondly, in relation to the gradual deterioration caused by the limping in relation to her low back condition and radiated left lower limb pain, Dr Habib did not take a clear history as to when Mrs Hannan started limping or using a walking stick. In her statement dated 9 April 2019, Mrs Hannan stated that she commenced using a walking stick a few months after the injury. That begs the question as to why it took the gradual deterioration to occur and take years for the left hip to suddenly become symptomatic.

(h) In Mrs Hannan's second statement dated 28 October 2008, she referred to her period of employment as a cashier with Coles between 2006 and 2007, which caused her significant problems and led to her ceasing work. Whilst she did not explain the nature of the significant problems or the nature or location of the pain she was experiencing, it does not take a massive leap of the imagination to understand that, if one has osteoarthritis in the hips and that there are long periods of standing involved at work, the latter may have an effect on the hips unrelated to a jarring incident at work a few years earlier.

(i) On 2 November 2006, Mrs Hannan's general practitioner, Dr Stephen Levett, reported that she presented to his surgery on 8 March 2005 with a history that she slipped on a wet floor onto her back and hit her right elbow and hand at work on 7 March 2005. He did not refer to any symptoms in Mrs Hannan's left hip.

(j) In the handwritten clinical records of Mrs Hannan produced by Dr Levett, the entry on 8 March 2005 made no reference to an injury to the left hip. There was a reference to an injury to the back and to workers' compensation. Thereafter, there was no reference in those clinical records to the left hip in 2005, 2006, 2007, 2008 or 2009. In the entry on 5 June 2004, there is a reference to "L lumbar spasm injected". In the entry on 30 July 2004, there is a reference to osteoarthritis of the left hip and to referral for an x-ray. It is quite clear that Mrs Hannan had problems with her left hip and sought medical treatment for it prior to the fall in 2005. Such evidence stands in stark contradistinction to the history that Mrs Hannan gave to doctors, where she said that she did not have any problems with her left hip prior to 2005. Dr Habib did not take any history or refer to any prior problems in relation to the left hip. He just assumed that the symptoms in the left hip were due to jarring without any explanation as to why there might be a delay of years for the onset of symptoms, when Mrs Hannan's evidence was that she had been limping since shortly after the fall. Mrs Hannan's statement dated 28 October 2008 did not seem to have been provided or commented on by Dr Habib and he did not refer to or consider her prolonged periods of standing and pain whilst working for Coles.

(k) The principles in relation to the acceptance of expert opinions in the Commission are well known. The starting point is rule 15.2 of the Workers Compensation Commission Rules 2011. The case law makes it quite clear that the *Evidence Act 1995* does not apply to proceedings in the Commission. *Hancock* is authority for the proposition that in a non-evidence-based jurisdiction such as the Commission, the question of acceptability of expert evidence will not be one of admissibility but one of weight. The relevant principles from *Makita* and thereafter are a guide to the weight to be given to experts' reports. *Makita* set out that the requirement for the admissibility of an expert opinion is that it must be established on the facts on which the opinion is based from a proper foundation for the opinion. The opinion of an expert requires demonstration of the examination of the scientific or other intellectual basis of the conclusions reached. The expert's evidence must explain how the field of specialised knowledge in which the witness is expert by reason of training study or experience and in which the opinion is wholly or substantially based, applies to the facts assumed or observed so as to produce the opinion propounded. The reasoning must be exposed demonstrating a particular specialised knowledge.

(l) Applying these principles to Mrs Hannan's medical evidence, there are reports from Dr Ellis and Dr Rosenberg neither of whom made any record of a history of complaints of left hip problems.

(m) Dr Habib concluded that there was also jarring of the asymptomatic left hip condition, which gradually deteriorated with limping from Mrs Hannan's low back condition and radiated left lower limb pain. Dr Habib did not demonstrate his reasoning process in coming to that conclusion. Further, the assumptions on which he based that opinion have not been made out. Firstly, Dr Habib referred to an asymptomatic left hip which, on the evidence, is not correct. Secondly, there is an assumption of jarring leading to deterioration with limping. It is unclear whether Dr Habib is saying that the limping is due to the deterioration of the left hip condition or whether it is the limping that causes the deterioration. On either version, Dr Habib does not explain how it occurs or why the lengthy delay in the onset of left hip symptoms.

(n) On 28 May 2010, Dr Sanki was the first doctor to report Mrs Hannan complaining of marked pain in the left hip area, being more than five years after the fall. On 2 July 2010, Dr Sanki noted that a CT scan of Mrs Hannan's left hip indicated the presence of moderate to severe osteoarthritic changes and he opined that the arthritis in her left hip was caused by the fall she sustained. He did not explain why the left hip arthritis was caused by the fall. The opinion ought to be given no weight.

(o) On 21 December 2010, in responding to the EML questionnaire, Dr Rosenberg opined that the proposed left hip replacement surgery was not directly related to the frank incident on 7 March 2005. He added that Mrs Hannan fell, hurt her back, altered her gait and experienced an increased load on an arthritic hip. This is inconsistent with Mrs Hannan's statement that she had symptoms in her left hip from the date of the fall. Dr Rosenberg appeared to be unaware of Mrs Hannan's prior hip problems. He was unaware of her prolonged standing whilst working for Coles. Dr Rosenberg did not provide an explanation as to when the increased load on her arthritic hip occurred. One cannot be satisfied that Dr Rosenberg's opinion can be given any significant weight without having considered the missing history. There was an absence of complaint of limping to Mrs Hannan's general practitioner. There was also an absence of complaint of increasing symptoms in the left hip until 2010.

(p) On 3 February 2020, Dr Bentivoglio took a history that included Mrs Hannan having sustained a jarring injury to her back. It is splitting hairs to argue that the doctor did not record her falling heavily onto her buttocks, when he did record a jarring injury to her back. Dr Bentivoglio had a clear history of jarring and when read together with his earlier reports, he clearly understood the mechanism of the fall. The criticism that he had an insufficient or incorrect history is not valid.

(q) It is also of note that, within a year or so of undergoing a total left hip replacement, Mrs Hannan underwent the same surgical procedure on her osteoarthritic right hip. Dr Bentivoglio dealt with that matter in his report dated 3 February 2020. Importantly, Dr Bentivoglio noted that Mrs Hannan started to notice increasing symptoms in the region of her left hip in about 2010 and that x-rays demonstrated quite significant degenerative change. He noted that she underwent a left total hip joint replacement in March 2012; continued to experience symptoms in her right hip; and underwent a right total hip joint replacement in about 2014 for a dysplastic right hip. Whilst he could not be certain, Dr Bentivoglio suspected that she may similarly have had a dysplastic left hip.

(r) On 3 February 2020, consistent with Mrs Hannan's general practitioner's clinical records, Dr Bentivoglio opined that Mrs Hannan suffered from constitutional bilateral degenerative hip joint disease unrelated to the injury in 2005.

(s) On 11 March 2011, Dr Ginsberg concluded that it was unlikely that the left hip pathology was related to the fall. He was not made aware of Mrs Hannan's osteoarthritic left hip as far back as 2004.

(t) The evidence does not support any of the three cases put forward by Mrs Hannan and there should be an award for the respondent in relation to the alleged left hip injury.

43. Ms Hannan's submissions in reply may be summarised as follows:

(a) Mrs Hannan's cases are put not only in the alternative, but also together. There was an injury to the left hip at the time of the fall, which was further aggravated. They are not inconsistent propositions. One can have a frank injury which is an aggravation of a disease type injury and such injury can be further aggravated by an altered gait because of the earlier injury to either the back or the left hip.

(b) Dr Bentivoglio's history taking is important. The history he takes is a very different mechanism of injury. Dr Bentivoglio's deficiency in history taking is not remedied by him saying that Mrs Hannan also sustained a jarring injury to her back. There was a direct assault on the spine and the hip area as a result of falling onto the buttocks. Further, Dr Bentivoglio did not provide an opinion as to whether there was an aggravation type injury. Such deficiencies in the reports are insurmountable.

(c) It is necessary to proceed with caution when drawing the inference that Mrs Hannan was symptomatic in the left hip simply because the clinical records on 30 July 2004 revealed she was referred for a left hip x-ray and on 3 August 2004, osteoarthritis was confirmed in the left hip. There was no suggestion or record of any problems with the left hip in the clinical records.

(d) Dr Habib's reasoning process is exposed because he did go through all of the material provided to him and reached his conclusion on the basis of his expertise.

(e) Dr Rosenberg's and Dr Sanki's opinions were not formed with litigation in mind, they were created for a different purpose. More weight should be given to those opinions because they were made at the time in their capacities as treating doctors.

(f) A logical and common sense inference ought to be drawn, namely, that at the time of the fall onto her buttocks, Mrs Hannan could well have, on the balance of probabilities, sustained some sort of jarring injury to the left hip. It must not be forgotten that the symptoms in terms of her left leg are all on the left side. She does not complain of any symptoms on the right side, other than the right elbow. Much was made that Mrs Hannan did not complain of pain in the left hip. She is not a doctor. All she knows is that she has fallen onto her buttocks and she went to the experts to tell them what had happened to her. She complained of groin pain in July 2005. All the focus seemed to be on her back. It was only later that it was discovered that there were problems with the left hip as well. When all the pieces of the puzzle are put together, one can be satisfied on the balance of probabilities.

44. In evidence, there are statements by Mrs Hannan dated 27 October 2006,[39] 28 October 2008[40] and 9 April 2019.[41]

45. In her evidentiary statement dated 27 October 2006, Mrs Hannan described the injurious event on 7 March 2005 as follows:

> "28. On 7 March 2005 I was performing my normal duties as a process worker, I was walking around my station where at the same time there was a cleaner who was doing something to the floor.

[39] ARD at pages 7-11.
[40] ARD at pages 12-16.
[41] ARD at pages 17-18.

> 29. There was quite a lot of soapy water on the floor and there was no sign indicating that the floor may be slippery.
>
> 30. As I walked between the Bobstil and the Jagenberg Machines I slipped and landed heavily onto my bottom.
>
> 31. My glasses fell and they broke.
>
> 32. Once I landed, I attempted to brace myself however because of the impact I also hit my right elbow on the ground.
>
> 33. I immediately felt pain in my elbow and back."[42]

46. Mrs Hannan stated that the pain in her back was severe. She was unable to continue working and went home to rest. On 8 March 2005, she consulted her general practitioner, Dr Levett because she was in extreme pain. Dr Levett allowed her to return to work on light duties on 9 March 2005. She continued to experience problems with her back and right shoulder and again consulted Dr Levett. On 6 April 2005, Dr Levett referred Mrs Hannan for an x-ray of her thoracic and lumbar spine and certified her fit to continue work on light duties. He also referred her for physiotherapy. "Over the next couple of months",[43] her condition did not improve, so Dr Levett referred her to Dr Rosenberg, who referred her for a lumbar spine MRI scan on 22 July 2005. Following the MRI scan, she underwent a bone scan. At an unspecified point in time in her evidentiary statement, Mrs Hannan stated:

> "As a result of this incident and specifically the injury to my back I began to experience referral pain down my left leg."[44]

47. From 7 March 2005 until 21 September 2005, when Mrs Hannan was made redundant by the respondent, she had continued to work on light duties and was only absent from work for about eight or nine days.

48. In her evidentiary statement dated 27 October 2006, Mrs Hannan stated that as a result of the injurious event on 7 March 2005, she suffered injuries to her right shoulder, back and left leg. She made no reference to an injury or symptoms in her left hip. She made no reference to her left groin. She made no reference to walking with a limp. She provided a comprehensive list of disabilities arising from the above-mentioned injuries, none of which involved the left hip or left groin or referred to walking with a limp.

49. In evidence, are Mrs Hannan's clinical records produced by Dr Levett.[45] In an entry in the handwritten and barely legible clinical records on 30 July 2004,[46] there was a reference to osteoarthritis of the left hip and to a referral for an x-ray. The entry on 3 August 2004[47] appeared to report that the left hip x-ray demonstrated osteoarthritis. The entry on 8 March 2005, being the first consultation with Mrs Hannan following the injurious event, appeared to refer to Mrs Hannan's back, workers' compensation and Zoloft. I find the balance of the entry on that date illegible. However, there did not appear to be any reference to left hip or left groin symptoms on that date.

[42] ARD at page 8.
[43] ARD at page 9 at [46].
[44] ARD at page 9 at [54].
[45] ARD at pages 55-105.
[46] ARD at page 66.
[47] ARD at page 66.

50. On 4 July 2005, Mrs Hannan consulted Dr Rosenberg on the referral of Dr Levett. On 7 July 2005, Dr Rosenberg reported back to Dr Levett[48] noting that Mrs Hannan had slipped at work earlier in the year landing heavily on her backside; had failed to improve; and had continued to suffer with left sacroiliac pain radiating into her buttock and groin. On clinical examination, Dr Rosenberg observed that Mrs Hannan was tender in the lower spine as well as over the left sacroiliac joint; that her left hip was unaffected; that there was weakness of the left foot; that reflexes were preserved; and that straight leg raising reproduced pain. He suspected an injury to the lumbosacral disc and recommended an MRI scan as the next investigative step. Dr Rosenberg did not record any complaints of symptoms in the left hip and specifically stated that the left hip was unaffected. He made no reference to Mrs Hannan walking with a limp.

51. Dr Rosenberg reported back to Dr Levett following consultations with Mrs Hannan on 2 August 2005,[49] 6 October 2005[50] and 27 April 2006.[51] In none of the latter mentioned reports did Dr Rosenberg record complaints of symptoms in Mrs Hannan's left hip. Dr Rosenberg referred to the findings on the lumbar MRI scan and suspected that Mrs Hannan had bruised her facet joints and arranged for her to undergo image guided injections to the left L4-5 and lumbosacral facet joints. The image guided injections provided some relief. As Mrs Hannan remained significantly impaired with ongoing pain in her back and left leg, Dr Rosenberg arranged for her to undergo a technetium bone scan by way of further investigation. He made no reference to Mrs Hannan walking with a limp.

52. On 5 May 2006, Mrs Hannan consulted Dr Ellis at the request of her former lawyers. Dr Ellis prepared a report dated 17 May 2006.[52] Dr Ellis took a history that Mrs Hannan slipped and fell onto the base of her spine injuring her back and right elbow at work. As to reported disabilities, Dr Ellis recorded persisting low back pain aggravated by bending, lifting, prolonged standing, sitting and walking. He also noted that the pain in Mrs Hannan's left leg when she walks causes her to limp. The back pain spread to the back of her left leg to her foot. However, he noted there was no numbness or paraesthesiae in the left leg. Dr Ellis opined that, as a result of the fall at work on 7 March 2005, Mrs Hannan suffered a musculo-ligamentous contusion, aggravation of degenerative change in her back affecting her lower thoracic and lumbar spines and the intervertebral discs. Dr Ellis made no reference to complaints of symptoms in the left hip or left groin.

53. On 10 May 2006, Mrs Hannan underwent a whole body bone scan by Dr Lin Chan.[53] Amongst other things, Dr Chan reported moderately advanced arthritic changes in the left hip joint and mild arthritic changes in the right hip.

54. On 18 May 2006, Mrs Hannan consulted Dr Rosenberg, who reported back to Dr Levett[54] that the technetium bone scan was reported as normal and showed no evidence of facet joint disease. He opined that Mrs Hannan had some age-related wear and tear in her back that had been significantly stirred up by the fall at work. He felt that her only option was to live with it and manage it with regular analgesics and by remaining active. He saw no need to investigate further and discharged her from his care. Dr Rosenberg made no reference to complaints of symptoms in the left hip or the left groin. He made no reference to Mrs Hannan walking with a limp.

55. On 4 September 2006, Mrs Hannan consulted Dr Bentivoglio at the request of the respondent's former insurer, CGU Workers Compensation (NSW) Limited (CGU). In evidence, there is a report by Dr Bentivoglio dated 6 September 2006.[55] Dr Bentivoglio took a history that Mrs Hannan slipped and fell onto the point of the right elbow injuring her back

[48] ARD at page 45.
[49] ARD at page 46.
[50] ARD at page 47.
[51] ARD at page 48.
[52] ARD at pages 40-44.
[53] ARD at page 126 and Reply at page 66.
[54] ARD at page 49.
[55] Reply at pages 19-30.

and elbow region at work on 7 March 2005. He took a history of treatment which was consistent with the evidence at that point in time. Dr Bentivoglio reported Mrs Hannan's symptoms as back pain with pain radiating down her left lower limb extending into the foot region. He made no reference to complaints of symptoms in the left hip or the left groin. On clinical examination, Dr Bentivoglio observed that Mrs Hannan walked without a limp; had about two thirds normal range of movement in the lumbar spine; had no paravertebral muscle spasm; straight leg raising was to 60° in both lower limbs; no localising motor, sensory or reflex abnormalities in the lower limbs; toes were down going; and that she was capable of walking on her heels and toes without difficulty. He opined that Mrs Hannan had aggravated some pre-existing changes present in her back as a result of the fall. He agreed with Dr Rosenberg's assessment. Dr Bentivoglio expressed the view that, if Mrs Hannan was experiencing left lower limb problems, they were probably referred symptoms from the constitutional degenerative osteoarthritic changes involving her left hip. He also noted that Mrs Hannan had constitutional degenerative osteoarthritic changes involving both shoulders, both hips, neck, thoracolumbar spine region and thumbs.

56. On 2 November 2006, Dr Levitt reported to CGU.[56] Dr Levitt confirmed that Mrs Hannan consulted him on 8 March 2005 with a history of having slipped on a wet floor onto her back at work the previous day. He diagnosed a soft tissue injury. Later in the month Mrs Hannan reported continuing pains in the lower thoracic and lumbar areas. Physiotherapy was recommended as were x-rays of her thoracic and lumbar spine, which demonstrated nothing significant. He referred to the outcome of the lumbar spine MRI scan; Dr Rosenberg's diagnosis; the lumbosacral facet joint blocks; and back strengthening exercises. Dr Levett made no reference to complaints of symptoms in the left hip or the left groin. There was no reference to Mrs Hannan walking with a limp.

57. On 3 September 2007, Mrs Hannan consulted Dr Rosenberg, who reported back to Dr Levett.[57] Dr Rosenberg reported that Mrs Hannan remained hampered with significant back pain and pain at the top of both thighs. All activities caused pain. He thought that an updated lumbar spine MRI scan would be worthwhile. Dr Rosenberg made no reference to complaints of symptoms in the left hip or the left groin. He made no reference to Mrs Hannan walking with a limp.

58. On 1 November 2007, Mrs Hannan consulted Dr Rosenberg, who reported back to Dr Levett.[58] Dr Rosenberg reported that Mrs Hannan was really struggling with constant back pain radiating into her buttock and groins. He reviewed all her radiology and recommended that she undergo provocative discograms. Dr Rosenberg made no reference to complaints of symptoms in the left hip. He made no reference to Mrs Hannan walking with a limp.

59. On 20 February 2008, Mrs Hannan consulted Dr Bentivoglio at the request of CGU. In evidence, there is a report by Dr Bentivoglio dated 20 February 2008.[59] Dr Bentivoglio reported that Mrs Hannan continued to experience symptoms in her back region and pain radiating down her left lower limb to the foot region of equal severity. She complained of decreased mobility. On clinical examination, Dr Bentivoglio observed that Mrs Hannan walked without a limp; was capable of undressing and re-dressing without significant difficulty; and experienced some minor difficulty getting up and down from the examination couch. In relation to the lumbar spine, he observed that there was no paravertebral muscle spasm; she had two thirds the normal range of movements in her lumbar spine; she had straight leg raising to about 60° in both lower limbs; she was capable of walking on her heels and on her toes; there were no motor abnormalities in the lower limbs; all reflexes were present and equal in the lower limbs; and she had some sensory blunting involving the left lower limb that did not conform to any particular dermatomal pattern. In relation to the left hip, Dr Bentivoglio observed on examination that Mrs Hannan had almost a full range of movement. However, she did have pain on extremes of movement in her hip region.

[56] ARD at pages 106-107.
[57] ARD at page 50.
[58] ARD at page 51.
[59] Reply at pages 33-39.

Dr Bentivoglio opined that a significant proportion, if not all, of Ms Hannan's lower limb symptoms and, possibly some of her lumbar spine symptoms, were as a result of degenerative changes involving her left hip region as demonstrated on the bone scan. The left hip condition was constitutional in origin and not work related.

60. On 17 April 2008, Mrs Hannan consulted Dr Rosenberg, who reported back to Dr Levett.[60] Dr Rosenberg reported that the provocative discogram was negative and stated that he was unable to confidently state from where her problem arose and therefore, could not offer any surgical remedy. However, he believed that on clinical symptoms, the L4-5 disc was the main contributor to her problems. He recommended ongoing management of pain by medication and strengthening of her core muscles. Dr Rosenberg made no reference to complaints of symptoms in the left hip. He made no reference to Mrs Hannan walking with a limp.

61. On 14 July 2008, Mrs Hannan consulted Dr Manohar, who reported back to Dr Levitt.[61] Dr Manohar did not take a detailed history of injury. He reported that Mrs Hannan's presenting problem was mid-dorsal pain extending to the lumbosacral spine and down the left leg to the calf. Dr Manohar made no reference to complaints of symptoms in the left hip. He made no reference to Mrs Hannan walking with a limp. He opined that Mrs Hannan's pain could be coming from the L/4, L/5 and L5/S1 facets and recommended that she undergo a diagnostic medial branch block bilaterally, followed by a multi-modal multi-disciplinary pain management program.

62. On 28 October 2008, Mrs Hannan consulted Dr Manohar, who reported back to Dr Levitt.[62] Dr Manohar reported that he performed a neural blockade of the medial branches of the right L4/L5 and L5/S1 facets under CT fluoroscopy. He noted that she had improved as a result of the procedure and recommended a neural blockade to the medial branches supplying the left L4/L5 and L5/S1 facets and that he would perform this procedure shortly. There are no further reports by Dr Manohar in evidence. Dr Manohar made no reference to complaints of symptoms in the left hip in any of the reports in evidence. He made no reference to Mrs Hannan walking with a limp.

63. In her evidentiary statement dated 28 October 2008, Mrs Hannan stated that she continued to suffer from injuries to her right shoulder, back and left leg. Further, she began experiencing pain in her neck. She felt that her injuries were deteriorating. She referred to periods of employment following her retrenchment by the respondent. She stated that she worked for Coles on a casual basis as a cashier from about December 2006 until 21 October 2007. Her duties as a cashier involved scanning grocery products at the checkout and placing them into customer's bags on average four to eight hours per day five days per week. She was constantly on her feet during each shift. She struggled with this work on a day-to-day basis and ultimately, the "pains"[63] she was experiencing were so intense, she could not do the work and she resigned. She did not describe the nature or location of the "pains" she experienced whilst working for Coles. Mrs Hannan stated that she continued to experience back pain during any period of prolonged standing, sitting, walking, bending or lifting. She also experienced shooting pains in the base of her back radiating into her left leg down her left foot. Occasionally, she experienced numbness in her left foot. She made no complaint of symptoms in her left groin or left hip. She made no reference to walking with a limp.

64. On 10 May 2010, Mrs Hannan consulted Dr Sanki. On 28 May 2010, Dr Sanki reported to the respondent's then insurer, EML.[64] Dr Sanki reported that Mrs Hannan consulted him about her lower back injury. He noted that she had marked pain in the left hip area. On examination of the left hip, he observed that Mrs Hannan had moderate reduction in movements and moderate restrictions. He recommended a left hip MRI scan that could not be undertaken

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[60] ARD at page 52.
[61] ARD at pages 108-109.
[62] ARD at page 111.
[63] ARD at page 14 at [27].
[64] ARD at page 112.

because Mrs Hannan underwent severe anxiety during the procedure. He recommended a CT scan instead. On the evidence before me, the consultation with Dr Sanki on 10 May 2010 was the first occasion on which any treating doctor recorded pain in Mrs Hannan's left hip area. He made no reference to Mrs Hannan walking with a limp.

65. On 9 June 2010, Mrs Hannan underwent a CT scan of her left hip by Dr Joseph Sanki.[65] The CT scan concluded moderate to severe osteoarthritic change present in the left hip joint as well as an effusion in the hip joint.

66. On 2 July 2010, Dr Sanki reported to EML on the left hip CT scan findings and opined that the arthritis in Mrs Hannan's left hip was caused by the fall that she sustained.[66] The report did not expose the reasoning behind reaching that opinion.

67. On 19 November 2010, Dr Rosenberg requested EML to approve left hip replacement surgery for Mrs Hannan. On 21 December 2010, in response to a questionnaire from EML, Dr Rosenberg opined that the proposed left hip replacement surgery was not directly related to the frank incident on 7 March 2005. He explained that Mrs Hannan fell, hurt her back, altered her gait and increased the load on an osteoarthritic hip. Dr Rosenberg also explained that the degeneration in the left hip was contributing to her back pain in part because she limped; her hip was stiff; and put more load on her spine. He opined that the proposed surgery would reduce that pain. Curiously, there were no reports in evidence from Dr Rosenberg between his report dated 18 April 2008 and the response to the EML questionnaire on 19 November 2010. One would assume that Mrs Hannan consulted Dr Rosenberg at some point prior to him requesting approval from EML for left hip replacement surgery. Understandably, Dr Rosenberg's response to the EML questionnaire does not fully or satisfactorily expose the reasoning behind his conclusions in the small space provided on the document. A report from Dr Rosenberg, who had treated Mrs Hannan over a long period of time, on the issue of causation would have been useful.

68. On 11 February 2011, Mrs Hannan consulted Dr Ginsberg at the request of EML. In evidence, there is a report by Dr Ginsberg dated 11 March 2011.[67] Dr Ginsberg took a history of injury and reported that Mrs Hannan slipped and fell at work on a wet soapy floor landing on her buttocks and injuring her right elbow. He reported her current status as being unable to walk due to low back pain and pain in the left leg experienced both posteriorly and laterally, as well as a radiation of pain towards the left small toe. She also described pain at the back of her neck and headaches. On examination of Mrs Hannan's hips, Dr Ginsberg observed a distinct limitation of abduction and internal rotation of the left hip; an inability to flex the spine beyond reaching with her hands to knee level; similar observations when performing lateral flexion; reduced rotation; all reflexes were extremely brisk and present; she was unable to walk on her toes or heels; and had difficulty squatting. Dr Ginsberg reviewed diagnostic investigations made available to him. In relation to Mrs Hannan's left hip, Dr Ginsberg reported his diagnosis as being probably a combination of age-related degenerative change in the axial skeleton and left hip. The relationship to the fall was probably less than 20% contribution. He then went on to opine that the description of the injury was such that she may well have aggravated her spinal condition on falling. Since she injured her right elbow, it was unlikely that the left hip pathology was related to the fall. Dr Ginsberg did not expose the reasoning behind the latter opinion.

69. On 6 January 2012, Mrs Hannan consulted Dr Sanki. Dr Sanki reported to EML[68] that Mrs Hannan attended complaining of right shoulder pain and continuous lumbar spine pain radiating into her right leg, especially inside and at the front of her thigh. This was the first occasion on which Mrs Hannan reported referred pain from her lower back into her right leg.

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[65] ARD at pages 130-131.
[66] ARD at page 113.
[67] Reply at pages 51-57.
[68] ARD at page 114.

70. On 21 March 2012, Dr Rosenberg reported to Dr Levett that Mrs Hannan underwent a left total hip arthroplasty on 20 March 2012.[69]

71. On 6 June 2012, Mrs Hannan consulted Dr Sanki. Dr Sanki reported to EML[70] that an MRI scan of both hips revealed severe arthritic changes. He noted that Mrs Hannan had already undergone a left hip replacement by Dr Rosenberg. The purpose of the report was to obtain EML's approval to cover the cost of home care and bilateral carpal tunnel surgery.

72. On 13 July 2012, Mrs Hannan consulted Professor Ehrlich at the request of EML. In evidence, there is a report by Professor Ehrlich dated 13 July 2012.[71] Professor Ehrlich did not take a detailed history of the mechanism of injury. However, he did report that Mrs Hannan was a very taciturn lady, who gave the impression of being very angry and very reluctant to give a history. She complained of pain in her lower back, pain in both legs, pain in her right elbow and pain in both hands. By the time of Mrs Hannan's consultation with Professor Ehrlich, she had already undergone the left hip replacement and so, he did not disturb the left hip on examination in case there was some instability following the hip replacement procedure. Professor Ehrlich did examine the right hip and observed that movement was restricted with loss of the final portion of flexion and with almost no internal or external rotation. He diagnosed initial strains and contusions of the spine, bilateral osteoarthritis of the hips and bilateral carpal tunnel syndrome. He opined that her symptoms had become worse over recent years, mainly because of progressive osteoarthritis of the hips and her bilateral carpal tunnel syndrome. Professor Ehrlich did not relate Mrs Hannan's present incapacities to the workplace injury.

73. On 22 October 2012, Mrs Hannan consulted Dr Y Kai Lee who reported back to Dr Levett.[72] Dr Kai Lee noted that Mrs Hannan had undergone a left hip replacement on 20 March 2012. Radiological examination of the right hip disclosed it to be dysplastic and degenerated. On physical examination Dr Kai Lee observed that Mrs Hannan walked with a right-sided antalgic gait; movement was painful; and the left leg was shortened by about 1 cm. Dr Kai Lee's impression was that she had osteoarthritis in both hips, and he placed her on a waiting list for a right hip replacement.

74. On 26 June 2013, Dr Y Kai Lee reported to Dr Levitt that Mrs Hannan had undergone a right hip replacement on 24 June 2013.

75. In her evidentiary statement dated 9 April 2019, in the words of her counsel, Ms Grotte, Mrs Hannan sought to fill in some of the blanks in her earlier two evidentiary statements.

76. Mrs Hannan stated:

> "When I injured my low back, I fell on my buttocks and had pain down my left leg and my left groin/hip area."[73]

77. Mrs Hannan did not refer to her left groin or left hip area in her evidentiary statements dated 27 October 2006 and 28 October 2008. Although, she did complain of left groin pain to some of the doctors she consulted.

78. In relation to any relevant pre-existing conditions, Mrs Hannan stated:

> "I did not have any problems with my back, left groin and hip before my low back injury."[74]

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[69] ARD at page 53.
[70] ARD at page 115.
[71] Reply at pages 58-65.
[72] ARD at page 122.
[73] ARD at page 17 at [9].
[74] ARD at page 17 at [10].

79. The above statement relating to her back was inconsistent with what was recorded in Dr Levett's clinical records on 12 May 2004.[75] The clinical records referred to left lumbar spasm and an injection. It was also inconsistent with Mrs Hannan's statement to Dr Bentivoglio on 4 September 2006 that she did have a muscular problem in her back previously, but nothing that had required any specific forms of treatment.[76]

80. Further, the above statement relating to the left hip was inconsistent with what was recorded in Dr Levett's clinical records on 30 July 2004,[77] where there was a reference to osteoarthritis of the left hip and to a referral for an x-ray. The entry on 3 August 2004[78] appeared to report that the left hip x-ray demonstrated osteoarthritis.

81. In relation to the issue of limping, Mrs Hannan stated:

> "I had a lot of pain in my left leg and this caused me to limp. I limped for many years and I would use a walking stick. I commenced limping after my injury and commenced using a walking stick a few months after the injury. I stopped using a walking stick after my second hip operation."[79]

82. Mrs Hannan did not refer to limping or using a walking stick in her evidentiary statements dated 27 October 2006 and 28 October 2008.

83. Mrs Hannan believed that since 2007, her low back injury and left hip became worse over time leading up to the left hip replacement in 2012. She stated that her walking had improved since the hip replacement surgery. She stated that her left leg pain had improved following her left hip replacement but that she started to experience a lot of pain in her right leg. She did not refer to her right hip replacement surgery carried out by Dr Kai Lee.

84. On 28 October 2019, Mrs Hannan consulted Dr Habib at the request of her lawyers. In evidence, there is a report by Dr Habib dated 1 November 2019.[80] Dr Habib took a history from Mrs Hannan that she was working afternoon shift when she slipped on soapy water used by a cleaner to clean the floor. Both her legs went forward, and she fell backwards landing on her bottom and hitting the back of her left elbow heavily against the floor. The reference to striking the left elbow is inconsistent with the preponderance of evidence, which referred to striking the right elbow. Dr Habib reported a history of post injury treatment and work activities which was, in the main, consistent with the evidence.

85. Dr Habib reported Mrs Hannan's current complaints as low back pain radiating into the back of the left thigh to the midcalf; pain in the left hip, requiring a total hip replacement; and subsequent right total hip replacement surgery. On examination of the left hip, Dr Habib observed a well-healed scar related to the hip replacement surgery; very little discomfort except during long periods of standing or climbing; and a good range of left hip movements. He reviewed the diagnostic imaging/investigations made available to him.

86. Dr Habib expressed the following opinion:

> "Mrs Hannan fell heavily on her bottom on 07/03/05 at work in the manner stated in the history. She developed severe left low back pain radiating in the left lower limb and at times the left groin. She underwent extensive investigations of the lumbar spine for the left lower limb radiculopathy but because of the discrepancy in the clinical and radiological findings, surgery was not proceeded with to the lumbar spine region.

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[75] ARD at page 66.
[76] Reply at page 20.
[77] ARD at page 66.
[78] ARD at page 66.
[79] ARD at page 17 at [12].
[80] ARD at pages 31-39.

> Mrs Hannan was also experiencing some left groin and also top of the thigh pain which was initially ignored due to the radicular symptoms/signs of radiculopathy. The earlier imagery did however show osteoarthritis of the left hip joint which the bone scan dated 10/04/08 confirmed being active.
>
> It would appear that with the severe jarring of the low back in the fall resulting in left sided low back, buttock, left groin and the left lower limb pain she also jarred the asymptomatic left hip condition which gradually deteriorated with the limping from her low back condition and radiated left lower limb pain."[81]

87. Dr Habib diagnosed Mrs Hannan as having lumbar discopathy with left radiculopathy; an aggravation injury of the asymptomatic left hip osteoarthritis; and a further aggravation as a consequential injury of the left hip from limping due to left low back and left lower limb radiation of pain. He opined that Mrs Hannan's employment at the time of her fall was the substantial contributor to her current condition.

88. On 31 January 2020, Mrs Hannan underwent her third consultation with Dr Bentivoglio at the request of EML's lawyers. In evidence, there is a report by Dr Bentivoglio dated 3 February 2020.[82] Dr Bentivoglio expanded on the history of injury he had previously taken in his reports and reported that on 7 March 2005, Mrs Hannan slipped and fell onto the point of the right elbow and sustained a jarring injury to her back. He took a history of post injury treatment which was, in the main, consistent with the evidence. Importantly, he reported that Mrs Hannan told him that in about 2010, she started to notice increasing symptoms in the region of her left hip and that x-rays indicated that she had quite significant degenerative change. This was inconsistent with Mrs Hannan's most recent statement that referred to 2007 as the time she experienced a worsening of her symptoms. Dr Bentivoglio also noted that she underwent a left total hip joint replacement in March 2012 under the Medicare system. He reported that Mrs Hannan continued to experience symptoms in her right hip, consulted Dr Kai Lee and underwent a right total hip joint replacement in about 2014. He noted that Dr Kai Lee indicated that Mrs Hannan had a dysplastic right hip.

89. Dr Bentivoglio reported that Mrs Hannan had more symptoms in her right hip than her left and still occasionally experiences pain in the groin, particularly when she sneezes or coughs. Mrs Hannan reported that she notices some degree of difficulty putting on shoes and socks. She does not use any walking aids. Walking capacity is limited by her back, but she could walk more than 600 metres. She can use public transport. She can negotiate stairs with a normal cadence. Sitting is not a problem for her.

90. On clinical examination of the hips, Dr Bentivoglio observed no leg length inequality in the lower limbs; a full range of movement in both hips, as long as movement was slow; a well-healed 10 cm scar at the left buttock region and a 16 cm scar at the right buttock; and a negative Trendelenburg's test. Dr Bentivoglio reviewed the radiological investigations.

91. Dr Bentivoglio opined that Mrs Hannan had aggravated pre-existing degenerative changes in her lumbar spine as a result of the fall at work and that such aggravation had long ceased. In relation to Mrs Hannan's left hip, Dr Bentivoglio opined:

> "Ms Hannan does suffer from constitutional bilateral degenerative hip joint disease. Her treating specialist for her right total hip joint replacement indicated that she had a dysplastic right hip and I would assume that she similarly had a dysplastic left hip to account for the degenerative changes. She certainly obtained a very good result from her left total hip joint replacement but still has some residual symptoms from her right total hip joint replacement. I do not consider the degenerative change at present

[81] ARD at page 35.

[82] Reply at pages 40-50.

in her hip have been caused by or accelerated by the specific incident she described at work in 2005. I consider her hip pathology to be entirely constitutional in origin."[83]

92. In response to a question posed by EML's lawyers as to whether the left hip injury was in the nature of a disease of gradual process and if so, whether it was a contributing factor to contracting the disease or to the aggravation, acceleration, exacerbation or deterioration of the disease, Dr Bentivoglio responded as follows:

> "I do not consider that Ms Hannan has a left hip injury in the nature of disease of gradual onset. I do not consider the specific injury in March 2005 aggravated, accelerated or exacerbated her degenerative changes present in her hip."[84]

93. Whilst I have no reason to doubt Mrs Hannan's credibility, I have concerns about the reliability of her evidence on the causation issue in dispute. Mrs Hannan's third evidentiary statement was completed with the assistance of her lawyer on 9 April 2019, some 14 years after the work-related fall and in support of a claim for further compensation. I have already referred to the inconsistencies in Mrs Hannan's evidence, in particular, the absence of contemporaneous complaints of left hip symptoms to her treating doctors until Dr Sanki noted marked pain in the left hip area in his report dated 28 May 2010.

94. The value of contemporaneous evidence has been repeatedly endorsed by the courts. In *Onassis and Calogeropoulos v Vergottis*[85], Lord Pearce said of documentary evidence:

> "It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance."

95. More recently, in *Watson v Foxman*,[86] McLelland CJ in Equity said:

> " … Human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which the plausible details are then, again often subconsciously, constructed. All of this is a matter of human experience."[87]

96. However, the absence of contemporaneous evidence is not determinative on the issue of causation where there is other evidence: *Owen v Motor Accidents Authority of NSW*[88]and *Bugat v Fox*.[89] While independent corroboration of complaints of pain will often be helpful and relevant in assessing the probative value of the evidence overall, such evidence is not a "requirement" that must be satisfied before an arbitrator can feel actual persuasion about the existence of a fact in issue: *Department of Aging, Disability and Home Care v Findlay*[90]. In this case, the 'other evidence' includes Mrs Hannan's third evidentiary statement, some

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[83] Reply at page 45.
[84] Reply at page 47.
[85] *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403 at 431.
[86] *Watson v Foxman* (1995) 49 NSWLR 315.
[87] *Watson v Foxman* (1995) 49 NSWLR 315 at 319.
[88] *Owen v. Motor Accidents Authority of NSW* [2012] NSWSC 650 at [52].
[89] *Bugat v Fox* [2014] NSWSC 888 at [31], [32] and [34].
[90] *Department of Aging, Disability and Home Care v Findlay* [2011] NSWWCCPD65.

14 years after the injurious event. I have already expressed my concerns about the reliability of Mrs Hannan's evidence above and I have treated it with caution.

97. Turning to the medical evidence, the principles in relation to the acceptance of expert opinions in the Commission are well known. Rule 15.2(3) of the Workers Compensation Commission Rules 2011 provides that "evidence based on speculation or unsubstantiated assumptions is unacceptable". The case law makes it clear that the *Evidence Act 1995* does not apply to proceedings in the Commission. *Hancock* is authority for the proposition that in a non-evidence-based jurisdiction such as the Commission, the question of acceptability of expert evidence will not be one of admissibility but one of weight. Further, it is well established in the authorities such as *Paric v John Holland (Constructions) Pty Ltd,*[91] *Makita*; *South Western Sydney Area Health Service v Edmonds*[92] (*Edmonds*); and *Hancock*; that there must be a "fair climate" on which a doctor can base an opinion. Whilst it is accepted that a doctor does not need to provide elaborate or detailed explanations for his conclusion, more than a mere "ipse dixit" (an assertion without proof) is required.

98. The relevant principles from *Makita* and onward are a guide to the weight to be given to experts' reports. *Makita* set out that the requirement for the admissibility of an expert opinion is that it must be established on the facts on which the opinion is based from a proper foundation for the opinion. The opinion of an expert requires demonstration of the examination of the scientific or other intellectual basis of the conclusions reached. The expert's evidence must explain how the field of specialised knowledge in which the witness is expert by reason of training study or experience and in which the opinion is wholly or substantially based, applies to the facts assumed or observed so as to produce the opinion propounded. The reasoning must be exposed demonstrating a particular specialised knowledge.

99. There is no opinion expressed by Dr Levett in respect of Mrs Hannan's left hip. Dr Levett's clinical records are of little assistance as they are barely legible during the relevant period. Dr Levett's report dated 2 November 2006 made no reference to complaints of left hip symptoms and focused on Mrs Hannan's lumbar spine. There is no subsequent report by Dr Levett in evidence.

100. Dr Ellis made no reference to complaints by Mrs Hannan of symptoms in the left hip. Dr Ellis was provided with contemporaneous evidence of persisting back pain and referred left leg pain to the foot that caused Mrs Hannan to limp. Mrs Hannan submitted that such evidence supported the consequential condition in the left hip opined by Dr Habib. I do not accept that the submission takes it as far as Mrs Hannan would like. It is evidence of a limp.

101. Similarly, Dr Manohar expressed no opinion in respect of Mrs Hannan's left hip. This is hardly surprising, as he recorded no complaints of left hip symptoms in any of his three reports in evidence.

102. Dr Sanki, being the first treating medical practitioner to refer to marked pain in Mrs Hannan's left hip area more than five years after the fall, opined that the arthritis in the left hip was caused by the work-related fall. Dr Sanki did not expose the reasoning behind his opinion or the facts on which he relied to base his opinion. There is no evidence that he was armed with a description of the mechanism of Mrs Hannan's fall within the body of his reports. I intend no criticism. I accept that, as a treating specialist, his task was not to provide an explanation for his opinion on causation. However, without an explanation, I can give Dr Sanki's opinion no weight. Accordingly, I do not accept Mrs Hannan's submission that Dr Sanki's opinion is not inconsistent with an injury to the left hip under section 4(b)(ii) of the 1987 Act.

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[91] *Paric v John Holland (Constructions) Pty Ltd* [1985] HCA 58.

[92] *South Western Sydney Area Health Service v Edmonds* [2007] NSWCA 16; 4 DDCR 421.

103. Dr Rosenberg's reports between 7 July 2005 and 18 April 2008 recorded no complaints of left hip symptoms by Mrs Hannan. I have already referred to the curious absence of reports from Dr Rosenberg preceding his request to EML for approval of left hip replacement surgery on behalf of Mrs Hannan. Dr Rosenberg's responses to the EML questionnaire seeking an explanation as to how the proposed surgery was related to the incident on 7 March 2005, were necessarily brief. His opinion that Mrs Hannan fell, hurt her back, altered her gait and experienced an increased load on an arthritic hip was inconsistent with Mrs Hannan's statement that she had symptoms in her left hip from the date of the fall. Dr Rosenberg did not expose the reasoning behind his opinion or the facts on which he relied to base his opinion. I accept that, as a treating specialist, his task was to seek EML's approval for the proposed surgery and provide a brief explanation for his opinion in response to the questions posed by EML. However, without a reasoned explanation, I can give Dr Rosenberg's opinion little weight.

104. Dr Ginsberg reported his diagnosis as being probably a combination of age-related degenerative change in the axial skeleton and left hip. The relationship to the fall was probably less than 20% contribution. He then went on to opine that the description of the injury was such that she may well have aggravated her spinal condition on falling. Since she injured her right elbow, it was unlikely that the left hip pathology was related to the fall. Dr Ginsberg did not expose the reasoning behind the opinion in respect of the left hip and I give his opinion no weight.

105. Professor Ehrlich diagnosed initial strains and contusions of the spine, bilateral osteoarthritis of the hips and bilateral carpal tunnel syndrome. He opined that Mrs Hannan's symptoms had become worse over recent years, mainly because of progressive osteoarthritis of the hips (unrelated to the workplace injury) and her bilateral carpal tunnel syndrome. Professor Ehrlich did not relate Mrs Hannan's present incapacities to the workplace injury. Whilst he did not take a detailed history of the mechanism of injury, he acknowledged that he had reviewed the many documents enumerated in his report. Those documents included, amongst many others, Dr Rosenberg's reports, the EML questionnaire response and a report by Dr Rosenberg dated 19 November 2010, the latter not being in evidence, but coinciding with the timing of his request for approval of the proposed left hip replacement surgery. I am satisfied that he was armed with sufficient information to form the opinion he came to.

106. I find Dr Habib's opinion as to causation in respect of Mrs Hannan's left hip unpersuasive. Dr Habib reported that Mrs Hannan was also experiencing some left groin and top of the thigh pain that was initially ignored due to the radicular symptoms/signs of radiculopathy. It appeared that he related the left groin pain and left thigh pain to the left hip condition. However, he failed to provide a reasoned explanation or the facts on which he based his conclusion. Dr Habib reported that Mrs Hannan had also jarred her asymptomatic left hip condition, which gradually deteriorated with the limping from her low back condition and radiated left lower limb pain. He gave no explanation of the facts on which he relied to conclude that she had jarred her left hip. He provided no reasoned explanation as to the delay in the onset of Mrs Hannan's left hip symptoms, in the light of her evidence about when she started limping.

107. Dr Bentivoglio's opinion that Mrs Hannan suffers from constitutional bilateral degenerative hip joint disease and that her left hip pathology is entirely constitutional in origin is supported by Professor Ehrlich. I accept that, by the time of his third consultation with Mrs Hannan, Dr Bentivoglio had a full appreciation of the mechanism of injury. Unlike Dr Habib, Dr Bentivoglio had the benefit of three consultations with Mrs Hannan and was in a good position to form an opinion as to causation in respect of the left hip. I give no weight to Dr Bentivoglio's unsupported assumption that Mrs Hannan had a dysplastic left hip. However, that does not affect my findings.

108. I prefer the opinion of Dr Bentivoglio, supported by Professor Ehrlich, over that of Dr Habib for the reasons stated above.

109. I have weighed the evidence of Mrs Hannan together with other objective evidence and/or the absence of it: *Department of Education and Training v Ireland*.[93] Having done so, and for the reasons stated above, I am not satisfied on the balance of probabilities, to a degree of actual persuasion or affirmative satisfaction, that Mrs Hannan has established that there was a definite or distinct physiological change or disturbance in her already degenerative left hip by way of a frank injury to which her employment was a substantial contributing factor or an aggravation thereof arising out of or in the course of her employment with the respondent on 7 March 2005 and I find accordingly. Further, having regard to the whole of the evidence, applying a common sense test and for the reasons referred to above, I am not satisfied that Mrs Hannan has discharged the onus of proving on the balance of probabilities that there is a sufficient causal chain connecting the condition of her left hip to the accepted injury to the lumbar spine on 7 March 2005 or the alleged limp caused by the lumbar spine injury and I find accordingly.

110. I enter an award for the respondent in respect of the claimed left hip injury.

Is Mrs Hannan entitled to lump sum compensation within the meaning of section 66 of the 1987 Act?

111. As there is an award for the respondent in respect of the claimed left hip injury, there is to be no referral to an AMS for the assessment of Mrs Hannan’s accepted lumbar spine injury, as her own forensic medical specialist, Dr Habib, assessed a 13% whole person impairment of the lumbar spine, being the same percentage impairment for which she was compensated in the Complying Agreement entered into on 15 January 2007.

CONCLUSION

112. My determination and orders are set out in the Certificate of Determination attached to this Statement of Reasons.

[93] *Department of Education and Training v Ireland* [2008] NSWWCCPD 134.