WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **4943/19**
Applicant: **Lisa Candy**
Respondent: **MC Connor Racing Pty Ltd**
Date of Determination: **6 January 2020**
Citation: **[2020] NSWWCC 2**

The Commission determines:

1. Award for the respondent.

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

Josephine Bamber
Senior 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 JOSEPHINE BAMBER, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A MacLeod

Ann MacLeod
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Lisa Candy worked for the respondent, MC Connor Racing Pty Ltd, as a track rider. On 25 June 2018, she fell from a horse. She alleges she sustained an injury to her right hip in that fall. In these proceedings she seeks an order from the Commission that the respondent pay the costs of, and ancillary to, surgery to her right hip.

2. The dispute notice dated 20 March 2019, issued by the respondent under section 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), refers to Ms Candy having bilateral hip dysplasia and asserts that Ms Candy's employment is not the main contributing factor to the cause or aggravation of any disease. The respondent's counsel conceded that Ms Candy was involved in a fall on 25 June 2018, but disputes that Ms Candy injured her right hip in that fall. The respondent also disputes there is any causal connection between the fall and the need for surgery to the right hip.

PROCEDURE BEFORE THE COMMISSION

3. A conciliation conference/arbitration hearing was held on 10 December 2019. Ms Candy was represented by Mr Stuart Grant, counsel, instructed by Mr Brian Dodd, solicitor. The respondent was represented by Mr David Saul, counsel, instructed by Mr Paul Macken, solicitor.

4. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary evidence

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

   (a) Application to Resolve a Dispute (ARD) and attached documents;
   (b) Reply and attached documents; and
   (c) Application to Admit Late Documents filed by the respondent dated 5 December 2019.

Oral evidence

6. There was no oral evidence. Both counsel made oral submissions, which were sound recorded. A copy of the recording is available to the parties.

FINDINGS AND REASONS

Ms Candy's statement

7. Ms Candy has provided a brief statement dated 27 August 2019 for these proceedings. She advises that on 20 April 2013 she suffered a fall from a horse and sustained a brain injury and also an injury to her left hip. After 22 weeks she returned to work and had a number of further falls. She states that on 25 June 2018 when she fell from the horse it trampled her and she suffered an injury to her right hip and lower back. She says this was the first time that she had a very serious injury to her right hip.

8. Ms Candy explains "I was thrown off the horse and managed to get up uninjured and then got back on the horse and was thrown off a second time. On that occasion the horse fell on me. I got out from under the horse but I had pain in my back and right hip."

9. Ms Candy says that Dr Bodel has a correct history of this fall but he is incorrect when he states she has had a left hip replacement. She says she has seen Dr Nabavi who has given her a series of injections into her hips which provided her with short term benefit, but that she still has considerable trouble with her right hip and wants to have surgery. She states that her right hip is very painful to put up with.

Pre-injury medical records

10. In the Late Documents filed by the respondent there are extracts from records produced under direction from Dr Nabavi, Dr Huynh and Liverpool Hospital.

11. In an entry on 26 June 2014, Dr Huynh, general practitioner, recorded "due for osteoplasty and labral repair". On 10 July 2014 Dr David Huynh recorded "fees for hip surgery too high, suggest checking fees with other orthopods: Prof Bruce and Dr Dave".

12. Dr Andrew Jordan provided a report to Dr Huynh dated 13 May 2015, giving a diagnosis of trochanteric pain syndrome.

13. On 13 May 2015 Dr Andrew Jordan, rheumatologist and consultant physician, reported to Dr Huynh. He noted that Ms Candy has had a number of falls from horses over the years. He relates an incident occurring three months before his examination when a horse reared on its hind legs and threw her off the horse onto her back and the horse landed on top of her. Dr Jordan refers to pain about her sternum and rib region which he said has resolved. He then adds "…but she has not developed pain over her right lateral hip and buttock." I find that it is more likely than not on the balance of probabilities that the word "not" in this sentence is a typographical error for the word "now". I find that the following sentences support this view. Dr Jordan states,

> "The pain localises to the region above and posterior to the trochanteric region in the area of the gluteus minimus and gluteus medius muscles. The pain is worse on right lateral flexion and there is a stretching sensation with left lateral flexion."

14. Dr Jordan states that the fall may have precipitated trochanteric pain syndrome, sometimes known as gluteus enthesopathy. He notes Ms Candy regularly sees the physiotherapist at Sports Focus and Dr Jordan says he has written to them to start some regular training of the gluteus minimus and gluteus medius muscle groups. He also says if she was not getting a benefit from this program he gave Ms Candy a referral for an MRI scan of the right hip which should provide a better delineation of the problem. Dr Jordan advised Dr Huynh that if Ms Candy needs to proceed to the MRI scan he would review her after it was done.

15. Also, in the late documents are records from Liverpool Hospital relating to an attendance on 22 May 2016 after a fall from a horse one day earlier. It is noted Ms Candy had lumbar back pain and was ambulant with a steady gait and "nil c-spine tenderness".

Worker's Injury Claim Form

16. A claim form was completed by Ms Candy on 29 June 2018 referring to injury to her lower back and face.[1] Ms Candy refers to falling off a racehorse and being trampled on 25 June 2018.

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[1] Reply page 17

Employer's Injury Claim Form

17. In the ARD is an Employer's Injury Claim Form referring to "fell off horse + trampled" on 25 June 2018 at the sand track at Warwick Farm. The parts of the body injured are described as "Lower back/hip". It is not stated who filled out this form. I find I cannot conclude this reference to "hip" is to the right hip when the employer's injury management plan identifies the left hip, as noted below.

Track Riding Incident Report

18. A Track Riding Incident Report was completed but the person who filled out the form is not identified. It refers to the horse kicking Ms Candy. The box for being trampled does not appear to have been crossed but the boxes for falling and being kicked are ticked. It does not appear that the body parts that were injured were filled out[2].

Injury Management Plan

19. On 3 August 2018 a Racing NSW Insurance Fund Injury Management Plan was completed which refers to the fall on 25 June 2018 and that the injury sites were "Lower Back and Left Hip"[3]. The author of this plan is not named. Joseph Gozdzialski is referred to as the case manager.

Dr Li

20. Dr Zeyu Li is Ms Candy's general practitioner. Extracts of her clinical notes are in the Late Documents filed by the respondent. These were produced pursuant to a Direction for Production order addressed to Dr Huynh made by me at the telephone conference. Dr Huynh and Dr Li are both doctors at the Moorebank Shopping Village Medical Centre. The clinical notes have page numbers. In the Late Documents at page 10 is Dr Huynh's record with "page 32" appearing in the bottom right corner starting with an entry on 13 May 2014. "Page 31" appears on page 9 of the Late Documents with an entry starting on 1 October 2014 and then on page 8 of the Late Documents is "page 21" of the clinical notes starting with an entry on 6 June 2018. So, the Commission does not have before it clinical records from 25 November 2014 to 6 June 2018. It is noted that Ms Candy's solicitors had first access to these records, but she has not filed any of the records produced under the Directions.

21. The entry for 26 June 2018 refers to Ms Candy falling from a horse early yesterday 4.30 am. "was thrown off twice, may have been trodded on by horse hoof also in back. Pain worse today- diffuse pain around lower back- nil radiation, denies any weakness in LL or bladder/bowel sx". On examination the doctor noted the presence of an antalgic gait, "tender +++ midline L3-5 and paravertebrally, LL neuro nad, ROM restricted due to pain ++ flexion/ext". The reason for contact was given as lower back pain. A CT scan was requested of the lumbar spine. Dr Li lists the management for Ms Candy including the "CT scan today, heat packs, voltaren rub, mobic + panadeine forte prn, exclude trauma related injuries +physiotherapy off work this week, review with result- initial WC filled".

22. On Wednesday 27 June 2018 Dr Li records that she reviewed the CT and in relation to the back she states, "no trauma related injuries seen on CT, pt reports pain is improving, nil neurological sx reported". She advised Ms Candy to continue her treatment and regular stretches and she would review her on the following Tuesday.

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[2] Reply page 18
[3] ARD page 25

23. The extracts of the clinical notes in the Late Documents only start at page 20 of the clinical notes and so only part of this entry is in evidence before the Commission. The date of the consultation is not in evidence. What is in evidence relates to lower back pain and that Ms Candy was seeing the physiotherapist twice per week. A worker's compensation certificate was created.

24. No physiotherapy records or workers compensation medical certificates are in evidence.

25. Dr Li referred Ms Candy to Dr Nabavi on 20 July 2018, noting she was 48 years 6 months old and she was a horse rider and has been reporting left hip pain, intermittently giving way. Dr Li said the MRI scan showed femoral acetabular impingement with a labral tear. Dr Li referred to the following history:

> "25 April 2013 severe traumatic brain injury following fall from horse
> 13 May 2014 MRI: dysplastic hip, early OA, degen. Lobulated labral cyst (Right)
> 1 October 2014 partial tear gastrocnaemius muscle with haematoma (left)
> 26 May 2015 left trochanteric bursitis/ gluteal medius tendinopathy"[4]

Dr Nabavi

26. Dr Nabavi is Ms Candy's treating orthopaedic surgeon; whose speciality includes hips. He reported to Dr Li on 6 August 2018. The doctor stated he was seeing Ms Candy for left sided hip pain. He adds,

> "I saw her previously with right sided hip pain as a result of labral pathology and dysplasia. She has had a recent exacerbation and her pain has been related to a fall from a horse.
>
> Clinical examination demonstrates a supple hip but her impingement signs are positive, particularly there is pain on flexion, abduction and internal rotation. An MRI scan also confirms presence of labral cysts and hip dysplasia.
>
> In view of the significant discomfort that she has, in fact in both hips, I think that she would be a suitable candidate for a course of PRP injections. I think that in view of the dysplasia, labral surgery may worsen her symptoms and accelerate the degenerative changes in her hip.
>
> I will be writing to the insurance company requesting approval to proceed with PRP injections and I will organise these for her once we have achieved the approval."

27. X-rays were taken at Dr Nabavi's request on 6 August 2018 of the pelvis and both hips. The radiologist queried if there was a background of hip dysplasia[5].

28. The MRI of the right hip undertaken on 8 February 2019 at the request of Dr Nabavi. The clinical history refers to "?labral pathology". The radiologist recorded his impressions and included that there was a complex tear anterior and anterosuperior acetabular labrum with a septated 8 mm paralabral cyst anteriorly. There was also a reference in the body of the report to "no acetabular dysplasia"[6]. However, as noted below Dr Nabavi said he did not agree with the radiologist's report.

[4] Late Documents page 5
[5] Reply page 14
[6] Reply page 13

29. In Dr Nabavi's report to Dr Zeyu Li dated 11 February 2019 he states:

> "Lisa's MRI scan of her right hip demonstrates chondrolabral pathology as well as thinning of the cartilage over the femoral head with a sphericity of the femoral head and mild to moderate dysplasia. I do not agree with the report which has been issued by the radiologist. I think arthroscopic surgery would not be successful in her due to the dysplasia and the thinning of the cartilage.
>
> Her only surgical option is a prosthetic hip replacement. She feels that her symptoms are severe enough to proceed with this and clinically she has pain with flexion of the hip passed 90°."[7]

30. Dr Nabavi said he was arranging for the hip replacement to take place in March and he was sending a copy of this report to the insurer to request approval to proceed. Dr Nabavi had Ms Candy complete a consent for the medical and/or surgical treatment form which referred to an admission date of 20 March 2019 and for the operation to take place that day[8]. The request for approval and quote is dated 12 February 2019[9] and was addressed to the respondent's insurer.

31. As noted above, the insurer disputed liability for the surgery in its section 78 notice dated 20 March 2019.

Dr Powell

32. Dr Powell, orthopaedic surgeon, was qualified by the respondent and has provided a report dated 15 March 2019. He has a brief history of the fall on 25 June 2018, noting that Ms Candy had a head injury in 2013 and her memory for detail was poor. Dr Powell states that Ms Candy cannot remember how she landed, but she got back up on the horse. He states she was told that the horse rolled on her, but that she could not recall what part of her was injured.

33. Dr Powell records the subsequent history as follows:

> "Ms Candy started having trouble with her right leg which caused her some pain about the upper anterior thigh and she started to have troubles with her leg giving on her at the hip, describing it as *'popping out',* although she was not quite sure what happens.
>
> This causes her to drop suddenly.
>
> She went to see her local doctor she thinks within a week. X-rays were undertaken and she was referred to Dr Nabavi, Orthopaedic Surgeon.
>
> Some further scans were done.
>
> Dr Nabavi suggested platelet rich plasma injections, and she had three of these, but without any alteration in symptoms.
> She has continued to have difficulties with her hip."

[7] ARD page 28
[8] ARD page 29
[9] ARD page 31

34. Dr Powell details Ms Candy's current symptoms, and his examination findings, including that she walked with a limp on the right leg that was more careful than antalgic and with heel walking she became quite unbalanced. Dr Powell referred to x-rays of the pelvis and hips dated 6 August 2018 which he said showed bilateral hip dysplasia with shallow acetabulum and aspherical hips on both sides. He also states the x-ray report referred to some ossific densities in the inferior to the pubis symphysis possibly from old trauma. Dr Powell also refers to the findings of the MRI scan report dated 8 February 2019.

35. In his summary, Dr Powell finds that Ms Candy most likely has bilateral hip dysplasia and is starting to develop degenerative disease on the right hip. However, he adds "Symptoms developed following a fall from a horse in the course of her work in June 2018."[10]

36. Dr Powell answers questions posed to him by the respondent and explains:

> "At the right hip, imaging has identified that she is in the early stages of osteoarthrosis with thinning of articular cartilage and labral degeneration.
>
> The hip dysplasia is congenital and developmental, principally being seen as a shallow acetabulum. She had been unaware of this condition being present which is frequently the case for those who have well-functioning hips and where there is no reason to have imaging performed at birth.
>
> Patients with mild to moderate dysplasia, unilateral or bilateral, will frequently have no clinical difficulties in their growing years and progress through the majority of their lives into middle age before becoming symptomatic and many do not even become symptomatic at that stage."

37. Dr Powell says it is not entirely clear why Ms Candy has remained symptomatic in the right hip he says,

> "While it is probable she had some local trauma to the region in the fall from the horse, on either the first or the second time, there is no indication on her imaging of actual structural failure occurring. She may have extended some of the labral deterioration and this may be why she is remaining symptomatic or possibly it is just one of those joints that once stimulated do not return to their premorbid state."

38. These comments seem to allow that Dr Powell was of the view that there may have been a right hip injury in the fall from the horse after which the right hip became symptomatic.

39. The respondent then asked Dr Powell a question that appears directed to the application of section 9A of the *Workers Compensation Act 1987* (the 1987 Act). Question 3 asks,

> "In your opinion is Ms Candy's employment or the incident on 25 June 2018 substantial contributing factor or is it likely that she would have developed similar condition/s at about the same time or at the same stage of her life, if she had not been at work or had not worked in that employment?"

40. Yet the doctor's response in the next paragraph seems to be somewhat inconsistent as he states, "There is no indication that the type of work Ms Candy has done, riding horses, has had any influence that has led her to an earlier presentation that might otherwise be expected." But then the doctor goes on to acknowledge that after the fall on 25 June 2018 she had symptoms in the right hip which have remained since that date.

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[10] ARD page 12

41. In terms of whether a total hip replacement is reasonably necessary, Dr Powell advised “if she suffers from sufficient pain symptoms that are impacting significantly on lifestyle and there are no other significant contraindications, total joint replacement would be a reasonable offer to make.” Interestingly when the doctor was asked whether a hip replacement would be needed for the left hip, Dr Powell advised

> “If symptoms do not develop in the left hip, Ms Candy would not need to consider a total joint replacement.
>
> As outlined above, total joint replacement is not inevitable for patients with hip dysplasia and many never come to medical attention.”[11]

Dr Bodel

42. Dr Bodel, orthopaedic surgeon, provided a medico-legal report for Ms Candy dated 5 July 2019. He noted on examination Ms Candy cannot fully flex the right hip and so she sits on the left and she rises slowly and walks with a pronounced right sided limp. Dr Bodel found restricted straight leg raising on the right side due to tightness in the hip.

43. Dr Bodel refers several times to a well healed scar over the left hip consistent with a total hip replacement. However, as noted above, in Ms Candy’s statement she says she has not had a left hip replacement.

44. Dr Bodel did not have available the x-rays or other tests for review. He refers to a report dealing with bilateral PRP injections performed by Dr Nabavi on 7 November 2018. Dr Bodel says that Dr Nabavi indicated because of a poor response the only viable treatment option is for a right hip replacement and he says he agrees with this. Dr Bodel adds “The need for this arises as a consequence of her injury in the fall that occurred on 25 June 2018”.

45. Dr Bodel refers to Dr Powell’s report as states,

> “The assessment report from Dr James Powell is also noted. He does indicate that the answer in regard to the reasonably necessary nature of the total hip replacement for the right hip is ‘rather difficult’. He confirms that imaging findings alone are not the determinant for whether hip replacement is required or not. He indicates that it should be based on ‘symptoms’. This lady presents today with a very irritable, painful stiff hip on the right hand side and a total hip replacement therefore is warranted.”

46. This is not a correct summary of Dr Powell’s opinion. Dr Bodel in the passage above refers to Dr Powell when answering a question in regard to right hip replacement as being “rather difficult”. However, the question posed to Dr Powell to which he gives the answer of “rather difficult” was not about the right hip but was concerning the left hip. Question 5 posed to Dr Powell is as follows:

> **“If Ms Candy requires now a THR for the right hip, what is the likelihood that she will require THR for the left hip in near to medium future?”** (bold in original)

47. However, Dr Bodel is correct when he says Dr Powell refers to symptoms in the right hip being an indicator for right hip replacement. In addition, Dr Bodel refers to the presence of right hip stiffness, whereas Dr Powell said there was no stiffness.

[11] ARD page 14

48. Dr Bodel then proceeds to answer questions posed to him. However, he does not really answer question 1 which was: “Does Ms Candy's requirement to have surgery arise out of the course of her employment as a track rider when on 25 June 2018 she fell and was trampled by a horse and injured her back and hip?”

49. Dr Bodel just responds that on 25 June 2018 Ms Candy had a fall at work and was “trampled by a horse” injuring her back and right hip. He does not say that the need for surgery was as a result of this fall. However, in answer to question 4 Dr Bodel states that the requirement for the surgery is causally related to the effects of the injury that occurred on 25 June 2018.

50. Of concern is Dr Bodel’s reference, on several occasions, to him not seeing the x-rays or scans. He says:

> “In part, the injury on 25 June 2018 may well have been an aggravation, acceleration, exacerbation and deterioration of an underlying disease process, being some early degenerative change but I have not had the opportunity to review the x-rays or scans to be able to determine that. There certainly was a frank injury on that day, the nature of which is difficult to determine, again, without the x-rays but I suspect that there was at least a labral tear and possibly some other fracture, although I have not seen that reported.”

Determination

51. The respondent submitted that Ms Candy’s statement is brief and her evidence needs to be treated with caution due to the sequelae of her prior head injury. I accept this submission. It seems clear from the medical history taken by Dr Powell that Ms Candy has some memory problems. Dr Bodel also refers to her having suffered from brain damage in 2013. I am concerned that Ms Candy makes no mention of the prior right hip problem, which is referred to in Dr Jordan’s report. The fall described by Dr Jordan occurred in 2015 and the circumstances surrounding it are quite similar to that described by her in 2018. Dr Jordan describes the 2015 fall as involving “a horse reared on its hind legs and threw her off the horse onto her back and the horse landed on top of her”.

52. Ms Candy in her statement says between the fall on 20 April 2013 and 25 June 2018 she had a number of falls, none of which were serious. She adds that “this was the first time I have had a very serious injury to my right hip.” However, she does not refer to the fall in 2015 which caused her to be referred to a specialist, Dr Jordan, and have physiotherapy and receive a referral for a right hip MRI. Furthermore, Dr Nabavi obviously saw her before the fall on 25 June 2018 for her right hip because Dr Nabavi stated to Dr Li in his report dated 6 August 2018 that he saw her previously with right sided hip pain as a result of labral pathology and dysplasia.

53. Therefore, I accept I do have to treat Ms Candy’s evidence cautiously. By making such a finding I am not suggesting she has been dishonest, but that relevant information about her medical history has not been covered in her statement.

54. Dr Bodel has a heading “past medical history” and says Ms Candy stated she has been previously quite well before these two horse-riding related injuries. The injuries he is referring to are those on 25 April 2013, involving an acute brain injury and fracture of the left hip, and the injury on 25 June 2018. Unfortunately, Dr Bodel does not appear to have known about the fall in 2015 and Dr Jordan’s treatment of Ms Candy’s right hip.

55. This was one reason why the respondent submitted that the report of Dr Bodel is seriously flawed. It was also argued that Dr Bodel has not seen any radiology and his opinion about causation is not reasoned. I accept these submissions and I find I can give no weight to Dr Bodel’s opinion for these reasons.

56. The counsel for Ms Candy submitted that he agreed that Dr Bodel "probably ought" to have had access to the radiology, but he argued that it does not matter because the assumptions made by Dr Bodel turned out to be correct about what was in the radiology. However, I cannot accept this submission because Dr Nabavi in his report dated 6 August 2018 refers to an MRI scan, so this obviously is a scan that pre-dates the one which is in evidence from 8 February 2019. Dr Nabavi says of this scan that it confirmed the presence of labral cysts and hip dysplasia. It is not clear from the evidence if this was the MRI scan from the referral of Dr Jordan in 2015 or an earlier scan. In Dr Li's referral to Dr Nabavi there is reference to an MRI scan on 13 May 2014 showing a "dysplastic hip, early OA, degen. Lobulated labral cyst (Right)."

57. No doctor for either party has considered all of the radiology and treating medical evidence. Furthermore, it would seem that all of the treating medical material regarding Ms Candy's right hip is not in evidence before the Commission, for instance the scan of 13 May 2014 and Dr Nabavi's reports about his consultations before that of 6 August 2018. In the absence of considered opinions based on all the evidence, it is very difficult for the Commission to make sound findings about injury on 25 June 2018 and whether the right hip replacement surgery is needed as a result of such an alleged injury.

58. It was also submitted by the respondent that Dr Nabavi has given no opinion about causation. A report from him dealing with causation would have assisted both the Commission and the doctors that have been qualified by both parties.

59. Furthermore, the respondent submitted that the contemporaneous medical record for 26 June 2018 only refers to lower back pain and the reason for contact recorded by Dr Li was "lower back injury". It was submitted that this is consistent with Ms Candy's claim form that only refers to injury to the lower back and face. The respondent's counsel submitted that there is no reference to a right hip injury and the claim form was dated four days post the fall.

60. The respondent's counsel emphasised that the claim brought by Ms Candy in these proceedings relates only to injury on 25 June 2018, that she has not brought a nature and conditions of employment type claim.

61. The respondent submitted that Dr Powell also does not appear to have all of the material that is before the Commission. In particular, it was submitted that Dr Powell did not know that the entry of Dr Li on the day following the fall of 25 June 2018 made no reference to the right hip being injured, nor did the claim form signed by Ms Candy four days later.

62. Ms Candy's counsel submitted that the Commission needed to take a "sensible approach" to issues such as causation. It was argued if Ms Candy was having significant problems in her right hip before the fall on 25 June 2018 would she have been able to ride racehorses? However, because Ms Candy does not deal with her prior right hip problems in her statement, or in histories to the doctors, it is not possible to make the findings sought by her counsel. Even if Ms Candy has memory problems and was not in a position to make a comprehensive statement, evidence such as a report from Dr Li and/or Dr Nabavi who knew of her health pre and post 25 June 2018 would have assisted to determine, firstly, the question of injury and, secondly, the causation question about the need for the right hip replacement.

63. Not only does the contemporaneous note of Dr Li and the claim form not refer to the right hip being injured, Dr Li's referral to Dr Nabavi a month later on 20 July 2018 does not refer to Ms Candy suffering right hip pain after the fall. Dr Li's referral was for "an opinion and management of L femoral acetabular impingement syndrome- Lisa is a horse rider and she has been reporting L hip pain, intermittently giving way". Dr Nabavi in the report dated 6 August 2018 says, "This time she is seeing me with left sided hip pain." He noted that he had previously seen her for right sided hip pain. All of this evidence does not support a finding that there had been a right hip injury on 25 June 2018.

64. However, Dr Nabavi does state “she has had a recent exacerbation and her pain has been related to a fall from a horse”. Unfortunately, I find this statement is not clear in its meaning as to whether the exacerbation refers to the right or left hip.

65. Ms Candy has the onus of proof.

66. In *Nguyen v Cosmopolitan Homes (NSW) Pty Limited* [12] McDougall J stated at [44]:

> “A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336. His Honour’s statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691 at 712.”

67. Because of the unsatisfactory nature of the evidence before the Commission, I find that Ms Candy has not discharged her onus of proof in relation to the issue of injury to the right hip. Furthermore, even if Dr Nabavi’s comments could be construed to mean there had been an exacerbation of the prior right hip condition in the fall, without him providing an opinion about causation relating to the need for the right hip replacement surgery I find I cannot find that the proposed surgery is as a result of the fall on 25 June 2018. Ms Candy has a complicated medical history in terms of the right hip and I find that without fully informed expert opinion I cannot accept the opinions of either Dr Bodel or Dr Powell about these issues.

68. Ms Candy’s counsel submitted that one needs to be careful when considering the notes from a general practitioner because they do not always include the full picture. I agree that is often the case, which is why I have carefully scrutinised the clinical notes that have been put into evidence. However, where the claim form signed by Ms Candy does not refer to her right hip I cannot conclude that the several entries by Dr Li which do not refer to the right hip have omissions. It would have been helpful had the full clinical notes been placed into evidence so that it could have been ascertained when complaints about the right hip were recorded before and after 25 June 2018. It would have also been helpful to have the physiotherapy records to see if the right hip had been complained about.

69. Ms Candy’s counsel relies on parts of Dr Powell’s opinion wherein he says that it is probable she had some local trauma to the region in the fall and she may have extended some of the labral deterioration. Such matters are possible, but I cannot make such findings on the balance of probabilities because Dr Powell’s opinion has not been based on a consideration of all of the treating evidence about Ms Candy’s right hip. He has not considered the scans that were taken pre-25 June 2018 with those after. He does not know about Dr Jordan’s treatment.

70. Reference was made to the test of causation in *Kooragang Cement Pty Ltd v Bates*[13]. In *Kooragang* Kirby P (as he then was) found “what is required is a commonsense evaluation of the causal chain.”

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[12] [2008] NSWCA 246

[13] (1994) 35 NSWLR; (1994) NSWCCR 796, *Kooragang*

71. More recently, in *Comcare v Martin*[14] the High Court stated at [42]:

> "Causation in a legal context is always purposive. The application of a causal term in a statutory provision is always to be determined by reference to the statutory text construed and applied in its statutory context in a manner which best effects its statutory purpose. It has been said more than once in this Court that it is doubtful whether there is any 'common sense' approach to causation which can provide a useful, still less universal, legal norm." (Footnotes omitted)

72. In *Martin* the High Court referenced its decision in *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd*[15] wherein it was stated:

> "[96] Santow JA also emphasised that this question of causality was not at large or to be answered by 'common sense' alone; rather, the starting point is to identify the purpose to which the question is directed. Those propositions should be accepted. The following may be added.
>
> [97] First, in *March v Stramare (E & M H) Pty Ltd*, McHugh J doubted whether there is any consistent 'commonsense notion of what constitutes a cause', and added:
>
>> 'Indeed, I suspect that what commonsense would not see as a cause in a non-litigious context will frequently be seen as a cause, according to commonsense notions, in a litigious context. This is particularly so in many cases where expert evidence is called to explain a connexion between an act or omission and the occurrence of damage. In these cases, the educative effect of the expert evidence makes an appeal to commonsense notions of causation largely meaningless or produces findings concerning causation which would often not be made by an ordinary person uninstructed by the expert evidence.'"

73. In *Martin* and *GSF Australia* the High Court was dealing with different statutory provisions to that in the NSW workers compensation legislation, but the passage about doubts about a "common sense" approach providing "a useful, still less universal, legal norm" are relevant to the determinations undertaken in the Commission. However, as I understand it, Kirby P in *Kooragang* when referring to applying "commonsense" was not suggesting it be applied at large or issues were to be determined or answered by "commonsense" alone, but by a careful analysis of the evidence.

74. In *Kooragang* it was stated at [461G],

> "[f]rom the earliest days of compensation legislation, it has been recognised that causation is not always direct and immediate".

75. After referring to earlier English authorities, his Honour added at [462E]:

> "Since that time, it has been well recognised in this jurisdiction that an injury can set in train a series of events. If the chain is unbroken and provides the relevant causative explanation of the incapacity or death from which the claim comes, it will be open to the Compensation Court to award compensation under the Act."

[14] [2016] HCA 43, *Martin*

[15] [2005] HCA 26; (2005) 221 CLR 568 at 596-597 [96]- [97], *GSF Australia*

76. His Honour said at [463–464]:

> "The result of the cases is that each case where causation is in issue in a workers' compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase 'results from', is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is a commonsense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation. In each case, the question whether the incapacity or death 'results from' the impugned work injury (or in the event of a disease, the relevant aggravation of the disease), is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions. Applying the second principle which Hart and Honoré identify, a point will sometimes be reached where the link in the chain of causation becomes so attenuated that, for legal purposes, it will be held that the causative connection has been snapped. This may be explained in terms of the happening of a *novus actus*. Or it may be explained in terms of want of sufficient connection. But in each case, the judge deciding the matter, will do well to return, as McHugh JA advised, to the statutory formula and to ask the question whether the disputed incapacity or death 'resulted from' the work injury which is impugned."

77. In Ms Candy's case, I find that I cannot apply a commonsense evaluation of the causal chain because quite simply key information is missing about the causal chain. I have found that the expert evidence which is before the Commission cannot be relied upon because the opinions have been given without both Drs Bodel and Powell being appraised of all of the medical evidence both in relation to Ms Candy's right hip condition and the medical evidence immediately available after 25 June 2018, which does not refer to the right hip. Furthermore, I find I cannot make sound decisions about relevant questions of fact because Ms Candy has not discharged her onus of proof.

78. Accordingly, I make an award for the respondent.