WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **3652/20**
Applicant: **Ehab Al Masannat**
Respondent: **Baiada Poultry Pty Ltd**
Date of Determination: **11 September 2020**
Citation: **[2020] NSWWCC 317**

The Commission determines:

1. The applicant sustained injury to his cervical spine, shoulders, wrist and right hip arising out of or in the course of his employment on 20 February 2020 (deemed).

2. The applicant's employment was the main contributing factor to his injury.

The Commission orders:

3. I remit the matter to the Registrar, to be held in the medical assessment pending list, for referral to an Approved Medical Specialist for assessment of the whole person impairment as follows:

    (a) Date of injury: 20 February 2020 – disease
    (b) Body system / part:

        (i) Cervical spine;
        (ii) Right upper extremity (shoulder and wrist);
        (iii) Left upper extremity (shoulder and wrist), and
        (iv) Right lower extremity (hip) and scarring (TEMSKI).

4. The documents to be reviewed by the Approved Medical Specialist are:

    (a) Application to Resolve a Dispute and attachments;
    (b) Reply and attachments, and
    (c) Application to Admit Late Documents received on 3 September 2020.

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

Glenn Capel
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 GLENN CAPEL, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Ehab Al Masannat (the applicant) is 48 years old and commenced employment with Baiada Poultry Pty Ltd (the respondent) as a truck driver on 6 December 1999. He ceased work on 7 October 2017 as a consequence of his right hip condition. His services were terminated on 1 June 2018.

2. It seems that the applicant made a claim on Employers Mutual NSW Ltd (the insurer) in relation to injuries sustained to his neck, shoulders and hands due to the "nature and conditions" of employment on 23 May 2016. The insurer accepted liability and paid for the applicant's treatment expenses. It is unclear whether any weekly compensation was paid before the file was closed on 10 November 2016.

3. It appears that in 2018, the applicant's former solicitor served a notice of claim on the insurer for weekly compensation and medical expenses in respect of his accepted injuries. The insurer disputed that it was liable to pay weekly compensation and medical expenses in a notice issued pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) on 19 October 2018. No further action was taken in respect of this claim. Unfortunately, the letter of claim and the dispute notice are not in evidence.

4. On 20 February 2020, the applicant's solicitor served a notice of claim for lump sum compensation on the insurer. The respondent accepts that this is the correct deemed date of injury.

5. On 5 June 2020, the insurer issued a notice pursuant to s 78 of the 1998 Act, disputing that the applicant sustained an injury in a frank incident on 23 May 2016, and that he had injured his right hip as a result of the "nature and conditions" of employment on 23 May 2016.

6. The insurer denied that the applicant's employment was the main contributing factor to the contraction of a disease or an aggravation, acceleration, exacerbation or deterioration of a disease, and that he was entitled to give notice and make a claim for compensation within time. It cited ss 4, 4(b)(i) and 4(b)(ii) [sic], and 66 of the *Workers Compensation Act 1987* (the 1987 Act), and ss 254 and 261 of the 1998 Act.

7. By an Application to Resolve a Dispute (the Application) registered in the Workers Compensation Commission (the Commission) on 1 July 2020, the applicant claims lump sum compensation pursuant to s 66 of the 1987 Act due to injury sustained on 20 February 2020 (deemed).

PROCEDURE BEFORE THE COMMISSION

8. 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.

ISSUES FOR DETERMINATION

9. The following issues remain in dispute:

    (a) whether the applicant suffered an injury to his right hip during the course of his employment with the respondent – s 4(b)(ii) of the 1987 Act;

(b) whether the hip injury can be aggregated with the accepted injuries to the cervical spine, shoulder and wrists – s 65 of the 1987 Act and s 322 of the 1998 Act, and

(c) quantification of the applicant's entitlement to lump sum compensation – s 66 of the 1987 Act.

10. The parties agreed that irrespective of the outcome of the dispute, the applicant's claim should be referred to an Approved Medical Specialist (AMS).

EVIDENCE

Documentary evidence

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

(a) the Application and attached documents;
(b) Reply and attached documents, and
(c) Application to Admit Late Documents with attached documents received on 3 September 2020.

Oral evidence

12. Neither party sought leave to adduce oral evidence or cross examine any witnesses.

REVIEW OF EVIDENCE

Applicant's statement

13. Given that there is no dispute in respect of the injuries sustained to the applicant's cervical spine, shoulders and wrists, I will focus my summary on the evidence relating to the alleged right hip injury.

14. The applicant provided a statement on 16 October 2019. He confirmed that he commenced employment in or around 1999 as a truck driver with Steggles Chicken. He worked for six days and averaged 50 to 55 hours per week. His work involved delivering poultry, long haul truck driving, loading and unloading of goods, labouring duties, and general duties incidental to truck driving, labour and handling.

15. The applicant stated that his truck was loaded with fresh and frozen chicken, and he would then make his deliveries. He would drive up to 14 hours per day from 8 am to 10 pm, and he would usually complete 20 to 23 deliveries per day throughout the Sydney metropolitan area. When the respondent took over Steggles Chicken in 2011, he was expected to make no less than 37 deliveries per day. This meant that he had to drive quicker, take fewer breaks and rush the manual labour tasks such as repetitive heavy lifting of blue tubs and boxes of chicken. He often had to walk very quickly backwards, and twist and turn in confined places when pulling and pushing heavy trolleys. He felt a strain of his right hip when rushing to perform these duties.

16. The applicant stated that the blue tubs containing chicken were stacked six to seven high. He had to pull each stack from the back of the truck to the front of the truck using a hook over the non-slip surface of the truck on each average delivery. The tubs would often get caught on the anti-slip floor, so he had to exert a lot of upper body force to move the heavy tubs for a distance of about half a metre. He would jump a distance of two metres off the back of the truck, and then pull each tub off the truck and place them onto a trolley. The unloading initially involved a significant amount of bending, but the process became easier when the tubs were at waist level.

17. The applicant stated that when the stack was six to seven tubs high, he would have to stand on his toes and reach above his shoulders to get the final few stacks. When the trolley was fully loaded, he would push the trolley, which weighed up to 150 kg to the store. He would then manoeuvre the trolley around boxes, kitchen equipment and people. This involved much pivoting, pushing and turning. He was also required to unstack the tubs. He felt strains in his hips, neck, shoulders and wrists during the process.

18. The applicant stated that he consulted Dr Aboud about unbearable right hip and groin pain on 15 September 2017. He did not understand the cause of his pain so he consulted the doctor as if he had a non-work related injury. He was unaware of his workers compensation rights because he did not understand the cause of his injury. He ceased work in or around October 2017 because he was unable to carry out his duties. He consulted Dr Dave, who recommended a total right hip replacement. Dr Laird also suggested that he have the surgery, and this was performed on 8 March 2018 at Fairfield Hospital under Medicare. His hip movements and pain had improved following his operation.

Clinical notes and certificates of Dr Aboud

19. The clinical notes of Dr Aboud commence on 11 September 2008 and conclude on 17 September 2019.

20. On 15 September 2017, Dr Aboud recorded that the applicant had right hip pain and he was limping. The doctor organised some x-rays that showed moderate to severe osteoarthritis in his right hip. The doctor referred the applicant to Dr Dave on 18 September 2017, and to Dr Laird on 13 November 2017.

21. On 16 March 2018, Dr Aboud recorded that the applicant's right hip replacement was okay. There were further complaints of right hip at consultations from April 2018 to July 2018, and on 8 August 2019.

22. Little can be gleaned from the medical certificates issued by Dr Aboud, as he has identified a variety of dates of injury. His specialist referrals only sought opinion and management of the applicant's right hip osteoarthritis.

23. The initial WorkCover certificate dated 8 June 2016 referred to neck and shoulder pain, numb hands, headaches and C5 to C7 canal narrowing with a date of injury of 23 May 2016. The applicant was certified fit for his pre-injury duties. Certificates containing a similar diagnosis and date of injury were issued on 16 July 2016, 18 August 2016 and 7 September 2018.

24. The WorkCover certificates issued on 28 September 2016 referred to carpal tunnel syndrome, hand pain and numbness, with a date of injury of 26 September 2016.

25. The non-WorkCover/non-SIRA certificates issued in 2017 and 2018 do not identify the nature of the health condition causing the applicant's unfitness for work.

26. The SIRA certificate issued by the doctor on 8 August 2019 identified "right hip osteoarthritis and hip replacement" due to injury sustained on 15 October 2017.

27. The SIRA certificate issued on 23 March 2019 referred to carpal tunnel syndrome and neck pain, with a date of injury of 26 September 2016.

Reports of Dr Dave

28. In his report dated 30 October 2017, Dr Dave advised that the applicant was a truck driver who did his own loading, He had groin pain and had difficulty performing his duties. The doctor stated that the applicant had osteoarthritis in his right. He advised that a right hip replacement was indicated, and the procedure had been scheduled at Fairfield Hospital.

29. In a handwritten report dated 30 October 201, Dr Dave indicated that the applicant had severe osteoarthritis in his right hip. He advised that the applicant was unable to work as a truck driver doing loading, heavy lifting and twisting, and that he was on a wait list for surgery at Fairfield Hospital.

Reports of Dr Laird and clinical notes of Fairfield Hospital

30. Dr Laird reported on 21 November 2017. He noted that the applicant had experienced right hip symptoms for about six months, but the symptoms had been getting worse over the last few months. He recorded that the applicant had to stop work about three weeks earlier.

31. Dr Laird noted that the applicant had been working as a truck driver, which involved heavy manual labour, unloading and loading of items. He walked with a markedly antalgic gait and the x-rays showed moderate to severe arthritis. He agreed that a hip replacement was indicated and he scheduled the procedure through the public system at Fairfield Hospital. The doctor stated that after the surgery, the applicant should probably not resume heavy manual labour.

32. In a report dated 20 April 2018, Dr Laird noted that the applicant was making good progress following his operation.

33. On 19 June 2018, Dr Laird reported that the applicant was doing well. He indicated that the applicant could return to his normal duties as his symptoms would allow.

34. The clinical notes from Fairfield Hospital confirm that the surgery was undertaken by Dr Laird on 8 March 2018. There was no history recorded that dealt with the issue of causation.

Clinical notes and reports of Professor Owler and Dr Al Khawaja

35. The clinical notes and reports of Professor Owler only refer to the applicant's neck and upper limb symptoms, so they are of little assistance with respect to the current dispute.

36. In his report dated 21 July 2016, Professor Owler recorded that the applicant's duties included lifting and pulling tubs of chicken products, which could weigh up to 60 kg, lifting and stacking empty containers, often above shoulder level. The applicant had load and pull trolleys with product that weighed 80 kg to 100 kg. He recorded no history of any right hip pain.

37. The applicant did not see Dr Al Khawaja for treatment of his neck symptoms until June 2019. The doctor did not report a history of the applicant's work injuries, so his notes and reports are of no assistance.

Reports of Dr Khan

38. Dr Khan reported on 29 October 2019. His description of the applicant's pre-injury duties mirrors that contained in the applicant's statement, which is not surprising, given that the doctor was provided with a copy of that document.

39. Dr Khan recorded that on 23 May 2016, the applicant was pulling a trolley of chicken up a ramp when he fell and the trolley landed on top of him. He injured his neck and back, with pain extending to his shoulders. He saw Dr Aboud and he was referred to Drs Owler and Al Khawaja. He was prescribed conservative treatment.

40. Dr Khan reported that the applicant had to frequently jump into the back of the truck and kick and push pallets loaded with chicken with his right hip. He developed pain in the right hip and was referred for x-rays. His hip symptoms gradually worsened and he was referred to Dr Laird, who recommended surgery. This was performed on 8 March 2018. Following the surgery, he developed pain in his left hip due to over reliance on his left leg.

41. Dr Khan diagnosed an injury to the applicant's right hip causing an aggravation, acceleration and exacerbation of pre-existing osteoarthritis leading to a total hip replacement, a consequential soft tissue injury to the left leg as a result of favouring his right leg after surgery, soft tissue injuries to his shoulders, mild bilateral carpal tunnel syndrome, a musculo ligamentous injury to the cervical spine, facet joint and disc trauma with symptoms of radiculopathy, and post-surgical scarring following right total hip replacement. The doctor attributed the applicant's injuries to the work injury on 23 May 2016 and the nature and conditions of his employment.

42. Dr Khan stated that the applicant's employment was the main contributing factor to his injury. In respect of the hip injury, the doctor advised as follows:

> "It is my opinion that the pre-existing constitutional condition of mild arthritis has been aggravated and accelerated by the general nature and conditions of his employment over many years with significant stressors and strains, especially on the right hip with repeated getting in and out of the truck and repeatedly jumping in and out from the back of the truck while doing deliveries over a number of years. The jarring and abnormal stressors on the right hip have caused acceleration of his degenerative condition in the right hip as he is right hand dominant and it has mainly affected the right hip. The constitutional condition in the left hip has not suffered such acceleration and is noted to remain at a mild arthritis stage over the years.
>
> Such acceleration has led to symptoms and disabilities affecting his right hip, requiring surgery in the form of right total hip replacement."

43. Dr Khan stated that the condition in the applicant's cervical spine, shoulders and wrists was a cumulative effect and result of the nature and conditions of his employment over a number of years during the course of his employment, with the incident on 23 May 2016 causing an acute exacerbation of the condition in his neck, shoulders and arms. He stated that the applicant was unfit for his pre-injury duties and was fit for sedentary or semi-sedentary work with a lifting restriction of 5 kg.

44. Dr Khan assessed 20% whole person impairment of the right lower extremity (hip), but made a deduction of 5% pursuant to s 323 of the 1998 Act in respect of pre-existing constitutional osteoarthritis, to arrive at a figure of 15% whole person impairment. There seems to be an error on the doctor's part, because he indicated that that the appropriate deduction was one fifth. Such a deduction would have resulted in a deduction of one fifth of 20%, namely 4%, resulting in an assessment of 16% whole person impairment.

45. Dr Khan also assessed 5% whole person impairment of the cervical spine, 2% whole person impairment relating to ADLs, 14% whole person impairment of the right upper extremity (shoulder and wrist), 12% whole person impairment of the left upper extremity (shoulder and wrist), and 2% whole person impairment for scarring (TEMSKI), for a combined total of 41% whole person impairment.

46. In a supplementary report dated 23 June 2020, Dr Khan advised that the acute exacerbation on 23 May 2016 had ceased, and his assessment of the applicant's whole person impairment related to the nature and conditions of employment with the respondent.

Reports of Dr Stephenson

47. Dr Stephenson reported on 18 April 2020. He recorded a brief history of the circumstances of the applicant's injuries, which seemed to be based partly on a description contained in the letter from the respondent's solicitor, which is not in evidence. He advised as follows:

> "Mr Al Masannat [sic] complains of symptoms related to 19 years as a truck driver for Baiada Poultry Pty Ltd. I understand he drove a freezer truck. He stopped work after his right total hip replacement in March 2017 by Dr Laird. He said when he offered a certificate for absence of work it was dismissed so he used his holidays and long service leave. He had no sick leave.
>
> The operation was performed at Fairfield Public Hospital. Right total hip replacement.
>
> You refer to the nature and conditions of the work. For example, with load shifts. As he was driving a truck, he would have to enter the back of the truck and adjust the pallets and position and kick them for example. His symptoms included neck and shoulder pain from heavy lifting of heavy tubs of chicken. On examination there was a full range in both wrists and both elbows."

48. Dr Stephenson accepted that the applicant had injured his neck, shoulders, wrists and right hip. He diagnosed a "post right total hip replacement with a diagnosis related to category 2 for cervical spine. There has been soft tissue injury right shoulder and left with impairment rating there". He stated that the applicant was unfit for his pre-injury duties, and he considered that he was partially fit for work.

49. Dr Stephenson assessed 5% whole person impairment of the cervical spine, 2% whole person impairment relating to the activities of daily living (ADLs), 7% whole person impairment of the right upper extremity (shoulder), 5% whole person impairment of the left upper extremity (shoulder), 15% whole person impairment of the right lower extremity (hip) (after a one quarter deduction pursuant to s 323 of the 1998 Act), and 1% whole person impairment for scarring (TEMSKI) for a combined total of 32% whole person impairment. There was no impairment of the wrists.

50. Dr Stephenson was requested to review his opinion on causation of the applicant's right hip condition on the basis of further documentation, including the applicant's statement and a statement from Mr Mercia of the respondent. The doctor provided a supplementary report on 17 July 2020.

51. Dr Stephenson summarised the documents before him and commented as follows:

> "Basically, there is no medical evidence to confirm that the nature and conditions of employment has caused injury to the claimant's right hip. I have searched all the relevant reports. The only one suggesting that is the report of Dr Sikander Khan to Law Partners 29 October 2019.
>
> Accordingly, with reference to my report of 18 April 2020 the conclusion of the hip replacement as a work related matter on the table referred to in the report should be excised."

52. Dr Stephenson assessed 5% whole person impairment of the cervical spine, 2% whole person impairment relating to ADLs, 7% whole person impairment of the right upper extremity (shoulder), 5% whole person impairment of the left upper extremity (shoulder), and 1% whole person impairment for scarring (TEMSKI) for a combined total of 19% whole person impairment. The inclusion of 1% whole person impairment for scarring (TEMSKI) is confusing, given that the scaring related to the right hip surgery.

Statement of Adrian Mercia

53. Adrian Mercia, a distribution manager who supervised the applicant, provided a statement on 24 June 2019. He confirmed that the applicant's truck would be loaded with goods and he would then make deliveries on the North Sydney run, which was considered to be the easiest run. The applicant would hand unload the goods using a multi-use trolley. Each truck also had a hook which could be hooked onto tubs so that they could be dragged or pushed. The number of deliveries would vary from day to day.

54. Mr Mercia advised that the deliveries consisted of tubs and boxes of chicken. Empty tubs were collected from each site. Each tub varied in weight from 6 kg to 18 kg , and the boxes were similar in weight. The heaviest tub had chicken pieces that were delivered to clients such as KFC and Red Rooster.

55. Mr Mercia stated that the applicant would return to the yard at the end of the shift. The loading team would then unload the empty tubs from his truck, although drivers would usually stack the empty tubs on the dock. The driver would then wash the inside of the truck using a foaming hose and broom. The applicant drove a six-pallet rigid truck which was one of the smaller vehicles.

56. Mr Mercia stated that the applicant reported that he had sore arms on 23 May 2016, and an incident report was completed. The applicant obtained a certificate on 25 May 2016, but he did not have any time off. On 30 May 2016, the applicant complained of having a sore back, so, he added this to the incident report.

57. Mr Mercia stated that on 19 June 2017, he was advised by the payroll section that the applicant had applied to cash out 76 hours of accumulated sick leave, but his application was cancelled when he was told that he would still have to work. The applicant applied for annual leave from 10 July 2017 to 30 July 2017, and Mr Mercia believed that this was approved.

58. Mr Mercia stated that on 30 October 2017, the applicant presented a medical certificate that certified that he was unfit for work due to a right hip injury,. The applicant was on a waiting list for surgery at Fairfield Hospital. Mr Mercia had no knowledge of any hip injury or pain.

59. Mr Mercia stated that the applicant told him that his hip injury was not work related. He needed money and he wanted to cash out all of his accumulated leave. On 31 October 2017, Mr Mercia sent an email to Sarah Moore and Rebecca Porter detailing his discussion with the applicant. He was advised that once the applicant had used his leave entitlements, he would need to apply for unpaid leave to keep his position open.

60. Mr Mercia stated that on 13 November 2017, the applicant gave him an income protection form and indicated that he would be off work for at least one year. He stated that he could not resign because if he did so, he would not be covered by his income protection policy. He said that he did not know whether he would be coming back to work.

61. Mr Mercia stated that on 22 November 2017, he asked the applicant to provide a certificate that showed the periods of his incapacity and certified that he was totally unfit, as the only certificate on file dated 30 June 2017 certified that he could not work as a driver and that he was on the surgery waiting list. The applicant provided a certificate that he was unfit from 22 November 2017 to 22 February 2018.

62. Mr Mercia advised that the respondent received a TAL AusSuper Claim Employers Statement, which noted that the applicant's right hip injury was not work related. The form was completed and signed by him on 4 December 2017. A certificate from Fairfield Hospital was provided for the period 8 March 2018 to 19 April 2018.

63. Mr Mercia stated that on 20 April 2018, the respondent sent the applicant a letter regarding his ongoing absence, and he was informed that his employment might be terminated if he was unable to return to work by 18 May 2018. On 25 May 2018, the applicant was issued with an abandonment of employment letter, and his services were terminated on 1 June 2018. Mr Mercia was not aware of the applicant making any other complaints of injury and pain, and he made no complaints about the system of work or his duties.

TAL Life Ltd documents

64. The applicant completed a Member's Statement on 8 November 2017. He indicated that he had severe osteoarthritis in his right hip and he had experienced symptoms since June 2017. He first saw a doctor on 15 September 2017 and the condition was diagnosed on 30 October 2017. He ceased work the following day.

65. On 9 November 2017, Dr Aboud completed a Medical Attendant's Statement. He advised that the applicant had been unable to work since June 2017 and he first reported his hip condition on 15 September 2017. The doctor noted that the applicant had had a workers compensation claim for neck and shoulder pain. He confirmed that the applicant had right hip osteoarthritis and he was on a wait list for surgery.

66. The TAL AusSuper Claim Employer's Statement was completed by Mr Mercia on 4 December 2017. He noted that the applicant had injured his hip and he had pain due to a non-work related event, and had last worked on 7 October 2017. He acknowledged that the applicant lifted weights of 10 kg to 15 kg for 10% of the time and weights of 15 kg to 20 kg for 10% of the time. He advised that he was not aware of the applicant submitting any other claims.

67. The medical evidence comprised certificates from Drs Aboud and reports from Dr Dave. The insurer was aware that the applicant had a workers compensation claim in respect of his neck and shoulders, but his symptoms had not prevented him from working. The applicant's claim was accepted on 2 January 2018, and income protection payments commenced from 29 November 2017. Payments continued until 10 August 2018, when the applicant was cleared to return to work.

APPLICANT'S SUBMISSIONS

68. The applicant's counsel, Mr McManamey, submits that in his statement, the applicant described the heavy and repetitive duties that he performed at the respondent and how he felt strain on his hip when undertaking this work. Mr Mercia rarely takes issue with the applicant's description of his duties. He did not dispute that the applicant had to lift multiple tubs of chicken and the applicant's description of the system of work has not been challenged.

69. Mr McManamey submits that in his statement, the applicant indicated that when he consulted Dr Aboud on 15 September 2017, he did not understand what was causing his right hip pain. He never understood that the condition was work related. The applicant advised that his job involved a loft of lifting and carrying, which placed strain on his neck. The contribution that the work duties, which included twisting, turning and manoeuvring, had on his right hip was more subtle. It is of no concern what the applicant thought, but rather whether there was a work relationship.

70. Mr McManamey submits that Drs Dave, Aboud and Laird did not turn their minds to the issue of causation. In his hand written report dated 30 October 2017, Dr Dave noted that the applicant's job as a truck driver involved loading, heavy lifting and twisting, and whilst he did not comment on causation, these duties were relevant to the question of his hip problem.

71. Mr McManamey submits that in his report dated 21 November 2017, Dr Laird noted that the applicant had been troubled by hip symptoms for six months. This was worsening and the applicant had to cease work three weeks earlier. There was no history of trauma, but he was aware that the applicant's duties involved fairly heavy manual labour, loading and unloading, so although he did not comment on causation, the doctor saw the applicant's work duties as a matter of significance to raise with Dr Aboud.

72. Mr McManamey submits that Dr Khan recorded a history of the applicant's work duties that was consistent with the applicant's statement and that of Mr Mercia. The doctor provided a detailed and fully reasoned opinion as to why he considered that the applicant's pre-existing osteoarthritic condition had been aggravated and accelerated by his work duties.

73. Mr McManamey submits that Dr Stephenson recorded a brief history and seemed to rely upon the letter of instructions from the respondent's solicitor. He noted that the applicant's duties involved loading, and entering the back of a truck to adjust, position and kick pallets. That was the full extent of his understanding. He recorded no history that the work placed strain on the applicant's hip. The doctor accepted that there was a connection between the applicant's hip condition and his employment by way of cause, rather than by way of an aggravation or acceleration.

74. Mr McManamey submits that Dr Stephenson was asked to revisit his opinion and in his supplementary report, the doctor advised that there was no medical evidence to suggest that there was a causal connection between the applicant's hip condition and his work, despite having the detailed statement from the applicant in which he referred to experiencing strain on his hip. The doctor was provided with a better history and the medical records were not new. He failed to explain why he had changed his opinion.

75. Mr McManamey submits that the TAL AusSuper document was completed by the respondent, and that insurer did not make any enquiry as to whether the hip condition was work related. It was only concerned about the applicant being off work and when he would be fit to resume employment.

76. Mr McManamey submits that the cause of the applicant's neck and shoulder injuries was the totality of the applicant's work duties that involved unloading, carrying and shifting of the respondent's products. The applicant's hip condition arose from the same duties, and there was no need to break the duties down. It would be a meaningless separation, and there was no evidence to justify this. This is consistent with the reasoning in *Department of Ageing, Disability and Home Care v Findlay*[1].

77. In reply, Mr McManamey submits that Dr Laird cautioned the applicant against returning to heavy manual labour after his surgery. The work duties placed strain on the applicant's hip and this was affirmation of a relationship between heavy manual labour and the applicant's hip condition.

78. Mr McManamey submits that Dr Khan recorded details of the applicant's work duties and the respondent has not adduced any medical evidence that challenged that the work duties aggravated the osteoarthritis in the applicant's hip. Dr Stephenson initially accepted that all of the applicant's duties caused his injury and the doctor did not differentiate between tasks.

79. Mr McManamey submits that Dr Khan was not asked to differentiate between duties, but he noted that the applicant was exposed to significant stressors and strains. He seemed to bundle the neck symptoms with the hip symptoms with the same matters as causative, and he attributed the wrist injuries to manual handling of crates, loading and unloading. However, jumping into and out of the truck formed part of the loading and unloading process, so it is referenced back to the same activities.

[1] [2011] NSWWCCPD 65, (*Findlay*).

80. Mr McManamey submits that the respondent says that whatever materially contributed to the injuries to the applicant's neck, shoulders and wrists, none of those duties materially contributed to the hip condition. The test in s 322 of the 1998 Act is "results from", so if there is a contribution in some sense, then it results from the same incident. The respondent needs to establish a complete separation, but there is no evidence to support this.

RESPONDENT'S SUBMISSIONS

81. The respondent's counsel, Mr Morgan, submits that Mr McManamey says that the development of a condition is not obvious to a lay person, but this ignores the critical elements of a history given to doctors. The applicant was seen by Dr Dave in 2017 and 2018. There was a live causation issue, the appearance of a degenerative condition in a worker, and an insurer was paying for hip surgery, and yet here was no opinion expressed by Dr Dave or Dr Laird about this.

82. Mr Morgan submits that Drs Dave and Laird referred to the applicant's employment duties, but neither expressed an opinion regarding the relationship between the applicant's work and the need for treatment. The surgery and physiotherapy expenses were paid through the public system. One would have expected that reports would have been provided on causation. All that the applicant can rely upon is the post facto report of Dr Khan, some two years after the applicant had surgery.

83. Mr Morgan submits that in his report dated 30 October 2017, Dr Dave noted that the applicant was having difficulty with his work duties, but he did not suggest that the work was causing the applicant's problems. Dr Aboud referred to complaints of hip pain on 15 September 2017 and on four occasions until 2 August 2018, but there was little thereafter.

84. Mr Morgan submits that in his report dated 21 November 2017, Dr Laird recorded that the applicant's duties involved fairly heavy manual labour, but this was in the context of the difficulties that the applicant had experienced in doing the work, rather than being causative.

85. Mr Morgan submits that there is no evidence that the applicant complained to his employer regarding the aggravating effects of his work duties. The only doctor to record complaints was Dr Khan. The doctor recorded details of the fall in May 2016, but there was no mention of an injury to the applicant's right hip. There was no incident report, no complaints about any difficulty getting into and out of trucks, and no suggestion the applicant's right hip was being aggravated by his employment.

86. Mr Morgan submits that one should be cautious about accepting the contents of the applicant's statement, which was prepared by his solicitor. He submits that the solicitor was trying to "strap up" the statement evidence.

87. Mr Morgan submits that the applicant consulted Dr Aboud on a regular basis and there is no record of complaints of hip pain in the clinical notes. The applicant can only rely on the report of Dr Khan and his self-serving statement. This is cause for concern where the applicant has been seeing a number of clinicians including Dr Dave, and there is no comment regarding any work relationship. It is only when the applicant provided a statement and was seen by Dr Khan that there was any suggestion that the applicant's work had aggravated the degenerative changes on his hip.

88. Mr Morgan submits that Dr Khan recorded that the applicant suffered significant stressors and strains on his hip from repeated getting into and out of the truck and repeatedly jumping in and out of the back of the truck. He did not record a history of the applicant bumping his hip, so his history was incomplete, even though he was provided with the applicant's statement.

89. Mr Morgan submits that Dr Stephenson obtained an incomplete history, so his initial report can only be fairly read with his second report. He was provided with the clinical notes of Dr Aboud and Dr Dave, and he provided an analysis of Dr Khan's report. The doctor was satisfied that there was no medical evidence that showed a causal connection between the applicant's hip condition and his employment. Dr Stephenson's opinion should be accepted, given the unreliability associated with the applicant's statement and the onset of his symptoms.

90. Mr Morgan submits that the mechanism of injury to the applicant's neck and shoulders differs from the mechanism of injury relating to the right hip. There is no evidence that lifting and carrying tubs and boxes of chicken aggravated the applicant's hip condition. The authorities caution against lumping various injuries together under the nature and conditions of employment. The analysis involves looking at the asserted cause of injury and determining whether an injury occurs as a consequence.

REASONS

Did the applicant sustain a hip injury? – ss 4, 4(b)(i) and 4(b)(ii) of the 1987 Act

91. There is no dispute that the applicant injured his neck, shoulder and wrist during the course of his employment with the respondent, with an agreed date of injury of 20 February 2020 (deemed). The issue that I need to determine is whether the applicant suffered an injury to his right hip in terms of ss 4, 4(b)(i) and 4(b)(ii) of the 1987 Act.

92. Section 4 of the 1987 Act defines "injury" as follows:

> "In this Act-
>
> ***Injury***-
>
> (a) means personal injury arising out of or in the course of employment,
>
> (b) includes a disease injury, which means:
>
> (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and
>
> (ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease, and
>
> (c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the *Workers' Compensation (Dust Diseases) Act 1942*, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined".

93. In order to be satisfied that an injury has occurred, there must be evidence of a sudden or identifiable pathological change: *Castro v State Transit Authority (NSW)*[2], or as stated by Neilson CCJ in *Lyons v Master Builders Association of NSW Pty Ltd* [3], "the word 'injury' refers to both the event and the pathology arising from it".

[2] [2000] NSWCC 12; 19 NSWCCR 496.
[3] (2003) 25 NSWCCR 422, [429].

94. The issue of causation must be determined based on the facts in each case. The accepted view regarding causation is set out in *Kooragang Cement Pty Ltd v Bates*[4] where Kirby J stated:

> "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 common sense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation."

95. Although the High Court in *Comcare v Martin*[5] raised some concerns about the common-sense evaluation of the causal chain in a matter that concerned Commonwealth legislation, the common-sense approach still has place in the application of the legislation to the facts of the case.

96. In *Department of Education & Training v Ireland*[6], President Keating considered the principles regarding the discharge of the onus of proof. He stated:

> "The principles relevant to the discharge of the onus of proof were discussed in *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246 (16 October 2008) ('*Nguyen*') where McDougall J (McColl and Bell JJA agreeing) said at [44] – [48]:
>
> '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) 60 CLR 336. His Honour's statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in *Helton v Allen* (1940) 63 CLR 691 at 712.
>
> 45. Dixon CJ put the matter in different words, although to similar effect, in *Jones v Dunkel* (1959) 101 CLR 298 at 305 where his Honour said that '[t]he facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied'. Although his Honour dissented in the outcome of that case, the words that I have quoted were cited with approval by the majority (Stephen, Mason, Aickin and Wilson JJ) in *West v Government Insurance Office of NSW* (1981) 148 CLR 62 at 66. See also Stephen J in *Girlock (Sales) Pty Limited v Hurrell* (1982) 149 CLR 155 at 161–162, and Mason J (with whom Brennan J agreed) in the same case at 168.
>
> 46. It is clear, in particular from *West* and *Girlock*, that the requirement for actual satisfaction as to the occurrence or existence of a fact is one of general application, and not limited to cases where the fact in question, if found, might reflect adversely on the character of a party or witness.

[4] (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*), [463].
[5] [2016] HCA 43, [42].
[6] [2008] NSWWCCPD 134 (*Ireland*).

47. In *Malec v JC Hutton Pty Limited* (1990) 169 CLR 638 Deane, Gaudron and McHugh JJ said at 642-643:

> 'A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain; if the probability of it having occurred is less than it not having occurred, it is treated as not having occurred.'

48. On analysis, I think, what their Honours said is not inconsistent with the requirement that the tribunal of fact be actually persuaded of the occurrence or existence of the fact before it can be found. On their Honours' approach, what is required is a determination of the respective probabilities of the event's having occurred or not occurred. There is nothing in that analysis to suggest that the determination in favour of probability of occurrence should not require some sense of actual persuasion.'"[7]

97. Therefore, in order for the applicant to discharge the onus that he sustained a hip injury on 20 February 2020 (deemed), I "must feel an actual persuasion of the existence of that fact".

98. The applicant relies on s 4(b)(ii) of the 1987 Act, namely an aggravation, acceleration, exacerbation or deterioration of the osteoarthritic disease in his right hip arising out of or in the course of his employment with the respondent.

99. What constitutes an aggravation of a disease process was discussed by Windeyer J in *Federal Broom Co Pty Ltd v Semlitch*[8]:

> "The question that each 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".[9]

100. Prior to the 2012 amendments, s 4(b)(ii) of the 1987 Act provided that the employment had to be a contributing factor to the aggravation of a disease, and that being the case, in accordance with s 9A of the 1987 Act, it had to be a substantial contributing factor to the aggravation as opposed to the disease itself. This was confirmed by Burke CCJ in *Harpur v State Rail Authority (NSW)*[10] and in *Cant v Catholic Schools* Office[11]where he stated:

> "… the employment is required to substantially contribute to the aggravation and not the pre-existing condition other than by way of such aggravation. The frame of reference is the contribution to the aggravation not to the overall disease."[12]

101. However, s 4(b)(ii) of the 1987 Act now provides that the employment must be the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease. Therefore, as in *Cant*, the employment needs to be the main contributing factor to the aggravation of the disease rather than the main contributing factor to the disease itself.

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[7] *Ireland*, [89].
[8] [1964] HCA 34; 110 CLR 626 (*Semlitch*).
[9] *Semlitch*, [369].
[10] [2000] NSWCC 3; (2000) 19 NSWCCR 256, [79].
[11] [2000] NSWCC 37 (*Cant*).
[12] *Cant*, [23].

102. In his statement, the applicant described the heavy nature of his work duties that he had performed for the respondent and its predecessor for 19 years. He worked for long hours, six days per week. He would drive for up to 14 hours per day and since 2011, he would make up to 37 deliveries of fresh and frozen chickens. He was required to unload tubs and boxes of chickens that weighed up to 15 kg each from the back of his truck. ‘

103. The applicant stated that the tubs were stacked up to six or seven high and he had to reach above shoulder level to reach the final stacks. He had to pull each stack from the back of the truck with a hook. The tubs would catch on the anti-slip floor and this made the task more difficult. He had to work quickly, and he had to twist and turn when pulling and pushing trolleys in confined spaces. He stated that he felt a strain of his right hip when rushing to perform these duties.

104. The applicant indicated that once he had moved the tubs to the back of the truck, he would jump out of the truck, pull each tub off the truck and place them onto a trolley. There was significant bending involved in the process. He would then push the loaded trolley that weighed up to 150 kg to the shop. He had to pivot, twist, turn and manoeuvre the trolley of tubs, unstack the tubs and load empty tubs. He claimed that he felt strains in his hips, neck, shoulders and wrists during the process.

105. Mr Morgan submits that one should view the applicant’s statement with some caution, because it has been drafted by his solicitor. However, if such a position was adopted in the Commission, every statement completed by a solicitor, employer or investigator would have to viewed in the same light.

106. Rarely do witnesses draft their own statements, and those that do tend to focus on irrelevant matters that have nothing to do with the dispute at hand. The applicant signed the statement, so he adopted its contents and accepted that it was correct. The weight to be given to the statement will depend upon its accuracy and consistency when viewed with other evidence. I have no reason to question the reliability of the applicant’s evidence merely because his statement contains words like “contemporaneous” or “material cause”.

107. The applicant’s description of his work duties has been largely corroborated by Mr Mercia. He confirmed that the tubs and boxes weighed 6 kg to 18 kg, and whilst he suggested that the North Sydney run was one of the easiest, he did not challenge what the applicant had to say about the heavy manual nature of the work.

108. According to the documents submitted to TAL Life Ltd, the applicant had been experiencing symptoms in his right hip since June 2017, but he had not reported his condition to Dr Aboud until 15 September 2017. Dr Aboud incorrectly reported that the applicant had not worked since June 2017. Curiously, the income protection insurer accepted the claim without question and without obtaining its own medical opinion.

109. I doubt that much can be made about the fact that the applicant made a claim on the income protection rather than the workers compensation insurer. According to the applicant’s statement, he did not understand the cause of his pain and he was unaware of his workers compensation rights, so he consulted Dr Aboud as if he had suffered a non-work related injury.

110. Given that the applicant is not a doctor, such a position is understandable, and it would seem that Dr Aboud did not look upon the applicant’s complaints as the result of a work injury.

111. Much has been made of the absence of any opinion on causation from the applicant’s treating doctors, particularly from Dr Dave, who is often involved in matters that come before the Commission. It certainly would have been prudent for the applicant’s solicitor to seek opinions on causation from Drs Aboud, Dave and Laird, but the absence of such evidence does not necessarily mean that the applicant’s claim must fail. As discussed in *Ireland*, I must feel an actual persuasion that the applicant was injured.

112. Little can also be gleaned from Dr Aboud's notes apart from the fact that there was a record of some complaints of hip pain. It is true that Dr Aboud's views on causation are unknown, but the doctor issued a SIRA certificate on 8 August 2019 identified a hip injury sustained on 15 October 2017, which might be interpreted as an acceptance of a work injury.
113. Similarly, the clinical notes and reports of Drs Dave and Laird provide no assistance regarding the question of causation. Both doctors acknowledged that the applicant was involved in heavy manual duties and Dr Dave noted that the applicant's hip symptoms compromised his ability to carry out his duties. Dr Laird recommend that the applicant refrain from truck driving after his surgery.

114. Therefore, there is no evidence from the treating doctors regarding the causal nexus between the applicant's hip condition and his employment duties. However, that is not surprising, because it appears that the doctors' views on causation were never sought.

115. The absence of a history of injury in the clinical notes is not fatal to the applicant's claim. In decisions such as *Davis v Council of the City of Wagga Wagga*[13]*, Nominal Defendant v Clancy*[14]*, King v Collins*[15]and *Mastronardi v State of New South Wales*[16], the Court of Appeal cautioned against placing too much weight on the clinical notes of treating doctors, given their primary concern was treatment. In the Court's view, the notes rarely, if ever, represent a complete record of the exchange between a busy doctor and the patient.

116. This also was confirmed in *Winter v NSW Police Force*[17], where Deputy President Roche stated:

> "It is important to remember that clinical notes are rarely (if ever) a complete record of the exchange between a patient and a busy general practitioner. For this reason, they must be treated with some care (*Nominal Defendant v Clancy* [2007] NSWCA 349 at [54]; *Davis v Council of the City of Wagga Wagga* [2004] NSWCA 34 at [35]; *King v Collins* [2007] NSWCA 122 at [34] – [36])."[18]

117. The clinical notes of Dr Aboud are lacking in detail and I do not have the benefit of Dr Dave's actual notes, only copies of various reports. Therefore, the contents of their medical files must be treated with some caution.

118. According to Mr Mercia, the applicant presented a certificate for a hip injury on 30 October 2017. There is no certificate in evidence that was issued on or around this date. Mr Mercia may have been in fact referring to the handwritten report Dr Dave of that date. Mr Mercia stated that the applicant told him that his injury was not work related, which is consistent with the applicant's understanding about his hip symptoms, but he did not disclose how he was injured outside of the work place.

119. Mr Mercia stated that the applicant made no complaints about his hip or his duties, but that does not mean that the applicant did not suffer an injury or was experiencing problems, only that he did not complain. He was a long term employee and it would seem that he was motivated to work in order to support his family, as evidenced by his post-surgery employment.

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[13] [2004] NSWCA 34.
[14] [2007] NSWCA 349.
[15] [2007] NSWCA 122.
[16] [2009] NSWCA 270.
[17] [2010] NSWWCCPD 12 (*Winter*).
[18] *Winter*, [183].

120. Therefore, the medical dispute basically comes down to the opinions of the two qualified specialists.

121. Dr Khan recorded a detailed history of the applicant's pre-injury duties that included loading and unloading activities, jumping into and out of the truck, kicking and pushing pallets with his right hip, and pushing and manoeuvring loaded trolleys. This history is consistent with that contained in the applicant's statement and has been largely corroborated by Mr Mercia. The fact that Dr Khan did not record a history of the applicant bumping his hip does not appear to me to be a material concern, and in any event, Dr Khan would have been aware of this fact because he was provided with a copy of the applicant's statement.

122. Dr Khan was satisfied that the applicant suffered an aggravation, acceleration and exacerbation of pre-existing osteoarthritis leading to a total hip replacement. He confirmed that the hip, neck shoulder and wrist conditions resulted from the cumulative effect of the nature and conditions of his employment over a number of years during the course of his employment.

123. In his initial report, Dr Stephenson accepted that the applicant injured his right hip, neck, shoulders and wrists as a result of his employment duties. The history that he reported was remarkably brief, and had the applicant been relying on his report as his own qualified specialist in support of his claim, little weight could have been given to his evidence as the doctor had not provided a fair climate for his opinion in accordance with the principles discussed in *Hancock v East Coast Timbers Products Pty Ltd*[19]and *Paric v John Holland (Constructions) Pty Ltd*[20]*.*

124. There are also concerns with Dr Stephenson's supplementary report. The doctor was provided with further evidence, although this has not been identified. When the doctor compiled his initial report, he was provided with a comprehensive medical file, so it appears that the only fresh evidence consisted of the statements of the applicant and Mr Mercia.

125. Dr Stephenson stated that there was no medical evidence, apart from Dr Khan, to confirm that the applicant suffered an injury to his right hip. In other words, he has taken the treating doctors reports and notes at face value. Whilst the doctor provided a brief summary of the history recorded by Dr Khan, Dr Stephenson did not engage with Dr Khan's opinion and merely dismissed his views without comment.

126. Further, whilst the doctor summarised the history recorded in the applicant's statement, he seems to have disregarded the applicant's evidence without providing any reasons for doing so. In the circumstances, I do not consider that Dr Stephenson's opinion should be preferred to that of Dr Khan.

127. Therefore, despite the absence of a contemporaneous record of complaints and opinions from the applicant's treating doctors on the issue of causation, bearing in mind the statutory requirements of s 4(b)(ii) of the 1987 Act and the principles set out in *Kooragang*, I am satisfied that the applicant sustained an injury to his right hip arising out of or in the course of his employment on 20 February 2020.

128. In previous decisions, I have held that "main contributing factor" can be interpreted as the "chief" or "principal" contributing factor. In this matter, having regard to the detailed and well-reasoned explanation from Dr Khan regarding this issue, and in the absence of any persuasive evidence to the contrary, I accept that the applicant's employment was the main contributing factor to his hip injury.

[19] [2011] NSWCA 11.
[20] [1985] HCA 58.

Aggregation

129. Mr McManamey submits that the cause of all of the applicant's injuries was the totality of his work duties. This involved unloading, carrying and shifting of the respondent's products, and there is no need to break down the work into the individual tasks. He submits that Dr Khan attributed the applicant's injuries to all of his delivery duties that involved stresses and strains. The applicant's injuries resulted from the same mechanism.

130. In contrast, Mr Morgan submits that the mechanism of injury to the applicant's neck and shoulders differs from that relating to the right hip, and that there was no evidence that lifting and carrying tubs and boxes of chicken aggravated the applicant's hip condition.

131. The relevant provisions regarding aggregation can be found in s 65 of the 1987 Act and s 322 of the 1998 Act.

132. Section 65 of the 1987 Act provides:

> "**65 Determination of degree of permanent impairment**
>
> (1) For the purposes of this Division, the degree of permanent impairment that results from an injury is to be assessed as provided by this section and Part 7 (Medical assessment) of Chapter 7 of the 1998 Act.
>
> (2) If a worker receives more than one injury arising out of the same incident, those injuries are together to be treated as one injury for the purposes of this Division.
>
> **Note:** The injuries are to be compensated together, not as separate injuries. Section 322 of the 1998 Act requires the impairments that result from those injuries to be assessed together. Physical injuries and psychological/psychiatric injuries are not assessed together. See section 65A.
>
> (3) If there is a dispute about the degree of permanent impairment of an injured worker, the Commission may not award permanent impairment compensation or pain and suffering compensation unless the degree of permanent impairment has been assessed by an approved medical specialist."

133. Section 322 of the 1998 Act provides:

> **"322 Assessment of impairment**
>
> (a) The assessment of the degree of permanent impairment of an injured worker for the purposes of the Workers Compensation Acts is to be made in accordance with Workers Compensation Guidelines (as in force at the time the assessment is made) issued for that purpose.
>
> (b) Impairments that result from the same injury are to be assessed together to assess the degree of permanent impairment of the injured worker.
>
> (c) Impairments that result from more than one injury arising out of the same incident are to be assessed together to assess the degree of permanent impairment of the injured worker.
>
> **Note:** Section 65A of the 1987 Act provides for impairment arising from psychological/psychiatric injuries to be assessed separately from impairment arising from physical injury."

134. The principles concerning aggregation was discussed by Deputy President Roche in *Department of Juvenile Justice v Edmed*[21]. Mr Edmed fractured his right scaphoid and radial styloid at work in March 2003 and he suffered a further injury to his wrist in August 2004. He sought lump sum compensation in respect of the combined effects of both injuries, and following an assessment by an AMS, an arbitrator entered an award in accordance with the Medical Assessment Certificate and ordered the respondent to pay compensation for pain and suffering.

135. On appeal, after referring to the definition of "injury" in s 4 of the 1987 Act, the Deputy President stated:

> "This definition is unhelpful in determining the issue before me. In *Lyons*, Judge Neilson held that 'injury' refers to 'both the [injurious] event and the pathology arising from it'. I accept that definition as being appropriate for many purposes under the 1987 Act and the 1998 Act. That the term 'injury' can have two different meanings is acknowledged in section 322(3) of the 1998 Act where reference is made to 'Impairments that result from more than one injury arising out of the same incident...' (emphasis added). This reference to 'injury' can only mean the 'pathology' that has resulted from the relevant work 'incident' or injurious event. For example, if a worker falls and suffers a broken leg and separate and distinct nerve damage in the arm, he or she has suffered more than one 'injury' (an injured leg and an injured arm) within the terms of section 322(3) resulting from the one 'incident'. In other words, he or she has suffered more than one pathology ('injury') as a result of the one incident or injurious event. Those 'injuries' are to be assessed together. This interpretation is consistent with section 65(2) of the 1987 Act and is uncontroversial.
>
> The difficulty arises when a worker suffers one pathology ('injury') as a result of several independent 'incidents' or injurious events. This situation is partly addressed in section 322(2), which provides that 'Impairments that result from the same injury are to be assessed together to assess the degree of permanent impairment of the injured worker' (emphasis added). The reference to 'the same injury' in section 322(2) cannot be a reference to 'the same incident' because that situation is dealt with in section 322(3). The expression 'the same injury' is not defined but it follows that if 'injury' in section 322(3) means 'pathology' (as it must), then, for the section to be logically consistent, it must mean the same in section 322(2). If 'injury' in section 322(2) means 'pathology' then, for section 322(2) to be consistent with section 322(3), impairments resulting from the 'same injury' (the same pathology) are to be 'assessed together' regardless of whether they arise from the same 'incident' or separate incidents.
>
> In my view the words 'the same' in section 322(2) must be given their normal meaning. The Macquarie Dictionary, second edition, defines 'same' to mean:
>
> '1. identical with what is about to be or has just been mentioned: *the very same man*;
> 2. being one or identical, though having different names, aspects, etc: *these are one and the same thing*;
> 3. agreeing in kind, amount, etc; corresponding: *two boxes of the same dimensions*;
> 4. unchanged in character, condition, etc. –pron;
> 5. the same person or thing;
> 6. **the same**, with the same manner (used adverbially);

[21] [2008] NSWWCCPD 6, (*Edmed*).

7. **all the same, a.** notwithstanding; nevertheless; **b.** immaterial; unimportant;
8. **just the same, a**. in the same manner, **b.** nevertheless.'

Applying this definition, the 'same' means 'identical'."[22]

136. The Deputy President continued:

> "Impairments that result from more than one injury (pathology) arising out of the same incident are to be assessed together (section 322(3) of the 1998 Act and section 65(2) of the 1987 Act). Impairments that result from the 'same injury' (pathology) are to be assessed together even if they have resulted from different incidents, but the pathology (injury) resulting from each incident must be identical (section 322(2))." [23]

137. The Deputy President determined that the pathologies in Mr Edmed's wrist were not identical, so the assessments of impairment could not be aggregated and there was no entitlement to compensation for pain and suffering.

138. The combined effect of s 65(2) of the 1987 Act and ss 322(2) and 322(3) of the 1998 Act is that injuries and impairments sustained in the one incident are to be assessed together.

139. In this matter, the applicant claims that he suffered one pathology or injury affecting his neck, shoulders, wrists and right hip as a result of the "nature and conditions" of employment with a deemed date of 20 February 2020, and accordingly, his injuries should be aggregated in accordance with s 322(2) and 322(3) of the 1998 Act. He does not rely on separate incidents or injurious events. This claim is similar to the facts in *Findlay*.

140. In *Findlay*, an arbitrator accepted that the worker sustained injuries, being aggravations of a disease in her neck and back on different deemed dates, as a result of heavy duties that she performed for her employer.

141. On appeal, Deputy President Roche determined that the injuries resulted from the same injurious incident in accordance with s 322(3), namely the heavy repetitive duties that Ms Findlay performed for her employer, so her impairments should be assessed together.

142. According to Dr Khan, the applicant's right hip osteoarthritis had been aggravated and accelerated by the general nature and conditions "with significant stressors and strains, especially on the right hip with repeated getting in and out of the truck and repeatedly jumping in and out from the back of the truck". He commented that the "jarring and abnormal stressors on the right hip" caused the acceleration of his degenerative condition, and he accepted that the applicant's hip, neck shoulder and wrist conditions resulted from the cumulative effect of the nature and conditions of his employment over a number of years.

143. I do not think that it is possible or that there is a need to dissect each and every task of the applicant's onerous delivery duties when one considers the issue of causation and aggregation. Common-sense would suggest that all of the applicant's heavy duties had the potential to aggravate or accelerate his degenerative condition, not only in his hip, but in his neck, shoulders and wrists.

144. Dr Khan has not suggested that the other duties, such as lifting and carrying, did not cause jarring or place abnormal stress on other parts of the applicant's body, including his right hip. He has not differentiated between the various delivery tasks, and I see no reason why I should do so in the absence of medical evidence to suggest otherwise.

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[22] *Edmed*, [26] to [29].
[23] *Edmed*, [39].

145. Accordingly, I am satisfied that the applicant's condition results from more than one injury (pathology) arising out of the same incident, and that the injuries to the applicant's neck, shoulders, wrist and right hip should be assessed together.

Quantification of whole person impairment

146. I will remit this matter to the Registrar for referral to an AMS pursuant to s 321 of the 1998 Act for assessment of the whole person impairment of the applicant's cervical spine, right upper extremity (shoulder and wrist), left upper extremity (shoulder and wrist), right lower extremity (hip) and scarring (TEMSKI) due to injury sustained on 20 February 2020 (deemed).

FINDINGS

147. The applicant sustained injury to his cervical spine, shoulders, wrists and right hip arising out of or in the course of his employment on 20 February 2020 (deemed).

148. The applicant's employment was the main contributing factor to his injury.

ORDERS

149. I remit the matter to the Registrar, to be held in the medical assessment pending list, for referral to an AMS for assessment of the whole person impairment as follows:

    (a) Date of injury: 20 February 2020 – disease
    (b) Body system / part:

        (i) Cervical spine;
        (ii) Right upper extremity (shoulder and wrist);
        (iii) Left upper extremity (shoulder and wrist), and
        (iv) Right lower extremity (hip) and scarring (TEMSKI).

150. The documents to be reviewed by the AMS are:

    (a) Application and attachments;
    (b) Reply and attachments, and
    (c) Application to Admit Late Documents received on 3 September 2020.