WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **5045/18**
Applicant: **Hannah Burton**
Respondent: **Queanbeyan Racing Club**
Date of Determination: **20 September 2019**
Citation: **[2019] NSWWCC 308**

The Commission determines:

1. The applicant suffered injury to the lumbar spine in the course of her employment with the respondent on 5 June 2013 and further suffered a consequential condition affecting the peripheral nerves in the right and left lower extremities.

2. The applicant's employment was a substantial contributing factor to the injury to the lumbar spine.

3. The claim pursuant to section 66 of the *Workers Compensation Act 1987* is remitted to the Registrar for referral to an Approved Medical Specialist (who the parties agree should be a neurosurgeon) to determine whole person impairment, if any, arising from injury to the lumbar spine in the course of employment and from consequential condition in the right lower extremity (peripheral nerve) and left lower extremity (peripheral nerve).

4. The material to be supplied to the Approved Medical Specialist should include:

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

    (b) Reply and attached documents;

    (c) Report of Dr Patrick dated 21 November 2018 attached to Application to Admit Late Documents by the applicant dated 26 November 2018;

    (d) Documents attached to Application Admit Late Documents by the Respondent dated 6 December 2018;

    (e) Report of Associate Professor Miniter dated 4 March 2019 attached to Application to Admit Late Documents by the respondent dated 4 March 2019;

    (f) Report of Dr Patrick dated 13 March 2019 attached to Application to Admit Late Documents by the Applicant dated 14 March 2019;

    (g) Paragraph 2 of the report of associate Professor Miniter dated 5 August 2019 attached to Application to Admit Late Documents by the respondent;

    (h) Medical Assessment Certificate Dated 20 March 2019 by Dr Mohammed Assem;

    (i) Applicant's Schedule of Evidence presented to the Approved Medical Specialist upon reconsideration request;

(j) Respondent's Schedule of Evidence presented to the Approved Medical Specialist upon Reconsideration Request and

(k) Medical Assessment Certificate declining reconsideration dated 11 July 2019 by Dr Mohammed Assem dated 11 July 2019.

5. The claim pursuant to section 60 of the *Workers Compensation Act 1987* is stood over and the Registrar is requested to permit a further telephone conference following receipt of the Medical Assessment Certificate for further consideration of that claim.

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

W Dalley
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 WILLIAM DALLEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Hannah Burton (Ms Burton/the applicant) suffered an injury on 5 June 2013, when she fell from a horse in the course of her employment as a rider engaged in trackwork (the subject accident) at Queanbeyan race course. By the operation of Clause 8 of Schedule 1 to the *Workplace Injury Management and Workers Compensation Act 1998* Ms Burton is deemed to be a worker employed by the relevant racing club, in this case the Queanbeyan Racing Club (the respondent).

2. Ms Burton was conveyed to Queanbeyan Hospital where an x-ray was interpreted as showing a likely avulsion injury to the right hip. Ms Burton was unable to weight bear and was admitted to the hospital. Upon discharge on 7 June 2013, Ms Burton was provided with crutches to assist mobility and analgesics for pain management. She was referred to a physiotherapist.

3. Ms Burton did not return to work doing track riding. She subsequently found other employment from January 2014. She worked in a variety of roles and ultimately established her own cleaning business.

4. Ms Burton complained to her general practitioner in April 2016 of continuing pain in her low back. A lumbar spine MRI examination was carried out and she was referred to Associate Professor Michael Neil at St Vincent's Hospital. Professor Neil was of the opinion that the symptoms that Ms Burton was experiencing originated in the spine.

5. Professor Neil referred Ms Burton to Dr Richard Day, consultant physician, for management. Dr Day recommended blood tests and suggested image guided injections of the sacroiliac joints with corticosteroids.

6. Ms Burton's claim for workers compensation benefits was accepted by the insurer in July 2013 in respect of injury to the right hip. Ms Burton's solicitors made a further claim on her behalf in mid-2017 seeking payment of more recent treatment expenses and weekly payments. That claim was declined by the insurer on the basis that any incapacity or need for treatment did not result from the subject accident.

7. Ms Burton was examined by Dr Patrick, general surgeon, on 24 November 2017. Dr Patrick diagnosed a lumbar spinal injury with radiculopathy in the right leg which he felt had led to weight gain leading to the consequential onset of peripheral nerve symptoms in both legs.

8. Dr Patrick assessed Ms Burton as falling within DRE Lumbar Category III and assessed 12% whole person impairment with respect to the lumbar spine. He assessed a further 3% in respect of both the right and left lower extremities attributable to peripheral nerve damage.

9. Ms Burton's solicitors made a claim for lump-sum payment pursuant to section 66 of the *Workers Compensation Act 1987* (the 1987 Act) based on Dr Patrick's assessment. That claim was declined by the insurer who denied the injury alleged.

10. Ms Burton's solicitors subsequently commenced proceedings in the Commission filing an Application to Resolve a Dispute (the Application) alleging injury on 5 June 2013 to the "lumbar spine and both lower extremities, and secondary psychological injury including aggravation [sic]". The Application claimed lump sum compensation pursuant to section 66 of the 1987 Act in respect of 17% whole person impairment arising from impairment resulting from injury on 5 June 2013 to the "lumbar spine, right lower extremity (peripheral nerve) and left lower extremity (peripheral nerve)" and reimbursement of treatment expenses pursuant to section 60 of the 1987 Act.

11. The respondent by its Reply maintained denial of liability, disputing the injuries alleged.

12. The dispute was referred for conciliation conference and arbitration hearing at Queanbeyan on 20 December 2018 before a Commission Arbitrator. The parties reached agreement to seek a non-binding opinion from an Approved Medical Specialist and consent orders were made in the following terms:

> "1. Grant leave to amend the cover page of the Application to Resolve a Dispute and Reply by substituting the name Queanbeyan Racing Club, for the Respondent.
>
> 2. The matter is remitted to the Registrar for referral to an approved medical specialist, on or after 4 February 2019, to assess the following general medical disputes:
>
> a) whether, and if so, how, the peripheral nerve system of the applicant's right lower extremity has been affected (directly or indirectly) by falling from horse on 5 June 2003.
>
> b) whether, and if so, how, the peripheral nerve system of the applicant's left lower extremity has been affected (directly or indirectly) by falling from horse on 5 June 2003.
>
> 3. The Registrar is requested to furnish the following documents to the approved medical specialist:
>
> a) Application to Resolve a Dispute with attached documents.
>
> b) Reply with attached documents.
>
> c) Applicant's Application to Admit Late Documents dated 21 November 2018 (as to which, leave is granted to refile in the Commission).
>
> d) Respondent's Application to Admit Late Documents dated 6 December 2018.
>
> e) Any further Application to Admit Late Documents to be filed by the party on or before 4 February 2018.
>
> 4. The claims pursuant to section 66 and 66 [sic] of the Workers Compensation Act 1987 are reserved for determination by the commission."

13. The Approved Medical Specialist (the AMS), Dr Mohammed Assem, issued a Medical Assessment Certificate dated 20 March 2019.

14. The dispute was again listed for hearing before the Arbitrator on 1 May 2019. The matter proceeded to hearing. Both parties presented submissions with respect to the issue of whether Ms Burton had suffered injury to the lumbar spine on 5 June 2013 and whether injury to the lumbar spine had resulted in a peripheral nerve disorder in the lower extremities. The issue of treatment expenses was reserved pending the decision with respect to the allegation of injury and any resultant pathology.

15. In the course of submissions the respondent drew attention to the material which had been supplied to the AMS, noting that it appeared that only the Application and the Reply had been supplied and the AMS had not had the benefit of the later material.

16. The Arbitrator considered that, in the circumstances, it was appropriate to request a reconsideration of the Medical Assessment Certificate and to supply the material to the AMS as listed in the Certificate of Determination issued on 20 December 2018 together with further documents attached to the Respondent's Application to Admit Late Documents dated 4 March 2019 and the documents attached to the applicant's Application Admit Late Documents dated 13 March 2019.

17. The Arbitrator granted leave to both parties to file a schedule "setting out, by reference to page numbers, any clinical notes and scans to which it requests the approved medical specialist to have specific regard".

18. On 11 July 2019 the AMS issued a Medical Assessment Certificate upon Further Assessment or Reconsideration dated 11 July 2019. The AMS considered that the additional material did not cause him to alter his conclusions expressed in the Medical Assessment Certificate dated 20 March 2019.

19. The dispute was then listed for further hearing before me at Queanbeyan, the Arbitrator who had previously heard the matter being unavailable. A recording of the proceedings before the previous Arbitrator was available.

ISSUES FOR DETERMINATION

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

    (a) Did the applicant suffer injury to her lumbar spine in the course of employment with the respondent on 5 June 2013?

    (b) Did the applicant suffer the onset of a peripheral nerve disorder in the right and left lower extremities as a result of injury to the lumbar spine and/or right hip in the course of employment on 5 June 2013?

    (c) Are the treatment expenses claimed reasonably necessary as a result of the subject injury?

21. The issue of the extent of any impairment arising from the subject injury was agreed by the parties to be a matter for assessment by an AMS if injury was established.

PROCEDURE BEFORE THE COMMISSION

22. 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

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

    (a) Application and attached documents;

    (b) Reply and attached documents;

    (c) Report of Dr Patrick dated 21 November 2018 attached to Application to Admit Late Documents by the applicant dated 26 November 2018;

    (d) Documents attached to Application Admit Late Documents by the Respondent Dated 6 December 2018;

    (e) Report of Associate Professor Miniter dated 4 March 2019 attached to Application to Admit Late Documents by the respondent dated 4 March 2019;

    (f) Report of Dr Patrick dated 13 March 2019 attached to Application to Admit Late Documents by the Applicant dated 14 March 2019;

    (g) Paragraph 2 of the report of associate Professor Miniter dated 5 August 2019 attached to Application to Admit Late Documents by the respondent;

    (h) Medical Assessment Certificate Dated 20 March 2019 by Dr Mohammed Assem;

    (i) Applicant's Schedule of Evidence presented to the AMS upon reconsideration request;

    (j) Respondent's Schedule of Evidence presented to the AMS upon Reconsideration Request and

    (k) Medical Assessment Certificate declining reconsideration dated 11 July 2019 by Dr Mohammed Assem dated 11 July 2019.

Oral Evidence

24. No application was made to adduce oral evidence or to cross examine any witness.

FINDINGS AND REASONS

25. It is convenient to consider the issues of injury to the lumbar spine and the allegation of a consequential condition together.

26. Counsel for the applicant submitted that there was no dispute that Ms Burton had suffered a heavy fall on her right hip on 5 June 2013 which had resulted in her being hospitalised. X-ray investigation upon admission to Queanbeyan Hospital had shown an avulsion fracture at the right lesser trochanter and there was a report of back pain.

27. Counsel for Ms Burton submitted that the evidence of the applicant was that she had continued to suffer low back pain which had ultimately led her to seek further treatment. The circumstances of the subject injury were such that it was likely to have caused injury to the lumbar spine and there was clear evidence of damage to adjacent structures including the sacroiliac joint.

28. There was no evidence of any other event which might have caused the symptoms in the lumbar spine.

29. The opinion of Associate Professor Miniter was flawed. The report of examination was submitted to be "scant" and he did not address the issue of whether there was an injury to the lumbar spine, noting "the cause of pain is not clear". In his later reports Professor Miniter did not come to grips with the issue of causation as reported by the AMS and which was supported by Dr Patrick on the issue of causation of the peripheral nerve damage. The preponderance of medical opinion favoured acceptance of the view of Dr Patrick and supported the causal link between the subject injury and subsequent problems in the lumbar spine and the legs.

30. In the circumstances, it was submitted, the evidence provided a fair climate for accepting the opinion of Dr Patrick that, as a result of the subject injury, Ms Burton had suffered an injury to her lumbar spine which had gradually worsened to the point where treatment was required.

31. Counsel for the applicant submitted that the evidence established, on the balance of probabilities, that as a result of injury to the lumbar spine, the applicant had suffered substantial weight gain due to forced inactivity which had led to peripheral nerve damage in both legs.

32. The solicitor for the respondent submitted that the evidence did not establish injury to the lumbar spine or a consequential condition in the legs resulting from weight gain in turn attributable to inactivity resulting from the lumbar spine injury.

33. The solicitor for the respondent submitted that there was no chain of causation established by the evidence. The evidence of the Queanbeyan District Hospital records in respect of Ms Burton's admission following her fall from the horse did not establish injury to the lumbar spine. Although there had been radiological examination of the neck, right hip and chest there was no radiological examination of the lumbar spine. The necessary inference was that there was no indication of injury to the lumbar spine.

34. The solicitor for the respondent submitted that it was unnecessary for the respondent to prove an alternative cause for the lumbar spine symptoms complained of in later years which could have occurred without any particular causative event. This was illustrated by the records of the Queanbeyan District Hospital discharge summary on 18 December 2015 which noted the spontaneous onset of neck pain radiating to the thoracic back.

35. From 28 August 2013, when the treating general practitioner noted a full range of motion, there was no reference in the medical records of any problem with the lumbar spine until 2016. That fact weighed against acceptance that there was an ongoing history of pain associated with injury to the lumbar spine.

36. The evidence as to weight gain was equivocal. Treating specialists had attributed weight gain to depression. The evidence did not establish the level of inactivity which had been accepted by Dr Patrick and the AMS, Dr Assem. Ms Burton had continued to ride horses and as late as 2018 was recorded as having participated in deer hunting.

37. The solicitor for the respondent submitted that, if injury to the lumbar spine was to be regarded as a “disease injury” than the evidence established that the respondent was not the last employer with respect to work tasks to which such injury would be due.

38. In reply counsel for the applicant submitted that any gap in the record of low back pain was explained by Ms Burton’s statement that she had complained to Dr Hendry of pain in her back while in hospital but Dr Hendry had been of the opinion that the pain was radiating from the hip and that Dr Hendry had said “he could only fix one thing at a time”.

Evidence

39. In her statement dated 19 September 2018, Ms Burton said that she had been employed as a “casual trackwork rider” from February 2013. She said that her duties included riding and handling horses, taking care of the stables, feeding and attending to the horses and training horses.”

40. I am not convinced that Ms Burton was a “supreme athlete” at the time of the subject injury but I accept that she was in good physical condition prior to the subject accident.

41. Ms Burton described her fall from horse on 5 June 2013: “I was riding a racehorse at Queanbeyan racecourse when the horse bucked, and I was thrown off the back of the horse. I landed heavily on the ground in my right hip.”

42. Ms Burton said that she had been taken to Queanbeyan Hospital where her right hip, cervical spine and chest were x-rayed. The x-ray had shown fracture of the right lesser femoral trochanter.

43. Ms Burton said that she could not weight-bear on the right leg due to pain. She was given crutches for mobility and analgesics to assist with the pain. She was discharged from hospital on 7 June 2013 and her treatment was then undertaken by her general practitioner, Dr Hendry.

44. Ms Burton noted that Dr Hendry had referred her to Dr Michael Neil who had then referred her to Dr Day. She said that those doctors had “agreed that I had dislocated my knee in the accident and crushed a vertebra.”

45. Ms Burton described her employment activities following the subject accident. She said that she was off work for approximately 11 months after her injury but also stated that from January 2014 to April 2014 she had been employed as a sales assistant at Spotlight. She had then moved to the Northern Territory from April 2014 to September 2014 where she had worked as a contract labourer and station hand.

46. Ms Burton said she had then worked at a McDonald’s store and then commenced a second job in August 2015 working as a waitress in Bredbo. She said that during that time she had also worked spraying weeds under a contract. She said that this work was difficult as required her to be on her feet all day which she said was “hard on my back”.

47. Ms Burton said:

> “Although I tried a variety of work, I was unable to hold any job longer than about five months due to my injury and the pain I was in. I would have to have days off due to my symptoms and it became difficult for my employer to rely on me. I was sacked from a few of my jobs because of this.

> I started work in April 2016 at My Cleaning Fairy in Canberra as a cleaner. I found the work difficult, especially mopping and vacuuming. I could not keep up with the work and resigned."

48. Ms Burton said that she had started her own cleaning business but had been restricted performing cleaning work by pain and "continuing symptoms". More recently she had been confined to doing bookkeeping work working from three to four days per week for approximately two hours per day.

49. Ms Burton said that she had continued to have pain and symptoms in her back radiating into her legs. It was numbness in the legs most of the time and a burning sensation. She described the problems that she experienced in her activities of daily life. She said that she was no longer able to get onto a horse or ride it. She said that she suffered anxiety and depression.

50. Ms Burton described the medication that she had been taking and said that her main concern was injury to her back.

51. Ms Burton's injury claim form dated 2 July 2013 was in evidence. In that form Ms Burton described the subject accident when she fell onto her hip after being thrown from a horse when it bucked. She said the part of the body injured was the "right hip". Ms Burton described her occupation as "trackwork rider".

Queanbeyan District Hospital

52. A number of records from the Queanbeyan District Hospital were in evidence. The records relating to Ms Burton's admission on 5 June 2013 record the presenting problem "unable to weight-bear plus pain management". The diagnosis recorded on the discharge summary as "fractured Ⓡ lesser trochanter femur" with a notation that the registrar is to review Ms Burton at the fracture clinic in two weeks.

53. The Progress Notes record that Ms Burton presented to the Emergency Department with complaint of "right side hip pain after a fall from horse". Upon admission the nursing notes record:

> "patient is a horse trainer and today horse "bucked" her off onto her right side – no head injury but now has # Rt lesser trochanter now causing pain right buttock and hip. Physio referral made and referred to fracture clinic (Dr Zang) faxed by A/E staff for two weeks' time".

54. The supply and use of crutches is described as well as the medication supplied. X-ray of the right hip showed; "There is a bony ossicles [sic] lying adjacent the lesser trochanter likely relating to an avulsion injury. There is no other acute bony abnormality. The right hip joint is normally aligned. There is no fracture involving the neck of the femur." X-rays of the cervical spine and the chest disclosed no abnormality. The records in respect of that admission note "# R trochanter with pain in Rt hip and buttock."

55. The records include attendance at Accident and Emergency on 28 January 2011 with respect to a fall from a horse resulting in a hand injury. Discharge summaries in respect of attendances at Accident and Emergency on 19 and 22 January 2018 record an unrelated medical condition.

56. Accident and Emergency records dated 28 February 2018 recorded “fall from horse landed on left/side injured left/hip”. The incident is further described in the Progress Notes “fell from horse approximately 18:00 hours, approximately 4m fall after horse threw Hannah 1 m up directly onto L side, unable to weight-bear following incident.” Radiation of pain into the lumbar spine was noted and x-rays of the lumbar spine, pelvis and left femur were carried out. The x-ray of the lumbar spine disclosed no abnormality.

57. Records relating to attendance at Accident and Emergency on 27 June 2018 record a diagnosis of “laceration of arm”. The discharge summary records “presents to ED with accidental laceration to left forearm with sharp butchering knife/sustained whilst hunting deer.” The incident is further described “professional shooters and went to cut throat of deer, missed and knife slipped.”

Cooma District Hospital

58. A discharge summary produced by Cooma District Hospital records an attendance at Accident and Emergency at that hospital on 15 December 2015 with complaint of dizziness and visual disturbance following the spraying of herbicide.

59. A further discharge summary records attendance at Accident and Emergency on 18 December 2015. The history as recorded as “presenting with a five-day history of spontaneous onset of neck pain, increasing and now radiating to thoracic back.” The entry notes the attendance on 15 December 2015 and notes “reports neck pain started prior that episode, but increasing since. Has otherwise been well since that presentation.” Ms Burton is noted to be “otherwise well and healthy”. The triage presenting information records “thoracic back pain. Sharp in nature. Spreads down spine. Recent presentation to ED with hypoglycaemia and lethargy.”

60. Further attendance at Accident and Emergency on 20 June 2016 records a right ankle injury with no fracture disclosed on x-ray. The prior medical history notes “# hip post fall from horse two years ago – ongoing pain on Endep 100 mg”.

61. Ms Burton was seen again at Accident and Emergency on 18 June 2017 with a laceration to the scalp.

General Practitioners – Dr Hutton, Dr Hendry, Dr Ayres and others

62. Clinical notes from general practitioners were in evidence. The earliest record of attendance is upon Dr Hutton on 31 January 2011, which records “thrown from horse and 28/1/2011 – injured left hand uncertain of mechanism – now loss of full finger flexion and loss of little finger adduction.” The entry notes “letter created – re-compo NSW WORKCOVER”. The progress of that injury is recorded in the subsequent attendances.

63. On 26 June 2013, a consultation with Dr Hendry is recorded. Dr Hendry noted “fall from horse at work on ?5/6/13 and was admitted to QDH with a fracture of right lesser femoral trochanter. Had three days in hospital and is now mobilising with full weight-bearing with crutches. Some pain in right hip and knee when she does too much.” The doctor noted the right hip and knee were not tender with full range of motion. He prescribed medication and requested a progress right hip x-ray.

64. On 8 August 2013, Dr Hendry noted “post w/c horse fall on? 5-6-13 and# right lesser trochanter – still aching in right iliac crest, ASIS and SI joint region, limping after walking for a while.” The doctor noted on examination that the hip was not tender with full range of motion but there was tenderness in the right anterior superior iliac spine (ASIS). The right hip x-ray on that date was reported; “There is a little calcification in the psoas tendon at its point of insertion into the less [sic] trochanter. No fracture has been identified.”

65. On 28 August 2013, Dr Hendry recorded "now essentially pain-free and has full ROM." The physiotherapy report on that date from a sports physiotherapist, Jane Grey, notes referral for management of right hip pain and suspected lesser trochanter fracture. The physiotherapist noted that the possible fracture site was presenting "little problem" but there was rather poor neuromuscular activation and control around the right hip and lumbar spine". The physiotherapist reported that Ms Burton had a full range of movement of the hip, full-strength and no significant areas of tenderness following exercise therapy. The physiotherapist reported "she can comfortably walk for kilometres on uneven terrain." She was certified as fit to return to horse riding, flat work or dressage only.

66. Ms Burton again consulted Dr Hendry on 19 March 2014. The general practitioner recorded "Working at Spotlight on feet on hard floors now after thrown from horse 2 ½ years ago and fractured right lesser trochanter. Ongoing problems with pains in right groin, but also in SI region and in both legs from feet to Achilles and calves to knees." Dr Hendry noted on examination "Tender ASIS and Iliopsoas region with limited ROM in right hip. Feet, Achilles, calves and knees OK".

67. Other surgery consultations in 2013 and 2014 record general health issues.
On 23 January 2015, Dr Hossain noted a history "right hip fracture from falling from horse" although that appears to have been unrelated to the purpose of the consultation. The balance of consultations in 2015 relate to general health issues.

68. A surgery consultation with Dr Ayres on 19 April 2016 records "Accident 05/06/13. Fell off a racehorse. Hip pain. Had previously been on compo. Requested old notes from GP super clinic on QBYN." Dr Ayres recorded a history:

> "Since 2013 injury, constant burning sensation from lumbar spine area to both hips all the way down to her toes. No clear exacerbating or alleviating sx [*scil* symptoms]. Whilst riding a horse a few weeks ago, "lost complete control of legs". Lasted for about 20 minutes. Managed to fall from horse but struggled to stand due to weakness. Has happened in the past. Burning pain gradually worsening at night."

69. Dr Ayres noted a full range of movement in the back and no midline bony tenderness. The report of an MRI scan of the lumbar spine requested by Dr Ayres on 19 April 2016 and reported on 27 April 2016 was in evidence. The indication for the examination is recorded as "history of fall. Bilateral lower limb burning and right hip pain." The MRI scan is reported:

> "No central canal or foraminal stenosis is seen. L5/S1 level demonstrates moderate hypertrophic changes at the facet joints. There is sclerosis noted at the pars intra-articularis region of L5. This may represent pars intra-articularis stress response or an incomplete pars defect.
>
> IMPRESSION: Facet joint degenerative changes at L5/S1 level with pars intra-articularis response at L5. No nerve root impingement noted. Normal appearance of the vertebral bodies."

70. A consultation with Dr Ayres on 3 May 2016 records "R lower back pain sharp. Worse walking on right leg. Then becomes too painful to move and she feels she can't actually move. Has to stand on the other leg and wait for the pain to resolve." Dr Ayres referred Ms Burton to a specialist.

71. On 4 July 2016, Dr Ayres noted tenderness in the right ankle following a tripping incident two weeks earlier. Dr Ayres saw Ms Burton again on 13 July 2016 when he discussed the results of an ultrasound examination of the ankle and diagnosed right ankle sprain. He noted "review for return to physical activity – horse riding."

72. On 15 August 2016, Dr Ayres noted that consultation with a specialist had taken place. He noted “L5/S1 arthritis, pars intra-articularis.” Dr Ayres noted that the insurer was requiring a letter from the specialist “linking original horse riding accident with current symptoms”.

73. A request by Dr Ayres dated 11 October 2016 for blood tests is included in the records of the practice. The note records “chronic lower back pain with neuralgia”. The report dated 14 October 2016 noted that the human leukocyte antigen – B27 (an indicator of congenital ankylosing spondylitis and other conditions) was not detected.

74. A bone scan and SPECT CT of the thoracolumbar segment, pelvis, both hips and both proximal femoral was reported on 22 August 2016:

> “Discovertebral activity within the lumbosacral segment is within physiological limits. There is no evidence of a pars defect on either side, with particular reference to the right L5 pars. There is no evidence of abnormal activity involving the facet joint on either side within the mid to low lumbar spine, with particular reference to the right L5/S1 level. There is no convincing evidence of significant bony neural foraminal narrowing on either side. Prominent activity is noted within both sacroiliac junctions, slightly more marked within the superior aspect of the right L5 posterior iliac wing. CT appearances are within physiological limits however.”

75. The report relevantly comments:

> “No scan evidence of active discovertebral disease or facet joint arthritis within the lumbar spine. There is no CT evidence of a pars defect on either side. There is no evidence of significant bony neural foraminal narrowing. Prominent activity is noted within both sacroiliac junctions, and in particular the right supero-posterior ilium just above the joint. This is of uncertain significance, but could reflect ligamentous strain. Minimal increased activity is noted in a symmetrical fashion within both hips.”

76. Subsequent consultations in 2017 concern general health issues. An entry on 8 April 2017 notes “non-visit” but records “Message from Mrs Jackie Ulrich [a practice employee] on 8/04/2017 at 3:44 PM had recall in January – contacted her by phone then sent two letters – not response can I remove reminder”.

77. On the next page the following entry appears:

> “Feels that things have improved a little.
>
> Pain levels fluctuating. On first inspection, she feels nothing has changed. On deeper review, cleaning houses, increased work by about four – five hours per week. Lots more driving. Cooma on Monday, Wednesday Bredbo, Friday Royalla.
>
> Spoke to Wiro (Rehab) and Racing NSW – Seem to be playing games. Frustration.”

78. Dr Ayres recorded a consultation on 24 August 2017 when the reason for visit is shown as “workers compensation”. The general practitioner noted “Working well. At night feels her legs go completely numb at night. Left leg painful and “locks”. “Like a cramp worse”. Can’t describe it further.” The doctor then notes medication being taken in comments “Has seen specialist “told me it was all in my head and that I should not be pursuing treatment, then offered be treatment on public system.”

79. At consultation on 15 September 2017, Dr Ayres noted complaints of pins and needles which commenced about one month earlier causing difficulty with sleep. He noted “pain from lower back to lateral aspects of legs” which was improving with medication. Dr Ayres also noted “bilateral ongoing wrist tingling.”

80. On 22 September 2017, Dr Ayres noted that the bilateral lower back and hip pain had reduced but at the next consultation on 6 October 2017, he noted that Ms Burton’s pain level had increased. He also noted other stressors in Ms Burton’s life. He noted “known depression”.

81. At consultation on 19 October 2017 Dr Ayres noted anxiety related to “combination of racing NSW, [partner] Chris’s arm and fell out with best friend over horses.”

82. On 4 January 2018, Dr Ayres noted:

> “Has been off all meds for > one week. Difficult discussion regarding pain management. Claims pains have been worse and not been able to do anything. Looks and moves freely as usual during consult. Drove her. Level of activity has not really declined, but acknowledged pain experience has worsened.”

83. On 16 March 2018, Dr Ayres noted that Ms Burton had:

> “Got back on horses. Bucked off horse a few weeks ago. See ED QYBN d/c. Left hip pain. Moving well. Feeling really hyperactive during the days. Focusing more on the horses unless on herself. Feels a pains are reducing. Working eight horses and doing things for herself. Crashes mentally by the afternoon. Low mood. Sometimes suicidal thoughts but would never act.”

84. Subsequent consultations relate to Ms Burton’s mental state. On 21 August 2018, Dr Ayres recorded “working six nights per week. Managing 60 – 100 hours per week. Ran out of pain meds. Still coped well. Few large contracts coming up.”

Associate Professor Neil

85. Ms Burton was referred by Dr Ayres to Associate Professor Michael Neil. Associate Professor Neil examined Ms Burton on 5 August 2016 and reported to Dr Ayres. Associate Professor Neil noted the history:

> “About three years ago, Hannah was riding trackwork for a racehorse trainer and was thrown on the compacted dirt. She landed on her right side, and was taken by private transport Queanbeyan district hospital. She was examined and x-rayed and found to have soft tissue injury. The problem is that she suffered serious pain in the right leg ever since the fall. She complains of whole global glove and stocking and a seizure in the right leg with severe buttock pain on the right side radiating to the back of the heel. Pain is also focused on the greater trochanter, low back. She cannot do much in the way of physical activity. She works as a part-time cleaner but no longer rides racehorses for trackwork.”

86. Associate Professor Neil noted that Ms Burton had gone from being very active to “someone who can barely do any exercise at all”. He noted the MRI study, agreeing that the study showed facet joint osteoarthritis of the L5/S1 vertebrae with a pars interarticularis defect at L5. He noted that there was no evidence of nerve root impingement. Associate Professor Neil concluded that “Hannah’s symptoms clinically almost certainly are of [sic] spinal in origin.”

87. Associate Professor Neil explained; “Given that there was no neurological defect or impingement, by definition that there are somatic and may well be coming from the pars interarticularis defect or an aggravation of low-grade pre-existing L5/S1 facet joint arthritis.” Associate Professor Neil did not consider surgery to be appropriate and referred Ms Burton to Dr Richard Day, consultant physician in musculoskeletal medicine for opinion and management.

Dr Richard Day

88. Ms Burton was examined by Dr Day on 29 August 2016. Dr Day noted the problem as “pain down her right thigh into the leg and towards the ankle.” Dr Day recorded the history of the fall from the horse with injury to the right hip three years earlier. He noted that the pain had receded with time and medication but there had always been discomfort present. Dr Day recorded that Ms Burton had gradually got fitter but more recently she had progressively experienced more pain and disability affecting the right lower limb. He noted the pain was now localised to the right lower back and sacroiliac area.

89. Ms Burton informed Dr Day of incident when “she had been participating in a pony club week and she essentially had locked hips on a horse which had just transferred from walking to trotting. Luckily the horse stopped. She has had two similar episodes like this and the most recent I believe in April this year.”

90. Dr Day noted that Ms Burton had tried to return to work in various roles including McDonald’s and was also teaching horseriding on Saturdays. He reported that she was unable to get onto a horse any more. He recorded “she is obviously depressed about this is and put on a large amount of weight going from 45 kg to 80 kg. She has had a very tough last six months.”

91. On examination Dr Day noted very good strength in the lower limbs. Reflexes were brisk at the knees and present at the ankles and symmetrical. Sensation was intact. Straight leg raise was satisfactory at 80° bilaterally. He noted that Ms Burton was flexible in the lumbar spine in all planes. She was tender over the upper part of the right sacroiliac area.

92. Dr Day noted that the bone scan had confirmed sacroiliac activity slightly more marked on the superior aspect on the right side but with normal appearance on CT scan. He reported that the lumbosacral spine otherwise was “pretty normal”. Dr Day expressed the need to access the MRI scan.

93. In a report to Associate Professor Neil and others dated 7 September 2016 Dr Day reported that he had reviewed Ms Burton’s bone scan of 22 August 2016 but had not yet seen the MRI scan. He commented that the bone scan showed bilateral sacroiliitis but the lumbosacral spine particularly L4/5 did not show activity in the facet joints. He noted that he had asked for blood tests to be arranged by Dr Ayres. He also suggested image guided injection of the sacroiliac joints with corticosteroid.

94. Much of the material in these reports from Dr Day to the other treating doctors is repeated in a report dated 20 November 2017 to Ms Burton’s solicitors. Dr Day again noted Ms Burton’s symptoms and the effect that she said it had had upon her employment and daily life. He said;

> “I felt she was obviously depressed about this and this had led in part to the significant weight gain from 45 kg to about 80 kg. Psychologically she was also not happy about being grumpy with her partner Chris and withdraw into herself avoiding communication and socialising. Because of discomfort in bed, she stays up very late.”

95. Dr Day noted that Ms Burton had experienced additional symptoms over the preceding six months with changes in sensation in her legs on standing and sitting. He diagnosed a chronic pain syndrome. He noted that the CT bone scan "did show bilateral sacroiliitis and some facet joint arthritis at L4/5 in the lumbosacral spine." He said that he had net been able to review the MRI. He noted that blood tests had been ordered but did not discuss the results.

96. Dr Day's records included a pro forma questionnaire completed by the applicant. Ms Burton gave her occupation as "cleaner" and noted her sports interests and hobbies as horse riding, bushwalking and camping. She noted medication Endep 50 mg. She listed major medical illnesses as broken arms and hip injury.

97. A handwritten Arthritis Record dated 29 August 2016 noted presenting symptoms of right lower limb pain. History was recorded:

> "3 y accident. Racehorse. Right hip bone sliver – crutches. Pain still. [Prescribed] pills got fitter but pain grumbling. Progressing now back of hip – picked up off track.
>
> Hurts to stand/sit/bending is better/can get stuck feels like. Stairs ↓ can be v. bad. If don't stop could go down. Pony club week – back locked on walk/trot – horse stopped – April 16. Twice. Back to work. Washing/can't feed dogs/ [illegible] Wt ↑ [complaint of] hip//back 45kg →80kg."

98. An accompanying skeletal diagram notes "v flexible all planes" in respect of the lumbar spine and the word "tender" in respect of the right sacroiliac region. The diagnosis is "referred pain lower ® limb L5/S1 distribution without segmental involvement." The plan of management includes review of the MRI scan and the bone scan with a requirement for a rehabilitation program of counselling for depression/weight and a physical program. The plan also includes contact with "Australian racing" presumably thought to be the employer.

99. On 6 September 2016, there is a record "reviewed bone scan CT that reveals [illegible] bilateral sacroiliitis – does not confirm L5/S1 facet arthritis or pars articularis"

Independent Medical Experts

100. Ms Burton was examined by Associate Professor Paul Miniter, Orthopaedic Surgeon, on 10 August 2017 at the request of the insurer. Associate Professor Miniter noted that Ms Burton had fallen to the ground when the horse she was riding had bucked. She had fallen "backwards and slightly onto her right hand side". Associate Professor Miniter said that although Ms Burton had been told at Queanbeyan Hospital that she may have had an injury, subsequent investigations had not confirmed "serious injury". He noted that Ms Burton was hospitalised for three days.

101. Associate Professor Miniter noted that the treating general practitioner, Dr Hendry, felt that Ms Burton had made an "excellent recovery" and the report of the physiotherapist whereby "she felt that Ms Burton could return to normal functional activity." Associate Professor Miniter recorded that Ms Burton had gained substantial weight having more than doubled her pre-injury weight.

102. Associate Professor Miniter noted the opinions of Dr Day and Associate Professor Neil. Associate Professor Miniter recorded that Ms Burton had been "seen by Associate Professor Neil as she was thought to have had issues with the right hip" but noted that Associate Professor Neil was of the opinion that the problem was probably of spinal origin.

103. Associate Professor Miniter noted the reports of Dr Day and the bone scan of the lumbar spine. He recorded that "the MRI scan of the lumbar spine demonstrated some sclerosis of the pars on the right hand side at L5 but did not demonstrate a frank defect." He noted that the x-ray taken of the right hip on 5 June 2013 identified "no serious anomalies". He remarked that the presence of bony ossicles lying adjacent to the lesser trochanter had suggested an avulsion injury but this had not been confirmed on other investigations.

104. Associate Professor Miniter noted current complaints of neck pain, back pain and discomfort in the right groin. She was noted to be in poor physical condition weighing approximately 100 kilograms.

105. Associate Professor Miniter reported that Ms Burton's current clinical condition was unrelated to the subject accident. He reported; "Her capacity to sit, stand, walk and drive a motor vehicle is unrestricted except by way of her poor physical fitness and increased weight which does need attention."

106. Ms Burton was examined by Dr Patrick, general and vascular surgeon, on 24 November 2017. Two reports dated 16 April 2018 were in evidence. Dr Patrick reported at the time of examination Ms Burton was "currently carrying out some limited self-employed work cleaning houses in Clinton. She is very limited in what she is able to do now."

107. Dr Patrick recorded that Ms Burton had suffered injury on 5 June 2013 recording: "Horse fall, sustaining injuries to lumbar spine, right hip region and right knee and with effect on both right and left lower limbs." He noted that Ms Burton had been "bucked off, thrown up and came down very heavily onto the compacted dirt ground impacting the severe jarring particularly to right buttock region and with significant low back pain and quite severe pain into the buttock and radiating right down to the foot on the right side."

108. Dr Patrick noted the progress Notes from Queanbeyan district hospital commenting that the triage information included reports of "painful hip, back, legs, ribs". Dr Patrick reported that, following discharge from hospital, Ms Burton's treatment had been attended to by her general practitioner. He recorded:

> "She continued in pain. She was followed up by Dr Bilkis Malek GP of Queanbeyan. He has sent her for plain x-ray right hip demonstrating bony ossicles or ossicles lying adjacent to the lesser trochanter likely relating to an avulsion injury. He also sent her for plain x-ray cervical spine and chest x-ray with rib view. There were no fractures otherwise."

109. Dr Patrick then recorded that Ms Burton had been treated by a general practitioner, Dr Ross Hendry, who had requested a progress x-rays of the right hip.

110. Dr Patrick reported that Ms Burton had ongoing low back pain and pain at the right hip and legs. He felt that "she developed some degree of depression due to the overall situation she was in."

111. Dr Patrick noted the report of the MRI scans of the lumbar spine and right hip of 27 April 2016. He recorded her post injury employment from January to April 2014 with Spotlight as a sales assistant and then to September 2014 as a labourer and station hand in the Northern Territory. She next found employment at a McDonald's store in Cooma in mid-2015 and taken further employment in August 2015 as a waitress in Bredbo. In addition Ms Burton had attempted contract worked spraying weeds but have been unable to continue because of back pain. Dr Patrick said "It was difficult for her to hold down a job because of a continuing symptoms."

112. Dr Patrick noted that in April 2016, Ms Burton had commenced employment as a cleaner in the Australian Capital Territory but was finding the work difficult. Dr Patrick considered the opinions of Associate Professor Neil and Dr Day. He recorded the problems that Ms Burton was currently experiencing including "quite severe annoying sensations at both thighs laterally" which he considered to be "probably a bilateral neuralgia paraesthetica ?dyaesthesia" which he felt was associated with weight gain.

113. On physical examination with respect to the lumbar spine, Dr Patrick reported:

> "Lumbar spine is stiff. She can flex achieving fingertips to lower shins with extension 80% expected, lateral flexion to the right just 60% (associated with pain) and lateral flexion to the left 70% of expected."

114. On examination of the legs Dr Patrick found "There is a readily demonstrated quite marked dyaesthesia over region of distribution of the lateral femoral cutaneous nerves (bilateral neuralgia paraesthetica and with dyaesthesia bilaterally)" as well as right calf muscular atrophy and diminished sensation which he felt corresponded with the L5 nerve root distribution.

115. Dr Patrick felt that Ms Burton had sustained a "significant lumbar spinal injury" which he believed to be "on balance of probability a likely unilateral pars intra-articularis undisplaced fracture which has gone on to healing". Dr Patrick felt that Ms Burton had developed significant depression and noted the history of "inexorable weight gain." He said that Ms Burton appeared to have developed "a quite severe dyaesthesia bilaterally associated with her bilateral neuralgia paraesthetica probably consequent upon her significant weight gain which I believe is as a consequence of the effects of her injuries of 5 June 2013."

116. In a supplementary report Dr Patrick commented on the report of Associate Professor Miniter dated 10 August 2017. He said that Associate Professor Miniter's comments relating to "current situation" "seem very limited as are the recorded findings on clinical examination."

117. Dr Patrick noted that he had not found normal range of motion of the lumbar spine, having found limitation in lateral flexion associated with pain. He noted that Associate Professor Miniter did not refer to the presence or absence of muscle guarding and made no mention of examination in relation to nerve roots or peripheral nerves. He disagreed with Associate Professor Miniter's opinion that the current clinical condition was unrelated to the subject accident. He said "I believe the evidence is that her significant weight gain is largely as a consequence of effects of the horse fall on 5 June 2013."

118. Ms Burton was again examined by Associate Professor Miniter on 19 February 2019. His report dated 4 March 2019 was in evidence. Associate Professor Miniter noted that Dr Patrick had diagnosed meralgia paraesthetica attributed to weight gain. He noted that Ms Burton's weight had increased since his last examination. Ms Burton informed him that she had not improved and was "in some ways worse" than when Associate Professor Miniter had seen her previously.

119. Associate Professor Miniter recorded complaints of back pain, discomfort in both legs and altered sensation over the lateral aspect of both thighs extending to the level of the knee. Associate Professor Miniter did not feel that the complaints of altered sensation followed the distribution "characteristically seen in meralgia paraesthetica". He reported that Ms Burton had not been involved in employment except in respect of her partner's business.

120. Associate Professor Miniter reviewed the records of Queanbeyan Hospital and the initial x-ray which he felt demonstrated a "long-standing lesion in the region of the lesser trochanter of the right hip region". He felt that the x-ray did not show acute pathology but evidence of longer standing pathology consistent with the previous injury or a developmental condition.

121. Associate Professor Miniter noted that Ms Burton did not report bruising or swelling in the right thigh at the time of the subject accident which he said he would have expected if the fall had caused the avulsion fracture. Associate Professor Miniter noted that the MRI scan of the lumbar spine performed on 27 April 2016 and identified no significant pathology and there was no evidence of nerve root impingement.

122. Associate Professor Miniter was unable to identify any features suggestive of meralgia paraesthetica or any other sign of nerve pathology upon examination. He reported "palpation of the areas anterior and inferior to the anterosuperior iliac spine of the pelvis does not indicate a positive Tinel's sign nor indeed tenderness in the region of the lateral cutaneous nerve of the thigh."

123. Associate Professor Miniter said that he was unable to explain the "plethora of symptoms" presented by Ms Burton. He acknowledged that she had had a fall from a horse and said it was possible that she had sustained injury at that time although there was no evidence to support this currently. He said that physical examination and investigative findings were effectively normal. He could see no reason why she should not be working.

124. Associate Professor Miniter referred to Dr Patrick's reports, noting that Dr Patrick was a general surgeon without experience in treatment of lower limb injuries. He felt that Dr Patrick provided no supporting evidence for his conclusion as to injury. Associate Professor Miniter said "I am unable to determine how it is that he links the current presentation to the original injury, however genuine this may have been in the first case."

125. Associate Professor Miniter did not feel it was reasonable to associate the weight gain with the injury and that there was no evidence of peripheral nerve damage in either leg.

126. Dr Patrick supplied a further report in relation to the report of Associate Professor Miniter. Dr Patrick agreed that the post-accident imaging did not necessarily indicate an avulsion fracture to the lesser trochanter in the right hip as result of the subject accident. He did draw attention to the Queanbeyan Hospital Progress Notes which included a record of "haematoma on right thigh". Dr Patrick also noted that the MRI scan referred to by Associate Professor Miniter had been ordered in response to complaint of "history of fall. Bilateral lower limb burning and right hip pain".

127. Dr Patrick criticised Associate Professor Miniter's physical examination as "very much incomplete". He detailed the respects in which he felt that examination to be lacking and questioned the basis of Associate Professor Miniter's assertion that he was familiar with the anatomy surrounding the lateral femoral cutaneous nerve.

128. Dr Patrick confirmed that he was still of the view that the inexorable weight gain was responsible for the onset of meralgia paraesthetica and the consequence of weight gain following the subject accident.

129. The respondent sought to introduce a further report of Associate Professor Miniter dated 5 August 2019 into evidence. The tender was objected to by the applicant on the ground that it would require a further report from Dr Patrick. I declined to admit the report upon the basis that it did not add significantly to the relevant evidence and was liable to delay proceedings. I did however admit the second paragraph of his observations in fairness to Associate Professor Miniter:

> "I understand that Dr Assem [the AMS] has taken a history and performed a physical examination. He makes comment in his summary of the matter that I did not appear to have examined the peripheral nervous system. *Au contraire*, a full examination of this lady was undertaken. I could see no evidence of involvement of the lateral cutaneous nerve on either side and I certainly did not see any evidence of sacroiliac joint pathology. I would be interested as to the physical examination by which Dr Assem has delineated features of sacroiliac joint involvement."

The AMS, Dr Assem

130. The Medical Assessment Certificate in respect of a general medical dispute dated 20 March 2019 by an AMS, Dr Mohammed Assem, was in evidence.

131. The AMS noted that he had been asked to address:

    (a) Whether, and if so how, the peripheral nerve system of the applicant's right lower extremity has been affected (directly or indirectly) by falling from horse on 5 June 2013.

    (b) Whether, and if so how, the peripheral nerve system of the applicant's left lower extremity has been affected (directly or indirectly) by falling from horse on 5 June 2013.

132. The AMS reported that he had been supplied with a copy of the application and attached documents and the reply and attached documents.

133. The AMS noted that Ms Burton was then aged 26. He recorded that Ms Burton had been thrown from horse on 5 June 2013, landing on her right hip. He recorded admission to Queanbeyan Hospital and the radiological investigations performed. He noted that she had been discharged with crutches and had received treatment by way of physiotherapy.

134. The AMS noted attendances on the general practitioner, Dr Hendry and Ms Burton's subsequent employment. He noted a history that Ms Burton had been driving tractors in the Northern Territory for a period but the repetitive jarring had aggravated "her back injury". He also noted employment with Resort Trailers in Queanbeyan in an administrative role and commencement of a cleaning business. He understood that she was currently doing administrative work in a cleaning business.

135. The AMS noted the report of the MRI scan of 27 April 2016 with the history of the fall and bilateral lower limb burning and right hip pain. The AMS noted that the report showed "facet joint degenerative changes at L5/S1 with pars intra-articularis response at L5". There was no nerve root impingement demonstrated. He noted that the MRI scan of the right hip had shown mild tendinosis of the conjoint hamstring origin and mild tendinosis of the gluteus medius.

136. The AMS considered the treatment offered by Associate Professor Neil and Dr Day. He recorded that Ms Burton had continued to gain weight due to a lack of activity. He said this had led to worsening of back symptoms and numbness at the lateral aspect of both thighs. The AMS recorded current complaints of constant pain across the lower back radiating to the hips down the lateral aspect of the thighs. He noted "reduced sensation in the distribution of the lateral femoral cutaneous nerve".

137. The AMS performed a physical examination noting tenderness across the lower back particularly over the right sacroiliac joint. There was no muscle guarding or spasm and a normal range of lumbar and hip movement. The AMS recorded "There was reduced sensation in the distribution of the lateral femoral cutaneous nerve bilaterally but no dyaesthesia."

138. The AMS summarised the radiological and ultrasound imaging in evidence. His summary of injuries and diagnoses was as follows:

> Ms Burton is a 26-year-old lady who fell off horse on 5 June 2013 sustaining an injury to her hip, back and sacroiliac joint. Her back complaints were documented by Dr Hendry and were temporarily aggravated by a fall in December 2015. Her back complaints have caused her to be less active and gain weight resulting in the development of meralgia paraesthetica in both thighs."

139. The AMS found no inconsistencies in Ms Burton's presentation. The AMS considered the earliest of Associate Professor Miniter's reports. He said that Associate Professor Miniter did not appear to examine the peripheral nervous system and had not considered that there are any signs of sacroiliac joint pathology. He said at the time of his assessment "provocative tests for sacroiliac joint dysfunction were positive."

140. The AMS agreed with Dr Patrick that there was reduced sensation in the distribution of the lateral femoral cutaneous nerve bilaterally but he had not made a finding of dyaesthesia. He agreed with Dr Patrick that reduced sensation in the distribution of the lateral femoral cutaneous nerve was probably related to weight gain as a result of inactivity due to the injury on 5 June 2003.

141. Request for reconsideration of the Medical Assessment Certificate was granted by the Arbitrator and the matter was remitted for reconsideration with the late material that had not been supplied to the AMS at the time of the initial referral. The AMS was also provided with a schedule by both parties setting out particular aspects of the clinical notes and scans which the respective parties wish to draw the attention of the AMS.

142. The AMS issued a further Medical Assessment Certificate dated 11 July 2019, noting that he had considered the additional material and the respective schedules but this had not cause him to alter his opinion.

Discussion

143. In reply to the applicant's submission that the evidence disclosed a chain of causation from the subject accident to the finding of impairment by Dr Patrick, the respondent submitted that no such chain was established. The respondent submitted that there was no evidence capable of supporting a finding of an injury to the lumbar spine as a result of the subject accident and no evidence of any causal link between the subject accident and any pathology which could be thought to give rise to impairment.

144. Counsel for the applicant pointed to references throughout the clinical notes to the history of the subject accident as indicative that Ms Burton was continuing to experience symptoms in and around the right hip. The evidence established no other cause for those ongoing complaints.

145. The respondent countered by pointing to the spontaneous onset of neck pain as well as other potentially injurious events.

146. The onus of proof as to injury and causation rests upon the applicant. To suggest that the respondent should be required to point to some alternative explanation is to risk reversing the onus of proof.

147. In *Nolan v Department of Education & Training*[1] Roche DP drew attention to the House of Lords decision in *Rhesa Shipping Co SA v Edmunds (The 'Popi M')*[2] where Lord Brandon (with whom the other members of the House of Lords agreed) explained why it is inappropriate to apply the "well-known but unjudicial dictum" of Sherlock Holmes that "when you have eliminated the impossible, whatever remains, however improbable, must be the truth". The Deputy President noted that the reasoning in that decision has been cited with approval in *Jackson v Lithgow City Council*[3] and *Guest v The Nominal Defendant*[4].

[1] [2012] NSWWCCPD 74
[2] [1985] 1 WLR 948 at 955-6
[3] [2008] NSWCA 312 at [12l]
[4] [2006] NSWCA 77 at [108]–[109].

148. The presence or absence of evidence of an alternative cause needs to be taken into account, but the absence of evidence of a plausible alternative explanation cannot be decisive. Proof of causation depends upon a consideration of the whole of the evidence.

149. The respondent noted a number of concerns with the evidence contained in Ms Burton's statement. Ms Burton stated that she had been off work for 11 months after the subject accident in June 2013 but spoke of commencing work in different employment in January 2014. Ms Burton described that she found "walking for long periods of time" to be challenging that problems walking down stairs. She said that she was no longer able to get onto a horse to ride. Ms Burton said that she was currently employed doing administrative tasks in her partner's business three to four days per week for approximately two hours per day. She said that her life had been put on hold as result of her accident.

150. Ms Burton's account of the symptoms is difficult to accept in the light of statements recorded by the treating general practitioner. In January 2018 the general practitioner noted "Looks and moves freely as usual during consult." He recorded "Level of activity has not really declined, but acknowledged pain experience has worsened."

151. Queanbeyan District Hospital progress Notes 28 February 2018 note a fall from a horse "approximately 4 m fall after horse threw Hannah 1 m up directly onto left side."

152. On 16 March 2018, the general practitioner noted "got back on horses. Bucked off horse a few weeks ago." The general practitioner noted that Ms Burton was "Working eight horses and doing things for herself."

153. On 11 April 2018, Dr Ayres recorded that Ms Burton was going to attend a "pony comp camp" for a week. In August 2018 Dr Ayres noted that Ms Burton was working six nights per week and "managing 60-100 hours per week." There was said to be a "few large contracts coming up". When seen at the Emergency Department of Queanbeyan Hospital on 28 June 2018 Ms Burton was recorded as reporting a laceration injury sustained "whilst hunting deer".

154. The Emergency Department documentation from Queanbeyan District Hospital dated 27 June 2018 records an injury to the left forearm while deer hunting.

155. When seen at Cooma District Hospital on 18 December 2015 Ms Burton had complained of spontaneous onset neck pain radiating to thoracic back. She was recorded as "otherwise well and healthy".

156. The level of activity recorded in the applicant's statement is difficult to reconcile with the records referred to. I take into account the need to approach medical records with care for the reasons explained by Basten JA in *Mason v Demasi*[5], but, in the absence of explanation or comment from Ms Burton as to the apparent discrepancies, I have also to approach her evidence with a substantial degree of caution.

157. I accept that the evidence of the general practitioners' clinical notes establish that Ms Burton made reference to the subject accident on a number of occasions in the years following the accident. In August 2013 there is complaint of pain in the right iliac crest, the anterior superior iliac spine (ASIS) and sacroiliac joint region. Although Ms Burton is recorded as being essentially pain-free with full range of movement later in August 2013 Ms Burton refers to the subject accident with ongoing complaints of pain in the right groin and sacroiliac region in March 2014 while working at Spotlight. The doctor notes tenderness in the ASIS and iliopsoas region.

[5] [2009] NSWCCA 227 at [2]

158. In January 2015, when consulting a general practitioner, Dr Hossain about unrelated matters the doctor notes a history of “right hip fracture from falling from [horse] nil other issues today”. The inference I accept is that the results of the fall were still concerning the applicant.

159. In April 2016, Dr Ayres noted the history of the subject accident and recorded “since 2013 injury constant burning sensation from lumbar spine area to both hips all the way down to her toes.” After investigation Ms Burton was referred to Associate Professor Neil, orthopaedic surgeon, for management. As Associate Professor Miniter observes in his report dated 10 August 2017, Ms Burton was “seen by Associate Professor Neil as she was thought to have had issues with the right hip.”

160. It is Associate Professor Neil who first appears to diagnose the source of pain as arising in the spine. After review of the MRI scan on the right hip, Associate Professor Neil reports “Hannah’s symptoms clinically almost certainly are of [sic] spinal in origin”. Associate Professor Neil reasons “given that there was no neurological defect or impingement, by definition that there [sic - ?these] are somatic and may well be coming from the pars intra-articularis defect or an aggravation of low-grade pre-existing L5/S1 facet joint arthritis.”

161. That evidence suggests, and I accept, that the general practitioners have treated Ms Burton’s complaints as related to her right hip and have had no suggestions for treatment until the situation becomes worse in April 2016. Upon referral the treating orthopaedic surgeon is satisfied that the symptoms probably arise from the lumbar spine.

162. Although there is no record by any doctor of complaints of pain in the lumbar spine until later years, I accept that the physiotherapist reported to Dr Hendry in August 2013, that Ms Burton had “rather poor neuromuscular activation and control around the right hip and lumbar spine.” The triage notes of the Queanbeyan Hospital record back pain when Ms Burton presented following the subject accident.

163. Associate Professor Miniter bases his opinion on a lack of evidence of injury. He does not accept the view of Dr Patrick whose opinion he says is unsupported by evidence. In coming to that conclusion Associate Professor Miniter does not appear to have taken into account the continuing history of complaints of pain experienced by Ms Burton around the sacroiliac region but attributed by Associate Professor Neil to the spine.

164. I accept that there is sufficient reference to the subject accident in the clinical notes to warrant the inference that Ms Burton continued to suffer low-grade symptoms in her low back following the subject accident which affected her work tasks and daily life. It is not disputed that Ms Burton has changed the nature of her employment and number of occasions since the subject accident and it is reasonable to infer that painful symptoms motivated these changes.

165. The AMS was placed in a rather difficult position by the terms of the general medical dispute referred for opinion. No finding of injury to the lumbar spine had been made at that point. The determination of the question of injury was one for the arbitrator to decide and no such a finding had been made. Nevertheless, in being asked to comment on the relationship between symptoms in the nerves of the legs and the subject accident, the AMS did not appear to have had any difficulty in accepting that there was an injury to the lumbar spine. I have not, however based my finding of injury to the lumbar spine on the view of the AMS in this regard as that would amount to an inappropriate finding of injury by the AMS.

166. I think it is likely that the treating general practitioners did not give consideration to the possibility of Ms Burton's symptoms arising from the lumbar spine but rather accepted the diagnosis of a fracture to the right hip which, as Associate Professor Miniter points out, may well have been doubtful in the light of the x-ray findings. On balance I am satisfied that Ms Burton did suffer an injury to her lumbar spine as a result of the subject accident. That injury continued to cause painful symptoms at a moderately low level until April 2016, when the level of symptoms appears to have increased. There is then a diagnosis by a specialist of lumbar spine involvement.

167. I accept the opinion of Dr Patrick that there has been damage to the lateral femoral cutaneous nerves in both legs resulting from the injury to the lumbar spine, sacroiliac joint and right hip.

168. Associate Professor Miniter appears to have placed significant weight on the absence of bruising as a result of the subject accident in reaching his conclusion. He relied upon the answers provided by Ms Burton in saying that there had been no bruising to the right hip in concluding that the fall had been a relatively minor event.

169. The records of the Queanbeyan Hospital which Associate Professor Miniter reported he had read, note the presence of a haematoma on the right hip. Why Associate Professor Miniter should prefer the recollection of the applicant over the contemporaneous record of the hospital in deciding that there was no bruising is unclear.

170. I prefer the opinion of Dr Patrick because he considers the history of continuing symptoms supplied by the applicant and supported by the clinical notes as evidence of a causal connection. Associate Professor Miniter bases his opinion on there being no evidence without explaining why he does not accept the applicant's account of continuing symptoms supported as it is by reference in the clinical notes at least to some degree.

171. I am satisfied that by 2016 Ms Burton's weight had almost doubled and that this is reasonably attributable to her relative inactivity and a changed mental state resulting from the injury. Having determined that Ms Burton suffered injury to her lumbar spine as a result of the subject accident I think I can then have regard to Dr Assem's opinion as to the aetiology of the nerve symptoms by way of weight gain. That view supports the causal link suggested by Dr Patrick by way of inactivity and mental state changes.

172. While I am satisfied that there is reduced sensation in the distribution of the lateral femoral cutaneous nerve in both thighs related to weight gain, the evidence does not allow me to decide whether dyaesthesia is established.

173. I am satisfied that the weight gain results from the injury to the lumbar spine and right hip by way of inactivity and altered mood which is likely as a result of unhappiness over the continuing symptoms as well as other factors in Ms Burton's life.

174. The injury to the lumbar spine in the subject accident was a discrete event. It was not an injury within section 4(b)(ii) of the 1987 Act. The respondent's submission that any pathology in the lumbar spine should be attributable to the last employer who employed Ms Burton in tasks likely to give rise to such a condition cannot be sustained where the injury falls within section 4(a) of the 1987 Act, even though it may also represent an aggravation of a pre-existing disease condition.

175. I am satisfied on the balance of probabilities that Ms Burton suffered injury to her lumbar spine in the course of employment on 5 June 2013. That injury was as a result of a forceful impact following a fall from the back of the horse to the ground onto the right hip region. Section 9A of the 1987 Act provides that no compensation is payable unless employment is a substantial contributing factor to the injury.

176. No submissions were addressed to section 9A and I am satisfied that the injury to the lumbar spine was directly caused while Ms Burton was performing an act which formed part of her employment duties. I have considered the factors set out in section 9A(2) and I am satisfied that employment was a substantial contributing factor to the injury to the lumbar spine.

177. The claim pursuant to section 66 of the 1987 Act is to be remitted to the Registrar for referral to an AMS determine the degree of whole person impairment, if any, arising from injury to the lumbar spine on 5 June 2013 and the consequential condition in the respective peripheral nerves in the right lower extremity and left lower extremity.

178. The parties agreed at hearing that, if referral was found to be appropriate, then it would be appropriate that the AMS be a neurological specialist. In the circumstances that is appropriate.

179. The Application included a claim that Ms Burton had developed a psychiatric or psychological condition as a consequence of injury. The respondent submitted that it was not appropriate that a claim based on a consequential psychiatric/psychological condition should be determined at the hearing. The respondent had placed the applicant on notice that it objected to this issue being decided as there had been no claim made and the respondent was not in a position to meet such a claim without a further medical report.

180. That issue was raised by the respondent in the earlier arbitration hearing on 1 May 2019 but does not appear to have been resolved. The allegation is relevant to a claim for treatment expenses pursuant to section 60 of the 1987 Act.

181. The respondent also raised the issue of whether recovery of treatment expenses was barred by the operation of section 59A. In the circumstances it is appropriate that the issue of treatment expenses stand over pending the assessment of whole person impairment resulting from the subject accident. It would then be appropriate to consider whether treatment expenses relating to a psychiatric/psychological condition result from injury to the lumbar spine and/or to the right hip are recoverable.

182. Although I have made a finding that Ms Burton's mood was adversely affected by the injuries that she suffered to her right hip and lumbar spine as a result of the subject accident, I have not made a finding that Ms Burton suffered the onset of a psychological/psychiatric condition within DSM IV.