

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 4649/19
Applicant: Veronica Thompson
First Respondent: 3M Purification Pty Limited
Second Respondent: Cannon Hygiene Australia Pty Limited
Date of Determination: 20 December 2019
Citation: [2019] NSWCC 420

The Commission determines:

1. The proceedings against the second respondent are discontinued.
2. Pursuant to section 4(b)(ii) of the *Workers Compensation Act 1987* the applicant sustained injury to her left hip in relation to the deemed date of injury 19 March 2013, with her employment with the respondent being the main contributing factor to the aggravation of the pre-existing disease.
3. Respondent to pay the applicant weekly compensation as follows:
 - (a) pursuant to section 36 of the *Workers Compensation Act 1987* from 19 March 2013 to 19 June 2013 at the rate of \$995.60 per week;
 - (b) pursuant to section 37 of the *Workers Compensation Act 1987* from 20 June 2013 to 30 June 2014 at the rate of \$838.40 per week;
 - (c) pursuant to section 37 of the *Workers Compensation Act 1987* from 1 July 2014 to 30 June 2015 at the rate of \$151.60 per week, and
 - (d) pursuant to section 37 of the *Workers Compensation Act 1987* from 1 July 2015 to 15 September 2015 at the rate of \$151.60 per week.
4. The respondent is to pay the claimed past section 60 expenses on production of accounts, receipts and/or Medicare Notice of Charge.
5. The lump sum claim is remitted to the Registrar for referral to an Approved Medical Specialist to assess permanent impairment of the lumbar spine and left lower extremity (hip) from the date of injury 19 March 2013 (deemed).
6. The documents to be referred to the Approved Medical Specialist are to include the Application to Resolve a Dispute and the Reply.

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

Josephine Bamber
Senior Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF JOSEPHINE BAMBER, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Ms Veronica Thompson is aged 60. She commenced work for the first respondent, 3M Purification Pty Limited (3M), from 1988 in their warehouse/factory at St Marys in various manual handling type roles. In about 2003, she commenced work for Cunno Pacific, who after 18 months were taken over by 3M. She says that the duties were the same up until the end of 2011. She then performed light duties until she was terminated in March 2013. Ms Thompson alleges she sustained injury to her lower back and left hip. On 4 February 2014, she had left hip replacement surgery.
2. Ms Thompson then worked for Cannon Hygiene Australia Pty Limited (Cannon), the second respondent, doing light delivery type work. At the Arbitration Hearing the proceedings against Cannon were discontinued.
3. The date of injury in Parts 4 and 5.6 of the Application to Resolve a Dispute (ARD) was amended by deleting the words "15 June 2012 (deemed) or in the alternative", so that the date of injury relied upon is just "19 March 2013 (deemed)".
4. The claims for compensation made in these proceedings are as follows:
 - (i) Lump sum compensation in relation to the lumbar spine and left lower extremity (hip);
 - (ii) The claim for weekly compensation was set out in Ms Thompson's handwritten schedule, based on agreed pre-injury average weekly earnings (PIAWE) figure of \$1,048 per week, as follows:
 - (i) pursuant to section 36 of the *Workers Compensation Act 1987* (the 1987 Act) from 19 March 2013 to 19 June 2013 at the rate of \$995.60, being 95% of the PIAWE;
 - (ii) pursuant to section 37 of the 1987 Act from 20 June 2013 to 30 June 2014 at the rate of \$838.40, being 80% of the PIAWE;
 - (iii) pursuant to section 37 from 1 July 2014 to 30 June 2015 when Ms Thompson was working near full time earning \$844 per week. $\$995.60$ less $\$844 = \151.60 per week, and
 - (iv) pursuant to section 37 from 1 July 2015 to 15 September 2015 when Ms Thompson was working earning \$634 per week. $\$995.60$ less $\$634 = \361.60 per week.
 - (iii) incurred section 60 expenses.
5. The respondent confirmed that it accepts that Ms Thompson sustained an injury to her lumbar spine in the course of her employment with 3M, but it disputes any injury was sustained to her left hip. This is consistent with the dispute notices issued by 3M's insurer, AAI Limited trading as GIO, dated 2 and 8 July 2019. The respondent's position is that if Ms Thompson does not succeed in establishing that an injury has occurred to her left hip, the assessment of permanent impairment for her lumbar spine upon which she relies does not meet the threshold in section 66(1) of the 1987 Act and so there cannot be a referral to an Approved Medical Specialist (AMS). Counsel also indicated that the determination of the liability issue in relation to the hip would also affect the determination of the claims for weekly compensation and section 60 expenses.

PROCEDURE BEFORE THE COMMISSION

6. The matter proceeded in arbitration hearing on 8 November 2019. Mr Ross Stanton, of counsel, appeared for Ms Thompson instructed by Ms Ishac, solicitor, and Mr Lachlan Robison, of counsel, appeared for the respondent, instructed by Ms Pritchard, solicitor. Ms Thompson attended with her son Daniel Thompson as her support person.
7. 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

8. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) ARD and attached documents, and
 - (b) Reply and attached documents.

Oral evidence

9. There was no oral evidence. The proceedings were sound recorded, and a copy is available to the parties. A written transcript has been made from the recording.

FINDINGS AND REASONS

Ms Thompson's statements

10. Ms Thompson's counsel submitted that she had worked for the respondent for an extensive period of time performing physically arduous tasks on a regular basis from the late 1990s towards the end of 2011 until she started to experience symptoms in her back and left leg. He recited the details set out in her written statement dated 5 September 2019. There is no need to summarise this aspect of Ms Thompson's statement as the facts surrounding the nature of her work are not in contention. I accept her evidence that her work involved repetitive lifting, carrying, twisting, bending and squatting. Ms Thompson also provided a statement dated 13 June 2016, which appears in the Reply.
11. On 18 June 2012, Ms Thompson completed a Worker's Injury Claim form and referred to "strain, lower back". She refers to lifting 10 kg rolls for weighing with repetitive twisting. She also noted that she had just found out she had been wrongly using the height adjustable trolleys over a long period of time. There is reference to the same in Dr Chin's notes.
12. Ms Thompson says she was laid off work by 3M in March 2013 when they no longer had light duty work for her. She says her condition deteriorated after this and she had to use a walking stick and she was unemployable up until she had recovered from the left hip replacement surgery. She says she then found the work at Cannon Hygiene delivering sanitary products in a van. She did this for 18 months and had increasing difficulties getting in and out of the van. She says the work at Cannon Hygiene did contribute to her pain and discomfort, but it was not significantly worse. She details her work in 2017 with West End City Motor doing administration. In 2018 she trained as a mobile speed camera operator but as she did not pass the medical examination, she did not get the job. In 2019 she worked for about six weeks at the state and federal elections.

Treating medical evidence

13. On 25 October 2011, Ms Thompson had an x-ray of her lumbo-sacral spine¹. A CT lumbar spine scan was performed on 24 February 2012². On 15 June 2012 Dr Chin, recorded in his clinical notes that she had developed low back pain in October 2011 and had seen Dr Peter Louda and had an x-ray performed.³ It is noted that in the last month the company had added a new process and her low back pain was worse.
14. On 2 August 2012, Dr Vincent Chin, referred her to Dr Robert Elliott, orthopaedic surgeon noting that Ms Thompson had been getting lower back pain since October last year and that in the last few months it was radiating down her left leg.⁴
15. On 13 August 2012, a Dr Lee of Blacktown performed an x-ray of the hip joint and pelvic girdle according to the Medicare Notice of Charge.⁵ Dr Breit refers to this x-ray as showing left hip arthritis⁶.
16. On 13 August 2012, Dr Elliott reported to Dr Chin that Ms Thompson's job involves a lot of repetitive lifting and twisting, and she used to lift up to 20 kg packages on a regular basis. Dr Elliott had a history of the development of back pain radiating to the left leg in October 2011. He said there was bulging at L5/S1 centrally and to the left shown on CT scan that fitted with her clinical symptoms. Dr Elliott said he reviewed the February CT scan and the disc bulge was moderate in size and to the left impinging on the neural structures.
17. An MRI lumbar scan was performed on 23 August 2012⁷. Dr Elliott reviewed the MRI and said it showed no large disc prolapse but there was an annular tear at L4/5, causing some of her symptoms⁸.
18. In Dr Chin's clinical notes there is a reference on 31 August 2012 to Ms Thompson slipping and falling on her left side in the bathroom and that she had a sore left knee/hip. On examination Dr Chin recorded the left hip was "non tender" and the "ROM" was ok⁹.
19. In report dated 24 September 2012, Dr Elliott advised that Ms Thompson's "clinical state remains much the same she still has a lot of pain around the left hip both anterior and posterior." The doctor sets out his examination findings as follows:

"Straight leg raising is unrestricted there is no neurological deficit in the limbs. Trendelenburg test on the left side is painful, but negative, her left hip is very stiff and she has minimal internal and external rotation. I think most of her problems seem to relate to the left hip and I wonder whether she has a significant labral tear from her twisting injury at work."¹⁰

¹ ARD page 39

² ARD page 41

³ ARD page 92

⁴ ARD page 49

⁵ ARD page 38

⁶ Reply page 63

⁷ ARD page 42

⁸ ARD page 78

⁹ ARD pages 90/91

¹⁰ ARD page 79

20. At the request of Dr Elliott an MRI scan was performed of the left hip on 4 October 2012¹¹. On 15 October 2012, Dr Elliott reported on it, stating the MRI did confirm “an extensive labral tear and advanced osteo arthritic change.” Dr Elliott opined that “I think she has developed the labral tear in the nature of her work and this has gone onto cause osteo arthritic change in the hip.”¹² Dr Elliott states that he advised Ms Thompson to undergo a total hip replacement and he arranged for the surgery on 9 November 2012. However, the surgery did not take place.
21. Ms Thompson then saw Dr Fraser at the request of Dr Mazher Khan, general practitioner, on 19 August 2013. Dr Fraser reported that she was suffering from an osteoarthritic left hip for more than a year. It was affecting her quality of life, and she had to walk with a stick at all times. Dr Fraser recommended a total hip replacement and arranged same for Mt Druitt Hospital¹³.
22. The operation was performed on 4 February 2014 by Dr Fraser¹⁴.
23. On 24 July 2017, Sandra Winterbottom, physiotherapist, reported to Dr Mazher Khan for treatment of low back pain and left anterior hip/groin pain. It was noted she had a brief period of physiotherapy after her hip replacement surgery but minimal intervention since. It was reported that she had multiple areas of dysfunction that were causing excess stresses in the lumbar spine, which could be improved with targeted exercise. Ms Winterbottom opined that her current functional capacity was quite limited, 10 minutes standing and walking. She said jobs involving primarily sitting could be tolerated for four to six hours per day¹⁵.
24. On 4 August 2017, Dr Khan issue a non-WorkCover certificate stating that Ms Thompson’s current functional capacity is quite limited¹⁶.

Dr Pillemer

25. Dr Pillemer provided a medico-legal report for Allianz on 27 September 2012. He took a history that Ms Thompson initially developed discomfort in October 2011 involving a burning sensation in her left knee. She saw her general practitioner who suggested the symptoms were coming from her back. After some physiotherapy her back pain settled but she still has ongoing discomfort from her left groin to her left knee. After examining Ms Thompson and reviewing the radiology, Dr Pillemer expressed the opinion that her symptoms were caused by osteoarthritic change in her left hip. Dr Pillemer says the osteoarthritic change is a constitutional condition not related to her work, but at most her work would have been an aggravating factor but not a substantial contributing factor to the development of the osteoarthritic change¹⁷.
26. However, the doctor does not consider whether the work was the main contributing factor to the aggravation of the osteoarthritic change. Later in his report Dr Pillemer states that any aggravation would be considered minor noting there was no history of any particular injury or precipitating factor¹⁸ and that “any work would not be regarded as being a substantial contributing factor”.¹⁹

¹¹ ARD page 138

¹² ARD page 80

¹³ ARD page 81

¹⁴ ARD page 82

¹⁵ ARD page 51

¹⁶ ARD page 52

¹⁷ ARD page 131

¹⁸ ARD page 133

¹⁹ ARD page 136

27. Dr Pillemer says the only definitive treatment is a total hip replacement and at that time her symptoms were not severe enough to warrant the same.
28. Dr Pillemer re-examined Ms Thompson and provided further reports to the insurer dated 20 February 2018 and 8 July 2019. Dr Pillemer finds that "It is reasonable to suggest that the nature and conditions of her work over the 23 years with 3M would have aggravated her lumbar condition." But he says there was no aggravation in relation to her hip²⁰.
29. In his final report Dr Pillemer opines:

"As far as Ms Thompson's left hip is concerned, as noted there is no history of an injury or precipitating factor and it remains my opinion that the osteoarthritic change is a constitutional condition for her, and not related to the nature and conditions of her work. She suffers from bilateral hip dysplasia. Once again at most, her work would have been an aggravating factor of her underlying condition, but not a substantial contributing factor to the development of the osteoarthritic change."²¹

Dr Home

30. Dr Home, consultant occupational physician, has provided reports for Ms Thompson dated 3 March 2015²², 19 December 2017²³ and 19 November 2018²⁴. Dr Home states that he viewed the bilateral hip MRI scans which he says demonstrate bilateral acetabular dysplasia and compensatory labral hypertrophy on the left side with a left sided labral tear at the 12 o'clock position. He also found moderately large left hip joint effusion and secondary degenerative loss of cartilage within the left hip joint consistent with advanced osteoarthritis.
31. In Dr Home's first report he noted that Ms Thompson has had a good recovery from her left total hip replacement, and she has no hip pain. She can walk and catch public transport and had no restriction of her sitting tolerance. She did have some low back pain for several hours, a few days per week. She has discomfort in her back when prolonged walking and standing, but no radiation of pain. At that time, she was undertaking hydrotherapy.
32. Dr Home notes that 12 months ago Ms Thompson obtained work as a delivery driver of a van and works full time.
33. Dr Home opined that Ms Thompson's work aggravated underlying degenerative change in her lumbar spine. He added that she developed progressive left hip pain in the period leading up to 2012 and investigations revealed a labral tear and secondary degenerative changes in the left hip joint. He said this occurred against a background of bilateral acetabular dysplasia, which was asymptomatic on the right side.
34. Dr Home gave a diagnosis of a left total hip replacement to manage osteoarthritis secondary to a labral tear. He also diagnosed mechanical low back pain due to underlying degenerative change in the facet joints rendered symptomatic by a work place accident in 2012. In answer to questions, Dr Home stated that the left hip condition is regarded as a disease process that has been materially aggravated by the nature of her employment over a long period. He also stated that the employment was the main contributing factor to the acceleration of the disease in the left hip.

²⁰ Reply pages 47/48

²¹ Reply page 80

²² ARD page 53

²³ ARD page 61

²⁴ ARD page 69

35. In terms of her work capacity, in this first report Dr Home opined Ms Thompson was fit for her current delivery driver work as it allowed her to sit and stand throughout the day and her previous work required prolonged sitting or standing. He said she had a 15 kg lifting restriction and she should involve work requiring deep forward bending from the waist.
36. In his second report Dr Home reviewed further medical documentation including the report from Dr Pillemer and Ms Thompson's statement. He took the further history that Ms Thompson has persisting lower back pain that is present for most of the day of moderate intensity. It is exacerbated by bending and prolonged sitting. In her hip she only has mild symptoms. She advised she had a sitting and driving tolerance of 30 minutes. She is able to walk for 10 minutes and has marked difficulty with forward bending at the waist.
37. Dr Home was asked the following question about causation:

“Do you accept that based on the history you have taken from Mrs Thompson and as set out in her enclosed statement dated 12 September 2017, that as a result of the nature of the work that Mrs Thompson performed at 3M Purification in its various forms in her 24 years of employment, that there has been an injury to the hip and lumbar spine either:

a. caused by the general nature and conditions of the work that she performed including heavy lifting and carrying or

b. whether the doctor considers the work has materially aggravated, accelerated or led to a deterioration of a disease process ongoing in Mrs Thompson's left hip and back and led to her present restrictions in ability to perform work, the need for surgery on the left hip and treatment directed at the left hip and lumbar spine.

It is my opinion that Ms Thompson's spinal condition was caused by the nature and conditions of her work aggravating underlying degenerative change in the facet joints at the lumbosacral junction and at the left hip.

It is my opinion that your client's left hip condition arises due to material aggravation of a disease process, leading on to the development of a local tear and subsequently post-traumatic degenerative change in the left hip, thereafter requiring a total hip replacement.”

38. Dr Home's opinion regarding Ms Thompson's work capacity was that she was unfit for her pre-injury duties and that she was fit for semi-sedentary work, such as the van driving. However, Dr Home noted that getting in and out of the van on a repetitive basis was aggravating her back pain.
39. In his 2018 report Dr Home noted that Ms Thompson performed the van work for Cannon Hygiene for 18 months and had increase in back pain. She ceased that work in late 2015. She was unemployed until 2017 when she commenced work with West End City Motors performing administration work. Dr Home records that employment was terminated recently, and during that work she had no aggravation of her hip or back. He notes that at the time of his report Ms Thompson was undertaking training as a mobile speed camera operator. In terms of causation Dr Home gives similar answers to his earlier report, particularly in relation to the hip.

Dr Breit

40. Dr Breit, orthopaedic surgeon, provided a medico-legal report for the respondent's solicitors dated 27 June 2019. He has a history of Ms Thompson's employment history and work duties. He states that on 14 June 2012 there was no traumatic event but the onset of marked pain, much worse than she had previously experienced and so she reported it. Dr Breit says that Ms Thompson saw the company doctor and had a referral for physiotherapy but lost no time from work. She returned to her normal work, but her problems persisted, and she saw Dr Elliott. Dr Breit says Dr Elliott told Ms Thompson that her problem was due more to her hip than her back and he wanted to do a hip replacement.
41. Dr Breit noted that his referral mentioned Ms Thompson slipping in the bathroom on 31 August 2012. He says she told him that she saved herself and did not fall. Although, as noted above Dr Breit refers to an x-ray of her pelvis and left hip on 13 August 2012, so this was before any incident on 31 August 2012. Dr Breit also notes that Ms Thompson complained about burning pain in the left knee before this in 2012 and that her general practitioner thought this pain was referred from her low back.
42. Dr Breit also has a history that after the hip replacement Ms Thompson was 99.9% better. He says her subsequent employment with Cannon involved driving around collecting sanitary bins and what stopped her working was the getting in and out of the driver's seat of the vehicle. Dr Breit also notes the treatment for her lumbar spine, that she walks 20-30 minutes five times a day but is limited by low back pain. She can sit in a chair for an unlimited time.
43. Dr Breit opines that Ms Thompson's employment with 3M has been at least an aggravating and extending factor with her lumbar spondylosis. He noted she had an extremely high BMI. Dr Breit states that the nature and conditions of her employment would aggravate and possibly accelerate the underlying spondylosis. He states there is no nexus between her employment and hip arthritis. "The literature has never shown such a connection and again her weight is probably of greater significance." He regarded the left hip condition as non-work related.
44. Dr Breit was asked about the employment at Cannon Hygiene and says,
- "I do not consider the getting in and out of a car or van to be a contributing factor to the hip arthritis and the same applies to the nature and conditions of her employment. The job however involved lifting and carrying of supplies which I am told was not significant so that in my opinion there has not been a contribution from employment with Cannon Hygiene."²⁵
45. In terms of work capacity Dr Breit said Ms Thompson could work normal hours in an area where there is no bending, stooping, lifting or carrying more than 10 kg and where she can sit, stand and move about according to comfort. He pointed to her having worked in an administrative office capacity.

Ms Thompson's submissions

46. Ms Thompson's counsel, after relating the nature of her duties by reference to her statement, summarised the medical evidence, which I have outlined above. It was submitted that it was understandable that when Ms Thompson was filling out her claim form, she referred to strain of her lower back rather than symptoms in her left leg and hip, because at that time her general practitioner was pondering whether her back was the source of her problems.

²⁵ Reply page 64

47. Counsel noted that both Dr Elliott and Dr Pillemer, who had seen Ms Thompson fairly early on, had taken a history of her performing work that was heavy at times. They both note repetitive lifting of 20 kg weights. Ms Thompson's counsel drew attention to Dr Pillemer's history that her main concern at the time of his first examination on 27 September 2012 was discomfort in the left groin going down her thigh to her knee. Counsel also referred to Dr Pillemer's examination that movements of the left hip caused discomfort in her left knee. Counsel submitted that it was very apparent Dr Pillemer was diagnosing problems in the left leg that were actually emanating from the hip. He submitted that this was born out by Dr Pillemer noting that Ms Thompson initially developed discomfort in the left knee region and that this fits in with her evidence in her statement.
48. Ms Thompson's counsel acknowledged that Dr Pillemer ruled out work being a factor in her hip complaints. However, counsel submits Dr Home has the contrary view. Counsel submitted that the MRI scan of 4 October 2012 revealed significant pathology in the left hip including a labral tear. Counsel submitted that it was significant that Dr Elliott reviewed this scan and opined that "I think she has developed the labral tear in the nature of her work and this has gone onto cause osteo arthritic change in the hip". Counsel submitted that Dr Elliott's opinion is supportive of Ms Thompson's claim.
49. Ms Thompson's counsel submitted that Dr Elliott had the advantage of seeing her on a number of occasions. It was submitted that it does not matter that Dr Elliott does not use the terminology of the legislation, as you would not expect him to when reporting to the general practitioner. Counsel relied upon cases such as *Fletchers International Exports Pty Limited v Barrow & Anor*²⁶. At [61] of *Barrow Mason P* in the Court of Appeal decision stated, with Justices Santow and Tobias agreeing:
- "The failure of an area of the body to cope with repeated stress imposed on it, leading to pain and loss of function is capable of being found to be a disease process (see generally *Armao v Ladue Holdings Pty; Perry v Tanine Pty Ltd t/as Ermington Hotel*)."
- (citations omitted)
50. Ms Thompson's counsel submitted that this is what Dr Elliott was describing about the repeated work and that the left hip has not been able to cope with the repeated strains being imposed on it, and the labrum was torn and that tear has gone on to cause osteoarthritic changes in the hip. It was submitted that this fits in with the fact that Ms Thompson did this type of work for many years. Counsel said that her presentation initially confused the doctors, who attributed her pain to her back, but both Dr Elliott and Dr Pillemer clarify that her left hip is a significant reason for part of these symptoms.
51. Counsel submitted that Ms Thompson's hip condition was so significant that in 2012 Dr Elliott wanted to perform the left total hip replacement. He argued that it was hardly surprising when this surgery did not proceed that Ms Thompson's condition worsened and she had to walk with a stick. He also drew attention to the fact that after the hip replacement Ms Thompson had improved and she was able to start to look for work.
52. Ms Thompson's counsel submitted that Dr Homes has a reasonably consistent history of the work she performed at 3M and formed the opinion that Ms Thompson sustained an injury to her left hip due to the nature and conditions of this work, having considered the MRI scan. Counsel relied upon Dr Home's opinion that the left hip condition arose due to material aggravation of a disease process, leading on to the development of a local tear and subsequently post-traumatic degenerative change in the left hip, thereafter requiring a total hip replacement. Counsel submitted that Dr Home is effectively opining exactly the same as Dr Elliott, who expressed his opinion more briefly.

²⁶ [2007] NSWCA 244, *Barrow*

53. In summary, Ms Thompson's submission was that the Commission would be well satisfied that the heavy work performed over a number of years to 2011 had produced injury to the left hip. I clarified with counsel and he confirmed he was relying on section 4(b)(ii) of the 1987 Act, that employment with 3M was the main contributing factor to the aggravation of the underlying disease in the left hip.
54. Counsel also submitted that Dr Pillemer did not turn his mind to the fact that Ms Thompson had a tear to her labrum. Counsel also submitted that there is a world of difference in what Ms Thompson did for years at work and what she would be doing in her day to day life. Counsel submitted that it is logical that the symptoms are occurred after that period of work and the symptoms were troublesome in the workplace, to the extent her work duties were modified, ultimately ceased and then surgery was performed. Counsel argued that Dr Pillemer did not grapple with these matters in his opinion.

Respondent's submissions

55. The respondent's counsel submitted that while Ms Thompson in her statement sets out in some detail her work duties, Dr Home does not grapple with this to any level of detail. He submitted that when her lay evidence is taken together with the medical evidence an issue arises as in *Makita (Australia) Pty Ltd v Sprowles*²⁷. It was submitted that Dr Home did not give an opinion of the body not coping with the work stressors.
56. The respondent's counsel then referred to parts of Ms Thompson's statement, such as from paragraph 38 onwards, which he submitted cannot be part of her case in terms of onset of injury because those paragraphs pertain to the work at Cannon. Counsel also referred to paragraphs 48 onwards, which deals with work in 2017. However, as I pointed out to counsel the weekly compensation claim ends on 15 September 2015, so these paragraphs did not seem that relevant. The respondent's counsel submitted that if there was capacity in 2017, and noting Ms Thompson had a good recovery from her hip replacement, why would she not have work capacity earlier in the periods she claims weekly compensation.
57. The respondent's counsel was also critical of Dr Home's expression of his opinion about the causal connection of the left hip condition to her work. Counsel submitted the opinion was a bare *ipse dixit* in the absence of an explanation of how the work activities led to pathology.
58. Counsel submitted that Dr Pillemer had provided an explanation for his opinion that the nature of the pathology could not be related to the nature and conditions of her work. Counsel did acknowledge that Dr Pillemer said there could be aggravation from her work at 3M, but it was not a substantial contributing factor to the osteoarthritic change.
59. During the respondent's submissions, Ms Thompson's counsel observed that the respondent had opinions from two orthopaedic specialists, Dr Pillemer and Dr Breit. Objection was taken under Regulation 44 of the Workers Compensation Regulation 2016. This objection was raised very late in the proceedings. While the provision is expressed in mandatory terms, as the respondent's counsel observed, at the time the Reply was admitted into evidence by me Ms Thompson was proceeding against two respondents and so he argued each party was entitled to rely on a specialist. He also argued that the proceedings were discontinued against the second respondent only after the Reply had been admitted into evidence. I consider this is arguably correct, and also because the objection was taken so late I permitted the respondent to rely on both experts.
60. The respondent's counsel submitted that Dr Pillemer in his first report opined that the disc changes were not the cause of Ms Thompson's discomfort, that the hip was the cause. Counsel said if the Commission finds the hip is not a work-related injury, then the weekly compensation would need to be reduced to reflect that.

²⁷ [2001] NSWCA 305, *Makita*

61. Counsel submitted that Dr Pillemer is alive to the difference between the causation of a disease and aggravation of a disease, but is of the view if there was aggravation it is not a substantial contributing factor and this means in Dr Pillemer's view the main contributing factor aspect in section 4(b)(ii) of the 1987 Act is not met.
62. The respondent's counsel also submits that Dr Breit reaches the same conclusion that the hip condition is constitutional.
63. Counsel also submitted that the claim form was completed by Ms Thompson around the same time as Dr Elliott had recommended a hip replacement, yet she only refers to injury to her lumbar spine. It was also noted that Dr Fraser, who performed the hip surgery, does not shed light on causation. It was submitted that these matters lead to the conclusion that Ms Thompson has not discharged her onus of proof that her hip injury is compensable. It was submitted that if there was aggravation it is *de minimus* and falls well short of the requirement in the Act.

Determination of the issue regarding injury

64. The *Workers Compensation Amendment Legislation Act 2012* (the 2012 amending Act) changed the definition of "injury" in the 1987 Act. The change applies to injuries received on or after 19 June 2012. Section 4 provides:

"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..."
(emphasis added)

65. Section 9A was also amended and does not apply to disease injuries.
66. Decisions in cases such as *Federal Broom Co Pty Ltd v Semlitch*²⁸, albeit dealing with the 1926 Act were illustrative of the questions to be asked when determining an issue of a "disease" injury. The three questions posed by Windeyer J in *Semlitch* were:
 1. Was the applicant suffering from a disease?
 2. If so, was there an aggravation, acceleration, exacerbation or deterioration of it?
 3. If so, was the employment a contributing factor?
67. I have set out the provisions from the 1987 Act regarding the definition of "injury" above. Section 4(b)(ii) refers to 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. The questions posed in *Semlitch* are still apt with the word "main" included in question 3.

²⁸ [1964] HCA 34; (1964) 110 CLR 626, *Semlitch*

68. In this case the medical evidence is in agreement that Ms Thompson suffers from a disease in her left hip so the first question in *Semlitch* is answered in the affirmative.
69. Various cases have considered what is required to prove an aggravation etc of a disease. For instance, Roche DP in *Kelly v Western Institute NSW TAFE Commission*²⁹ referred to *Semlitch* and stated at [66]:
- “The Arbitrator erred in rejecting Dr Burgess’s evidence on the basis that he did not explain the ‘baseline’ from which the deterioration was said to have occurred. It was not necessary for the doctor to explain any baseline. An aggravation or exacerbation of a disease occurs where the experience of the disease by the patient is increased or intensified by an increase or intensifying of symptoms.”
70. When considering questions of causation, a relevant authority is *Kooragang Cement Pty Ltd v Bates*³⁰ Kirby P (as he then was) found “what is required is a commonsense evaluation of the causal chain.”
71. Taking into account these authorities, I find the evidence is persuasive that there was an aggravation of the degenerative changes in Ms Thompson’s left hip because of the nature of her work over a very long period of time, with acute symptoms becoming manifest in 2011 and continuing thereafter. I find that Ms Thompson’s experience of the degenerative changes in her left hip was made worse and increased the intensity of her symptoms by the aggravation etc caused by her work.
72. It needs to be borne in mind that “the main contributing factor” requirement in section 4(b)(ii) relates to the aggravation etc of the disease. I find the factual and medical evidence from Dr Elliott and Dr Home supports a finding that the main contributing factor to the aggravation of the left hip disease was her work over a long period of time.
73. I prefer the opinion of Dr Elliott to that of Drs Pillemer and Breit because as Ms Thompson’s treating specialist he had the advantage of seeing her several times as her symptoms were developing. Dr Elliott identified in his report of 13 August 2012 that Ms Thompson’s job involved a lot of repetitive lifting and twisting and lifting of packages up to 20 kg on a regular basis. Dr Elliott also queried if Ms Thompson had a significant labral tear from a twisting injury at work. He was proved to be correct with the MRI scan findings. Indeed, the MRI of 4 October 2012 revealed an extensive labral tear. Dr Elliott was aware that she had underlying degenerative changes, but considered the nature of her work resulted in the development of the labral tear and this has gone on to cause osteoarthritic change.
74. While Dr Pillemer did also examine Ms Thompson in the time Dr Elliott was treating Ms Thompson, he only examined her once in the period and not again until 2018 and 2019. Furthermore, as Ms Thompson’s counsel submitted, Dr Pillemer in his 2012 report did not consider the labral tear. This clearly was because the MRI scan revealing the same was performed *after* his 27 September 2012 report. In his subsequent 2018 report Dr Pillemer does not refer to the MRI scan of 4 October 2012. The only radiology he refers to is a CT scan of the lumbar spine. Dr Pillemer says his opinion remains the same as noted previously. Dr Pillemer does not refer in this 2018 report to the reports of Dr Elliott.

²⁹ [2010] NSWCCPD 71, *Kelly*

³⁰ (1994) 35 NSWLR; (1994) NSWCCR 796, *Kooragang*

75. In his 2019 report Dr Pillemer lists the documents sent to him and included are Dr Elliott's report and "04.10.12 radiology report"³¹, but under the heading investigations Dr Pillemer again only refers to the CT scan of May 2016 of the lumbar spine. He does not refer to any of the radiology of the hip³². No where in his report does he refer to the MRI scan of 4 October 2012 or to Dr Elliott's reports referring to the same.
76. I cannot be confident that Dr Pillemer has taken into account this material. He does not refer to the presence of a labral tear. Therefore, I find that I can give no weight to the opinions expressed by Dr Pillemer.
77. Dr Breit does refer to an x-ray on 13 August 2012 of the pelvis and left hip and says it shows left hip arthritis. In the x-ray on 29 January 2014 he says the arthritis has become worse. He does refer to the MRI scan of 4 October 2012 but only stating "there is left hip arthritis" He does not refer to it revealing a labral tear³³. Even though he was sent Dr Elliott's reports, Dr Breit does not refer to the same. In his history he mentions that Ms Thompson saw Dr Elliott and advised her that her hip was the problem and he wanted to do a hip replacement. But Dr Breit does not otherwise refer to Dr Elliott's opinion. I find this to be an extraordinary omission as one would expect a medico-legal doctor who is sent all of the material to consider the treating orthopaedic surgeon's opinion about causation.
78. Dr Breit just says there is no nexus between her employment and hip arthritis. However, he does not refer to the presence of the labral tear. Dr Breit does not consider if the nature of her work could have aggravated her left hip condition. For these reasons, I find I also cannot place weight on Dr Breit's opinion about causation.
79. Dr Home, on the other hand, provides much more detailed reports when they are carefully considered than either Drs Pillemer and Breit. I reject the respondent's submissions that there is a *Makita* issue with his opinions. Dr Home states he has reviewed the bilateral hip scans that Dr Elliott ordered³⁴. He, in quite a bit of detail, relates the following:

"They demonstrate bilateral acetabular dysplasia. There is a compensatory labral hypertrophy on the left side. There is a left side labral tear at the 12 o'clock position. There is a moderately large left hip joint effusion. There is secondary degenerative loss of cartilage within the left hip joint consistent with advanced osteoarthritis."

80. Dr Home gives the opinion in his first report that:

"Your client developed progressive left hip pain in the period leading up to 2012 with investigation of this demonstrating a labral tear and secondary degenerative changes within the left hip joint. The degeneration occurred against a background of bilateral acetabular dysplasia, which is asymptomatic on the right side. Comparison views demonstrate no abnormalities at the right hip, despite underlying constitutional factors..."

Your client's left hip condition has arisen as consequence of the manual handling requirements of the work place, with superimposed underlying vulnerability due to acetabular dysplasia...

Your client's left hip condition is regarded as a disease process that has been materially aggravated by the nature of her employment over a long period."

³¹ Reply page 77

³² Reply page 79

³³ Reply page 64

³⁴ ARD page 54

81. Dr Home also expressed the opinion that Ms Thompson's employment is considered to be a main contributing factor to the acceleration of the disease in the hip.
82. I consider that Dr Home's opinion is consistent with that of Dr Elliott and is expressed thoroughly and in a considered way.
83. I find that Ms Thompson has relied upon evidence that satisfies the questions posed in *Semlitch* and *Kelly*, that her experience of the disease in her left hip, which had been asymptomatic, has been increased or intensified and so there has been an aggravation of the disease. I accept the opinions of Drs Elliott and Home that her employment with 3M is the main contributing factor to such aggravation.
84. Accordingly, I find Ms Thompson has discharged her onus of proof that pursuant to section 4(b)(ii) of the 1987 Act she has sustained injury to her left hip in relation to the deemed date of injury 19 March 2013, with her employment with the respondent being the main contributing factor to the aggravation of the pre-existing disease.

Weekly compensation

85. Ms Thompson's counsel submitted that in relation to the claim for weekly compensation, if there was a finding in her favour in relation to injury to the left hip, then it should be accepted that she had no current work capacity in the period from when she ceased at 3M on 19 March 2013 to 30 June 2014. Counsel noted that even though the hip replacement was on 4 February 2014, it is significant surgery and a period needs to be allowed for her recovery thereafter.
86. Anticipating an argument by the respondent that Ms Thompson could have continued to do work of a suitable nature that she had been doing before her termination from 3M, her counsel discussed the case of *Wollongong Nursing Home Pty Ltd v Dewar*³⁵. Her counsel noted that in *Dewar* it was found the work had to be a "real" job.
87. In *Dewar* Roche DP explained how the determination of an injured worker's entitlement to weekly compensation differed after the 2012 amendments and that care needed to be taken when relying on older authorities. This is because section 32A of the 1987 Act eliminates a consideration of whether work is "available" and whether it is "of a type or nature that is generally available in the employment market".
88. However, as Roche DP pointed out the first question to ask is whether a worker has a "current work capacity" or "no current work capacity". As he explained at [47],

"A 'current work capacity' is an 'inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment'. The suitable employment referred to is not restricted to light duties performed for the respondent employer, which may or may not be suitable employment. It is suitable employment as defined in s 32A. 'No current work capacity' exists when the worker is not able to return to work either in the worker's pre-injury employment or in suitable employment."
89. Ms Thompson's counsel submitted that an injured worker could be totally unfit to work when the realities of work was considered. In Ms Thompson's case counsel submitted that weekly compensation should be awarded in accordance with his handwritten schedule. So, for the first two periods until 30 June 2014 on the basis of no current work capacity. Counsel submitted that after Ms Thompson had returned to work the Commission should be satisfied that her capacity for employment was equivalent to her actual earnings. The latter period is from 1 July 2014 to 15 September 2015.

³⁵ [2014] NSWCCPD 55, *Dewar*

90. The respondent made brief submissions about the claim for weekly compensation, that on the balance of the evidence Ms Thompson has had a good recovery from the hip surgery and if she succeeds regarding the injury issue, she should not receive the full value in relation to the claim for weekly compensation.
91. I will consider the relevant evidence about Ms Thompson's work capacity pertaining to the periods for which she claims weekly compensation.

19 March 2013 to 19 June 2013

92. Dr Pillemer on 27 September 2012 considered Ms Thompson's fitness for employment and said she was a very well-motivated person, not having to take any time off work but now on restricted duties which in Dr Pillemer's opinion would need to be continued in the future. He said she could not return to pre-injury duties until she had a hip replacement. Dr Pillemer noted that her symptoms in her groin were aggravated by walking or trying to negotiate stairs. He describes her restricted duties as having a 5 kg lifting limit and a 15 kg pushing, pulling and rolling limit.
93. However, I find it is significant that Dr Elliott had recommended and had arranged for the hip replacement surgery to take place on 9 November 2012. In his report dated 15 October 2012 he described her pain as quite disabling. Not only did Ms Thompson have to contend with her worsening hip injury, she had a back injury. The respondent has conceded "injury" in relation to the lumbar spine. I note on 18 December 2012 Ms Thompson underwent a CT guided right L5/S1 facet joint steroid injection and on 19 December 2012 a CT guided right L4/5 facet joint block. At the time Dr Pillemer examined Ms Thompson her back had settled down, but it is reasonable to assume that these injections in December 2012 indicated her back had become more painful.
94. Ms Thompson says after her employment was terminated in March 2013, she had to use a walking stick which I infer was predominantly due to her worsening hip problem.
95. In the period 19 March 2013 to 19 June 2013, I find that Ms Thompson was not fit to perform her pre-injury duties. I find on the balance of probabilities due to her lumbar spine injury and hip injury that Ms Thompson had no current work capacity. I find that it is unrealistic for Ms Thompson who was aged 54 at this time, walking with a stick and requiring a hip replacement and suffering a lumbar injury to have a work capacity. Dr Pillemer described her as well motivated and I accept that this is an accurate description of her, not only because of her long-term employment with 3M but also because she did try to keep working up until she was terminated and then once she recovered from her hip surgery, she obtained work. I find that the medical evidence, to which I have referred, supports a finding in this period of no current work capacity, but also it is reasonable to infer had she been able she would have worked, because she has proved in the past and post-surgery keen to work.
96. The respondent did not argue that she could have kept doing restricted duties, although it was argued the Commission should not make an award at full value, but no real assistance was offered as to what level nor was there a detailed response to Ms Thompson's submissions.
97. Accordingly, I find from 19 March to 19 June 2013 Ms Thompson had no current work capacity and is entitled to weekly compensation pursuant to section 36 of the 1987 Act at 95% of the PIAWE figure, which was agreed at \$1,048. This equates to \$995.60 per week.

20 June 2013 to 30 June 2014

98. In this period Ms Thompson was not working and Dr Fraser had examined her on 19 August 2013 and said her left hip was affecting her quality of life and she had to walk with a stick at all times. He performed a total hip replacement on 4 February 2014 at Mt Druitt Hospital. Again, I am persuaded that it would be quite unrealistic to find that Ms Thompson would have a capacity for some employment while waiting for this surgery. And I find adopting the reasoning above, that Ms Thompson had no current capacity for employment in this period. I accept her counsel's submission that a period post operation needs to be allowed for her rehabilitation.
99. I find pursuant to section 37 of the 1987 Act from 20 June 2013 to 30 June 2014 Ms Thompson is entitled to weekly compensation at the rate of \$838.40 being 80% of the PIAWE.

1 July 2014 to 30 June 2015

100. In this period Ms Thompson was working at Cannon and earning \$844 per week. Under section 37(2) of the 1987 Act Ms Thompson is entitled to 95% of the PIAWE figure, so \$995.80 less the greater of (a) the amount she can earn in suitable employment or (b) her current weekly earnings. Her counsel argued that the Commission should find that the amount she could earn in suitable employment equated to her actual earnings of \$844.
101. Her work was with Cannon driving a van and delivering and collecting sanitary products. Dr Home examined her in this period and in his report dated 3 March 2015 found she was not fit for her pre-injury duties, but was suited to her current employment as it was more sedentary. He placed a 15 kg lifting restriction on her and because of her lumbar condition said she should avoid standing and walking and repetitive deep bending at the waist. He said she was not totally incapacitated for work and could do full time work for Cannon.
102. I consider that in light of Dr Home's opinion that Ms Thompson was working in this period to her maximum capacity or in other words she had a current work capacity to perform suitable employment. Section 32A of the 1987 Act requires the Commission when assessing suitable employment to have regard to the nature of her incapacity and details in the medical information. Dr Home has provided this evidence, given his examination in the period. Her age in this period was 56, her education was to year 10 and her skills and work experience were predominantly in manual type work. There were no return to work plans or occupational services offered to Ms Thompson.
103. In *Dewar Roche DP* found at [58]
- “‘suitable employment’ must be determined by reference to what the worker is physically (and psychologically) capable of doing, having regard to the worker’s ‘inability arising from an injury’. Suitable employment means ‘*employment in work* for which the worker is currently suited’ (emphasis added).”
104. Taking into account the factors discussed above from section 32A, I consider that her ability to work in suitable employment was the employment at Cannon, that is the work she was currently suited to. Therefore, I accept the submissions of her counsel that under section 37 95% of the PIAWE is \$995.60 less \$844 leaving an entitlement of \$151.60

1 July 2015 to 15 September 2015

105. In this period Ms Thompson was working at Cannon according to her 2015 and 2016 taxation returns³⁶. The claim ends on 15 September 2015 as that is the end of 130 weeks according to Ms Thompson's counsel's handwritten schedule. Her earnings were \$634 per week. The respondent's counsel did not challenge these figures. Ms Thompson in her statement says she did the work at Cannon for about 18 months but found she was having increasing difficulties getting in and out of the van and climbing stairs and carrying receptacles. She says the work did contribute to pain and discomfort, but it was not significantly worse. This suggests a revelation of symptoms, rather than genesis of further injury.
106. The most contemporaneous medical evidence remains the assessment of Dr Home, referred to above, as all the other medico-legal reports post date this period by quite a time. Dr Home found she could do full time work for Cannon in the 2015 report. In his 2017 report he took a history that access and egress from the van exacerbated her back complaints³⁷. However, in this period I consider that her statement and medical evidence does not adequately address why her ability to perform suitable work was only \$634 per week, when she had demonstrated for a year she could earn \$844. The respondent's counsel had submitted that the fact that later on she could do administrative type work suggests she would have had a capacity to do it earlier. However, I note that administrative work in 2017 was not full time.
107. Ms Thompson has the onus of proof and given the lack of detail in this period I consider I cannot just find that \$634 was the limit of her capacity and so I propose to allow loss based upon the preceding period when she demonstrated a capacity to work full time and earn \$844 per week. Therefore, in this period I also allow \$151.60 per week, not the \$361.60 claimed.

Section 60 expenses

108. The section 60 expenses were not disputed by the respondent's counsel if there was a finding made in relation to the hip. I order that the respondent is to pay the claimed past section 60 expenses on production of accounts, receipts and/or Medicare Notice of Charge.

SUMMARY

109. The determination and orders are as follows:

- (a) The proceedings against the second respondent are discontinued.
- (b) Pursuant to section 4(b)(ii) of the 1987 Act the applicant sustained injury to her left hip in relation to the deemed date of injury 19 March 2013, with her employment with the respondent being the main contributing factor to the aggravation of the pre-existing disease.
- (c) Respondent to pay the applicant weekly compensation as follows:
 - (i) pursuant to section 36 of the 1987 Act from 19 March 2013 to 19 June 2013 at the rate of \$995.60 per week;
 - (ii) pursuant to section 37 of the 1987 Act from 20 June 2013 to 30 June 2014 at the rate of \$838.40 per week;

³⁶ ARD pages 188 and 185

³⁷ Reply page 40

- (iii) pursuant to section 37 of the 1987 Act from 1 July 2014 to 30 June 2015 at the rate of \$151.60 per week, and
- (iv) pursuant to section 37 of the 1987 Act from 1 July 2015 to 15 September 2015 at the rate of \$151.60 per week.
- (d) The respondent is to pay the claimed past section 60 expenses on production of accounts, receipts and/or Medicare Notice of Charge.
- (e) The lump sum claim is remitted to the Registrar for referral to an AMS to assess permanent impairment of the lumbar spine and left lower extremity (hip) from the date of injury 19 March 2013 (deemed).
- (f) The documents to be referred to the AMS are to include the ARD and the Reply.