WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **4241/19**
Applicant: **Gregory Warren Shiels**
Respondent: **Security Specialists Australia Pty Ltd**
Date of Determination: **28 February 2020**
Citation: **[2020] NSWWCC 57**

The Commission determines:

1. The applicant suffered an injury to his left and right hips on 24 October 2017 pursuant to section 4(a) of the *Workers Compensation Act 1987* (the 1987 Act).

2. The applicant's employment was a substantial contributing factor the above injury.

3. The injuries to the applicant's hips and lumbar spine have not resolved.

The Commission orders:

4. Award for the applicant on the claim for injury to his left and right hips.

5. Award for the applicant on the claim for weekly benefits compensation. The respondent is to pay the applicant weekly benefits compensation pursuant to section 37 of the 1987 Act from 8 May 2019 to date and continuing at a rate of $856.80. The respondent is to have credit for any payments made to the applicant during this period.

6. Award for the applicant on the claim for medical expenses. The respondent is to pay the applicant's reasonably necessary medical expenses pursuant to section 60 of the 1987 Act on production of accounts, receipts and/or HIC Notice of Charge.

7. Award for the applicant on the claim for surgery in the form of a L3-S1 decompression and fusion. The respondent is to pay the costs of the surgery pursuant to section 60 of the 1987 Act, and associated expenses.

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

Nicholas Read
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 NICHOLS READ, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A MacLeod

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

STATEMENT OF REASONS

BACKGROUND

1. Gregory Shiels was employed by Security Specialists Australia Pty Ltd, the respondent, as a security guard. Amongst other duties, Mr Shiels was responsible for the transfer of cash to and from banks and other businesses. Mr Shiels claimed that on 24 October 2017 he suffered injury to his back, a left-sided hernia and injury to both hips as a result of lifting a heavy bag of coins. Mr Shiels also claimed he suffered injury as a result of the heavy manual tasks he was required to undertake over the course of his employment.

2. The respondent accepted that Mr Shiels suffered an injury to his back and a hernia on 24 October 2017, but disputed that Mr Shiels suffered injury to his hips. The respondent said Mr Shiels’ hip condition was no more than a temporary aggravation of underlying osteoarthritis. The respondent also said Mr Shiels’ back injury had resolved and he was no longer entitled to weekly benefits compensation or medical expenses.

PROCEDURE BEFORE THE COMMISSION

3. The parties attended a conciliation conference and then arbitration on 11 February 2020.

4. Mr Ty Hickey of counsel appeared for Ms Shiels. Mr Paul Stockley of counsel appeared for the respondent.

5. I was satisfied that the parties to the dispute understood the nature of the application and the legal implications of the assertions made in the information supplied. I used my best endeavours to attempt to bring the parties to the dispute to a settlement acceptable to all of them. I was satisfied that the parties had sufficient opportunity to explore settlement and that they were unable to reach an agreed resolution of the dispute.

ISSUES FOR DETERMINATION

6. The issues for determination were as follows:

   (a) whether Mr Shiels’ suffered a compensable injury to his hips as a result of the incident on 24 October 2017, or alternatively as a result of the nature and conditions of his employment;

   (a) whether Mr Shiels suffers from incapacity for work as a result of his injuries;

   (b) whether Mr Shiels is entitled to a “general” order for reasonably incurred medical expenses as a result of the injuries, and

   (c) whether the claimed lower back surgery, a L3-S1 decompression and fusion is reasonably necessary as a result of injury sustained to Mr Shiels’ back?

7. The issues were notified in notices under section 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) dated 24 October 2017, 2 November 2018 and 19 December 2018.

8. It is agreed between the parties that the applicant’s pre-injury average actual earnings are $1,008.

EVIDENCE

9. The following documents were in evidence before the Commission and have been taken into account in making this determination:
   (a) Application to Resolve a Dispute, and attachments (ARD);

   (b) Reply, and attachments;

   (c) Application to Admit Late Documents lodged by the applicant, and attachments (ALD 1). This document contained 316 pages of clinical notes produced by the Royal North Shore Hospital. The documents were not referred to by either party in their oral submissions, and

   (d) Application to Admit Late Documents lodged by the applicant, and attachments. This document contained a supplementary statement from Mr Shiels and a further report from Dr James Bodel, orthopaedic surgeon (ALD 2).

10. There was no application to adduce oral evidence or to cross-examine Mr Shiels.

EVIDENCE

Mr Shiels' evidence

11. In a statement dated 17 July 2019 Mr Shiels said that prior to commencing work with the respondent he had never had any previous workers compensation claim and was generally active and fit.

12. Mr Shiels duties included being allocated on "cash in transit runs", which required picking up cash from approximately 20 clients' premises per run. This required securing bags of money and carrying them to and from an armoured vehicle. Mr Shiels said all cash and/or coins were carried in a backpack and a trolley was available, if required. Mr Shiels said it was not unusual to carry 20 kg to 30 kg in a backpack or a trolley two to three times per day. Mr Shiels said there were numerous complaints from other employees about the requirement to pick up and deliver heavy bags of coins. It is worthwhile noting that Mr Shiels served some time as a health and safety representative so it is likely he would have been aware of such complaints (ARD page 2).

13. Mr Shiels said that on 24 October 2017 he picked up the heavy bag of coins and:

> "…as I held the bag with both hands and proceeded to bend my legs and waist to place the bag in the trolley, I felt an immense pulling type pain in the middle of my lower back. I also felt pain in my groin."

14. Mr Shiels reported his injury to his operations manager. Mr Shiels said the pain in his lower back and groin did not subside and he also developed pain in both of his hips (ARD page 3).

15. On 1 December 2017 Mr Shiels underwent an operation to repair a hernia. Mr Shiels returned to work on light duties but has continued to experience pain in his back, groin and hips (ARD page 4).

16. At the date of the arbitration hearing Mr Shiels had undergone surgery on both hips. In his further statement dated 2 February 2020, Mr Shiels said he had chronic and debilitating back pain since his injury and had been advised to undergo hip replacement surgery prior to any surgery on his back. Mr Shiels said his right hip felt that it had recovered from the hip replacement surgery in April 2019, however he was continuing to receive treatment to his left hip (ALD 2, pages 3-4).

Medical evidence

17. The clinical records from Macquarie Medical Centre were included in the ARD. The records revealed an absence of complaints made by Mr Shiels in relation to his hips in the period 16 June 2012 to 29 October 2017.

18. On 29 October 2017, Mr Shiels saw Dr Emad Ghannoum, general practitioner. Dr Ghannoum recorded that Mr Shiels had complained of lower back, hip and groin pain. Dr Ghannoum referred Mr Shiels for an ultrasound (ARD page 467).

19. On 1 November 2017, Dr Ghannoum explained the outcome of the ultrasound to Mr Shiels, noting the hernia. Mr Shiels was advised to avoid repetitive bending and lifting (ARD page 468).

20. On 15 November 2017, Mr Shiels saw Dr Anubhav Mittal, gallbladder, hernia and pancreatic surgeon. Dr Mittal reported that Mr Shiels had bilateral groin pain, which he felt was referred from the hips due to severe osteoarthritis identified on x-rays. Dr Mittal said, "This may also be work related given his heavy lifting." Dr Mittal said the proposed hernia surgery would not fix the pain coming from Mr Shiels' hip osteoarthritis, and he would most likely continue to have chronic groin pain even after the surgery (ARD page 222).

21. On 29 January 2018, Dr Ghannoum recorded that Mr Shiels had reported right hip pain, worsening lower back pain and reduced mobility.

22. On 15 February 2018, Mr Shiels saw Dr Rami Sorial, orthopaedic surgeon specialising in hip and knee surgery. In report of the same date Dr Sorial said:

> "He [Mr Shiels] reports that he sustained a work-related injury on 24 October of last year. Prior to this, he was experiencing intermittent symptoms in both hip regions associated with some abductor spasm requiring occasional paracetamol...In the process of picking up the bag of coins which would normally by 10 to 15 kg, he experienced a sharp pain as he felt the load was a lot heavier than anticipated. He describes a tearing sensation in the lower lumbar spine associated with acute pain at the time.
>
> He continued to report symptoms, particularly problems bending over with abdominal pain leading to investigations that identified the presence of an inguinal hernia, leading to referral to a general surgeon and in December he had an inguinal herniorrhaphy... He reports persistent pain in both lower limbs and is lower spine, necessitating the use of analgesics and occasional Endone tablets."

23. On examination, Dr Sorial said Mr Shiels had an altered stiff and antalgic gait and the range of motion in his right and left hips was limited. Dr Sorial noted that a plain radiograph of Mr Shiels' pelvis demonstrated moderate degenerative arthropathy in both right and left hips. Dr Sorial recommended an MRI scan of both right and left hips in order to help document the further pathology and extent of the disease process (ARD page 88-89).

24. On 22 February 2018 Mr Shiels had MRIs on his lumbar spine and bilateral hips. The left hip MRI showed moderately advanced osteoarthritis with effusion, suggestive of associated reactive synovitis and a severe moderately advanced degenerative tear of the left acetabulum. The right hip MRI showed osteoarthritis to a lesser degree than the left side (ARD pages 470, 36, 39).

25. On 14 March 2018, 25 March 2018 and 11 April 2018 Dr Ghannoum recorded that Mr Shiels reported unchanged symptoms in his hip and back (ARD page 471).

26. Following the MRI scans on 1 March 2018, Dr Sorial reported that Mr Shiels had a gradual improvement in symptoms, however continued to experience pain in both lower limbs with the focus being in the groin regions and both right and left hips. Dr Sorial said the MRI scan of the right and left hips demonstrated an arthritic process on both sides with the right being more advanced and this correlated with the aggravation of symptoms in both regions and the ongoing pain (ARD page 84).

27. The clinical notes on 11 April 2018 and 2 May 2018 record that Mr Shiels continued to complain about bilateral hip pain (ARD page 471).

28. On or around 27 April 2018 Mr Shiels had an epidural steroid injection, performed by Dr Bhisham Singh, orthopaedic and spine surgeon.

29. Following the injection, in a report dated 23 May 2018 Dr Singh said:

> "...he [Mr Shiels] has bilateral hip osteoarthritis as well as lumbar canal stenosis at L4-5, and there has been some overlap of symptoms from both pathologies."

30. Dr Singh reported that Mr Shiels' back pain had subsided but his hip pain had now been "unmasked" and he had irritable hips on both sides, the right being worse. Dr Singh said Mr Shiels would benefit from a review for his hips and if his back continued to bother him, he would need decompressive surgery (ARD page 373).

31. On 4 June 2018, Mr Shiels presented to Dr Ghannoum with an exacerbation of lower back and hip pain. Dr Ghannoum referred Mr Shiels to the Emergency Department at Royal North Shore Hospital. The hospital discharge note records that Mr Shiels was treated with pain medication, which provided good relief. Mr Shiels was reviewed by Dr Harwood who felt that Mr Shiels' pain was long-standing and did not require hospital admission (ARD page 329).

32. On 13 September 2018 Mr Shiels saw Dr Sorial for review. Dr Sorial observed Mr Shiels walked with a stick and remained disabled with pain in both lower limbs. Dr Sorial said a bone scan confirmed presence of degenerative change and significant pathology in Mr Shiels' right hip joint (ARD page 25). Dr Sorial recommended a right-sided hip replacement.

33. In a report dated 23 October 2018 Dr Singh recommended Mr Shiels undergo lumbar spine surgery in the form of a staged anterior and posterior decompression and fusion from L3-S1, in addition to the right-sided hip replacement recommended by Dr Sorial (ARD page 78).

34. On 25 February 2019 Dr Ghannoum opined that the type and force of the lifting incident was the cause of Mr Shiels' hip and low back pain. Dr Ghannoum said Mr Shiels was totally incapacitated for work from "7 May 2018 to current" (ARD pages 67-68).

35. In a report to Mr Shiels' former solicitors dated 25 February 2019, Dr Sorial repeated the history of the injury and noted that prior to the injurious event Mr Shiels had noted symptoms in both left and right hips requiring the use of occasional paracetamol (ARD page 71).

36. Dr Sorial said:

> "Mr Shiels employment with Security Specialist Australia and the specific injury on 24 October 2017 is not the cause for development of arthritis in his right or left hip joints. This is a pre-existing pathology of the symptoms associated with it may have been aggravated by the incident described. The residual and ongoing pain and stiffness, however, is due to the original pathology of osteoarthritis. There is no clear evidence that a traumatic injury to the hip joint specifically has occurred but the presence of ongoing pathology and symptoms arising from his lumbar spine are aggravating his whole presentation and the lumbar spine pathology may well have been aggravated by the specific incident that occurred on 24 October 2017."

37. Dr Sorial said that Mr Shiels was unlikely to return to any capacity of work until after the recommended surgery had been carried out (ARD page 72).

38. On 13 February 2019, Dr Singh diagnosed Mr Shiels with spondyloisthesis with canal stenosis at L3-S1 and right hip osteoarthritis. Dr Singh said Mr Shiels' employment with the respondent was a substantial contributing factor to his injury. Dr Singh said Mr Shiels had no work capacity and was disabled by back and hip pain (ARD page 74). Dr Singh said he expected considerable functional improvement after recommended back and hip surgery (ARD page 75).

39. On 30 April 2019 Mr Shiels underwent a total right hip replacement (ARD page 564).

40. On 26 July 2019 Dr Sorial confirmed his opinion that the injury on 24 October 2017 did not lead to the pathology in Mr Shiels' right and left hip:

> "He [Mr Shiels] has pre-existing osteoarthritis evident by clinical examination and radiographic findings. it is plausible, however, that the stated injury of 24 October 2017 lead to a moderate aggravation of the disease process, particularly in the right hip joint, leading to ongoing symptoms" (ARD page 65).

41. In or around November 2018 Dr Ghannoum reported that Mr Shiels had sustained an injury after picking up bags of coins in October 2017 and experienced sharp pain affecting his lower back, hip and groin. Dr Ghannoum said the diagnosis was severe bilateral hip pain and coexisting osteoarthritis. Dr Ghannoum said:

> "I believe that given the onset of the symptoms, pain and formation of the inguinal hernia this indicates that the type and the force of the injury is the cause of the patient's hip and low back pain" (ARD page 539).

Forensic medical reports

42. The respondent relied upon forensic medical reports from Dr Vijay Panjratan, orthopaedic surgeon. In a report dated 10 July 2018 Dr Panjratan recorded a history of the incident on 24 October 2017. Mr Shiels told Dr Panjratan the bag of coins had been heavier than usual (ARD page 35).

43. Dr Panjratan said Mr Shiels had complained of dreadful pain across his lower back and in both hips, with the right hip being worse than the left and noted that he had an awkward gait resulting from right hip pain (ARD page 37).

44. Dr Panjratan said Mr Shiels had osteoarthritis of both hips and back pain that appeared to be due to degenerative change. Dr Panjratan said it was difficult to determine whether Mr Shiels' back pain was primary or secondary to the osteoarthritis in his hips.

45. Dr Panjratan said Mr Shiels' bilateral hip pathology was not consistent with the mechanism of the workplace injury on 24 October 2017. Dr Panjratan said the osteoarthritis was likely to have become symptomatic with or without the work injury. Dr Panjratan also said Mr Shiels' lower back pain pathology was pre-existing and consistent with age and not the mechanism of the injury.

46. Dr Panjratan conceded that Mr Shiels may have aggravated pre-existing degenerative change on 24 October 2017. Dr Panjratan said:

> "The right hip was due to become symptomatic in any case and I doubt it is related to the injury. The left hip symptoms are unclear, whether they are secondary to the back or due to altered weight-bearing from the right hip. I doubt they are primary symptoms. There is a possibility of aggravation of pre-existing degenerative change with the low back which would be temporary, but is also likely that the current back symptoms could be coming from right hip. The initial injury appears to have caused the hernia and possibly low back pain and for some reason, after the hernia operation pain has been aggravated. There is no clear history and a lot of over-reaction." (ARD page 39-40).

47. Dr Panjratan rejected Dr Ghannoum's opinion that the "wear and tear" was due to the nature and conditions of Mr Shiels' employment with the respondent (ARD page 41).

48. Dr Panjratan noted the osteoarthritis was much more severe than expected of a person of Mr Shiels' age (ARD page 41).

49. Dr Panjratan said Mr Shiels had no current capacity for employment and a timeframe for upgrading his capacity could not be provided (ARD page 42).

50. When asked to indicate the usual timeframe that would be expected from a person to recover from an aggravation type injury, Dr Panjratan said:

> "Regarding aggravation of pre-existing osteoarthritis of the hip, there is no standard rule. Sometimes it can settle down in a few weeks and sometimes it can go on indefinitely" (ARD page 42).

51. In a supplementary report dated 17 September 2018, Dr Panjratan said Mr Shiels' lower back and bilateral hip pathology could not be due to the workplace injury on 24 October 2017 because the pathology reported could not have occurred in such a short space of time since the injury and was pre-existing.

52. Dr Panjratan said it was possible Mr Shiels had aggravated his back and hips but any aggravation would have been temporary and should have settle down in a short period of time (ARD page 45).

53. Dr Panjratan opined Mr Shiels' incapacity for work was due to osteoarthritis in his lower back and both hips and was not due to the workplace injury on 24 July 2017 (ARD page 45).

54. Mr Shiels relied upon forensic medical reports from Dr Bodel. In a report dated 23 October 2018, Dr Bodel recorded the history relating to the injury and reported that Mr Shiels presented with irritable and arthritic changes in both hips. Dr Bodel agreed with Dr Sorial's opinion that a right total hip replacement was required and said Mr Shiels would inevitably require a left hip replacement.

55. Dr Bodel diagnosed a musculoskeletal injury to the back with disc pathology and an aggravation of Mr Shiels' hip disease in the form of arthritic change in both hips as a consequence of the injury (ARD pages 58-59).

56. In a supplementary report dated 2 March 2019, Dr Bodel said there was extensive degenerative change in the right hip, which was a constitutional ailment. Dr Bodel said:

> "The episodes of injury that occurred at work in the nature of work in general over the period from the early 2000s (2001 or 2002) through until October 2017, is caused aggravation, acceleration, exacerbation deterioration of that disease process and the work injury and work in general is a substantial contributing factor by way of aggravation, acceleration, exacerbation or deterioration of a disease process" (ARD page 63).

57. Dr Bodel disagreed with Dr Panjratan's opinion that Mr Shiels' condition was purely constitutional in nature and not work-related (ARD page 63).

58. In a further report dated 10 January 2019 Dr Panjratan observed that Dr Ghannoum had described Mr Shiels' bilateral hip condition as a "coexisting" condition (ARD page 19).

59. Dr Panjratan confirmed his opinion that the cause of Mr Shiels' hip condition was osteoarthritis due to idiopathic osteoarthritis. Dr Panjratan said the injury was not a "disease type injury" and he did not consider Mr Shiels had suffered an aggravation of pre-existing condition. Dr Panjratan said "...in the minor possibility that he did suffer an aggravation this would have long settled" (ARD page 21).

60. Dr Panjratan said Mr Shiels had an incapacity for work due to osteoarthritis, but did not suffer any incapacity for work as a result of his alleged lumbar spine injury (ARD page 22).

61. Dr Panjratan said Mr Shiels suffered from lumber and hip osteoarthritis which were not work-related and could be contributing to his incapacity (ARD page 22).

62. Dr Panjratan said a total hip replacement was not reasonable and necessary because the osteoarthritis was a pre-existing condition that would have progressed irrespective of work activities. Dr Panjratan also said the back surgery arose from Mr Shiels' pre-existing condition of the lumbar spine (ARD page 23).

63. In a final report dated 31 January 2019, Dr Bodel confirmed his opinion that the injury was an aggravation of the disease process in Mr Shiels' hips. Dr Bodel said:

> "Historically, the pathology in the lower part of the back of the left hip became symptomatic, during the course of his days' work when lifting heavy bags of calling on 24 October 2017. He was unaware of any particular problems his back was hips before that as far as I can determine.
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> ...
>
> The event caused some additional structural injury to both the back and a left hip causing this to become symptomatic. After that, there has been aggravation, acceleration, exacerbation and deterioration of the previously asymptomatic degenerative change and that by definition in the Workers Compensation Act is the cause of the 'injury'.
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> ...
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> The lower back and left hip aggravation, acceleration, exacerbation or deterioration has been caused by the specific event that occurred at work on 24 October 2017.
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> The aggravation, acceleration, exacerbation or deterioration of the arthritic process in the right hip came on gradually over time as a consequential condition to the original 'injury' to the lower part of the back and left hip" (ALD 3 pages 1-2).

REASONS

Did the applicant suffer a personal injury to his hips on 24 October 2019?

64. Mr Shiels' primary case is that he suffered a personal injury to his hips pursuant to section 4(a) of the 1987 Act on 24 October 2019 by way of aggravation of the disease process in his hips. In the alternative Mr Shiels says he suffered an injury by way of aggravation of his pre-existing osteoarthritis in his hips pursuant to section 4(b)(ii) of the 1987 Act.

65. Mr Shiels has the onus of proving that he sustained an injury. The standard of proof is the balance of probabilities (see *Nguyen v Cosmopolitan Homes* (NSW) Pty Ltd [2008] NSWCA 246 at [44]).

66. Section 4(a) of the 1987 Act defines injury as a personal injury arising out of or in the course of employment.

67. In *Military Rehabilitation and Compensation Commission v May* [2016] HCA 19 (11 May 2016) the plurality of the High Court observed:

> "[45] …As Gleeson CJ and Kirby J explained in *Kennedy Cleaning Services Pty Ltd v Petkoska* , if 'something ... can be described as a *sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state*, it may qualify for characterisation as an 'injury' in the primary sense of that word' (emphasis added).
>
> [46] That physiological change or disturbance of the normal physiological state may be internal or external to the body of the employee. It may be, for example, the breaking of a limb, the breaking of an artery, the detachment of a piece of the lining of an artery, the rupture of an arterial wall or a lesion to the brain. Each would be described as an 'injury' in the primary sense.
>
> [47] However, as the Full Court correctly held, 'suddenness' is not *necessary* for there to be an 'injury' in the primary sense. A physiological change might be 'sudden and ascertainable'. A physiological change might be 'dramatic'. The employee's condition might be a 'disturbance of the normal physiological state'. That an 'injury' in the primary sense can arise, and can be described, in a variety of ways does not mean that 'suddenness' is irrelevant. As the Full Court said, 'suddenness' is often useful where there is a need to distinguish a physiological change from the natural progress of an underlying (and in one sense, closely related) disease (as occurred in *Zickar v MGH Plastic Industries Pty Ltd* and *Kennedy Cleaning*). But it is the *physiological* change – the nature and incidents of that change – that remains central (footnotes omitted)."

68. Whether a worker has suffered a physiological effect that satisfied the test for personal injury under section 4(a) depends on the nature and severity of his or her symptoms. However, the terms "disease" and "personal injury" are not mutually exclusive and the difference will not usually be of critical importance. Each case will depend on the evidence concerning the nature and incidents of the physiological change (see *NSW Police Force v Gurnhill* [2014] NSWWCC 12 at [72]-[73] citing *Zickar v MGH Plastic Industries Pty Ltd [*1996] HCA 31 and *Kennedy Cleaning Services Pty Ltd v Petkoska* [2000] HCA 45 at [39]-[40])).

69. I accept that an underlying arthritic condition being rendered symptomatic may fall within the definition of injury in section 4(a) of the 1987 Act (see *Australian Conveyor Engineering Pty Ltd v Mecha Engineering Pty Ltd* [1998] NSWCC 51; 45 NSWLR 606 (*Mecha*)).

70. In *Macarthur Group Training Ltd v Tahere* [2019] NSWWCCPD 46 (2 September 2019) Deputy President Wood observed at [95]-[97]

> "95. In *Mecha*, the Court of Appeal considered the nature of an injury in circumstances where the evidence suggested there had been an aggravation of degenerative changes. In that case the worker was injured in a fall on 11 February 1992 (a 'frank injury'). As in this case, the nature of the injury was the aggravation of pre-existing degenerative changes in his back (aggravation of

a disease). The worker suffered a further injury to his back with a second employer as a result of the nature and conditions of his employment with that employer (a 'nature and conditions' injury), which further aggravated his degenerative condition. The trial judge apportioned liability between both employers under s 22 of the 1987 Act.

96. On appeal it was held that while the injury on 11 February 1992 could have satisfied either definition of 'injury' in s 4 (either a 'frank injury' or 'injury in the nature of an aggravation of a disease') the words 'injury consists in the aggravation ... of a disease' in s 16(1) should be construed as not referring to something which is an injury independently of its aggravating effects on a previously existing disease, but as being confined to what are entirely injuries by aggravation. In other words, the 'frank injury' and the 'nature and conditions' injury were separate injuries each giving rise to compensation entitlements. Justice Powell discussed the legislative history of s 4 of the 1987 Act and the High Court decision in *Zickar v MGH Plastic Industries Pty Ltd* and referring to *Zickar*, relevantly said that:

> 'The effect of the decision of the majority is, thus, first, that, if there can be identified an incident which involves--either by being itself the change, or by bringing about the change--a physical change in the worker, then--even though that change may be no more than the culmination of a progressive disease, and not the product of some external force--that damage is to be regarded as an "injury" within the meaning of par (a) of the definition of "injury" in s 4 of the Act.
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> ...
>
> In the present case, the medical evidence which was before the trial Judge was sufficient to demonstrate that, even before the fall which he sustained on 11 February 1992, the worker's lumbo-sacral spine had begun to degenerate. ... This notwithstanding, the evidence of the worker, which was accepted by the trial Judge, was that, prior to the fall, his back condition was asymptomatic.
>
> The worker's evidence, which was supported by that of his general practitioner, was that, following his fall, he began to suffer pain in his back and neck, which pain grew worse and led to his ceasing work for a period ...
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> There thus having been an identifiable incident, which incident appears to have caused, at least, ligamentous injury to the lumbar spine segment, the sequelae of which involved pain, which was, for a time disabling, and which, in any event, has continued over the years, the decision of the majority in *Zickar v MGH Plastic Industries Pty Ltd* would seem to dictate that, even if it be the fact that the result of the incident was merely that the worker's pre-existing back condition was rendered symptomatic, he was nonetheless to be regarded as having sustained an injury within the meaning of par (a) of the definition of "injury".'

97. The above rationale was unanimously agreed to be correct by Handley JA, Hodgson JA and Young CJ in Eq in *Dimovski.*"

71. Thus, the rendering symptomatic of Mr Shiels' arthritic condition can be regarded as an injury within the meaning of section 4(a), being an injury that has aggravated or brought about the effect of a disease.

72. It is only if I am not satisfied on the balance of probabilities that there is evidence to support an injury pursuant to section 4(a) is it necessary to consider whether the injury suffered was a disease or aggravation etc of the disease.

73. On 24 October 2017 Mr Shiels said he felt immediate pain in his lower back and groin when lifting the heavy bag of coins after which he developed hip pain.

74. I accept the respondent’s submission that it is difficult to understand how Mr Shiels injured his hips by way of lifting the bag of coins. This submission is, to some extent, supported by the remark from Dr Sorial that there was no clear evidence of trauma to the hip joints. It is also consistent with Dr Panjratan’s opinion that Mr Shiels’ bilateral hip pathology was not consistent with the mechanism of the injury on 24 October 2017.

75. There is also reference to Mr Shiels experiencing minor symptoms in both hips before the lifting incident. Dr Sorial said Mr Shiels had experienced intermittent symptoms in both hips. The nature and extent of these symptoms are unclear. However, the use of the term “intermittent” suggests to me that they were not continuous and can be readily distinguished from the onset of pain in the hips post-incident. This is supported by the absence of any report of hip problems in the clinical notes for a period of over five years prior to the incident.

76. Mr Shiels’ evidence concerning the development of pain in his hips is corroborated by the contemporaneous clinical notes. The first report of pain was on 29 October 2017, only five days after the incident. There is no requirement for the onset of pain to be “sudden” for there to have been physiological change. There is a strong temporal connection between the incident and the onset of symptoms in the hips. I also infer from the development of the hernia, that the lifting incident was a significant event that had the potential to impact different parts of Mr Shiels’ body, including by aggravating the underlying pathology in his hips.

77. Whilst Mr Shiels may not have experienced direct trauma or strain to his hips as a result of the incident, Dr Singh said the hip pain had been “unmasked” by the incident.

78. I am satisfied that there is an appropriate employment connection between the incident on 24 October 2017 and the onset of, or advancement, of symptoms in the hips. I am also satisfied that that nature and severity of Mr Shiels’ symptoms were such to bring the injury within the meaning of section 4(a).

79. Whether Mr Shiels suffered a compensable injury to his hips must be resolved by having regard to the medical and expert opinion evidence.

80. The principles relating to expert evidence were discussed in *Hancock v East Coast Timber Products Pty Ltd* [2011] NSWCA 11 (*Hancock*). In *Hancock* Beazley JA said at [85], in non-evidence-based jurisdictions such as the Commission, the question of “acceptability of expert evidence will not be one of admissibility but of weight.” What is required for satisfactory compliance with the principles governing expert evidence is for the expert’s report to set out “the facts observed, the assumed facts including those garnered from other sources such as the history provided by the appellant and information from x-rays and other tests.”

81. In *Hevi Lift (PNG) Ltd v Etherington* [2005] NSWCA 42,McColl JA (Mason P and Beazley JA agreeing) said at [84]: “It has been long been the case that a court cannot be expected to, and should not, act upon an expert opinion the basis for which is not explained by the witness expressing it.”

82. Mr Shiels relies on reports from Dr Bodel. In my view Dr Bodel has taken an adequate history of the lifting injury and the subsequent onset of hip pain. I accept that Dr Bodel has not recorded that Mr Shiels experienced intermittent symptoms in his hips prior to the incident, however I am satisfied this is of little consequence and I accept that his opinion was given in a reasonable factual climate.

83. Dr Bodel opined the injury to the hips was an aggravation of pre-existing extensive arthritic change that came about as a consequence of the injury. Dr Bodel's opinion is consistent with Mr Shiels' evidence of initial trauma to the back and subsequent development of ongoing pain in the hips. It is also consistent with the contemporaneous reports of pain recorded in the clinical notes and Dr Ghannoum's opinion on the cause of the hip problems.

84. I accept the respondent's submission that Dr Bodel has not provided a detailed explanation for his opinions. The same criticism can be made of Dr Panjratan's reports. As the respondent submitted, Dr Bodel's opinions tend to use the "cluster of terms" in section 4 of the 1987 Act. This is unhelpful and tends to distract from his clinical opinion. However, I do not accept that Dr Bodel has provided any insight into the cause of Mr Shiels' pain. Dr Bodel's opinion is consistent with the history of the onset of pain after the incident and it is difficult to understand what further insight was required. I understand Dr Bodel's use of the cluster of terms to mean means there has been a worsening of disease in the sense that it has become more serious in its effect on Mr Shiels.

85. Also, that Dr Bodel may not have addressed the ultimate legal question is not fatal to Mr Shiels' case. Questions of injury are to be determined having regard to the whole of the evidence (*State Transit Authority v El-Achi* [2015] NSWWCCPD 71 at [72]).

86. Dr Bodel's opinion is supported by the opinions of Dr Sorial. Dr Sorial said Mr Shiels' pre-existing pathology may have been aggravated by the incident on 24 October 2017. Dr Sorial said it was "plausible" that the injury had caused a moderate aggravation of the hip osteoarthritis, particularly the right hip, leading to ongoing symptoms. Dr Mittal also considered that the bilateral hip and groin pain may have been due to heavy lifting.

87. Dr Ghannoum said the type and force of the lifting incident was the cause of Mr Shiels back and hip injuries. It is important to note that the incident on 24 October 2017 was sufficiently serious to cause a hernia. This provides support for the potential of other body parts being affected, in particular the hips. I place weight on Dr Ghannoum's opinion on the cause of Mr Shiels injury because he treated him both before and after the incident, and since at least March 2015.

88. Dr Panjratan said that Mr Shiels hip injury was not consistent with the mechanism of injury, however he also conceded that Mr Shiels may have suffered an aggravation of his underlying hip pathology but said any aggravation should have resolved in a short time.

89. I accept Mr Shiels' submission that Dr Panjratan does not adequately engage with the reasons for the onset of hip pain, which were reported shortly following the lifting incident and which continue to plague him to date. In my view it is more likely that the onset of pain was connected to the incident, as opposed to being a spontaneous onset of the underlying disease condition.

90. Dr Panjratan's opinion that the hip pathology is not consistent with the mechanism of injury is also undermined by his opinion that the back pathology was not consistent with the mechanism of injury. Dr Panjratan linked the hernia to the lifting incident, but did not concede the incident was capable of causing pathology in the lumbar spine, save for a potential aggravation. It is common-sense that a lifting injury has the potential to injure the back.

91. Further, in my view, Dr Panjratan does not adequately explain why any aggravation of the hip pathology would have ceased in light of Mr Shiels' ongoing complaints of pain. I find Dr Panjratan's opinion difficult to accept in the circumstances where he acknowledged there was no "standard rule" about how long it would take a person to recover from an aggravation type injury. Dr Panjratan also said Mr Shiels' osteoarthritis was more severe than expected of a person of his age, which tends to support that incident has brought about change in the hip pathology, consistent with the opinion of Dr Bodel.

92. On balance, I find Dr Panjratan's opinion to be less persuasive and I prefer the opinion of Dr Bodel.

93. The weight of medical evidence supports that Mr Shiels suffered an injury to his left and right hips as a result of the work injury on 24 October 2017. Drs Panjratan, Sorial and Mittal were open to the possibility that the incident had aggravated the underlying condition in Mr Shiels' hips. I accept Dr Bodel's opinion that Mr Shiels suffered an aggravation of pre-existing arthritic change as a consequence of the lifting incident.

94. For the above reasons, I am satisfied on the balance of probabilities that Mr Shiels suffered an injury pursuant to section 4(a) of the 1987 Act by way of aggravation of the disease process in his hips. The injury is the aggravation of arthritis in Mr Shiels hips.

Was Mr Shiels' work a substantial contributing factor to his injury?

95. Section 9A of the 1987 Act provides that no compensation is payable in respect of an injury unless the employment concerned was a substantial contributing factor to the injury.

96. Section 9A(2) sets out a non-exhaustive list of matters to be to be taken into account for the purposes of determining whether a worker's employment was a substantial contributing factor to an injury including:

    (a) the time and place of the injury;

    (b) the nature of the work performed and the particular tasks of that work;

    (c) the duration of the employment;

    (d) the probability that the injury or a similar injury would have happened anyway, at about the same time or at the same stage of the worker's life, if he or she had not been at work or had not worked in that employment;

    (e) the worker's state of health before the injury and the existence of any hereditary risks, and

    (f) the worker's lifestyle and his or her activities outside the workplace.

97. A worker's employment is not to be regarded as a substantial contributing factor to a worker's injury merely because the injury arose out of or in the course of, or arose both out of and in the course of, the worker's employment (section 9A(3)(a)).

98. Whether the test of "a substantial contributing factor" for the purposes of section 9A is satisfied is a question to be decided on the overall evidence, including a consideration of the matters described in section 9A(2). It is not purely a medical question (*Awder Pty Limited t/as Peninsular Nursing Home v Kernick* [2006] NSWWCCPD 222).

99. In deciding whether Mr Shiels' work was a substantial contributing factor to his hip injury I have had regard to the following matters:

    (a) that the incident on 24 October 2017 occurred at work whilst Mr Shiels was undertaking his ordinary work duties;

    (b) the temporal connection between the onset of pain in the hips and the lifting injury. Whilst I accept osteoarthritis may become symptomatic at any time, the medical records demonstrate an absence of complaints of a period of five years prior to the injury and ongoing complaints after the injury;

(c) I accept Mr Shiels' evidence that he was in generally good health prior to the incident. Whilst Dr Sorial referred to intermittent symptoms in the hips prior to the incident, there is no evidence of the nature or severity of the symptoms and the medical records do not record any complaints about same;

(d) for the reasons set out above, I prefer the opinion of Dr Bodel over Dr Panjratan. I accept Dr Bodel's opinion that the work incident was a substantial contributing factor to the injury, and

(e) whilst Mr Shiels' underlying arthritis has contributed to overall medical presentation, I am satisfied that there was connection between the incident on 24 October 2017 and the injury that was real and of substance.

100. Having regard to the above matters I am comfortably satisfied that Mr Shiels' employment was a substantial contributing factor to the injury to his hips.

101. There will be an award for Mr Shiels on the claim for injury pursuant to section 4(a) of the 1987 Act to his bilateral hips.

102. It is not necessary for me to consider Mr Shiels' alternative argument that he suffered an injury as a result of the nature of his work as a security guard pursuant to section 4(b)(ii) of the 1987 Act. However, if that was required, I would have been satisfied on the balance of probabilities that that Mr Shiels had suffered an aggravation of the arthritic disease in his hips as a result of the nature and conditions of his work. As Mr Shiels submitted, there was no factual evidence that contradicted the nature of the work over the period of 15 years as described in paragraphs 7 to 12 of the first witness statement. Dr Bodel took an adequate history of the nature of the work (ARD page 56). Dr Panjratan took no history of the nature of the work. For the reasons set out above I would have preferred the opinion of Dr Bodel over the opinion of Dr Panjratan. All other doctors were open to the possibility of the arthritis having been aggravated. I would also have been satisfied that Mr Shiels' employment was the main contributing factor to the aggravation of the arthritis in the hips, taking into account the nature of the work and the lifting incident on 24 October 2017. There are no other competing causal factors of the aggravation (see *Goodson v Wingecarribee Shire Council* [2020] NSWWCCPD 9 a [77] – [78]).

103. I am satisfied that injuries to Mr Shiels back and hips have not resolved. I do not accept Dr Panjratan's opinion. Mr Shiels continues to complain of pain in both body parts. He has undergone bilateral hip replacements. Extensive surgery has been recommended for the back. The weight of medical evidence supports that Mr Shiels is severely disabled as a result of the injuries. In May 2018 Dr Singh said if Mr Shiels' back continued to bother him he would need decompressive surgery. In October 2018 Dr Singh said that Mr Shiels hip and back injury in October 2017 has resulted in his "current condition" (ARD page 78). In November 2018 Dr Singh recommended surgery (ARD page 31).

Mr Shiels' claim for weekly benefits compensation

104. Section 33 of the 1987 Act provides that if total or partial incapacity for work results from an injury, the compensation payable by the employer under this Act to the injured worker shall include weekly payments during the period of incapacity.

105. Mr Shiels claims he is totally incapacitated for work and seeks an award for payment of compensation under section 37 of the 1987 Act from 8 May 2019 to date and continuing. Mr Shiels has the onus of establishing that his incapacity results from the injury.

106. There can be multiple causes of incapacity and injury (*Calman v Commissioner of Police* [1999] HCA 60; (1999) 73 ALJR 1609; *Conkey & Sons Ltd v Miller* (1977) 51 ALJR 583 at 585; *Cluff v Dorahy Bros. (Wholesale) Pty Ltd* [1979] 2 NSWLR 435). It is not necessary that employment be the main (or substantial) contributing factor to the incapacity (*NSW v Rattenbury* [2015] NSWWCCPD 46 at [91]).

107. During the arbitration the respondent appropriately conceded that if I found that Mr Shiels had suffered an injury to his hips of which the effects were ongoing, Mr Shiels would be entitled to receive an award for weekly benefits compensation. The respondent also conceded that if I found that Mr Shiels continued to suffer from the effects of his back injury he suffered from total incapacity for work.

108. For the reasons set out above I have found that Mr Shiels suffered an injury to his hips and is continuing to suffer from the effects of same. I have also found find Mr Shiels' back injury has not resolved. Having regard to the medical evidence, I am satisfied that the lifting incident on 24 October 2017 is a factor that contributes to Mr Shiels' ongoing symptoms and incapacity for work.

109. There will be an award for Mr Shiels on the claim for weekly benefits compensation pursuant to section 37 of the 1987 Act as set out above.

Mr Shiels' claim for medical expenses

110. Mr Shiels claims a "general order" for medical expenses pursuant to section 60 of the 1987 Act. Section 60 provides inter alia that if, as a result of an injury received by a worker, it is reasonably necessary that any medical or related treatment is reasonably necessary the employer is liable to pay the treatment expenses.

111. During the arbitration hearing the respondent conceded that if I found in favour of Mr Shiels on the issues of injury and incapacity that a general order for medical expenses should follow.

112. Accordingly, there will be an award for Mr Shiels on the claim for medical expenses pursuant to section 60 of the 1987 Act.

Mr Shiels' claim for the costs of surgery

113. It is common ground that the procedure recommended by Dr Singh is appropriate treatment given the condition of Mr Shiels' lumbar spine. The only issue is whether the need for surgery "results from" the injury or the development of Mr Shiels' underlying pathological condition.

114. It is well established that there can be multiple causes for a need for surgery. Mr Shiels does not have proven the injury on 24 October 2017 was the only, or even a substantial, cause of the need for the surgery. Mr Shiels only need to establish that the injury materially contributed to the need for the surgery (see *Murphy v Allity Management Services Pty Ltd* [2015] NSWCCPD 49 at [57]-[58] and the cases cited therein).

115. I am satisfied on the balance of probabilities that the work injury has materially contributed to the need for the surgery. Whilst the natural progression of Mr Shiels' underlying condition is likely to be a contributing factor to the need for surgery, I am satisfied that the work injury was of a sufficient nature to have made a material contribution to need for the surgery. In making this finding I rely upon the gravity of the incident as demonstrated by the development of the hernia, Mr Shiels' ongoing reports of pain, the opinions of Dr Singh that the injury in October 2017 has resulted in Mr Shiels' current condition (ARD page 78) and the opinion of Dr Bodel. For the reasons set out above, I do not find Dr Panjratan's opinion that any back injury was temporary in nature to be persuasive. The opinion is inconsistent with the nature of the lifting injury and the documented reports of ongoing complaints of back pain since the incident.

116. There will be award for Mr Shiels on the claim for surgery, as set out above.