WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **3016/20**
Applicant: **Marilyn Privitera**
Respondent: **George Weston Foods Limited t/as Tip Top**
Date of Determination: **8 September 2020**
Citation: **[2020] NSWWCC 310**

The Commission determines:

1. As a result of the nature and conditions of the applicant's employment with the respondent between September 2004 and 14 June 2019, the applicant sustained a personal injury to her left foot and ankle in the course of employment pursuant to s 4(a) of the *Workers Compensation Act 1987*.

2. Employment with the respondent was a substantial contributing factor to the injury in accordance with s 9A of the *Workers Compensation Act 1987*.

The Commission orders:

1. The respondent to pay the costs of and incidental to the surgery proposed by Dr Mayuran Suthersan pursuant to s 60 of the *Workers Compensation Act 1987*.

2. Pursuant to s 60 of the *Workers Compensation Act 1987*, the respondent to pay the applicant's reasonably necessary incurred medical and related treatment expenses in respect of the left foot and ankle injury, upon production of accounts, receipts and / or valid Medicare Notice of Charge.

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

Rachel Homan
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 RACHEL HOMAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Ms Marilyn Privitera (the applicant) was employed as a merchandiser by George Weston Foods Limited t/as Tip Top (the respondent). The applicant claims that as a result of the nature and conditions of her employment with the respondent, she sustained an injury to her left ankle and foot.

2. On 12 July 2019, the applicant's orthopaedic surgeon, Dr Mayuran Suthersan, requested approval for the applicant to undergo a triple arthrodesis surgery to her hind foot. Liability for the surgery was declined in a dispute notice issued pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) on 29 July 2019. That decision was maintained following an internal review completed on 21 November 2019. Liability for the injury to the left foot and ankle as a well as a number of other body parts was disputed. A further dispute notice pursuant to s 287A of the 1998 Act maintaining the earlier decisions was issued on 20 May 2020.

3. The present proceedings were commenced by an Application to Resolve a Dispute (ARD) lodged in the Commission on 29 May 2020. The applicant sought weekly compensation from 16 June 2019 on an ongoing basis, incurred medical expenses pursuant to s 60 and compensation for the costs of and incidental to the surgery proposed by Dr Suthersan.

PROCEDURE BEFORE THE COMMISSION

4. The parties appeared for conciliation conference and arbitration hearing, conducted by telephone, on 10 August 2020. The applicant was represented by Mr Craig Tanner of counsel, instructed by Mr Peter Naddaf. The respondent was represented by Mr Allen Parker, of counsel, instructed by Mr Christopher Michael. A representative from iCare was also present.

5. During conciliation, the applicant withdrew the claim for weekly benefits as well as a claim for incurred medical expenses relating to an alleged secondary psychological condition. This left only the claim for incurred s 60 expenses for the alleged left foot and ankle injury and the claim for the costs of and incidental to the proposed surgery.

6. An Application to Admit Late Documents was received from the applicant. After hearing submissions from both parties, I determined to admit the late documents from the applicant as well as the documents attached to an Application to Admit Late Documents lodged by the respondent on 24 July 2020. The parties' submissions and my reasons for determination were recorded.

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.

ISSUES FOR DETERMINATION

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

    (a) Whether the applicant sustained an injury to her left ankle and foot as alleged;

    (b) Whether the need for the surgery proposed by Dr Suthersan results from injury; and

    (c) The entitlement to s 60 expenses.

EVIDENCE

Documentary Evidence

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

    (a) ARD and attached documents;

    (b) Reply and attached documents;

    (c) Documents attached to an Application to Admit Late Documents lodged by the respondent on 24 July 2020, and

    (d) Documents attached to an Application to Admit Late Documents lodged by the applicant on 10 August 2020 other than a report of Dr David Kumagaya dated 19 July 2020.

10. Neither party applied to adduce oral evidence or cross-examine any witness.

Applicant's evidence

11. The applicant's evidence is set out in written statements made by her on 8 January 2020, 13 May 2020 and 6 July 2020.

12. The applicant denied experiencing any pain or restrictions in her left foot prior to commencing employment with the respondent.

13. The applicant said she had previously been employed in physical but not strenuous work with other employers. The applicant was employed by Power Force and Strike Force rearranging items on shelving and displays in stores. Those items would weigh between 50 g and about 10 kg. The applicant was not required to use any faulty trolleys or work at speed.

14. The applicant was employed by Energizer putting stock on shelves. The applicant would collect items from the back dock and place them into a trolley then wheel them inside and stock shelves. The trolleys were not faulty and did not require excessive force to manoeuvre.

15. The applicant was also employed by Woolworths collecting online orders in trolleys for online shoppers. This involved moving a trolley around store, collecting orders then leaving them in the back dock for collection. The applicant said she was always able to pick a trolley that functioned well and did not have any faults with the wheels.

16. The applicant said that each of these roles was part time and she did not attribute her injury to that employment.

17. The applicant commenced employment with the respondent in September 2004, as a part-time merchandiser, working 22.5 hours per week. The applicant's duties involved rotating store stock and sending waste products back to bakeries, filling shelves with fresh bread products and general duties incidental to merchandising and stock management.

18. The applicant said she was constantly required to physically exert herself, performing awkward, repetitive and strenuous movements. The applicant was also required to wear steel capped boots:

> "One key aspect of my employment with Tip Top Bakeries that I believe contributed to my injuries was the fact that I was required to wear steel-capped Oliver boots. These boots were provided to me by Tip Top and I did not have a choice in whether or not I wore them. This footwear did not lace up and was a 'slip-on' shoe that was rigid and lacked support. Due to the rigidity of the shoe, I wasn't able to squat and basically had to kneel where I felt all of the pressure on my knees and ankles. This was especially felt when I had to fill lower shelves with crumpets.
>
> Beyond the rigidity of the shoe, I also note that the shoes were not fitted at all and were extremely generic. As I have a narrow foot, I found that my foot was sliding around inside the shoe. I wore these uncomfortable shoes as a requirement by Tip Top, which meant that I was in them for 4.5 hours per day, 5 days a week. I confirm I didn't wear these shoes in the course of any other employment. My other employment didn't require me to wear steel caps."

19. The applicant also expressed the belief that her injury was caused by dealing with bread dollies:

> "I believe the constant use of bread dollies is what actually caused my injury. I believe this because it was very strenuous work and I would always experience aches and pains after handling the bread dollies in the course of my work. Bread dollies are essentially trolleys specifically for the purpose of transporting bread crates which would hold various types of bread. Bread dollies were regularly delivered to the back dock. These dollies were expected to not exceed 2 wide and 10 high, but delivery drivers often break this rule.
>
> Stacking the dollies in excess of the abovementioned standard has detrimental effects. For one, it increases the weight of the entire trolley such that it became much heavier and harder to manoeuvre. Even without exceeding the maximum height, a fully loaded dolly containing crates of crumpets meant that I would be pushing a round 20 creates of crumpets weighing 12kg per crate, totalling to 240kg. Additionally, it meant that when I would unload crates of bread or crumpets from the dolly, I had to reach on my tippy-toes to an awkward height.
>
> I found that I had to use my entire body as the pushing, steering and braking system for the bread dollies. A good majority of bread dollies were faulty and were extremely hard to steer or get moving. Some of them were also missing wheels. I liken this to a faulty supermarket shopping trolley- naturally these are harder to move around and require greater bodily force on behalf of the user to push, pull and steer. I was also not able to avoid bread dollies if they were faulty. As such, I was placing a lot of pressure on my feet when 'starting' the dollies up for movement when I placed my feet flat and firm and when steering/ manoeuvring them."

20. The applicant found it impossible to see over the dolly as it was stacked 10 crates high. As a result, the applicant had to perform awkward and uncomfortable twist turns and bends to avoid knocking over shelving or people pushing the dollies over metal strips on the floor was also difficult and strenuous. Over time, the applicant said she experienced a gradual onset of severe pain across her body, most significantly in her left foot/ankle.

21. On 24 December 2018, the applicant had an ultrasound and x-ray taken of her left ankle. On 31 December 2018 the applicant underwent an ultrasound guided left ankle injection which did not provide significant or lasting relief.

22. The applicant consulted orthopaedic surgeon, Dr Mayuran Suthersan on 6 March 2019 complaining of left foot pain for around eight months. The applicant was advised to wear a CAM boot with custom orthotic and continue on anti-inflammatory medication. The idea of surgical intervention was discussed.

23. On 22 May 2019, the applicant advised Dr Suthersan that her left foot pain had worsened. The applicant expressed her belief that her work with the respondent and the pushing of heavy and often faulty bread dollies had caused the pain. The applicant was referred for an MRI scan which was performed on 30 May 2019.

24. At a consultation with Dr Suthersan on 12 June 2019, surgery was recommended.

25. The applicant said she experienced symptoms including constant sharp pain in her left ankle swelling and restricted range of motion. The applicant said she was finding it extremely difficult to maintain home duties and engage with the care of her grandson. The applicant said she was struggling psychologically due to the severity of the injury to her left foot which had significantly reduced her quality of life.

26. In her final statement, the applicant referred to having a motor vehicle accident on 15 December 2018. Although an ambulance attended, the applicant said she was fine physically and not in any pain. A week later, the applicant consulted her general practitioner, Dr Arceli Montesclaros and reported the motor vehicle accident. Dr Montesclaros noted that the applicant's left foot was slightly swollen. The applicant stated:

> "I had not experienced any pain in my left foot following the car crash and the feelings of fatigue and pain in my left foot had become largely prominent after long shifts at work.
>
> Thus, I strongly believe that the incident on 15 December 2018 had no bearing on my left foot injury. This is because the pain I developed in my left foot was a gradual onset of symptoms that reflected the physically demanding requirements of my employment as I was constantly required to be on my feet all day..."

Treating medical evidence and investigations

27. The clinical notes of the applicant's general practitioner, Dr Arceli Montesclaros are in evidence. On 27 November 2018, the notes referred to a slip in a puddle causing the applicant to fall on the left side of the buttocks. The applicant felt pain in her left buttock and left lateral thigh but was fully ambulant.

28. On 24 December 2018, Dr Montesclaros recorded a consultation as follows:

> "15/12/2018, 8 pm - MVA,
>
> driver, in Windsor Rd going to Richmond
> road slippery after the rain
> going at 70kmph
> loss of control or her car and went off the road into the footpath, went right,
> flipped over and went over the other side of road
> airbags did not go off
> ambulance attended scene. No other casualties with other motorists or pedestrian
> was brought to ED
> was over the limit of alcohol. .092
> p~ has been charged
> lost her license
> denies any neck pain, body aches
> …

4 days
left ankle pain
felt triggered from walking, has no car, no license
…
left medial malleolus tender, sl swollen"

29. An ultrasound of the left foot performed on 28 December 2018 was reported as showing:

> "Sonographic evidence of tibialis posterior tenosynovitis associated with small talar and subtalar joint effusion. No acute bony Injury is identified. Degenerative change is present about the medial malleolus. If the patient is refractory to conservative therapy, consider ultrasound guided HCLA injection to assist management."

30. On 31 December 2018, a general practitioner from the same practice as Dr Montesclaros, Dr Lourdes Joy Elpedes-Bolina discussed the ultrasound results with the applicant. Persistent pain was noted and the applicant was given a referral for ultrasound guided HCLA injection of the left posterior tibia. The ultrasound guided left ankle injection was performed on 31 December 2018.

31. On 24 January 2019, Dr Montesclaros recorded that the applicant had improvement for only one week post cortisone injection and still had pain in the left ankle. The applicant reported that she was "always on her feet".

32. A further injection to the left ankle tibialis posterior tendon was performed on 31 January 2019. Dr Elpedes-Bolina recorded on 15 February 2019 that there had been no improvement. Referrals to a podiatrist and orthopaedic surgeon, Dr Brian Martin, were prepared.

33. On 4 March 2019, the applicant consulted Dr Montesclaros requesting a referral to another orthopaedic surgeon as she was waiting a long time to see Dr Martin. Dr Montesclaros referred the applicant to orthopaedic surgeon, Dr Mayuran Suthersan for persistent pain and swelling in the left ankle "after slipping in November 2018". There was said to be no improvement with physiotherapy and post steroid injection twice.

34. On 6 March 2019, Dr Suthersan saw the applicant in relation to her left foot symptoms and recorded a history as follows:

> "She has noticed both medial and lateral hindfoot pain and a progressive collapse of the arch over the past 6 to 8 months. She does not recall any specific injuries prior to the onset of the symptoms. She has had two separate injections of the posterior tibial tendon sheath, which provided some symptomatic relief, but not changed her disease course. She has tried some custom orthotics, however, they do not appear to be improving her symptoms."

35. Dr Suthersan recommended the applicant wear a CAM boot with a custom orthotic to try and settle the acute inflammation. The applicant could continue taking anti-inflammatories. In the longer term, Dr Suthersan stated:

> "Ultimately to correct alignment she will either choose a non-operative measure which will involve a custom AFO with arch support orthotic. Or eventually she may require surgery which will involve subtalar arthrodesis. I will see her again in eight weeks' time after she has worn the boot for six weeks."

36. On 22 March 2019, Dr Suthersan noted that the applicant had been wearing medial arch support orthotics, however, the pain and deformity had persisted and become worse. Dr Suthersan noted that the applicant advised that she thought the injury may be work-related:

> "She does not perform any other significant physical exercise and has quite a physically demanding job. As this condition is chronic in nature, it is highly possible that it is indeed work-related."

37. Dr Suthersan recommended an MRI scan, which was performed on 30 May 2019.

38. On 12 June 2019, Dr Sutherson reported that the MRI scan confirmed a failure of the posterior tibial tendon and subsequent hindfoot valgus as well as oedema within the calcaneus and cuneiforms suggesting a fracture in this region. Dr Suthersan advised:

> "Given the chronic degenerative nature of her condition and the progressive deformity I believe she would benefit from surgery. Surgery would involve a triple arthrodesis of the hind foot to correct the alignment and prevent progression of deformity."

39. Dr Suthersan issued a medical certificate on the same date certifying the applicant as unfit to push bread dollies and noting that the applicant had bought rubber shoes that were suitable for work.

40. General practitioner, Dr Eric Lim, provided a report as the applicant's nominated treating doctor on 14 June 2019. Dr Lim recorded a history that on 24 December 2018, the applicant suffered a left foot injury from 15 years of prolonged standing, walking, pushing and pulling bread dollies. Dr Lim diagnosed "L) ankle acute insufficiency/stress fracture, subchondral infraction/microfracture of the medial cuneiform adjacent, high grade tibialis posterior tendinosis (MRI)".

41. Dr Lim expressed the opinion:

> "From my understanding of the injured worker's role as a Merchandiser, it would be reasonable to conclude that the mechanism of injury was the direct result of performing those specified tasks. The history given is consistent with employment being the main contributing factor to the injury. I do not have medical evidence to indicate an alternative mechanism of injury..."

42. A fee estimate for surgery was prepared by Dr Suthersan and forwarded the insurer on 12 July 2019.

43. Dr Suthersan prepared a report for Dr Lim on 5 August 2019, which noted that the applicant had a progressive planovalgus deformity of her left hindfoot. With regard to cause, Dr Suthersan noted:

> "Hereditary causes for planovalgus alignment of the foot include patients who are born with bilateral flat feet. However she has a normal foot on the contralateral side. Other hereditary causes include conditions such as tarsal coalition, accessory navicular or inflammatory arthritis. She does not have an identifiable hereditary cause for this unilateral deformity. Marilyn identifies her work involving pushing a heavy bread dolly. As a result of this she needs to pivot off her ankles in order to change direction. The motion of pushing a heavy bread dolly over a period of time can result in tearing and degeneration of the tibialis posterior tendon. I believe that her employment is a substantial contributing factor to her current deformity. I have not identified any contraindications to the surgery."

44. In a report to the applicant's solicitors dated 3 December 2019, Dr Suthersan said the applicant presented with a progressive deformity affecting her left foot which was becoming severe. Dr Suthersan described the cause of the condition as follows:

> "The primary cause for a planovalgus deformity of the foot in adults is insufficiency of the tibialis posterior tendon. Insufficiency of the tibialis posterior tendon is caused by acute or repetitive trauma. This results in tearing involving the tendon and subsequent inflammation and degeneration. The purpose of the tibialis posterior tendon is to maintain the medial arch and is an important tendon throughout the gait cycle. When the tibialis posterior tendon fails then there is an imbalance of muscular forces affecting the foot resulting in the deformity."

45. With regard to the relationship between the condition and the applicant's employment with the respondent, Dr Suthersan said:

> "Marilyn identifies her work involving pushing a heavy bread dolly. As a result of this she needs to pivot off her ankles in order to change direction. The motion of pushing a heavy bread dolly over a period of time can result in tearing and degeneration of the tibialis posterior tendon. I believe that her employment is a substantial contributing factor to her current deformity. This mechanism is consistent with the type of mechanism required for such an injury. Chronic repetitive pushing and twisting off that ankle can result in tearing and degeneration of the tibialis posterior tibial tendon. It is not possible to say when the injury exactly occurred as it is likely a consequence of chronic repetitive injuries. However as a result of the tibialis posterior tendon she now has secondary deformities affecting her hind foot which has resulted in the current deformed alignment of her hindfoot."

46. Dr Suthersan expressed the opinion that the employment with the respondent was the primary cause of the injury.

47. With regard to the need for surgery, Dr Suthersan stated:

> "At this stage, given the deformity has become significant and relatively rigid, conservative measures are unlikely to improve her condition. Surgery will involve a triple arthrodesis of the hindfoot. This involves arthrodesis of the subtalar joint, talonavicular joint and calcaneal cuboid joint. This will restore the alignment of the hindfoot and reduce pain. However the associated stiffness of the hindfoot will affect her ability to return to preinjury duties. She will likely need to be retrained to perform sedentary duties without significant requirement for prolonged standing, walking, lifting, twisting."

48. Dr Lim prepared a report for the applicant's solicitors on 18 July 2020, in which it was noted:

> "She has worked as a merchandiser for some 15 years, and will not return to this. She wears a modified footwear to reduce the load through her foot, but this has not resolved her condition. This is consistent with her need for ankle surgery, by Dr Suthersan. She did work following her injury for some time with some modifications, but this was unsustained due to the subsequent deterioration of her condition."

49. Asked to comment on the clinical record of 24 December 2018, Dr Lim stated:

> "I have reviewed the patient's entire medical records, and particular the 15/12/2018 MVA medical records, which was some 6 months prior to when I initially examined her. The points of note are that she did not recall the exact date of injury, and confirmed that she had reported her deteriorating symptoms to her GP on 24/12/2018, having had 4 days of pain, which puts the symptom onset some 5 days after the MVA."

50. With regard to the cause of the applicant's left foot condition, Dr Lim gave the opinion:

> "In summary, she was noted to have had some sporadic L) foot/ankle symptoms in the preceding months for which she saw a podiatrist, consistent with her 15 years of physical work. I do not consider the MVA to have caused the stress fractures, and the x-rays at the time were normal. Had the MVA caused the fractures, it would be inconsistent with working and walking home. She had tendonitis after the MVA which occurs as a result of repetitive trauma over time, not usually consistent with an acute impact of a MVA which would have caused a tear. There was no tear.
>
> I therefore conclude that the history, medical records, and evidence supports work over 15 years for George Weston Foods to have contributed to her foot/ankle condition, with a deterioration worsening in 2020 around the time she saw Dr Sutherson, and had a MRI.
>
> The date of injury reported, was from the clinical notes report of symptoms, but may be more accurately be recorded as the date she saw Dr Sutherson or date of MRI, being the date of diagnosis, and the development of the fractures. Surgery is reasonably necessary, as she has failed conservative measures, and remains totally incapacitated."

Dr Poplawski

51. The applicant relies on medicolegal reports prepared by orthopaedic surgeon, Dr Zbigniew Poplawski, dated 23 October 2019, 28 January 2020 and 13 July 2020.

52. Dr Poplawski took an employment history consistent with the applicant's evidence. The applicant's employment with the respondent was described as involving:

> "…a considerable amount of physical activity, including loading and unloading transport trolleys with bread, pushing these to the designated sites in the supermarket shop and then stacking the bread onto shelves.
>
> The trolleys are heavy of themselves, have metal wheels with plastic rims many of which are damaged, making it difficult to push them and steer them. Trolleys are loaded up with 24 crates of bread, each weighing 12 kg giving a total weight of 288 kg plus the weight of the trolley itself. The work is therefore physically demanding and puts considerable stress on the worker's arms, legs, knees, ankles and feet, particularly when changing the loaded trolley's direction which requires pivoting on her feet under load.
>
> During the trolley's journey on the supermarket floor, strips of metal on the floor have to be crossed from time to time, this requiring extra effort to push the wheels over the obstruction caused by these.
>
> Ms Privitera describes pushing and pulling such bread trolleys, some of which have faulty wheels, for four and a half hours per day, five days a week. For years she has had no pain in either foot, other than some discomfort which one would expect with this type of work, until 24 December 2018 when she developed a sudden pain in the left foot and ankle which has progressively increased since."

53. Dr Poplawski noted the history of treatment including the prescription of the CAM boot with customised orthosis, analgesic and anti-inflammatory medication and Dr Suthersan's recommendation for surgery in the form of a triple arthrodesis.

54. Dr Poplawski performed an examination and considered the MRI scan of the left ankle taken on 30 May 2019 and expressed the opinion:

> "Ms Privitera sustained cumulative injury to her left foot as a result of the type of work she was required to carry out while employed at the George Weston Foods Company Supermarket, as outlined in the body of my report.
>
> To summarise, she was required to push heavy trolleys, some of them with faulty wheels, loaded with produce of up to 288 kg in weight, this ultimately resulting in failure, insufficiency and partial tearing of the tibialis posterior tendon leading to a plantar valgus foot and failure of the spring ligament with the deemed date of injury 24 December 2018."

55. Dr Poplawski expressed the opinion that from what he had been told of the applicant's other jobs, employment with the respondent was "more likely than not to be the reason for the current problem in her left foot". Dr Poplawski considered the injury to be a gradual injury resulting from "repetitive pivotal and axial stresses to her foot with a sudden deterioration on 12 December 2018 when she sustained a partial tear of the tibialis posterior tendon, due to the nature and condition of her employment."

56. Dr Poplawski said the applicant had reached the stage where surgery needed to be considered, having undergone conservative treatment despite which her symptoms persisted and were increasing in severity. Dr Poplawski expressed the opinion that the surgery advised by Dr Suthersan was "reasonably indicated and necessary".

57. In the supplementary report of 13 July 2020, Dr Poplawski was asked to comment on the motor vehicle accident on 15 December 2018 and the general practitioner's clinical note of 24 December 2018. Dr Poplawski said this did not change the opinion expressed in his previous reports:

> "Ms Privitera had been troubled by significant symptoms in the left ankle for a prolonged period of time prior to the motor vehicle accident and, according to her statement and the brief entry in Dr Montesclaros notes, the MVA did not result in any significant, if any, injury to the ankle."

Dr Powell

58. The respondent relies on medicolegal reports prepared by orthopaedic surgeon, Dr Richard Powell, dated 10 September 2019 and 14 October 2019.

59. Dr Powell recorded an employment history as follows:

> "She works in a permanent part time capacity for 22.5 hours per week. She provides services to Coles and Woolworths stores in Richmond representing the Tip Top brand. She has concurrent employment directly with the Woolworths store at Richmond as an online shopper for 12 hour per week. There is a third role with Strikeforce for 1 day a week as a Retail Consultant with duties that involve changing product lines, and constructing point of sale displays."

60. Dr Powell recorded that the applicant's left foot condition was reported on 24 December 2018 although she had been aware of increasing pain, swelling and deformity in the left foot for several months prior to this.

61. Dr Powell performed an examination and reviewed the ultrasound of the left foot dated 28 December 2018 and MRI scan of 30 May 2019. Dr Powell made a diagnosis of marked planovalgus deformity most likely secondary to failure of the tibialis posterior tendon. Dr Powell noted that corrective surgery had been recommended.

62. Asked whether the applicant would have sustained the injury regardless of her employment, Dr Powell responded:

> "There is no doubt that Ms Privitera does have significant issues, particularly in relation to the left foot though I do not believe there is sufficient evidence to conclude that her employment represents the main contributing factor in either the development or aggravation of these conditions. It is likely she would have developed similar symptoms irrespective of the nature and conditions of her employment with George Weston Foods."

63. Dr Powell did not believe that the applicant was malingering nor did she demonstrate features of abnormal illness behaviour:

> "She has a significant problem involving her left foot for which her treating specialist has recommended surgery. This is having a profound effect on her mobility and as her job does involve prolonged periods of standing and walking she has had increasing difficulty maintaining her pre-injury duties."

64. Asked whether the diagnosis made by Dr Suthersan could be caused by hereditary factors, Dr Powell said:

> "I would agree with Dr Suthersan's diagnosis though the definitive cause has not been identified. It may represent end stage tibialis posterior tendon dysfunction more than "hereditary factors". The requested surgery is reasonable though is required to address the pre-existing degenerative disease process and is not required on the basis of injuries sustained in the course of her employment."

65. Dr Powell expressed the opinion that the surgery requested was reasonable and necessary for the management of the condition but "was not required on the basis of injuries sustained in the course of employment".

66. In his supplementary report, Dr Powell responded to further questions with regard to the cause of the applicant's condition. Asked whether he agreed with Dr Suthersan's opinion that the injury could have resulted from pushing the bread dolly, Dr Powell responded:

> "Ms Privitera worked for George Weston Foods in a part time capacity. She had concurrent employment in two other roles, both of which required prolonged periods of standing and walking. Her job with George Weston Foods did involve manoeuvring of bread trolleys, though it is my understanding that these platforms have four steering wheels, making them far more manoeuvrable than a normal trolley, requiring less force to steer. Nevertheless, I would agree with Dr Suthersan that the action of manoeuvring the trolley does require some degree of loading of the foot and ankle. Under normal circumstances these forces would be well within the physiological capabilities of a normal foot and ankle. There is no history of any acute injury to Ms Privitera's left foot or ankle that I am aware of.
>
> Therefore, her condition appears to represent one of gradual onset without any specific precipitating incident and would be considered a disease process.
>
> Although Dr Suthersan indicated the condition was unilateral, at the time of my clinical assessment I noted that Ms Privitera had bilateral pes planus deformity that was obvious far more severe on the left side, where it has been accentuated by the failure of the tibialis posterior tendon with subsequent collapse of the medal longitudinal arch. There is no doubt about her pathology and the nature of the underlying disease process. Similarly, it is acknowledged that periods of prolonged standing and walking will result in aggravation of this condition.

> The issue is whether or not Ms Privitera's employment with George Weston Foods, which represents one of three concurrent roles she holds, is the main contributing factor in the development of the degenerative disease process. I acknowledge that employment may be a factor to her current level of symptoms and dysfunction, though after considering all the factors above, I do not believe there is sufficient evidence to conclude that her permanent part time employment with George Weston Foods represents the main contributing factor in the development of the degenerative disease process involving the left foot."

67. Dr Powell said the applicant's condition could be multifactorial and was often idiopathic in nature. Dr Powell concluded:

> "As I have indicated above, I acknowledge that there is likely to be some degree of contribution from Ms Privitera's employment to the degenerative disease process, though I do not believe there is sufficient evidence to conclude that her part time employment with George Weston Foods represents the main contributing factor in that pathology."

Applicant's submissions

68. Mr Tanner said the applicant sought a general order that the respondent pay her incurred medical or related treatment expenses in respect of her left foot and ankle pursuant to s 60 of the 1987 Act as well as an order that the respondent pay the costs of and incidental to the surgery proposed by Dr Suthersan.

69. Mr Tanner noted that the primary question requiring determination was whether the applicant sustained an injury to her left foot and ankle within the meaning of s 4 of the 1987 Act. Mr Tanner noted that there was no dispute that the surgery was reasonably necessary treatment.

70. Mr Tanner referred to the applicant's written statements and noted that she relied on the nature of her employment with the respondent as causative of her left foot and ankle injury. Mr Tanner noted that none of the applicant's evidence as to her employment duties was in dispute. No countervailing evidence had been provided by the respondent as to the nature and conditions of the applicant's work.

71. Mr Tanner noted that the applicant had described her employment with other employers as physical but not strenuous. There was no other account of the work the applicant performed for her other employers in evidence. Mr Tanner submitted that there was no basis to find that the applicant's other employment was strenuous or contributed to the applicant's left foot condition.

72. Mr Tanner referred me to the medicolegal reports of Dr Poplawski. Mr Tanner noted that Dr Poplawski took a history of strenuous, physically demanding work for the respondent which placed considerable stress on the applicant's feet particularly when changing direction and pivoting. Dr Poplawski concluded that there was a cumulative injury to the left foot as result of the type of work the applicant performed for the respondent. This opinion was reiterated in Dr Poplawski's supplementary report.

73. Mr Tanner submitted that it could be seen from Dr Poplawski's reports that the applicant sustained a "nature and conditions injury" as a result of a series of micro-traumata over the course of her employment with the respondent which commenced in 2004. Alternatively, the applicant had an injury in the nature of a disease developing gradually over a period of time or aggravation of a disease. Mr Tanner noted that the date of injury relied on in these proceedings was 14 June 2019 reflecting the date of first incapacity.

74. Mr Tanner referred me to the reports of Dr Suthersan and submitted that the opinions expressed by Dr Suthersan were consistent with injury caused by acute and repetitive trauma in the course of the applicant's employment with the respondent. Dr Suthersan noted that the evidence revealed the applicant had a normal foot on the contralateral side. There was no identifiable hereditary cause for a unilateral deformity.

75. Mr Tanner submitted that as the applicant's treating surgeon, Dr Suthersan had seen the applicant on numerous occasions. Dr Suthersan was liable for the consequences of the opinions he gave and Mr Tanner submitted that particular weight should be afforded to his opinions.

76. Mr Tanner referred me also to the reports prepared by Dr Lim. Mr Tanner submitted that three medical practitioners had given an opinion that employment was causative of the applicant's pathology.

77. In contrast, Dr Powell stood alone in giving the view that there was insufficient evidence that employment with the respondent was the main contributing factor to the applicant's condition. Mr Tanner submitted that Dr Powell's reports did not acknowledge the extent to which the applicant's foot and ankle were subjected to stress by her work tasks. Dr Powell did not engage with the applicant's undisputed evidence with regard to the forces required to move the bread dollies. Dr Powell did not understand the particular difficulties with the dollies the applicant worked with.

78. Mr Tanner said it was important to note that Dr Powell did not consider the applicant to be malingering and agreed that she did have a significant condition at her foot which required surgery.

79. Mr Tanner noted that Dr Powell did consider the applicant would have difficulty performing her pre-injury duties which involved prolonged periods of standing and walking. Mr Tanner said this explained why those same duties would have been causative of injury.

80. Mr Tanner submitted that Dr Powell accepted that the mechanism of injury described by the applicant could be causative of injury but did not consider there was sufficient evidence to support a conclusion that it was the main contributing factor to the injury. Mr Tanner submitted there was sufficient evidence before the Commission from the applicant and the treating surgeon. The evidence did not establish that employment with the respondent made only a minor contribution. Dr Powell's opinion in this regard was said to be unexplained.

81. Mr Tanner noted that Dr Powell also seemed to require evidence of a specific injury.

82. To the extent that it was suggested that other employment may be causative of the injury, Mr Tanner submitted that Dr Powell did not have before him evidence of what those duties entailed.

83. Mr Tanner noted the evidence with regard to the motor vehicle accident but submitted that Dr Powell did not consider the motor vehicle accident to be relevant.

Respondent's submissions

84. Mr Parker submitted that it was unclear whether the applicant relied on an injury for the purposes of s 4(a) or s 4(b) of the 1987 Act. It was not known when the applicant ceased employment with the respondent or her other employers. The evidence thus raised questions as to whether the respondent was the last employer to employ the applicant in employment to the nature of which the injury was due if the injury involved a disease for the purposes of s 4(b).

85. Mr Parker submitted that the history of injury was problematic. Dr Poplawski's more recent report referred to a history of problems for a prolonged period of time before the motor vehicle accident in December 2018. In contrast, in his first report Dr Poplawski referred to the applicant having no pain in either foot for years but developing a sudden pain in her left foot and ankle on 24 December 2018. Mr Parker said there was a remarkable difference in the histories taken by Dr Poplawski.

86. Mr Parker took me to the clinical notes of the applicant's general practitioners, which on 24 December 2018 recorded a motor vehicle accident on 15 December 2018 and four days of pain in left foot and ankle which the applicant felt was triggered by walking after she could not drive her vehicle. Mr Parker said it was unclear what the "walking" entailed.

87. Mr Parker noted the applicant's other employment as a merchandiser or online shopper. The applicant was also employed by the Australian Electoral Commission in work which required her to be on her feet. Given that all of the applicant's other employment involved her being on her feet and walking, Mr Parker said the identification of the "last employer" was a matter of considerable concern.

88. Having regard to the evidence, Mr Parker submitted that the Commission would not be satisfied that employment with the respondent was the main or substantial contributing factor to the injury. If it was a disease case, there was no evidence as to who was the last relevant employer.

89. Mr Parker referred to and relied on the reports of Dr Powell. Mr Parker noted that Dr Powell had a history of the applicant's concurrent work. Dr Powell's history of the onset of symptoms several months prior to 24 December 2018 did not appear consistent with the clinical notes. Mr Parker submitted that the evidence of Dr Powell would be preferred over Dr Poplawski.

Applicant's submissions in reply

90. Mr Tanner submitted that the applicant relied on three alternative injuries for the purposes of s 4 of the1987 Act. The condition was either an injury caused by a series of micro-traumata over the period of employment from 2004 until June 2019 for s 4(a); a disease caused by repetitive stresses on the left foot an ankle for the purposes of s 4(b)(i); or an aggravation of a disease for the purposes of s 4(b)(ii).

91. Mr Tanner submitted that it was not open to the respondent to rely on a dispute under ss 15 or 16 of the 1987 Act having failed to provide any evidence as to the nature of the employment with the other employers. There was no evidence to challenge the applicant's evidence as to the nature of her work elsewhere. It was not established that there was any contribution from the other employment to the applicant's condition.

92. Mr Tanner noted that the history as to the timing of the onset of symptoms taken by Dr Powell was consistent with that recorded by Dr Suthersan in his report to Dr Lim. Dr Poplawksi also took a history of "some discomfort" previously.

93. With regard to the reference to "walking" in the clinical note of 24 December 2018, Mr Tanner noted that this was not developed in the respondent's medical case. Dr Powell did not suggest that the injury was caused by walking. There was no medical evidence to support the theory developed by the respondent in its submissions. On the other hand, the evidence clearly established a work-related basis for the condition, whether it was one which fell within ss 4(a) or (b).

FINDINGS AND REASONS

Injury

94. Section 9 of the 1987 Act provides that a worker who has received an "injury" shall receive compensation from the worker's employer. The term "injury" is defined in s 4 of the 1987 Act as follows:

> **"4 Definition of 'injury'**
>
> In this Act:
> **injury:**
>
> (a) means personal injury arising out of or in the course of employment,
>
> (b) includes a disease injury, which means:
>
> (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and
>
> (ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease, and
>
> (c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the *Workers' Compensation (Dust Diseases) Act 1942*, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined."

95. For injuries other than disease injuries, compensation will not be payable unless s 9A is also satisfied:

> **"9A No compensation payable unless employment substantial contributing factor to injury**
>
> (1) No compensation is payable under this Act in respect of an injury (other than a disease injury) unless the employment concerned was a substantial contributing factor to the injury.
>
> **Note—**
> In the case of a disease injury, the worker's employment must be the main contributing factor. See section 4.
>
> (2) The following are examples of matters to be taken into account for the purposes of determining whether a worker's employment was a substantial contributing factor to an injury (but this subsection does not limit the kinds of matters that can be taken into account for the purposes of such a determination)—
>
> (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,
(f) the worker's lifestyle and his or her activities outside the workplace.

(3) A worker's employment is not to be regarded as a substantial contributing factor to a worker's injury merely because of either or both of the following—

(a) the injury arose out of or in the course of, or arose both out of and in the course of, the worker's employment,

(b) the worker's incapacity for work, loss as referred to in Division 4 of Part 3, need for medical or related treatment, hospital treatment, ambulance service or workplace rehabilitation service as referred to in Division 3 of Part 3, or the worker's death, resulted from the injury.

(4) This section does not apply in respect of an injury to which section 10, 11 or 12 applies."

96. It is possible for an injury to satisfy the definitions in both s 4(a) and s 4(b). In *Zickar v MGH Plastics Industries Pty Ltd (Zickar)*[1] Kirby J said:

> "No longer is there a dichotomy between "personal injury" in its full sense and "disease injury" within the additional part of the definition. A worker is entitled to succeed if he or she can bring a claim within either head of recovery. Logically, the first question to ask, including in cases which might otherwise be classified as manifestations of a "disease", is whether, notwithstanding that manifestation, the case falls within the primary definition of "injury" as a "personal injury arising out of or in the course of employment". In that context, the word "injury" should not be given a narrow meaning. It should have an ample application, in no way read down because Parliament, additionally, has provided a separate head of recovery for cases of work related diseases. It is not to the point to complain that this will lead to adventitious outcomes depending upon the nature of the precise "injury". That is inherent in the definitions contained in the 1987 Act. As Powell JA pointed out in the Court of Appeal, it has been a feature of workers' compensation law virtually since the first statute was enacted.
>
> The approach to the definition of "injury" which I favour does not necessarily mean that every catastrophe connected with a progressive disease will fall within the definition of "personal injury", primarily so defined. Whether, in the case of a progressive disease, leading inevitably to a sudden or identifiable pathological change, it can be said that such change constitutes a "personal injury" can be left to determination on a case by case basis. It must be assumed that Parliament intended the extended definition, enacted to cover cases of "disease" within s 4(b) of the 1987 Act, to have some operation."

[1] [1996] HCA 31; 187 CLR 310.

97. In the present case, there is no dispute as to the nature of the medical condition suffered by the applicant. Nor is there any disagreement within the medical evidence that the surgery proposed by Dr Suthersan is reasonably necessary treatment for the applicant's condition. The primary issue in dispute is the causal relationship between the condition and the applicant's employment with the respondent.

98. The applicant bears the onus of establishing the causal relationship required by ss 4 and 9A. The respondent argues that the applicant has, in this case, failed to discharge her onus, in part, due to inconsistencies in the histories provided by the applicant to the doctors.

99. The applicant's own evidence is that after commencing employment with the respondent in 2004, over time she experienced a gradual onset of severe pain in her left foot/ankle. The applicant has expressed the belief that her symptoms were caused by the nature and conditions her employment with the respondent, which she has described in detail. The applicant's evidence does not suggest, however, that she sought medical advice in relation to her symptoms until 24 December 2018. This is consistent with the clinical notes in evidence.

100. The clinical note recorded by Dr Montesclaros on 24 December 2018 deals predominantly with a motor vehicle accident which had occurred some nine days earlier on 15 December 2018. It is not suggested in this clinical note or elsewhere in the medical or lay evidence that the applicant injured her left foot and ankle in the motor vehicle accident itself. The clinical note does, however, suggest that the applicant had experienced pain for four days, which she felt was triggered by walking. It was noted that at the time the applicant had no car or licence.

101. In this regard, the clinical note does not on its face appear consistent with the applicant's evidence with regard to either the timing of the onset of symptoms or the context in which they arose.

102. It is well established that clinical notes are to be approached with caution. In *Nominal Defendant v Clancy*[2], Santow JA observed:

> "While clinical notes, as McColl JA observes, may in common experience be the raw data on which diagnosis and opinions are based, it does not follow that they will be comprehensive … clinical notes are written in the course of a busy practice where the clinician is primarily there to observe and administer treatment. They should not be construed with the minute attention one might give a formal legal document. It is fair to say a report to another doctor [or a medico-legal report] is likely to have been written with more deliberate consideration than rough notes." (at [54]-[55])

103. A history of an onset of pain on or about 20 December 2018 in the context of walking due to not having a car or license is not one which was repeated elsewhere. There also appears to have been a lack of clarity in Dr Montesclaros' mind as to the context in which symptoms arose, noting that the letter of referral to Dr Suthersan suggests that a slip in November 2018 was relevant. The clinical note referring to a slip on 27 November 2018 does not, however, make any mention of left foot or ankle symptoms. I am not persuaded that Dr Montesclaros had a clear history as to the timing or context in which the left foot/ankle symptoms arose. If he did, it is not revealed in the evidence.

104. The left foot and ankle symptoms were investigated and the referral eventually made to Dr Suthersan. Dr Suthersan took a more detailed history, which was consistent with the applicant's evidence, of a gradual onset over a period of time. Dr Suthersan recorded in early March 2019 that the applicant had noticed medial and lateral hindfoot pain and a progressive collapse of the arch over the past six to eight months. The applicant did not recall any specific injuries.

[2] [2007] NSWCA 349.

105. The first suggestion of a causal relationship with employment appears in the report of Dr Suthersan dated 22 March 2019. On that occasion, Dr Suthersan indicated that it was "highly possible" that the condition was work-related, noting that the applicant did not perform any other significant physical exercise and had a quite a physically demanding job. The condition was described as chronic in nature. The medical certificate issued by Dr Suthersan on 12 June 2019 suggests that the applicant's footwear and use of bread dollies were considered significant in the context of her condition.

106. Dr Lim's report of 14 June 2019 suggested there was an injury on 24 December 2018, although he clarified in his subsequent report of 18 July 2020 that this date had been taken from the first report of symptoms clinical records. Dr Lim's latter report gave a history of sporadic symptoms in the months preceding the motor vehicle accident, worsening in the first half of 2019. This history appears to be broadly consistent with both the applicant's evidence and the history given to Dr Suthersan.

107. The history reported by Dr Poplawski is, however, problematic. In his first report, Dr Poplawski referred to the applicant working for years with no pain other than "some discomfort". He then said there was a "sudden pain in the left foot and ankle" on 24 December 2018. This suggestion of an acute incident on 24 December 2018 is not supported by any other evidence. Later in the report, Dr Poplawski referred to this as a "deemed date" suggesting a disease or aggravation of a disease of gradual onset. Elsewhere in the report, Dr Poplawski referred to a "sudden deterioration on 12 December 2018". In his final report, Dr Poplawski described the applicant being troubled by "significant symptoms" in the left ankle for "a prolonged period of time prior to the motor vehicle accident". In view of these inconsistencies, I consider Dr Poplawski's reports provide an unreliable account of the onset of symptoms.

108. Dr Powell, on the other hand, recorded an account of increasing symptoms for several months prior to 24 December 2018. Dr Powell's history was therefore consistent with the applicant's evidence and the histories recorded by Dr Suthersan and, eventually, Dr Lim.

109. On this analysis of the evidence, I accept that there is inconsistency and some degree of confusion in the medical evidence as to the timing and context of the onset of symptoms. This is particularly so in the evidence from Dr Montesclaros and Dr Poplawski. There is, however, a consistent narrative in the applicant's evidence and the reports of Dr Suthersan, Dr Lim and Dr Powell of a gradual onset of symptoms in the latter half of 2018 and deterioration in the first half of 2019, culminating in the applicant ceasing employment in June 2019.

110. This history is broadly consistent with the opinions expressed in the medical evidence that the condition in the applicant's left foot and ankle is characterised by chronic degeneration and progressive deformity.

111. There is also a universal acknowledgement in the medical evidence that the nature and conditions of the applicant's employment at least had the potential to contribute to the condition.

112. As Mr Tanner observed, the applicant's account of the nature and conditions of her employment is uncontradicted. The applicant has described her duties in detail in her evidence and provided a consistent account of what her work entailed to Dr Suthersan, Dr Lim, Dr Poplawski and Dr Powell.

113. Dr Powell appears to have had some difficulty accepting that bread dollies would be as strenuous to manoeuvre as suggested by the applicant. Dr Powell referred to the bread dollies having four steering wheels which would make them "far more manouverable than an ordinary trolley".

114. It is not clear on what basis Dr Powell formed that opinion. I note that shopping trolleys, which the applicant described using in her other employment would typically also have four wheels and would not usually be as heavily laden as the bread dollies the applicant described using in her employment with the respondent. Nonetheless, Dr Powell did agree that the action of manouvering the dolly would require some degree of loading of the foot and ankle. Dr Powell accepted that employment with the respondent may be "a factor" to the applicant's level of symptoms and dysfunction.

115. I accept the submission that Dr Powell does not appear to have fully engaged with the applicant's evidence as to the way the bread dollies were used and the difficulties she encountered in using them. The applicant's evidence was that the dollies were stacked up to 10 crates high with up to 240 kg of product. The dollies were often faulty and missing wheels. The dollies were hard to get moving and the applicant had to use her "entire body" to push, steer and brake them. The applicant described having to stand on tip toes to reach the top crates. Dr Powell also did not engage with the applicant's evidence that she was required by the respondent to wear rigid, steel capped shoes that did not fit her narrow foot well.

116. These features of the applicant's work duties were, in contrast, properly appreciated by Dr Suthersan and Dr Poplawski. Dr Suthersan gave the opinion that the motion of pushing a heavy bread dolly over a period of time was consistent with the type of mechanism required for the applicant's injury. Specifically, Dr Suthersan said that chronic repetitive pushing and twisting off the ankle could result in tearing and degeneration of the tibialis posterior tibial tendon. Dr Suthersan expressed the opinion that employment with the respondent was "a substantial contributing factor to her current deformity".

117. Similarly, Dr Poplawski recorded his understanding that the dollies were heavy, had metal wheels with plastic rims, many of which were damaged, making it difficult to push and steer them. The dollies were loaded up with 24 crates of bread, each weighing 12 kg. This work was described as placing considerable stress on the ankles and feet, particularly when changing the loaded dollies' direction, which required pivoting on the feet under load. Consistently with Dr Suthersan, Dr Poplawski accepted that this work resulted in failure, insufficiency and partial tearing of the tibialis posterior tendon leading to a plantar valgus foot and failure of the spring ligament. Dr Poplawksi concluded that employment with the respondent was "more likely than not to be the reason for the current problem in her left foot".

118. Dr Powell did not agree that there was sufficient evidence that the employment with the respondent was the "main contributing factor" to the applicant's condition. Although this opinion was described in submissions as "unexplained", I accept that it can be inferred from Dr Powell's report that he considered that the applicant's other employment was relevant. Dr Powell noted that employment with the respondent was only part-time. Dr Powell made reference to hereditary factors and the presence of bilateral pes planus deformity on his examination. Dr Powell suggested that the condition could be idiopathic in origin and could also be multifactorial.

119. The applicant gave evidence as to the nature of her other employment in her written statements, saying it did not involve strenuous work. Although it did involve standing and walking, her other employment was distinguished on the basis that it did not require the applicant to push and manoeuvre faulty, heavily laden dollies. It was this particular aspect of her role with the respondent, which Dr Suthersan and Dr Poplawski regarded as significant in giving their opinions. The applicant also was not required to wear rigid steel capped shoes in her other employment. The respondent has not provided any evidence to contradict the applicant's account of her other employment.

120. The evidence establishes that the applicant worked around 22.5 hours per week over a period of almost 15 years for the respondent, performing the duties described. There is little evidence before me as to the hours worked in the other employment or over what period, although Dr Powell's history suggested that the applicant worked 12 hours per week for Woolworths and one day per week for Strikeforce. I am prepared to accept on this basis that employment with the respondent was the applicant's main or primary job.

121. Dr Suthersan has specifically addressed and provided a well-reasoned explanation for why he did not identify a hereditary cause for the applicant's unilateral deformity.

122. Although it may be the case that conditions such as that experienced by the applicant are idiopathic in origin, there is in this case an identifiable mechanism of injury which has been accepted by all the doctors involved as potentially causative of the applicant's condition.

123. Accepting also that the applicant's condition may be multifactorial in origin would not preclude the applicant from discharging the relevant onus. It is not necessary that employment with the respondent be the sole cause of the condition in order for the applicant to establish an injury under ss 4 and 9A. Employment with the respondent need only be a "substantial" or "the main" contributing factor.

124. It was also suggested by the respondent's submissions and Dr Powell's report that being "on her feet all the time" and prolonged walking, particularly following the motor vehicle accident could have been causative of the applicant's condition. There is, however, no medical opinion that prolonged walking and standing was a substantial or the main contributing factor to the applicant's condition although Dr Powell did accept that prolonged standing and walking could result in aggravation of the applicant's condition. As indicated above, it was the particular mechanism of pivoting and pushing a heavy dolly under load, not simply standing and walking, which led Dr Suthersan and Dr Poplawski to their ultimate conclusion.

125. For all the reasons given above, I find there is a fair climate for the acceptance of the opinions given by Dr Suthersan and Dr Poplawski, notwithstanding the problematic history recorded by Dr Poplawski. Furthermore, I prefer those opinions to the opinion given by Dr Powell.

126. The issue which remains is whether the condition falls within one or more of the definitions of injury in s 4(a), 4(b)(i) or 4(b)(ii). I am satisfied on the balance of probabilities, relying on the opinions of Dr Suthersan and Dr Poplawski, that the condition satisfies ss 4(a) and 9A. That is, in the course of her employment with the respondent between September 2004 and 14 June 2019, the applicant experienced repetitive traumatic injuries or micro traumata to her left foot and ankle resulting in sudden and pathological change in the nature of failure, insufficiency and partial tearing of the tibialis posterior tendon, leading to a plantar valgus foot. Whilst other factors may have contributed to the applicant's injury, having regard to the examples set out in s 9A(2), I am satisfied that employment with the respondent was a substantial contributing factor to the injury.

127. Having found that the injury falls within s 4(a) and s 9A, I find it unnecessary to determine whether the condition also falls within s 4(b), or determine for the purposes of ss 15(1)(b) and 16(1)(b) whether the respondent was the employer who last employed the applicant in relevant employment.

Entitlement to s 60 expenses

128. In view of the findings above, I am satisfied on the evidence before me that the surgery proposed by Dr Suthersan is reasonably necessary as a result of injury. There will be an order that the respondent pay the costs of and incidental to the surgery pursuant to s 60 of the 1987 Act.

129. It is also appropriate that there be a general order that the respondent pay the applicant's reasonably necessary incurred medical and related treatment expenses in respect of the left foot and ankle injury upon production of accounts, receipts and / or valid Medicare Notice of Charge.

SUMMARY

130. As a result of the nature and conditions of the applicant's employment with the respondent between September 2004 and 14 June 2019, the applicant sustained a personal injury to her left foot and ankle in the course of employment pursuant to s 4(a) of the 1987 Act.

131. Employment with the respondent was a substantial contributing factor to the injury in accordance with s 9A of the 1987 Act.

132. The respondent to pay the costs of and incidental to the surgery proposed by Dr Suthersan pursuant to s 60 of the 1987 Act.

133. Pursuant to s 60 of the 1987 Act, the respondent to pay the applicant's reasonably necessary incurred medical and related treatment expenses in respect of the left foot and ankle injury on production of accounts, receipts and / or valid Medicare Notice of Charge.