

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 4464/20  
**Applicant:** David James Massouh  
**Respondent:** Prime Facility and Asset Management Pty Limited  
**Date of Determination:** 18 February 2020  
**Citation No:** [2021] NSWCC 52

The Commission determines:

1. The applicant suffered injury in the form of a left inguinal hernia arising out of or in the course of his employment with the respondent on or about 26 January 2019 and in or about April 2019 within the meaning of sections 4(a) and 9A of the *Workers Compensation Act 1987*.
2. The left inguinal hernia surgical mesh repair proposed by Dr Thomas Oh, General Surgeon is reasonably necessary treatment as a result of the injury sustained by Mr Massouh on or about 26 January 2019 and in or about April 2019 within the meaning of section 60 of the *Workers Compensation Act 1987*.

The Commission orders:

3. The respondent is to pay for the costs of and ancillary to the left inguinal hernia surgical mesh repair proposed by Dr Thomas Oh, General Surgeon at the gazetted rates.

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

Anthony Scarcella  
**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 ANTHONY SCARCELLA, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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



## STATEMENT OF REASONS

### BACKGROUND

1. The applicant, Mr David James Massouh, is a 32-year-old man who was employed by Prime Facility and Asset Management Pty Limited (the respondent) as a tiler and trade technician.
2. Mr Massouh alleges that the nature and conditions of his employment with the respondent culminated in injury. The nature and conditions of his employment included picking up and carrying heavy items such as, vinyl board sheets, villa boards, sandbags, cement, glue bags and tools required for tiling and bathroom renovations.
3. On 30 May 2019, Mr Massouh lodged a claim in respect of his alleged left inguinal hernia under the *Workers Compensation Act 1987* (the 1987 Act) with iCare Workers Insurance (iCare).
4. On 9 July 2019, Dr Thomas Oh, General Surgeon diagnosed a left inguinal hernia and recommended that Mr Massouh undergo a left inguinal hernia surgical mesh repair.
5. On 18 October 2019, iCare accepted Mr Massouh's claim and referred to the injury as a "strain of adductor muscle, fascia and tendon of left thigh".<sup>1</sup>
6. On a date not disclosed in the evidence, Mr Massouh sought iCare's approval to undergo the left inguinal hernia surgical mesh repair proposed by Dr Oh.
7. On 28 November 2019, iCare issued a Dispute Notice under section 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) denying the surgery proposed by Dr Oh was reasonably necessary treatment as a result of injury within the meaning of section 60 of the 1987 Act.
8. On 17 April 2020, Mr Massouh, through his lawyers, requested a review of the decision contained in iCare's Dispute Notice dated 28 November 2019 under section 287A of the 1998 Act.
9. On 1 May 2020, in response to the request for a review of its decision, iCare issued a Dispute Notice under section 78 of the 1998 Act maintaining its decision to deny liability for the proposed surgery and, in addition, disputed liability under sections 4(a), 4(b), 9A; 33, 59 and 60 of the 1987 Act.
10. On 11 August 2020, iCare issued a Dispute Notice under section 78 of the 1998 Act denying an entitlement to reasonably necessary medical and related treatment expenses as a result of injury within the meaning of sections 59 and 60 of the 1987 Act and denying an entitlement to weekly benefits under section 33 of the 1987 Act.
11. Mr Massouh lodged an Application to Resolve a Dispute (ARD) dated 12 August 2020 in the Workers Compensation Commission (the Commission) seeking a finding that the left inguinal hernia surgical mesh repair proposed by Dr Thomas Oh, General Surgeon is reasonably necessary treatment as a result of the injury sustained by Mr Massouh on 26 January 2019 within the meaning of section 60 of the 1987 Act and seeking an order that the respondent pay the costs of and ancillary to the proposed surgery.

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<sup>1</sup> Reply at pages 1-4

## PROCEDURE BEFORE THE COMMISSION

12. The parties were to participate in an audio-visual conciliation conference/arbitration on 5 November 2020. Mr Massouh failed to appear and could not be contacted. Mr Paul Stockley of counsel appeared for Mr Massouh and Ms Nicole Compton of counsel appeared for the respondent.
13. The parties agreed that the matter could proceed by way of written submissions. Accordingly, on 5 November 2020, I made the following directions:
  - “1. The respondent’s Application to Admit Late Documents dated 27 October 2020 and attached documents are admitted into evidence.
  2. The applicant is to lodge and serve written submissions by 9 November 2020.
  3. The respondent is to lodge and serve written submissions in reply by 16 November 2020.
  4. The applicant is to lodge and serve any written submissions in reply to the respondent’s submissions by 23 November 2020.
  5. The parties are granted leave to restore if any interlocutory issues for determination arise from direction 1 above or from the written submissions directed above.”
14. In its written submissions dated 16 November 2020, the respondent requested an urgent teleconference to clarify an interlocutory issue with respect to Mr Massouh’s proposed amendment to his pleading as to injury.
15. On 26 November 2020, following a teleconference with the parties and their legal representatives, I made the following further directions:
  - “1. The applicant is to draft an amended pleading in respect of injury (the amended pleading) and provide it to the respondent for its consideration by close of business on 26 November 2020.
  2. The respondent is to advise the applicant whether the amended pleading is consented to by close of business on 27 November 2020.
  3. If the applicant’s amended pleading is consented to by the respondent, then the applicant is to lodge an amended Application to Resolve a Dispute incorporating the amended pleading without supporting documents by close of business on 30 November 2020.
  4. If the applicant’s amended pleading is not consented to by the respondent, the applicant is to lodge an amended Application to Resolve a Dispute incorporating the amended pleading without supporting documents by close of business on 30 November 2020 in any event; and the issue of the amended pleading is to be incorporated in the parties’ written submissions referred to below.
  5. The respondent is to lodge and serve written submissions in reply in respect of the substantive issues and, if necessary, the interlocutory issue related to the amended pleading by 4 December 2020.

6. The applicant is to lodge and serve any written submissions in reply to the respondent's submissions in respect of the substantive issues and, if necessary, the interlocutory issue related to the amended pleading by 11 December 2020.
7. At the conclusion of the time allowed for submissions the dispute will be determined 'on the papers'."

16. I am satisfied that the parties to the dispute understood the nature of the application and the legal implications of any assertion made in the information supplied. I 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**

17. The first issue for determination was the following interlocutory issue:

- (a) Should Mr Massouh be granted leave to amend the particulars of injury in the ARD as proposed in the written submissions dated 30 November 2020 made on his behalf?

18. Thereafter, the following issues remained for determination:

- (a) Did Mr Massouh suffer a left inguinal hernia arising out of or in the course of his employment with the respondent within the meaning of section 4 of the 1987 Act?
- (b) Is the left inguinal hernia surgical mesh repair proposed by Dr Thomas Oh, General Surgeon reasonably necessary treatment as a result of the injury sustained by Mr Massouh on 26 January 2019 within the meaning of section 60 of the 1987 Act?

## **Matters previously notified as disputed**

19. The issues in dispute were notified in the Dispute Notices referred to above.

## **Matters not previously notified**

20. The applicant's proposed amendments to the ARD in respect of the pleading of injury is discussed below.

## **EVIDENCE**

### **Documentary Evidence**

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

- (a) ARD dated 12 August 2020 and attached documents;
- (b) Reply dated 23 August 2020 and attached documents;
- (c) Respondent's Application to Admit Late Documents dated 27 October 2020 and attached documents;
- (d) Applicant's written submissions dated 5 November 2020;

- (e) Respondent's written submissions dated 16 November 2020;
- (f) Applicant's further written submissions dated 25 November 2020;
- (g) Applicant's further written submissions to amend ARD dated 30 November 2020;
- (h) Respondent's further written submissions dated 14 December 2020.

### **Oral Evidence**

22. Neither party sought leave to adduce oral evidence from or to cross-examine any witness.

### **SUBMISSIONS**

23. The parties lodged and served written submissions in accordance with my directions on 5 November 2020 and 26 November 2020. I will refer to the parties' principal submissions under each relevant issue for determination set out below.

### **AN ANALYSIS OF THE EVIDENCE**

24. In his evidentiary statement dated 9 June 2020, Mr Massouh stated that he commenced employment with the respondent on or about 2 January 2019. He stated that his role involved levelling out flooring with sand and cement, generally, at worksites, including homes and construction sites of the respondent's customers. He stated that the work "involved a tremendous amount of heavy manual labour"<sup>2</sup> and provided further details in the following terms:

- "8. On a regular basis, I was required to lift 20kg bags of sand and cement out of trucks and had to make them wet by placing water in those bags. I would then empty the bags into buckets which would weigh approximately 15kg.
- 9. Two buckets would then need to be carried to the bathroom side, approximately 15 metres from the truck. Once I reach the bathroom, the contents of the buckets were poured onto the floor and I would then level the floor to make it flat.
- 10. I would also occasionally be required to pick up and carry heavy items including vinyl board sheets, villa boards, sandbags, cement, glue bags and tools required for tiling and bathroom renovations.
- 11. I would usually carry out these occupational duties by myself without assistance. I was not assisted by any other work colleague or management with my duties.
- 12. I continued working in these conditions from between January 2019 to March 2019, when I became aware of a strong pain in my left groin. I was not aware of any obvious lump beforehand, however, did notice a lump in the side of my left groin area.
- 13. On one occasion, the pain became very unbearable, so I informed my employer. I was sent home and told not to continue with the job I was undertaking in Wollongong that day."<sup>3</sup>

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<sup>2</sup> ARD at page 1 at [6]

<sup>3</sup> ARD at pages 1-2

25. In evidence, there are documents referred to as the clinical notes of Dr Ijaz Khan, one of Mr Massouh's general practitioners.<sup>4</sup> The documents consist of a series of certificates of capacity relating to Mr Massouh's work-related left groin injury; radiological reports and a number of requests for approval of treatment, amongst other things. There are no consultation notes. The certificates of capacity issued by Dr Khan disclosed that Mr Massouh attended the medical practice in relation to his left inguinal hernia symptoms on 29 May 2019, 19 June 2019, 31 July 2019, 11 September 2019, 23 October 2019, 6 November 2019 and 4 December 2019.
26. Dr Khan's clinical records disclosed that Mr Massouh underwent a CT scan of the abdomen, pelvis and lumbar spine on 26 January 2019 by Dr C Geraldine Walsh. Dr Walsh's CT scan report dated 26 January 2019 referred to the following under the heading "clinical notes":
- “? Discitis? Psoas access. Left lower quadrant pain and lumbosacral tenderness.”<sup>5</sup>
- Of relevance to this matter was the reference to left lower quadrant pain, which was arguably consistent with Mr Massouh's complaint of left groin symptoms in late January 2019. Dr Walsh found a probable sub-centimetre cyst in the right liver; a normal gallbladder without biliary dilatation; no splenic or pancreatic abnormality; no adrenal or renal abnormality; no hydronephrosis; normal abdominal aorta; no acute intestinal abnormality; and the diverticular change in the sigmoid colon appeared uncomplicated. Dr Walsh concluded that there were no significant osseous or soft tissue abnormalities identified and that, if there were ongoing concerns, then an MRI scan should be considered for more accurate spinal evaluation.
27. Because the documents purported to be Dr Khan's clinical notes, it could be presumed that it was he who referred Mr Massouh for the CT scan. In the absence of Dr Khan's consultation notes, it remains unclear. However, there is no evidence before me that Mr Massouh consulted Dr Khan prior to 29 May 2019. In fact, the certificate of capacity issued by Dr Khan dated 29 May 2019 specified that Mr Massouh was first seen at the medical practice for the subject injury on 29 May 2019.
28. On 29 May 2019, Dr Khan, issued a certificate of capacity diagnosing Mr Massouh as having suffered a work related "Left inguinal region protrusion ?hernia" and nominating the date of injury as "January 2019 and then reaggravated in late March, April 2019."<sup>6</sup> The certificate recorded the relationship of the injury to work as being the lifting of 18 bags of sand and cement weighing approximately 20 kg each; tile boxes weighing in excess of 30 kg each; five glue bags weighing approximately 20 kg each. The certificate went on to record that, subsequent to these activities, Mr Massouh noticed a swelling "pop out" of his inguinal region. The certificate was submitted with the Worker's Injury Claim Form dated 31 May 2019.<sup>7</sup> On examination of Mr Massouh's left groin region, Dr Khan observed a superficial skin lump approximately 2 cm in diagonal length along the line of the inguinal ligament and canal.
29. On 29 May 2019, Dr Khan referred Mr Massouh for an ultrasound of "both groins, umbilicus, left groin lump under Valsalva".<sup>8</sup>
30. Mr Massouh stated that he instructed his lawyers to lodge a Worker's Injury Claim form with the insurer and his employer on 31 May 2019.<sup>9</sup> In the Worker's Injury Claim Form dated 31 May 2019, Mr Massouh described the date of injury as "Ongoing since January 2019".<sup>10</sup>

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<sup>4</sup> ARD at pages 33-66

<sup>5</sup> ARD at page 56

<sup>6</sup> ARD at page 13

<sup>7</sup> ARD at pages 5-12

<sup>8</sup> ARD at page 66

<sup>9</sup> ARD at page 2 at [15]

<sup>10</sup> ARD at page 6

31. In the Worker's Injury Claim Form dated 31 May 2019, Mr Massouh described the tasks he was performing when he was injured in the following terms:

"The nature and conditions of my employment required me to do the following:

- Picking up and carrying heavy items such as vinyl board sheets, villa boards, sandbags, cement, glue bags and tools required for tiling and bathroom renovations.
- I would usually carry out these occupational duties by myself without assistance from other workers."<sup>11</sup>

32. In the Worker's Injury Claim Form dated 31 May 2019, Mr Massouh described how the injury occurred in the following terms:

"I was lifting 18 bags of sand and cement weighing approximately 20kg each, tile boxes, and 5 glue bags weighing approximately 20kg each. While carrying one of the bags, I noticed a swelling pop out of my stomach."<sup>12</sup>

33. In the Worker's Injury Claim Form dated 31 May 2019, Mr Massouh described the injury he sustained in the following terms:

"Left inguinal region protrusion – Hernia

- I first noticed it in late January 2019;
- The swelling reaggravated in late March 2019; and
- It has been present since April 2019."<sup>13</sup>

34. In response to the question in the Worker's Injury Claim Form dated 31 May 2019 seeking particulars of the area of the worksite where he sustained injury, Mr Massouh responded:

"Various jobs and locations."<sup>14</sup>

35. On 7 June 2019, Mr Massouh underwent an ultrasound of both groins and Dr Zita Gacs reported the following findings to Dr Khan:

"In the **left groin** there is an indirect inguinal hernia situated lateral to the inferior epigastric vessels. The hernia is reducible. The hernia neck is 6 mm. It contains omental fat. The hernia sack is 28 mm. On the left side there is a soft mobile subcutaneous hypoechoic lesion measuring 26 x 8 x 30 mm suggestive of a superficial lipoma."<sup>15</sup>

The history provided to Dr Gacs was one of a left groin lump.

36. On 3 July 2019, Dr Khan referred Mr Massouh to Dr Thomas Oh, General Surgeon for opinion and management of an "occupationally induced inguinal hernia".<sup>16</sup> On 9 July 2019, Mr Massouh consulted Dr Oh. Dr Oh reported the following history:

"He was lifting a heavy item last week during his work, which is usually the case with the nature of his work and felt a sharp pain in the left groin. This has worsened since then and he is consistently uncomfortable with exertion in that focal region."<sup>17</sup>

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<sup>11</sup> ARD at page 7

<sup>12</sup> ARD at page 7

<sup>13</sup> ARD at page 7

<sup>14</sup> ARD at page 7

<sup>15</sup> ARD at page 32

<sup>16</sup> ARD at page 60

<sup>17</sup> ARD at page 67

37. In his written submissions dated 5 November 2020, Mr Massouh referred to Dr Oh's reference to lifting a heavy item "last week" at his work as unhelpful, but clearly incorrect on the evidence. I accept Mr Massouh's submission in this regard based on the evidence before me.
38. On examination on 9 July 2019, Dr Oh observed a focal point tenderness on coughing with cough impulse on the left direct inguinal region and around the deep ring. He also observed a small lipomatous lesion more laterally to that area, just medial and inferior to the anterior superior iliac spine, measuring roughly 3 cm. Dr Oh noted that Mr Massouh pointed to the latter area and the deep ring as being very painful. He noted that the ultrasound revealed a left inguinal hernia containing omental fat and a subcutaneous lesion measuring 26 mm. He informed Mr Massouh of the need for surgery by way of surgical mesh repair and that he would also remove the subcutaneous lesion during the proposed surgical procedure. Dr Oh reported to Dr Khan that he would await the insurer's approval prior to booking Mr Massouh on his list for surgery.
39. On 16 August 2019, Mr Massouh consulted Dr Philip Truskett, Surgeon at the request of iCare on behalf of the respondent. Dr Truskett took a history that Mr Massouh commenced employment with the respondent on 2 January 2019 and that his employment was terminated on 25 May 2019. He last worked for the respondent on 22 May 2019. In respect of the injury in dispute, Dr Truskett recorded the following history:
- "He described an injury which occurred at work on 26 January 2019. He had been doing heavy lifting and had some discomfort in his left groin. He palpated the region and felt a 'lump'. He said he had been doing a lot of responsive work which would mean having to fix bathrooms and lifting heavy slabs of concrete. He said the initial pain improved but he did not report it.
- Mr Massouh continued working and he was at Fig Tree [sic] working with his manager, Mr Malcolm Forbes. He felt giddy and unwell and felt a lump in his left groin. This was sometime in April. He told Mr Forbes who sent him home. He advised him that if he felt a lump it might be a hernia."<sup>18</sup>
40. On examination of Mr Massouh's abdomen on 16 August 2019, Dr Truskett observed a non-tender obvious 2 cm lipoma in the left iliac fossa just medial to the anterior superior iliac spine. He found no evidence of inguinal, femoral or umbilical hernia in the lying or standing position. There was no cough impulse. The only lump described by Mr Massouh was the lipoma. There was moderate tenderness at the left adductor tendon, which was exacerbated by forced flexion and forced abduction against resistance. The latter finding on examination was consistent with left adductor longus tendonitis. Dr Truskett diagnosed Mr Massouh as having suffered a groin strain, also known as adductor longus tendonitis in his left groin, which was in keeping with his recent repetitive bending, stooping and heavy lifting at work. Dr Truskett opined that Mr Massouh did not have an inguinal hernia and accordingly, did not require a left inguinal hernia repair. Mr Massouh's groin pain from his adductor longus tendonitis would not be repaired by the proposed hernia surgery.
41. On 10 September 2019, Dr Truskett prepared a supplementary report at the request of iCare.<sup>19</sup> Dr Truskett opined that there appeared to be a causal and temporal relationship to the strain leading to adductor longus tendonitis at work on 26 January 2019 when Mr Massouh was performing heavy lifting.
42. On 10 March 2020, Mr Massouh consulted Dr Anthony Greenberg, General and Gastrointestinal Surgeon at the request of his lawyers. Dr Greenberg reported the following history of injury:

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<sup>18</sup> Reply at pages 21-22

<sup>19</sup> Reply at pages 30-31



“Mr Massouh said he was levelling out a floor with sand and cement. He requested help as the work involved heavy manual labour. No help was available. He lifted 20 bags of sand and cement out of the truck. When he lifted the bags, each bag was approximately 20 kg, each bag then had to be made wet by putting water on it. He then emptied the bags into buckets. Each bucket was approximately 15 kg and he would then carry two buckets at a time to the bathroom side, a distance of approximately 15 m. When he got to the bathroom, the contents of the bags were poured down onto the floor and he would then level the floor to make it flat.

Mr Massouh explained to me that when he was working in those circumstances, some time or thereabouts in March, that he became aware of a strong pain in his left groin. He was not aware of any obvious lump beforehand but did notice a lump in the lateral aspect of the left groin. Because of the pain he was sent home and told not to continue with the job he was doing in Wollongong.”<sup>20</sup>

Dr Greenberg’s report dated 11 March 2020 recorded the date of injury as “March 2019 thereabouts”.<sup>21</sup> There was no reference to 26 January 2019, nor was there reference to any date in April 2019 in Dr Greenberg’s report.

43. On examination on 10 March 2020, Dr Greenberg observed that Mr Massouh moved freely without any apparent discomfort. However, he found him to be quite tender in the area above the pubic tubercle and, when pressed, he complained of pain radiating out towards the left aspect of the inguinal region. Dr Greenberg observed a swelling in the lateral aspect near the anterior superior iliac spine that was not particularly tender and on examination, it appeared to be consistent with a lipoma of which Mr Massouh was unaware prior to the injury. The adductor tendon was a little tender towards the insertion but not abnormally so. He was able to flex and abduct Mr Massouh’s leg without causing pain. Mr Massouh was able to stretch, standing laterally and put the adductor tendon under tension without problems.
44. Dr Greenberg reported that he had reviewed the clinical notes of Dr Khan, the clinical notes of Dr Oh, the ultrasound dated 7 June 2019 and Dr Truskett’s report. Dr Greenberg stated that Dr Oh’s findings were similar to his findings on examination. Dr Greenberg concluded as follows:
- “ • In my opinion, Mr Massouh has a work-related injury.
  - In my opinion, Mr Massouh [sic] history is consistent.
  - When I examined Mr Massouh, I found no obvious hernia.
  - I note the ultrasound and the ongoing symptoms that Mr Massouh describes.
  - I found Mr Massouh very tender in the suprapubic region and the area above the deep inguinal ring. (refer to Examination5) [sic]
  - In my opinion, the lipoma is unrelated and not contributing to his symptoms.
  - In my opinion, Mr Massouh does not have adductor tendinitis.
  - Adductor tendinitis was not confirmed on the ultrasound or on my clinical examination.
  - In my opinion, despite the fact there is no obvious hernia, in view of Mr Massouh’s history, the ultrasound findings and the chronicity of his symptoms (over one year), I believe surgical repair would be appropriate.
  - The risks of surgery are small weighed by the gains as Mr Massouh should be able to return to work once he has recovered from surgery.
  - In view of the fact that he has had symptoms for a year, I do not think there is any alternative and this would be appropriate treatment.”<sup>22</sup>

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<sup>20</sup> ARD at page 69

<sup>21</sup> ARD at page 68

<sup>22</sup> ARD at page 73

45. Dr Greenberg described the nature and extent of Mr Massouh's injuries as a probable left inguinal hernia and opined that his work involving heavy manual labour was a substantial contributing factor to the injury. He opined that the proposed left inguinal surgical mesh repair was "a reasonable option".<sup>23</sup> Dr Greenberg further opined that the heavy nature and conditions of Mr Massouh's employment was the main contributing factor to his injury.
46. On 9 May 2020, Dr Oh provided a quotation for the cost of the proposed surgery, separating the cost of the left inguinal surgical mesh repair from the removal, by surgical excision, of the lipoma.<sup>24</sup>
47. On 24 July 2020, Mr Massouh was re-examined by Dr Truskett at the request of iCare. Dr Truskett took a history of injury at work on 26 January 2019. On this occasion, the doctor took a more detailed history as follows:

"He was working on a property at Figtree. He was renovating a bathroom. He recalled that he started the day feeling dizzy. At the time he was doing sand/ cement dry mix. This is used for laying tiles. He indicated that he had been sent to Mitre 10 and collected 300 bags of 20kg sand and cement, placed them in a truck and drove them to the worksite. He was then in the driveway of the site mixing the sand and cement filling two buckets each weighing approximately 20kg and carrying them to the worksite. He described progressive pain in his left groin which apparently radiated around to his back.

He inspected the region and felt a lump. He showed his manager who advised him that he thought he had a hernia. He continued working however he did leave early and went home. The following day he reported the injury to the general manager. He was apparently talked into continuing the job as they were short-handed with skilled workers. He said *"I felt like crap."* There was a combination of general malaise and left groin discomfort.

He subsequently attended a local medical officer in Fairfield Chase a few days later. He cannot recall his name. He was put off work for two days. ...

He then attended Dr Khan of Chullora. An ultrasound was performed, and he was advised he had a hernia. He was referred to Dr Thomas Oh (General Surgeon) in July 2019 and was advised he required surgery. This was not approved.

Since last reviewed by me he states his pain in his left groin has continued unabated and he has also begun to experience alternating constipation and diarrhoea. This was associated with abdominal pain. There has been no further treatment. He now states that he is suffering from both back pain and left groin pain. He continues to receive workers' compensation payments."<sup>25</sup>

In evidence, are Mr Massouh's Fairfield Chase Medical & Dental Centre clinical records.<sup>26</sup> The clinical records did not disclose a consultation in respect of left groin symptoms. This was inconsistent with the history taken by Dr Truskett referred to above.

48. The Fairfield Chase Medical & Dental Centre clinical records disclosed the reasons for Mr Massouh's consultations with various general practitioners in the medical practice between 3 January 2019 and 20 May 2019, which I summarise as follows:

3 January 2019: dressing change of a left preauricular wound.  
12 January 2019: wound care for infected cyst – left preauricular wound.  
14 January 2019: diarrhoea preceded by a sore throat.

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<sup>23</sup> ARD at page 76 at [10]

<sup>24</sup> ARD at page 78

<sup>25</sup> Reply at pages 33-34

<sup>26</sup> Respondent's Application to Admit Late Documents dated 27 October 2020 at pages 1-13

22 January 2019: fever, fatigue, lower back and leg pains.  
6 February 2019: back pain.  
26 February 2019: multiple problems – reference to a hospital CT scan of the back.  
6 March 2019: back pain.  
14 April 2019: back pain – acute on chronic.  
20 May 2019: anxiety.

There were no references to left groin symptoms in any of the consultation entries referred to above. However, the clinical records revealed that on 17 April 2015 Mr Massouh provided a history of a mild painful lump on the lower abdomen for more than two years. The attending doctor queried a diagnosis of a lipoma. On 19 July 2016, the attending doctor opined that, an occasionally painful small mobile lump appeared to be a lipoma in the lower iliac fossa and referred Mr Massouh for an abdominal ultrasound.

49. In his report dated 20 August 2019, Dr Truskett referred to Mr Massouh feeling giddy and unwell and feeling a lump in his left groin sometime in April 2019. In his report dated 24 July 2020, there was no reference to April 2019. However, the history taken in respect of the Figtree incident is consistent with the history the doctor took in his first report, when he recorded it as having taken place in April 2019.
50. On examination of Mr Massouh on 24 July 2020, Dr Truskett observed a soft abdomen; organomegaly; no palpable masses; an obvious lipoma just medial to the anterior superior spine measuring about 2 cm x 2 cm; no inguinal or abdominal wall hernias on the lying or standing position; exquisite tenderness over the left pubic tubercle in the top of the adductor longus tendon on the left; complaint of severe pain to light touch, exacerbated by forced flexion against resistance; no pain against abduction; pain appeared quite out of proportion to the level of palpation; and normal sensation. Dr Truskett confirmed his previous opinion that his examination was still in keeping with adductor longus tendonitis, with no evidence of a groin hernia. Dr Truskett further opined that Mr Massouh's adductor longus tendonitis had resolved.
51. Dr Truskett commented on the ultrasound of Mr Massouh's groins on 7 June 2019 as follows:

"This is more in keeping with a lipoma of the cord [sic] is most unusual for the omentum to be able to reach the internal ring of the groin in a male of this age. This is a common misdiagnosis on ultrasound."<sup>27</sup>
52. Dr Truskett again did not support the diagnoses of Dr Oh and Dr Greenberg. Dr Truskett noted that Dr Greenberg did not record Mr Massouh's general feeling of dizziness on examination. Further, Dr Greenberg noted that Mr Massouh moved freely; that he was quite tender in the region of the pubic tubercle; that he was not particularly tender in the adductor tendon region but was a little tender at the insertion; he did not find or describe a cough impulse; he made a diagnosis of probable left inguinal hernia. He did not find a hernia on examination. All he found was pubic tubercle tenderness. Dr Truskett concluded that Mr Massouh did not require a repair of his left groin.
53. Dr Truskett believed that the symptoms described by Mr Massouh in his left groin were quite exaggerated and demonstrated a significant emotional overlay and illness behaviour.

## **FINDINGS AND REASONS**

### **The interlocutory matter for determination**

#### **Should Mr Massouh be granted leave to amend the particulars of injury in the ARD?**

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<sup>27</sup> Reply at page 36

54. In the ARD, Mr Massouh pleaded the date of injury as 26 January 2019 and pleaded the injury description in the following terms:

“The nature and conditions of the Applicant’s employment culminated in injury, for example:

- Picking up and carrying heavy items such as vinyl board sheets, villa boards, sandbags, cement, glue bags and tools required for tiling and bathroom renovations.
- He would usually carry out these occupational duties by himself without assistance from other workers.
- The Applicant was lifting 18 bags of sand and cement weighing approximately 20kg each, tile boxes, and 5 glue bags weighing approximately 20kg each.
- On one occasion, while carrying one of the bags, he noticed a swelling pop out of his stomach.”

The above description, in the main, appeared to be taken directly from the Worker’s Injury Claim Form dated 31 May 2019, with the exception of the references to the dates, namely, late January 2019, late March 2019 and April 2019.

55. At the teleconference with the parties on 9 September 2020, I raised the pleaded injury with Mr Massouh’s solicitor, Mr Abhinand Ramesh. Mr Ramesh maintained the injury as pleaded and it was acknowledged that the issues for my determination were as follows:

- (a) Whether Mr Massouh suffered a left inguinal hernia by way of a gradual process as a result of the nature and conditions of his employment with the respondent deemed to have occurred on 26 January 2019 within the meaning of section 4(b)(i) of the 1987 Act.
- (b) Whether the left inguinal hernia surgical mesh repair proposed by Dr Thomas Oh, General Surgeon is reasonably necessary treatment as a result of the injury sustained by the applicant on 26 January 2019 within the meaning of section 60 of the 1987 Act.

56. During the conciliation of the matter on 5 November 2020, respondent’s counsel queried the nominated date of injury and discussion took place in respect of amending the pleadings in relation to injury. The matter could not proceed in Mr Massouh’s absence and I made the directions referred to above on 5 November 2020.

57. In his written submissions dated 5 November 2020, Mr Massouh, whilst conceding that, the matter had not been elegantly pleaded, there was no doubt as to what was being asserted based on all of the clinical, claims material and medico-legal histories and opinions in evidence. The true controversy raised by the respondent’s Dispute Notices was founded on

the opinion of Dr Truskett, being that, Mr Massouh did not sustain a hernia injury in the course of his employment and that he did not have a left inguinal hernia on the occasions he was examined by him. If, contrary to Mr Massouh's submission, Dr Truskett's opinion is accepted, it does not and cannot matter, what date of injury is alleged or determined because a surgical repair cannot be reasonably necessary treatment for a condition that does not exist.

58. In his written submissions dated 5 November 2020, Mr Massouh sought leave to amend the date of injury in the ARD to:

“In or about January 2019 and again in or about March or April 2019.”<sup>28</sup>

59. In its written submissions dated 16 November 2020, the respondent opposed the proposed amendment on the ground that it would suffer prejudice that could not be cured at such a late stage in proceedings. The respondent submitted that, had Mr Massouh articulated the proposed alternative claim at an early stage, it could have sought a further opinion from its expert, Dr Truskett. The respondent submitted that, whilst Dr Truskett denied that there was a hernia injury at all, if an amendment to the pleadings was allowed, it would be precluded from putting to Dr Truskett, the question as to whether the injury could have occurred in the circumstances, over the further period of time proposed to be pleaded. The respondent called for an urgent teleconference to clarify the proposed amended pleading.
60. In his written submissions dated 25 November 2020, Mr Massouh submitted that, given Dr Truskett's opinion was that the relevant pathology (a hernia) simply did not exist, it was difficult, or perhaps, impossible to contemplate his opinion being fortified or more forensically useful than it currently stood. Mr Massouh submitted that, if the respondent were truly prejudiced, then the amendment will be rejected. The Commission must satisfy itself that the respondent's perception of prejudice is properly founded.
61. On 26 November 2020, following a teleconference with the parties and their legal representatives, I made the further directions referred to above.
62. In his written submissions dated 30 November 2020, Mr Massouh sought leave to further amend the particulars of injury in the ARD as follows:

“Personal injury on 26 January 2019, late March and April 2019, while carrying out work lifting and carrying heavy items of up to 20 kg the applicant felt sudden pain in his left groin and noticed a swelling.

Alternatively, the nature and conditions of employment including the lifting and carrying of heavy items of up to 20kgs between January and May 2019 resulted in a disease of gradual onset, namely a left inguinal hernia with a deemed date of injury of 29 May 2019.”

63. In its written submissions dated 30 November 2020, the respondent “vigorously” opposed the proposed amendments articulated in Mr Massouh's written submissions dated 30 November 2020. The respondent accepted an injury in respect of a strain of the adductor muscle fascia and tendon of Mr Massouh's left thigh with a date of injury of 26 January 2019; but disputed liability for the left inguinal hernia surgery. The respondent submitted that Mr Massouh sought to change the nature of the dispute as previously articulated between the parties in the teleconference on 9 September 2020. The proposed amendment sought to plead three frank injuries on 26 January 2019, late March 2019 and in April 2019 and, in the alternative, a nature and conditions claim. The latter two frank injuries and the nature and conditions claim were unnotified. Section 289A(3) of the 1998 Act prevents the Commission from hearing or otherwise dealing with any dispute unless previously notified. Mr Massouh

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<sup>28</sup> Applicant's written submissions dated 5 November 2020 at [9]

ought to have notified the additional claims in the usual fashion and it is now too late to seek leave to amend the ARD. The respondent submitted that, none of the claims now sought to be made have been investigated by it. Such investigation would likely have involved discussions with various employees and supervisors in respect of the nature of the tasks Mr Massouh undertook at work. In this regard, the respondent would be prejudiced if leave were granted to amend the ARD. Although an amendment may be permitted under section 289A(4) of the 1998 Act, it would not be in the interests of justice to do so and leave to amend the ARD ought not be granted.

64. I agree with counsel for Mr Massouh that the claim was not “elegantly pleaded”<sup>29</sup> in the ARD. However, the Commission is not a tribunal of strict pleadings.
65. I do not agree with the respondent’s submission that the proposed amendment to the ARD to plead frank injuries in March 2019 and April 2019 (in addition to 26 January 2019) and, in the alternative, the nature and conditions claim were unnotified claims, for the following reasons:
- (a) The Worker’s Injury Claim Form dated 31 May 2019 referred to and described the nature and conditions of Mr Massouh’s employment with the respondent; that the injuries occurred at various work sites; and referred to the January, March and April 2019 dates.
  - (b) On 16 August 2019, Dr Truskett took a history from Mr Massouh of an onset of an injury at work on 26 January 2019 and worsening of symptoms associated with a lump in his left groin at a work site at Figtree in April 2019.
  - (c) On 1 May 2020, in response to the request for a review of its decision, iCare, on behalf of the respondent, issued a Dispute Notice under section 78 of the 1998 Act maintaining its decision to deny liability for the proposed surgery and, in addition, disputed liability under sections 4(a), 4(b), 9A, 33, 59 and 60 of the 1987 Act. On the face of the Dispute Notice, the respondent also considered injury within the meaning of section 4(b) of the 1987 Act and put it in dispute.<sup>30</sup>
  - (d) The information referred to in (a) and (b) above was available to the respondent well before the filing of the ARD and was apparently taken into consideration when it drafted its Dispute Notice dated 1 May 2020, where it, amongst other things, disputed liability under sections 4(a), 4(b) and 9A of the 1987 Act.
66. The respondent’s claim of prejudice if leave to amend the ARD were granted, is not made out for the following reasons:
- (a) The respondent was armed with the information referred to in [57 (a) and (b)] above with ample time and opportunity to conduct any enquiries it deemed necessary.
  - (b) Given that Dr Truskett found the injury to be a left adductor longus tendonitis (left groin strain) and not a left inguinal hernia, I agree with Mr Massouh’s submission that, by being informed of the proposed amendment, any change in his position is hard to envisage.
  - (c) In considering Mr Massouh’s claim dated 31 May 2019, the respondent would have been expected to carry out any investigations as to the nature of the tasks undertaken by him at work, after receipt of the claim. In fact, based on Dr Truskett’s opinion, the respondent accepted liability for injury in the form of an adductor longus tendonitis, which the doctor attributed to the heavy lifting performed by Mr Massouh.

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<sup>29</sup> Applicant's written submissions dated 5 November 2020 at [10a.]

<sup>30</sup> ARD at pages 27-31

67. Section 354(1) of the 1998 Act provides that proceedings in any matter before the Commission are to be conducted with as little formality and technicality as the proper consideration of the matter permits. Section 354(3) of the 1998 Act provides that the Commission is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms. I have considered section 354(1) and section 354(3) of the 1998 Act in coming to the above conclusions. Further, I find that, in the circumstances, it is in the interests of justice to allow the proposed amendment to the ARD.
68. Accordingly, I grant Mr Massouh leave to amend the ARD in the terms referred to at [54] above.

### **The substantive issues for determination**

#### **Did Mr Massouh suffer a left inguinal hernia arising out of or in the course of his employment with the respondent within the meaning of section 4 of the 1987 Act?**

69. Section 9 of the 1987 Act provides that a worker who has received an “injury” shall receive compensation from the worker’s employer in accordance with the Act.
70. Section 4(a) of the 1987 Act defines “injury” as a personal injury arising out of or in the course of employment. Section 9A(1) of the 1987 Act provides that no compensation is payable under the Act in respect of an injury (other than a disease injury) unless the employment concerned was a substantial contributing factor to the injury. The parties made no submissions in relation to section 9A(1) of the 1987 Act.
71. Section 4(b)(i) of the 1987 Act provides that injury includes 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. The word “main” in the phrase “main contributing factor” means “chief” or “principal”.<sup>31</sup>
72. Section 4(b)(ii) of the 1987 Act provides that injury includes 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.
73. Roche DP in *State Transit Authority v El-Achi*<sup>32</sup> (*El-Achi*) said:
- “That a doctor does not address the ultimate legal question to be decided is not fatal. In the Commission, an Arbitrator must determine, having regard to the whole of the evidence, the issue of injury, and whether employment is the main contributing factor to the injury. That involves an evaluative process.”<sup>33</sup>
74. In *AB v AW*<sup>34</sup>, Snell DP agreed with the above quoted passage in *El-Achi* and observed that the following could be taken from the relevant cases:
- “(a) The test of ‘main contributing factor’ in s 4(b)(ii) is more stringent than that in s 4(b)(ii) in its previous form, which applied in conjunction with the test in s 9A. There will be one ‘main contributing factor’ to an alleged aggravation injury.

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<sup>31</sup> *Meaney v Office of Environment and Heritage – National Parks and Wildlife Service* [2014] NSWCC 339 at [138]-[147] and *Wayne Robinson v Pybar Mining Services Pty Ltd* [2014] NSWCC 248 at [78]-[88]

<sup>32</sup> *State Transit Authority v El-Achi* [2015] NSWCCPD 71 (*El-Achi*)

<sup>33</sup> *State Transit Authority v El-Achi* [2015] NSWCCPD 71 at [72]

<sup>34</sup> *AB v AW* [2020] NSWCCPD 9

- (b) The test of ‘main contributing factor’ is one of causation. It involves consideration of the evidence overall; it is not purely a medical question. It involves an evaluative process, considering the causal factors to the aggravation, both work and non-work related. Medical evidence to address the ultimate question of whether the test of ‘main contributing factor’ is satisfied is both relevant and desirable. Its absence is not necessarily fatal, as satisfaction of the test is to be considered on the whole of the evidence.
- (c) In a matter involving s 4(b)(ii) it is necessary that the employment be the main contributing factor to the aggravation, not to the underlying disease process as a whole.”<sup>35</sup>

75. The observations of Snell DP in *AB v AW* also apply to matters involving section 4(b)(i) of the 1987 Act.
76. The onus of establishing injury falls on Mr Massouh and the standard of proof is on the balance of probabilities, meaning that I must be satisfied to a degree of actual persuasion or affirmative satisfaction: *Department of Education and Training v Ireland*<sup>36</sup> (*Ireland*) and *Nguyen v Cosmopolitan Homes*<sup>37</sup> (*Nguyen*).
77. The issue of causation must be based and determined on the facts in each case and requires a common sense evaluation of the causal chain: *Kooragang Cement Pty Ltd v Bates*<sup>38</sup> (*Kooragang*). As I understand it, when referring to applying “common sense”, Kirby, P in *Kooragang* was not suggesting that it be applied “at large” or that issues were to be determined by “common sense” alone but by a careful analysis of the evidence, including a careful analysis of the expert evidence: *Kirunda v State of New South Wales (No 4)*<sup>39</sup> (*Kirunda*). The legislation must be interpreted by reference to the terms of the statute and its context in a fashion that best effects its purpose.
78. As Parker ADP observed in *Le Twins Pty Ltd v Luo*,<sup>40</sup> “[m]ost conditions are the result of multiple factors. The question is always whether the facts as found satisfy the statutory criterion for causation.”
79. In order to establish that a “personal injury” has been suffered within the meaning of section 4(a) of the 1987 Act, Mr Massouh must establish, on the balance of probabilities, that there has been a definite or distinct “physiological change” or “physiological disturbance” in his left groin for the worse which, if not sudden, is at least, identifiable: *Kennedy Cleaning Services Pty Ltd v Petkoska*<sup>41</sup> (*Kennedy*) and *Military Rehabilitation and Compensation Commission v May*<sup>42</sup> (*May*). The word “injury” refers to both the event and the pathology arising from it: *Lyons v Master Builders Association of NSW Pty Ltd*<sup>43</sup> (*Lyons*). While pain may be indicative of such physiological change, it is not itself a “personal injury”.
80. *Zickar v MGH Plastic Industries Pty Ltd*<sup>44</sup> (*Zickar*) highlighted that a worker can rely on injury simpliciter despite the existence of a disease. In *Zickar*, the High Court of Australia held that the presence of a disease did not preclude reliance on that event as a personal injury. The terms “personal injury” and “disease” are not mutually exclusive categories. A sudden

<sup>35</sup> *AB v AW* [2020] NSWCCPD 9 at [78]

<sup>36</sup> *Department of Education and Training v Ireland* [2008] NSWCCPD 134

<sup>37</sup> *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246

<sup>38</sup> *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796

<sup>39</sup> *Kirunda v State of New South Wales (No 4)* [2018] NSWCCPD 45 at [136]

<sup>40</sup> [2019] NSWCCPD 52, [71]

<sup>41</sup> *Kennedy Cleaning Services Pty Ltd v Petkoska* [2000] HCA 45

<sup>42</sup> *Military Rehabilitation and Compensation Commission v May* [2016] HCA 19

<sup>43</sup> *Lyons v Master Builders Association of NSW Pty Ltd* (2003) 25NSWCCR 496

<sup>44</sup> *Zickar v MGH Plastic Industries Pty Ltd* [1996] HCA 31; 187 CLR 310



identifiable physiological (pathological) change to the body brought about by an internal or an external event can be a personal injury and the fact that the change is connected to an underlying disease process does not prevent the injury being a personal injury: *North Coast Area Health Service v Felstead*.<sup>45</sup>

81. I now turn to the application of the relevant legislation and the legal principles referred to above to the available evidence in this matter.
82. The respondent submitted that in order for Mr Massouh to succeed, he needed to articulate that, on at least one of the dates of injury referred to in the amended pleading, he had suffered an identifiable injury; and as a result of that identifiable injury, it was reasonably necessary for him to undertake the proposed hernia surgery. The respondent further submitted that Mr Massouh had not articulated the injuries he sustained in either the March, April or in the nature and condition claims. The details of the injury must be specific enough for the Commission to make a finding that the proposed surgery is reasonably necessary as a result of that injury. Based on the opinion of Dr Truskett, the respondent accepted that Mr Massouh suffered an injury in the form of adductor longus tendonitis on 26 January 2019. The respondent submitted that there was no evidence available to determine that the accepted injury in January 2019 resulted in a hernia which required the proposed surgery.
83. Mr Massouh submitted that he sustained injury during the course of his employment due to the nature and conditions of work which included the manual handling of bags of sand and glue bags weighing 20 kg, resulting in a sudden onset of symptoms. Similar descriptions are contained in Mr Massouh's evidentiary statement dated 9 June 2020 and the certificate of capacity issued by Dr Khan dated 29 May 2019. On 9 July 2019, Dr Oh recorded a history of sharp pain in the left groin associated with lifting a heavy item, albeit incorrectly referring to it as having occurred during the preceding week. Mr Massouh stated that it was not until a date after the onset of the pain that it became very unbearable; he complained at work; was sent home; and consulted Dr Khan. Dr Greenberg also took a history of the pain associated with the lump in the left groin resulting in Mr Massouh being sent home from a job in Wollongong. A similar history was recorded by Dr Truskett, that is, an initial onset of symptoms in January 2019 and worsening associated with a lump in the left groin, leading to Mr Massouh being sent home from work on a job at Figtree, a suburb of Wollongong.
84. The respondent relied on the evidence of Dr Truskett. The only lump Dr Truskett could find on examination was the lipoma, which was not work-related. The respondent submitted that such finding was persuasive evidence that Mr Massouh did not suffer a hernia as claimed and therefore, no hernia requiring treatment. The Commission could comfortably accept the medical evidence of Dr Truskett that Mr Massouh sustained only a groin strain in January 2019, but that such groin strain did not result in a hernia or the need for surgery.
85. Mr Massouh submitted that his medical case was the essence of simplicity. It was supported by Dr Khan, the treating general practitioner; Dr Oh, the treating surgeon; Dr Gacs, the treating radiologist; and Dr Greenberg, Mr Massouh's qualified surgeon.
86. On the documentary evidence before me, I have formed the view that Mr Massouh is a poor historian. Such conclusion is supported by the inconsistencies I have referred to in the evidence. I accept that Mr Massouh did his best to provide a history of his injuries, his treatment and his complaints to his various treating doctors and the forensic medical specialists. I have no reason to doubt Mr Massouh's credibility. However, I found his evidentiary statement dated 9 June 2020 lacked the expected clarity and substance in respect of the important issue of injury. Some of this may have been due to Mr Massouh being a poor historian. I also suspect that some of it may have been due to the statement

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<sup>45</sup> *North Coast Area Health Service v Felstead* [2011] NSWCCPD 51 at [77]

taker. For example, there was no reference to what occurred in the workplace on 26 January 2019, late in March 2019 or in April 2019, despite those dates being referred to in the Worker's Injury Claim Form dated 31 May 2019. Some of those dates were also referred to in the medical evidence. These deficiencies in his evidentiary statement caused me to analyse in some detail the histories provided by Mr Massouh to Dr Khan, Dr Oh, Dr Truskett, Dr Greenberg and to the history provided in the Worker's Injury Claim Form dated 31 May 2019, all of which I have referred to above.

87. There is no report from Dr Khan, nor are his consultation notes in evidence. However, the certificates of capacity, radiological reports and requests for approval of treatment are of assistance. Dr Khan raised the possibility of a left inguinal hernia, having observed a left inguinal region protrusion at his first consultation with Mr Massouh on 29 May 2019 and issued a certificate of capacity expressing that opinion. In that certificate of capacity, Dr Khan referred to the dates of injury as being January 2019 and reaggravations in late March, April 2019. The certificate of capacity was attached to the Worker's Injury Claim Form dated 31 May 2019. Dr Khan referred Mr Massouh for an ultrasound of both groins. The ultrasound report of Dr Gacs dated 7 June 2019 found an indirect reducible inguinal hernia in the left groin. Thereafter, Dr Khan's certificates of capacity referred to a diagnosis of a work-related left inguinal hernia. Dr Khan had the benefit of viewing Dr Gacs' ultrasound films to assist him with his diagnosis.
88. I have referred to the relevant contents of the Worker's Injury Claim Form dated 31 May 2019 to which Dr Khan's first certificate of capacity was attached.
89. Dr Khan's clinical records included a CT scan of Mr Massouh's abdomen, pelvis and lumbar spine on 26 January 2019 performed by Dr Walsh. The clinical notes to the CT scan report included a reference to left lower quadrant pain. I find this to be consistent with Mr Massouh's complaint of left groin symptoms in late January 2019. Sometime thereafter, the respondent accepted that Mr Massouh suffered an injury in the form of adductor longus tendonitis on 26 January 2019.
90. Mr Massouh relied on the evidence of Dr Oh in the form of a short report dated 9 July 2019 to Dr Khan. The short history recorded in Dr Oh's report referred to a heavy lifting incident in the preceding week, which was clearly incorrect based on the preponderance of the evidence and the fact that Mr Massouh ceased working, in accordance with the history taken by Dr Truskett, on 22 May 2019. Dr Oh briefly referred to the nature of Mr Massouh's work as usually being heavy. He recorded that Mr Massouh felt a sharp pain in the left groin region at work which had worsened since then, causing consistent discomfort on exertion in that region. It is not uncommon for a treating specialist to refrain from going into detail on the issue of causation. The focus of the treating specialist is to manage and treat the patient's condition, in particular, when reporting back to the referring general practitioner. Dr Oh reported his findings on examination, to which I have referred above in my analysis of the evidence. It is apparent to me that he related a heavy lifting incident at work, albeit on the incorrect date, with a diagnosis of a left inguinal hernia that required surgical mesh repair. Dr Oh had the benefit of viewing Dr Gacs' ultrasound films and Dr Khan's preliminary diagnosis of "occupationally induced inguinal hernia"<sup>46</sup> to assist him with his diagnosis.
91. Mr Massouh also relied on the evidence of Dr Greenberg in the form of a report dated 11 March 2020. The history taken by Dr Greenberg referred to Mr Massouh becoming aware of a strong pain in his left groin whilst at work performing his duties, which he described in detail, sometime in about March 2019. Dr Greenberg did not record a history of an incident in January 2019. The history taken by Dr Greenberg appeared to refer to the Figtree incident. However, the absence of any reference to an incident in January 2019, is consistent with the

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<sup>46</sup> ARD at page 60

history recorded by Dr Truskett of an initial onset of symptoms in January 2019 that, initially improved but worsened in or about April 2019, when Mr Massouh observed a lump in his left groin region, leading to him being sent home from work on a job at Figtree. Dr Greenberg's findings on examination were similar to those of Dr Oh. Dr Greenberg's diagnosis was one of a probable work-related left inguinal hernia. He opined that work was a substantial contributing factor to Mr Massouh's injury. He also opined that the heavy nature and conditions of Mr Massouh's employment was the main contributing factor to his injury. Dr Greenberg had the benefit of viewing Dr Gacs' ultrasound films.

92. The respondent relied on the evidence of Dr Truskett in the form of reports dated 28 August 2019, 10 September 2019 and 24 July 2020. Dr Truskett accepted that Mr Massouh suffered a left groin strain at work on 26 January 2019 when performing heavy lifting. He opined that there was a causal and temporal relationship to the strain leading to adductor longus tendonitis. Whilst Dr Truskett took a history of the Figtree incident in about April 2019 in his first and third reports, he appeared to confuse the January 2019 incident with the later incident in Figtree in about April 2019 in his third report. Dr Truskett's history in his third report focused on the Figtree incident.
93. Whilst Dr Greenberg supported "a probable hernia", he was of the opinion that Mr Massouh did not have adductor tendonitis because such condition was not confirmed on the ultrasound or on his clinical examination. I found Dr Truskett's opinion that Dr Gacs had misdiagnosed the hernia on ultrasound and that such misdiagnosis was a common one, unconvincing. This was particularly so as he only had access to the ultrasound results.
94. I prefer the opinions of Dr Khan, the treating general practitioner; Dr Gacs, the treating radiologist; Dr Oh, the treating surgeon; and Dr Greenberg over the opinions expressed by Dr Truskett. Dr Khan, Dr Oh and Dr Greenberg had the benefit of viewing Dr Gacs' ultrasound films. Dr Truskett only had Dr Gacs ultrasound results available to him.
95. I accept the unchallenged evidence as to the heavy nature of Mr Massouh's work with the respondent as set out in his evidentiary statement and the Worker's Injury Claim Form and supported in the evidence of Dr Khan, Dr Oh, Dr Greenberg and Dr Truskett to varying degrees. There is evidence of a definite or distinct physiological change or disturbance in Mr Massouh's left groin on or about 26 January 2019 and then again in about April 2019 (the Figtree incident). There is no evidence to corroborate any specific incident in late March 2019. However, it may have been confused as the date of the Figtree incident.
96. I accept that Mr Massouh continues to suffer the ongoing symptoms in his left groin as set out in his evidence.
97. I am satisfied on the balance of probabilities, to a degree of actual persuasion or affirmative satisfaction, that Mr Massouh has established that there was a definite or distinct physiological change or disturbance in his left groin in the form of a left inguinal hernia arising out of or in the course of his employment with the respondent on or about 26 January 2019. There was a sudden identifiable pathological change.
98. I find that after about 26 January 2019, Mr Massouh's initial left groin symptoms improved and he continued to work for the respondent in his usual duties.
99. I am satisfied on the balance of probabilities, to a degree of actual persuasion or affirmative satisfaction, that Mr Massouh has established that there was a further definite or distinct physiological change or disturbance in his left groin in the form of a left inguinal hernia arising out of or in the course of his employment with the respondent in or about April 2019, whilst working at the Figtree site. Whilst Mr Massouh had a condition in his left groin prior to the Figtree incident, the principle espoused in *Zickar* highlighted that a worker can rely on injury simpliciter despite the existence of a disease or condition. The fact that the change is connected to an underlying disease process does not prevent the injury being a personal injury.

100. The parties made no submissions in relation to section 9A of the 1987 Act and for more abundant caution, I have considered the factors set out in section 9A(2) of the 1987 Act. I am satisfied and find that there was a causal relationship between the injury and the work Mr Massouh was required to do on or about 26 January 2019 and in or about April 2019, that is, there was a connection with his employment which was real and of substance. Accordingly, I am satisfied that Mr Massouh's employment was a substantial contributing factor to his injury within the meaning of section 9A of the 1987 Act.
101. Accordingly, I find that Mr Massouh sustained a personal injury in the form of a left inguinal hernia arising out of or in the course of his employment with the respondent on 26 January 2019 and in or about April 2019 within the meaning of section 4(a) and 9A of the 1987 Act.

**Is the left inguinal hernia surgical mesh repair proposed by Dr Thomas Oh, General Surgeon, reasonably necessary treatment as a result of the injury sustained by Mr Massouh within the meaning of section 60 of the 1987 Act?**

102. I will now refer to the relevant legislation and the legal principles.
103. Section 60(1) of the 1987 Act relevantly provides that, if as a result of an injury received by a worker, it is reasonably necessary that any medical or related treatment be given, the worker's employer is liable to pay, in addition to any other compensation under the Act, the cost of that treatment or service.
104. Section 60(5) of the 1987 Act relevantly provides the Commission with jurisdiction to determine a dispute concerning any proposed treatment or service and the compensation that will be payable under section 60 of the 1987 Act in respect of any such proposed treatment or service. In this case, the proposed treatment is the left inguinal hernia surgical mesh repair proposed by Dr Oh.
105. There are two elements to section 60(1) of the 1987 Act that must be considered. The first element is "as a result of an injury received by a worker". The second element is that of "reasonably necessary" treatment.
106. Dealing with the first element, namely, "as a result of injury received by a worker", I am required to conduct a common sense evaluation of the causal chain to determine whether the left inguinal hernia surgical mesh repair proposed by Dr Oh is reasonably necessary treatment as a result of the injury sustained by Mr Massouh in the course of his employment with the respondent within the meaning of section 60 of the 1987 Act.
107. *Murphy v Allity Management Services Pty Ltd*<sup>47</sup> referred to *Kooragang* and is authority for the proposition that an injured worker must establish that the injury materially contributed to the need for the treatment or the surgery. The need for surgery can arise from multiple causes. The work injury does not have to be the only, or even a substantial, cause of the need for the relevant treatment before the cost of that treatment is recoverable under section 60 of the 1987 Act. Mr Massouh only has to establish, applying the common sense test of causation, that the treatment is reasonably necessary "as a result of" the injury. That is, he has to establish that the injury materially contributed to the need for the surgery.
108. I now turn to the application of the relevant legislation and the legal principles referred to above to the available evidence in this matter.
109. Dr Oh reported that Mr Massouh felt a sharp pain in his left groin whilst performing heavy lifting at work and causally related the left groin symptoms and resultant hernia to his work. Dr Oh advised of the need for surgery by way of surgical mesh repair. Dr Greenberg opined that Mr Massouh's left groin symptoms were work-related and that the proposed surgery was appropriate. Mr Massouh's left groin symptoms have persisted.

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<sup>47</sup> *Murphy v Allity Management Services Pty Ltd* [2015] NSWCCPD 49

110. Having already preferred the evidence of Dr Oh and Dr Greenberg, I am satisfied and find, after applying the common sense test of causation, that Mr Massouh's injury in the form of a left inguinal hernia on or about 26 January 2019 and in or about April 2019, materially contributed to the need for the proposed surgery.
111. Based on the preponderance of the medical evidence, I find that Mr Massouh's left superficial lipoma was not a work-related condition.
112. Turning to the "reasonably necessary" element, Roche DP in *Diab v NRMA Ltd*<sup>48</sup> (*Diab*) set out the "standard" test adopted for determining if medical treatment is reasonably necessary in *Rose v Health Commission (NSW)*<sup>49</sup> (*Rose*) and he noted subsequent appellate authority with respect to the use of the words "reasonably necessary".
113. Roche DP's observations in *Diab* of the words "reasonable necessity", after noting the appellate authority, may be summarised as follows:
- a. Reasonably necessary does not mean "absolutely necessary".
  - b. Depending on the circumstances, a range of different treatments may qualify as "reasonably necessary" and a worker only has to establish that the treatment claimed is one of those treatments.
  - c. The relevant matters, according to the criteria of reasonableness, include, but are not necessarily limited to, the matters noted by Burke CCJ in *Rose*:
    - (i) the appropriateness of the particular treatment;
    - (ii) the availability of alternative treatment, and its potential effectiveness;
    - (iii) the cost of the treatment;
    - (iv) the actual or potential effectiveness of the treatment, and
    - (v) the acceptance by medical experts of the treatment as being appropriate and likely to be effective.
  - (b) In respect of the criteria referred to in (c)(iv) above, while the effectiveness of the treatment is relevant to whether the treatment was reasonably necessary, it is certainly not determinative. The evidence may show that the same outcome could be achieved by a different treatment, but at a much lower cost.
  - (c) Bearing in mind that all treatment, especially surgery, carries a risk of a less than ideal result, a poor outcome does not necessarily mean that the treatment was not reasonably necessary.
  - (d) While the above matters are useful heads for consideration, the essential question remains whether the treatment was reasonably necessary. As always, each case will depend on its facts.
114. I now turn to the application of the relevant legislation and the legal principles referred to above to the available evidence in this matter.

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<sup>48</sup> *Diab v NRMA Ltd* [2014] NSWCCPD 72

<sup>49</sup> *Rose v Health Commission (NSW)* (1986) 2 NSWCCR 32

115. As I have already made findings in relation to Mr Massouh's left groin symptoms and resultant left inguinal hernia being work-related, there is no need for me to deal with Dr Truskett's evidence again, as I have preferred the evidence of Dr Oh and Dr Greenberg for reasons already stated.
116. Dr Oh expressed the need for surgery by way of surgical mesh repair and that he would also remove the subcutaneous lesion (the lipoma) during the proposed surgical procedure.
117. Dr Greenberg opined that despite the fact there was no obvious hernia at the time of his examination, in view of Mr Massouh's history, the ultrasound findings and the chronicity of his symptoms (over one year), he believed surgical repair was appropriate. Dr Greenberg further opined that the risks of surgery were small when weighed against the gains. He expected that Mr Massouh should be able to return to work once he recovered from the proposed surgery. In view of the fact that Mr Massouh had experienced symptoms for a year, he did not believe that there was any alternative to the proposed surgery and that it was appropriate treatment.
118. Applying the principles referred to in *Diab* above, different treatments may qualify as reasonably necessary and Mr Massouh only has to establish that the treatment claimed is one of those treatments. The proposed left inguinal hernia surgical mesh repair is one of those treatments and I find as follows:
- (a) The alternative treatment by way of conservative management in the form of pain relieving medication which has failed since mid-2019, apart from providing some temporary relief, is unlikely to be effective and on the balance of probabilities, will result in Mr Massouh continuing to suffer the ongoing pain and restrictions referred to in the evidence. Without the proposed surgery, Mr Massouh will continue to experience pain and discomfort in his lower abdominal region and left groin region.
  - (b) The evidence did not disclose any alternative treatment for Mr Massouh.
  - (c) There is no issue raised by the respondent as to the cost of the proposed surgery, except that, if a finding is made in favour of Mr Massouh, it should not be liable for the cost of the surgical removal of the lipoma. I have already made a finding in this regard and if Mr Massouh chooses to have the lipoma excised at the time, he undergoes the proposed left inguinal hernia surgical mesh repair, the respondent will not be liable for the cost of the excision procedure.
  - (d) The potential effectiveness of the proposed surgery is the best chance Mr Massouh has of improving his current and longstanding symptoms, improving his quality of life and eventually resuming employment.
  - (e) The purpose and potential effect of the proposed surgery is to alleviate the consequences of the injury as far as possible.
  - (f) The evidence of Dr Oh and Dr Greenberg support the proposed surgery as being reasonably necessary and likely to be beneficial in the circumstances of this case.
119. Accordingly, I find that Mr Massouh has discharged the onus of proving that the left inguinal hernia surgical mesh repair proposed by Dr Oh is reasonably necessary treatment as a result of the injury sustained by him in the course of his employment with the respondent.

## **CONCLUSION**

120. My determination and orders are set out in the Certificate of Determination attached to this Statement of Reasons.