

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 3637/19
Applicant: Shayne Michael Taylor
Respondent: Soxami Pty Ltd; Burrangong Pet Foods Pty Ltd; Burrangong Meat Processors Pty Ltd; Burrangong Abattoirs Pty Ltd (in receivership)
Date of Determination: 18 October 2019
Citation: [2019] NSWCC 338

The Commission determines:

1. Pursuant to section 162 (1)(d) of the *Workers Compensation Act 1987* (the 1987 Act) the Commission declares that the respondent, being a corporation, had commenced be wound up after having entered into a contract with CGU Workers Compensation in respect of liability for injury on 31 October 1997 and with Employers Mutual NSW Limited in respect of any liability under the 1987 Act in respect of injury on 27 September 2002.
2. The Application to Resolve a Dispute is amended:
 - (a) by deleting the claim for domestic assistance and for medical expenses, and
 - (b) by amending the claim for weekly payments to claim weekly payments:
 - (i) from 3 February 2010 to 31 December 2012 pursuant to section 37 of the 1987 Act as preserved pursuant to clause 3 of Part 19H of Schedule 6 to the 1987 Act, and
 - (ii) from 7 January 2016 to 8 April 2016 pursuant to section 41 of the 1987 Act.
3. The respondent is to make weekly payments to the applicant pursuant to section 37 of the 1987 Act as preserved pursuant to clause 3 of Part 19H of Schedule 6 to the 1987 Act as follows:
 - (a) from 3 February 2010 to 31 January 2010 at the rate of \$500.50 per week;
 - (b) from 1 April 2010 to 30 September 2010 at the rate of \$510.10 per week;
 - (c) from 1 October 2010 to 31 March 2011 at the rate of \$516.90 per week;
 - (d) from 1 April 2011 to 30 September 2011 at the rate of \$527.40 per week;
 - (e) from 1 October 2011 to 31 March 2012 at the rate of \$536.40 per week;
 - (f) from 1 April 2012 to 30 September 2012 at the rate of \$546.50 per week, and
 - (g) from 1 October 2012 to 31 December 2012 at the rate of \$555.30 per week.
4. The applicant is to file and serve written submissions on or before close of business on 29 October 2019 addressing the following issues:
 - (a) What power does the Commission have to make an award of weekly payments pursuant to section 41 of the 1987 Act in the light of *Lee v Bunnings Group Ltd* ([2013] NSWCCPD 54)?
 - (b) How is it alleged the applicant “had current work capacity prior to suffering the incapacity resulting from the injury related surgery” (section 41(5)(a) of the 1987 Act)?

- (c) Do the words “being medical treatment for which the insurer has accepted liability under this part” (section 41(4)) extend to medical treatment for which the insurer has not accepted liability but which the Commission has held results from the subject injury?
5. The respondent is to file and serve submissions in reply on or before close of business on 13 November 2019.
 6. Any response to the respondent’s submissions in reply is to be filed and served on or before close of business on 20 November 2019.
 7. The issue of weekly payments in the period 7 January 2016 to 8 April 2016 will then be decided on the papers in the light of the further submissions received.

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

W Dalley
Arbitrator

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

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Shayne Michael Taylor (Mr Taylor/the applicant) was employed by the operators of the Burrangong Abattoirs (the respondent) from 1987 until the operator went into receivership and the abattoir closed on 2 February 2010.
2. Mr Taylor suffered a back injury on 31 October 1997 in the course of his employment and injury to his right ankle on 27 September 2002.
3. Following his back injury in October 1997 Mr Taylor was paid weekly compensation up to 20 November 2001.
4. Mr Taylor was also paid lump-sum compensation in respect of the back injury in proceedings which were settled in September 1999 and, in 2003 a further sum was agreed upon in respect of whole person impairment of the right lower extremity. Despite these injuries, an earlier bout of Q fever and an injury to the left arm, Mr Taylor continued in his employment performing modified duties until the abattoir closed in February 2010.
5. Proceedings in 2013 and 2015 were discontinued.
6. A further claim was made on 28 November 2016 for permanent impairment compensation in respect of the injuries on 31 October 1997 and 27 September 2002. The claims were disputed and an Application to Resolve a Dispute was filed in the Commission.
7. The allegations of injury in October 1997 were pleaded in the alternative as injuries pursuant to section 4(a) of the *Workers Compensation Act 1987* (the 1987 Act) and section 4(b), that is as “frank” injuries and “disease” injuries. A claim was also made for weekly payments, domestic assistance, treatment expenses and a declaration that back surgery represented reasonably necessary treatment in respect of the October 1997 injury pursuant to section 60 (5) of the 1987 Act.
8. At hearing the applicant discontinued the claims for weekly benefits, medical and treatment-related expenses, domestic assistance and the section 60(5) declaration. An award was made on 17 August 2017 remitting the further claims pursuant to section 66 to the Registrar for referral to an Approved Medical Specialist to assess:
 - (a) “Pursuant to the Table of Disabilities, the degree of the permanent impairment of the applicant’s back in the permanent loss of efficient use of the right leg at or above the knee the date of injury of 31 October 1997.
 - (b) The degree of the applicant’s whole person impairment in relation to the right lower extremity (foot and ankle) with a date of injury of 27 September 2002.”
9. There was an award for the respondent “in relation to disease injury claims for the lower back and right lower extremity”.
10. Subsequently a request for assessment of a threshold dispute seeking assessment of whole person impairment in respect of injury on 31 October 1997 was added.
11. Pursuant to that request, the Approved Medical Specialist, Dr Davis, assessed 30% whole person impairment in respect of injury on 31 October 1997 in respect of the lumbar spine and right lower extremity.
12. The applicant then applied for a reconsideration of the orders referring the dispute to the Approved Medical Specialist seeking to add a request for assessment of scarring consequential upon surgery (L5/S1 fusion) performed by Dr Nicholas Tsai. That claim was

contested by the respondent and was the subject of a further determination based upon the respective submissions of the parties. After discussion of the submissions the arbitrator concluded:

“Based on the reasons in findings made above and the interests of justice, I find that Order 4 in the Certificate Determination dated 17 August 2017 should have included a remittance to the Registrar for referral to an Approved Medical Specialist to assess the degree of Mr Taylor’s whole person impairment in relation to the back (lumbar spine), right lower extremity and skin (surgical scarring to the back) with the date of injury of 31 October 1997.”

13. The order remitting the dispute was amended accordingly.

14. In a Medical Assessment Certificate dated 17 May 2018 the Approved Medical Specialist, Dr Davis, noted the history:

“On 31 October 1997, in the process of pulling meat out of the freezer, he developed pain in the lower back and right leg. After a period of conservative treatment, there was a referral to a neurosurgeon, Dr Sheehy, who initially recommended conservative treatment.

On 27 September 2002, when operating a forklift, Mr Taylor was involved in an accident. The forklift slid off a ramp landing heavily on his right foot and ankle, particularly aggravating the low back pain. There was a specialist referral to Dr Tsai who performed an L5/S1 fusion on 7 January 2016. Physiotherapy followed.”

15. Dr Davis noted the appearance of the surgical scar and noted the absence of symptoms. He noted that there had been previous low back injuries which were relevant. He noted “Mr Taylor suffered an injury to his lower back and right leg, as a result of that injury undergoing surgery that involved in L5/S1 fusion” he diagnosed “Aggravation of degenerative disc disease of the lumbar spine (L5/S1 fusion) with an associated surgical scar in the lumbosacral area midline.”

16. Applying the New South Wales Workers Compensation Guidelines For The Evaluation Of Permanent Impairment, TEMSKI Scale, Dr Davis assessed 0% whole person impairment as result of the surgical scarring.

17. In the light of the assessment by the Approved Medical Specialist, a consent award was made on 18 January 2018 for additional sums pursuant to section 66 of the 1987 Act in respect of permanent impairment of the back and permanent loss of efficient use of the right leg at or above the knee attributable to the injury on 31 October 1997 as well as an additional sum attributable to the ankle injury on 27 September 2002.

18. Subsequently a consent award was made on 15 August 2018 finding that Mr Taylor suffered from a 30% whole person impairment in accordance with the Medical Assessment Certificate as a result of the injuries he sustained on 31 October 1997.

19. On 28 May 2019 Mr Taylor’s solicitors made a claim for weekly benefits from 3 February 2010 to date and continuing and a claim for treatment expenses including the L5/S1 discectomy and fusion performed by Dr Tsai.

20. The respondent disputed liability. In a notice pursuant to section 78 of the *Workplace Injury Management and Workers Compensation Act 1998* the respondent stated:

“We do not agree that you are entitled to weekly payments for your claimed injury because you do not have total or partial incapacity for work resulting from an injury as required by section 33 of the *Workers Compensation Act 1987*.

We also do not agree that you are entitled to medical or related treatment for your claimed injury because the medical or related treatment is not reasonably necessary as a result of an injury as required by section 59 and 60 of the *Workers Compensation Act 1987*.”

21. The respondent asserted that the effects of the injury on 31 October 1997 would have resolved within four weeks in accordance with the opinion of Dr Casikar. In addition, the respondent disputed that the need for surgery performed by Dr Tsai resulted from injury on 31 October 1997.
22. At the arbitration hearing the applicant discontinued the claim for domestic assistance and medical expenses. The claim for weekly payments was amended to claim weekly payments from 3 February 2010 to 31 December 2012 pursuant to the transitional provisions contained in Part 19H of Schedule 6 to the 1987 Act and from 7 January 2016 to 8 April 2016 pursuant to section 41 of the 1987 Act.

ISSUES FOR DETERMINATION

23. The parties agree that the following issues remain in dispute:
 - (a) Did the applicant suffer incapacity for work in the period 3 February 2010 to 31 December 2012 as result of the injury on 31 October 1997 and/or 27 September 2002?
 - (b) With respect to the claim for weekly payments in the period 7 January 2016 to 8 April 2016:
 - (i) was the surgery which gave rise to the alleged incapacity reasonably necessary treatment in respect of injury to lumbar spine on 31 October 1997, and
 - (ii) if so, what is the extent of the incapacity flowing from that surgery?
24. For the reasons set out below it seems that the latter issue may not have correctly identified the issues raised in respect of a claim pursuant to section 41 of the 1987 Act. These issues seem to be somewhat broader and include questions of jurisdiction.
25. The respondent asserted, and it was not disputed by the applicant, that the applicant had been paid 56 weeks of weekly compensation as a result of the low back injury sustained on 31 October 1997¹.

PROCEDURE BEFORE THE COMMISSION

26. 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.

¹ notice pursuant to section 78 of the 1998 Act.

EVIDENCE

Documentary Evidence

27. The following documents were in evidence before the Commission and taken into account in making this determination:
- (a) Application to Resolve a Dispute and attached documents;
 - (b) Reply and attached documents;
 - (c) Documents attached to Application Admit Late Documents dated 11 September 2019 by the applicant, and
 - (d) Documents attached to Application to Admit Late Document dated 16 September 2019 by the respondent.

Oral evidence

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

FINDINGS AND REASONS

Issue 1 – incapacity in the period 3 February 2010 to 31 December 2012

29. Counsel for the applicant submitted that Mr Taylor should be assessed as having no practical capacity for work following the closure of the abattoir. Mr Taylor had been employed on modified duties which would not have been available in the open labour market. Mr Taylor's capacity to earn was dependent upon his ability to perform physical tasks and this had been severely compromised by his two injuries as reflected in the findings of 15% permanent impairment of the back and 5% loss of use of the left and right legs at or above the knee.
30. Counsel for the respondent submitted that Mr Taylor had been employed in full-time work up to the closure of the abattoir. He was clearly a valued worker. Mr Taylor had continued working for many years following his injuries. He had demonstrated skills in driving a forklift. If there was financial loss arising from incapacity, Mr Taylor's wife should not be regarded as dependent as she was shown to have an income.
31. It was agreed by the parties that Mr Taylor was not an "existing recipient" of weekly payments as at 1 October 2012. The respective claims were made prior to 1 October 2012 so that the weekly payments amendments introduced by the *Workers Compensation Legislation Amendment Act 2012*, applied from 1 January 2013 (see clause 3 of the *Workers Compensation Amendment (Transitional) Regulation 2012* the effect of which was explained by Roche DP in *Kilic v Kmart Australia Ltd*² at [10]).
32. There is no dispute that Mr Taylor suffered injuries to his back and right ankle in the course of his employment with the respondent. In 1999 Mr Taylor was awarded lump sum compensation in respect of 15% impairment of the back and 5% loss of use of the right leg.
33. A series of reports from Dr Neil Berry, surgeon, were in evidence. Dr Berry saw Mr Taylor on 30 March 1998 and again on 6 August 1998. His opinion was that Mr Taylor was "permanently unfit for his pre-injury duties and any other form of heavy manual work" as a result of his low back injury. He said:

² [2013] NSWCCPD 37

“His prognosis remains guarded as his symptoms and disability persist. His clinical course is one of unchanging pain since I last saw him although there has been some minor improvement in his leg pain and I therefore doubt that there will be any significant change in the foreseeable future.”

34. A report by an occupational psychologist, Toni Smith, to the Commonwealth Rehabilitation Service dated 16 September 1998 noted literacy levels consistent with that expected of a seven-year-old. The psychologist noted the test results “demonstrate that Mr Taylor experiences difficulties in comprehending, interpreting and analysing information.” She commented “these results classify Mr Taylor as mentally retarded.” The psychologist reported:

“Whilst there is nothing to suggest that these results are not a true indication of Mr Taylor’s [sic], it is unusual to find someone with this level of ability who has such a sound and consistent work history in open employment. I think this attests to the fact that Mr Taylor has tried extremely hard, has been very well socialised and has received a lot of support from his wife and family. Unfortunately, though, a person with this level of intellectual ability has no alternative employment options other than unskilled manual work. If this is no longer a possibility due to chronic injury, the only remaining option is to apply for disability support pension.”

35. The psychologist added:

“Mr Taylor is a well-presented man who appears to have achieved above the level expected of someone with an intellectual disability. As a result of his disability it is going to be difficult to gain alternative, sustainable employment.”

36. Dr Endrey-Walder, surgeon, examined Mr Taylor on 3 June 2003 at the request of Mr Taylor’s solicitors for the purpose of assessment of the effects of the injury to the right ankle in September 2002. Dr Endrey-Walder noted the x-rays of the right ankle and continuing complaints of difficulty with walking with pain. Mr Taylor complained to Dr Endrey-Walder of the foot giving way on uneven ground and swelling after a full day’s work.

37. Dr Endrey-Walder noted that Mr Taylor’s schooling had extended to age 16 but “he remained with rather poor literacy”. Dr Endrey-Walder commented:

“Mr Taylor is going to remain with a degree of handicap on the open labour market for physically demanding work situations on account of his difficulty negotiating uneven ground or stairs in an extensive manner. He is currently wearing gumboots at work, but should he be required to wear steel cap boots, the deformity in relation to his fourth toe may remain a problem. His difficulties in this regard would be compounded by the fact that it was not one’s immediate impression today that his retraining into somewhat more skilled work is likely to be successful.”

38. Dr Dixon, orthopaedic surgeon, examined Mr Taylor on 18 March 2015 at the request of Mr Taylor’s solicitors. That examination predates the L5/S1 discectomy and fusion which was performed by Dr Tsai on 7 January 2016. Dr Dixon noted complaints of pain in the lower back and intermittent sciatic pain bilaterally. Mr Taylor complained that his back pain disturbed his sleep and impacted his ability to sit and stand for continuous periods. Dr Dixon noted that Mr Taylor “has a sitting, standing and driving tolerance of half an hour, and walking tolerance of 20 minutes.”

39. Dr Dixon also noted pain and stiffness in the right ankle, clawing of the fourth and fifth toe with difficulty walking on uneven terrain. Dr Dixon noted the radiological investigations of the lumbar spine and the right foot.

40. Dr Dixon assessed fitness for work:

“He had been able to return to work in the abattoirs doing light duties and had difficulty continuing and the abattoir subsequently closed and he has been out of work since 2010. Although the abattoir has recently reopened, he is unfit to do the duties of a slaughterman due to ongoing pain and stiffness in his back and right sciatica, and due to the pain and stiffness in his right ankle. These injuries impact on his ability to do recurrent bending and stooping, heavy lifting and carrying and prolonged standing. He does not have clerical training to do an office job. He has always done manual work. He remains on a disability pension.”

41. Dr Dixon commented:

“His prognosis is guarded for him returning to manual work for the reasons stated above. He has permanently retired from manual work. He does not have the intellectual capacity to be retrained for a clerical occupation.”

42. Mr Taylor was examined by Dr Casikar at the request of the respondent on 20 November 2015. His report of that date was in evidence. Dr Casikar obtained a history of injury to the low back when Mr Taylor “was pulling produce out of the freezer”. He noted that Mr Taylor suffered further injury on 27 September 2002 when he “fell off a forklift”. Dr Casikar noted “He caught his right foot. He had an injury to the right ankle. This required plaster immobilisation for six weeks.”

43. Mr Taylor complained of persistent back pain. Dr Casikar diagnosed constitutional degenerative disease of the lumbar spine. He said that Mr Taylor appeared to have a musculoligamentous injury on 31 October 1997 and that Mr Taylor “seems to have been complaining of back pain since then.” Dr Casikar said that in his opinion any work-related aggravation had ceased. Dr Casikar noted:

“Mr Taylor has not worked since 2010. He is now on the Disability Pension. I am not quite sure about the reasons for the Disability Pension. In my opinion, Mr Taylor is capable of doing normal hours of suitable duties. He would require a work capacity assessment to identify suitable job that he would be able to perform.”

44. Dr Casikar recommended against back surgery which he felt would be unhelpful. Dr Casikar believed that any consequences of the October 1997 injury would have resolved within a relatively brief period of time.

Discussion.

45. It is necessary firstly to determine whether Mr Taylor suffered incapacity for work in the period 3 February 2010 to 31 December 2012 and, if so, the extent of that incapacity.

46. It is clear from the statement of the applicant that Mr Taylor was on light duties at the time the abattoir closed on 3 February 2010. Mr Taylor said that the assessment of his work capacity following the earlier injury had included a finding that he had an intellectual deficit. That is borne out by the report of his psychological testing. He had a low level of literacy. On returning to work in April 1999 he was given a job making twine loops for hanging up carcasses. By September 2002 he was working driving a forklift when he had the accident involving injury to the right ankle. He was paid compensation for a period of time and then returned to work driving a forklift. He did not hold a license to drive a fork lift.

47. There is no contemporaneous medical assessment of Mr Taylor’s capacity for employment once the abattoir closed. His capacity for employment needs to be gauged by the limited available evidence.

48. Mr Taylor in his earliest statement details his previous work experience which was labouring picking rocks from a conveyor belt at a mine site then other labouring type work until commencing with the abattoir in about 1987.
49. The Initial Return to Work Plan dated 28 November 2002 by Dr Brown and the Physical Capabilities Checklist provide evidence of the limitations imposed by the injury to the right foot on 27 September 2002 with very short tolerances on standing and walking in particular.
50. Mr Taylor was aged 41 when the abattoir closed. I accept that he had an intellectual disability which limited his ability to read and write and to comprehend instructions. I accept the psychologist's report and the conclusions about Mr Taylor's capacity which is spelled out in that report: "a person with this level of intellectual ability has no alternative employment options other than unskilled manual work. If this is no longer a possibility due to chronic injury, the only remaining option is to apply for disability support pension".
51. Dr Dixon reported in 2015 that "These injuries impact on his ability to do recurrent bending and stooping, heavy lifting and carrying and prolonged standing. He does not have clerical training to do an office job. He has always done manual work. He remains on a disability pension."
52. Dr Casikar's opinion that the effects of low back injury would have resolved within four weeks runs contrary to the assessment of permanent impairment of the lumbar spine of 15% with loss of use of both legs agreed at 5% in 1999. The weight of medical opinion including that of Dr Berry and Dr Dixon is that Mr Taylor suffered permanent impairment of his lumbar spine following the 1997 injury with resulting impairment of the legs. That is supported by the finding of permanent impairment to the back. I prefer the opinion of Dr Dixon to that of Dr Casikar for that reason.
53. I could not be satisfied that Mr Taylor would have been capable of undertaking the necessary process of obtaining a forklift driver's licence because of his limited intellectual capacity. I am satisfied that unskilled manual work is all that was available to him in the period claimed. He was able to continue his employment with the respondent with restrictions consistent with the impairment to his low back and legs. I am satisfied that, having regard to the restrictions on performing manual work resulting from the respective injuries, Mr Taylor would not have been able to find employment on the open labour market in a role requiring physical fitness. He would be unsuited for retail or clerical work as explained by the psychologist.
54. Section 37 of the 1987 Act, as preserved by the transitional provisions³, provided for payment of the statutory rate determined by reference to dependency. The only evidence as to average weekly earnings was pointed to by Counsel for the applicant as that derived from the year ended 30 June 2009 in which the average weekly earnings were \$689.34 per week.
55. The maximum weekly payment after 26 weeks as at 3 February 2010 was \$396.10 per week for a single worker aged 21 or over. Mr Taylor claimed entitlement as having a dependent spouse.
56. Counsel for the respondent submitted that Mr Taylor's wife was not dependent as she had earnings. Apart from the applicant's statement that his wife was dependent as at March 2010, the evidence of those earnings is to be found in the income tax returns in evidence. In Mr Taylor's income tax return for the year ended 30 June 2009 his wife's income is shown as five dollars only. The following year, to 30 June 2010, spouse income is recorded as \$574.
57. I accept that a spouse who earns an average of less than \$12 a week would be unable to support herself and would have been dependent on Mr Taylor as at 3 February 2010.

³ clause 3 of Part 19H of Schedule 6 to the 1987 Act

58. Pursuant to section 37 of the 1987 Act as preserved by the transitional provisions, Mr Taylor's entitlement to weekly payments in the period claimed is as follows:

From	To	Single	Spouse	Total
3/02/2010	31/01/2010	\$ 396.10	\$ 104.40	\$ 500.50
1/04/2010	30/09/2010	\$ 403.70	\$ 106.40	\$ 510.10
1/10/2010	31/03/2011	\$ 409.10	\$ 107.80	\$ 516.90
1/04/2011	30/09/2011	\$ 417.40	\$ 110.00	\$ 527.40
1/10/2011	31/03/2012	\$ 424.50	\$ 111.90	\$ 536.40
1/04/2012	30/09/2012	\$ 432.50	\$ 114.00	\$ 546.50
1/10/2012	31/12/2012	\$ 439.50	\$ 115.80	\$ 555.30

Issue 2 – Incapacity in the period 7 January 2016 to 8 April 2016

59. Counsel for the applicant submitted that Mr Taylor was entitled to be paid in the period 7 January 2016 to 8 April 2016 pursuant to section 41 of the 1987 Act. (7 January 2016 is the date upon which Dr Tsai performed the L5/S1 disc decompression).
60. Section 41 of the 1987 Act provides:.

“Compensation for incapacity after second entitlement period resulting from surgery
 41 COMPENSATION FOR INCAPACITY AFTER SECOND ENTITLEMENT PERIOD
 RESULTING FROM SURGERY

- (1) An injured worker who suffers incapacity resulting from injury related surgery is entitled to weekly payments of compensation ('special compensation') as provided by this section in respect of that incapacity when the incapacity occurs after the second entitlement period.
- (2) The special compensation provided for by this section is payable at the rate provided under section 37, as if the period of incapacity in respect of which the special compensation is payable occurred during (not after) the second entitlement period.
- (3) Special compensation is not payable in respect of any period of incapacity that occurs:
 - (a) during the first 13 consecutive weeks after the end of the second entitlement period, or
 - (b) more than 13 weeks after the surgery concerned, or
 - (c) during any period in respect of which the worker is otherwise entitled to compensation after the second entitlement period (under section 38).
- (4) Surgery is "injury related" if it is surgery that the worker undergoes in the course of medical treatment provided to the worker as a result of an injury (the 'initial injury') received by the worker (being medical treatment for which the insurer has accepted liability under this Part).
- (5) The following requirements must be satisfied for a worker to be eligible for the special compensation provided for by this section:
 - (a) the worker must have received weekly payments of compensation in respect of the initial injury and have had current work capacity prior to suffering the incapacity resulting from the injury related surgery,
 - (b) the worker must have returned to work after the initial injury (whether in self-employment or other employment) for a period of not less than 15 hours per week and have been in receipt of current weekly earnings (or

current weekly earnings together with a deductible amount) of at least \$155 per week.

(6) This section does not limit section 52 (Termination of weekly payments on retiring age).”

61. I am satisfied that the surgery performed by Dr Tsai on 7 January 2016 was surgery that resulted from the earlier injury in October 1997. That is indisputable given that scarring was referred for assessment by the Approved Medical Specialist, Dr Davis. The scarring clearly resulted from the surgery performed by Dr Tsai and the inescapable inference is that the back surgery which gave rise to the scarring resulted from the October 1997 injury. If that were not the case then there would have been no basis for referral of the scarring for assessment.
62. I am satisfied that there is an implicit finding that the surgery resulted from the earlier injury. Whether this is issue estoppel or Anshun⁴ estoppel would depend on the contents of the dispute notice issued in respect of the claim for lump-sum compensation made in Mr Taylor’s solicitors’ letter dated 28 November 2016. That dispute notice does not appear to be in evidence although an earlier notice dated 27 February 2013 in respect of a claim for weekly payments was included as was the section 78 notice dated 14 August 2019.
63. If the respondent specifically disputed that the surgery resulted from the subject injury then that dispute appears to have been resolved in favour of the applicant by the order remitting the claim for scarring which resulted from the surgery for impairment as a result of the first injury. There would then be issue estoppel.
64. If not specifically raised then Anshun estoppel appears to apply given that it would be reasonably expected that the respondent would raise the issue of whether there was a causal connection between the surgery and the injury in connection with the claim for lump-sum impairment which depended in part for assessment upon the effects of surgery.
65. In the Medical Assessment Certificate dated 8 November 2017, the Approved Medical Specialist, Dr Davis, recorded a history:
- “In the normal course of the claimant’s employment, on 31 October 1997, he was pushing down forcefully on a sheep carcass, when he felt ‘the back go’. There was pain in the lower back
- He finished that shift and then sought medical advice. He sought advice from his GP, who initially prescribed anti-inflammatory and analgesic medication and physiotherapy. CT and MRI Scans were performed identifying an L5/S1 disc lesion. At this stage, as well as back pain, he developed pain in the right leg. He was still working
- [the AMS then recorded history of injury on 27 September 2002 and subsequent treatment)
- Throughout this period, he continued with pain in the lower back, radiating into the right leg and there was a neurosurgical referral to Dr Tsai who performed surgery on 7 January 2016 involving L5/S1 disc decompression and fusion.”
66. Putting to one side the issue of estoppel, the evidence is clear that the Approved Medical Specialist assessed lumbar spine impairment arising from injury on 31 October 1997 as including an additional 3% whole person impairment “because there is radiculopathy following spinal surgery”. That assessment clearly supports a finding that the surgery resulted from the injury and I accept that this is the case. Accordingly, I am satisfied that the

⁴ Port of Melbourne Authority v Anshun Pty Ltd [1981] HCA 45; (1981) 147 CLR 589

surgery performed by Dr Tsai on 7 January 2016 resulted from injury to the lumbar spine on 31 October 1997.

67. For the purposes of section 41 it is not sufficient that the incapacity following surgery results from the initial injury. Section 41(4) defines surgery as “injury related” if the surgery is provided as a result of initial injury “being medical treatment for which the insurer has accepted liability under this part”.
68. It is clear that the insurer did not accept liability for this medical treatment. No submissions were addressed at hearing to the issue of whether the definition is satisfied if the Commission finds that the surgery resulted from the initial injury.
69. Similarly, no submissions were addressed to the issue as to whether the Commission has jurisdiction to make an order for weekly payments pursuant to section 41, given the restrictions upon the jurisdiction of the Commission identified in *Lee v Bunnings Group Limited*⁵ in respect of claim for weekly payments after the expiry of the second entitlement period.
70. The respondent’s submissions at hearing were principally directed to whether the requirement for surgery resulted from the injury on 31 October 1997 or from other causes such as a degenerative condition. The respondent noted that a claim based on onset of a gradual process pursuant to section 4(b)(i) or (ii) had been dismissed in proceedings in the Commission with a finding of injury to the low back pursuant to section 4(a).
71. It is appropriate that the parties be afforded the opportunity to make submissions as to whether the Commission has jurisdiction to make an award for weekly payments of compensation pursuant to section 41 after the expiry of the second entitlement period and, if so, whether section 41(4) can be satisfied by a declaration of the Commission as to liability of the respondent for treatment.
72. The parties’ submissions should also address the meaning to be attributed to the phrase “had current work capacity prior to suffering the incapacity resulting from the injury related surgery” and whether work capacity prior to February 2010 satisfies that requirement.



⁵ [2013] NSWWCPCD 54