

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 6102/19
Applicant: Stephen Perry
Respondent: Ausgrid
Date of Determination: 3 June 2020
Citation: [2020] NSWCC 187

The Commission determines:

1. The Respondent pay the Applicant weekly compensation as follows:
 - (a) Under section 36 of the *Workers Compensation Act 1987* at the rate of \$876.82 per week from 5 July 2018 to 4 October 2018;
 - (b) Under section 37 of the *Workers Compensation Act 1987* at the rate of \$618.37 per week from 5 October 2018 to date and continuing in accordance with the provisions of the *Workers Compensation Act 1987*.

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

Jane Peacock
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 JANE PEACOCK, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. By Application to Resolve a Dispute (the Application), the applicant, Mr Stephen Perry, seeks weekly compensation as a result of injuries to his back, neck and left knee in the course of or arising out of his employment as a linesman.
2. The respondent is Ausgrid. Ausgrid was self- insured at the relevant time for the purposes of workers compensation.

ISSUES IN DISPUTE

3. There is no dispute before me that Mr Perry suffered injury to his back, neck and left knee in the course of or arising out of his employment with Ausgrid.
4. Mr Perry pleads injury to the back, neck and left knee on various dates in the Application at Part 4. I was advised by counsel for Ausgrid that injury is not disputed and that I am not asked to make a determination on the issue of injury. Accordingly, my determination will not traverse the issue of injury.
5. The dispute at the arbitration was confined to the issue of Mr Perry's capacity for employment and the award of weekly compensation, if any, that should flow to Mr Perry.
6. There was no dispute at the arbitration that Mr Perry is incapacitated for his pre-injury employment with Ausgrid. Counsel for Ausgrid expressly stated that he would not argue that Mr Perry could perform his pre-injury employment as a linesman.
7. Mr Perry's primary case is that he is totally incapacitated for employment or effectively totally incapacitated and he seeks weekly compensation on this basis. In other words, in line with the relevant provisions of the *Workers Compensation Act 1987* (the 1987 Act) that were introduced by the 2012 legislative amendments, Mr Perry contends he has no current capacity for employment.
8. Ausgrid disputes that Mr Perry is either totally incapacitated or effectively totally incapacitated for employment, that is, it is disputed that Mr Perry has no current capacity for employment.
9. Mr Perry's alternative case is that his capacity for work is minimal, that it would be limited to 12 hours per week performing some low paying work at \$20 per hour and returning him \$250 per week (on his counsel's calculation) and he seeks weekly compensation on this basis in the alternative.
10. Ausgrid disputes that Mr Perry is so limited.
11. Mr Perry's pre-injury average weekly earnings (PIAWE) is agreed to be \$1721.30.
12. On the basis of the agreed PIAWE, Mr Perry seeks an order for weekly compensation based on no current work capacity as follows:
 - (a) Under section 36 of the 1987 Act at the rate of \$1636.82 per week from 5 July 2018 to 4 October 2018;
 - (b) Under section 37 of the 1987 Act at the rate of \$1378.37 per week from 5 October 2018 to date and continuing in accordance with the provisions of the Act.

13. Ausgrid disputes that an order for weekly compensation should be made on the basis of total incapacity for employment or no current capacity for employment but if Mr Perry is successful, then the weekly rates sought are agreed.
14. In the alternative, Mr Perry seeks weekly compensation on the basis of partial incapacity for employment with an assessment that his current capacity to earn in some suitable employment is limited to being able earn \$250 per week resulting in the following being sought:
 - (a) Under section 36 of the 1987 Act at the rate of \$1386.82 per week from 5 July 2018 to 4 October 2018;
 - (b) Under section 37 of the 1987 Act at the rate of \$1128.37 per week from 5 October 2018 to date and continuing in accordance with the provisions of the Act.
15. Counsel for Ausgrid submitted that Mr Perry could work in some suitable employment earning at least the minimum weekly wage which he specified to be \$790 per week. Counsel for Ausgrid also submitted that he could probably earn between \$55,000 and \$60,000 per year. This equates to between \$1058 and \$1154 per week. Counsel for Ausgrid went onto submit that Mr Perry could earn per week between \$1000 and \$1500 (the latter of which actually equates to \$78,000 per year) week which he said would result award of weekly compensation in Mr Perry's favour as follow:

At \$1000 per week:

- (a) Under section 36 of the 1987 Act at the rate of \$636.82 per week from 5 July 2018 to 4 October 2018;
- (b) Under section 37 of the 1987 Act at the rate of \$378.37 per week from 5 October 2018 to date and continuing in accordance with the provisions of the Act.

At \$1500 per week:

- (a) Under section 36 of the 1987 Act at the rate of \$136.82 per week from 5 July 2018 to 4 October 2018;
- (b) No award under section 37 of the 1987 Act from 5 October 2018 to date and continuing in accordance with the provisions of the Act.

PROCEDURE BEFORE THE COMMISSION

16. The parties attended a conciliation arbitration by telephone on 21 April 2020. The parties were both legally represented by counsel. Mr Perry was represented by Ms Hunt of counsel and Ausgrid was represented by Mr Grant of counsel. Conciliation took place however the parties were unable to come to a resolution of the matter. I'm 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've 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 entire dispute.

EVIDENCE

Documentary evidence

17. The following documents filed on behalf of each party were admitted into evidence before the Commission by consent and taken into account in making this determination:

For Mr Perry:

- (a) The Application and all documents attached;
- (b) The reports of Dr Spittaler 22 March 2019 and 10 September 2019 filed with an Application to Admit Late Documents.

For Ausgrid:

- (a) The Reply and all documents attached;
- (b) Late documents dated 5 February 2020 and filed 13 February 2020.

Oral evidence

18. Mr Perry did not seek leave to adduce oral evidence.
19. Ausgrid did not seek leave to cross-examine Mr Perry.

FINDINGS AND REASONS

20. Mr Perry pleads injury to the back, neck and left knee on various dates in the Application at Part 4. I was advised by counsel for Ausgrid that injury is not disputed and that I am not asked to make a determination on the issue of injury. Accordingly, my determination will not traverse the issue of injury.
21. The dispute at the arbitration was confined to the issue of Mr Perry's capacity for employment and the award of weekly compensation, if any, that should flow to Mr Perry.
22. There was no dispute at the arbitration that Mr Perry is incapacitated for his pre-injury employment with Ausgrid. Counsel for Ausgrid expressly stated that he would not argue that Mr Perry could perform his pre-injury employment as a linesman.
23. Mr Perry's primary case is that he is totally incapacitated for employment or effectively totally incapacitated and he seeks weekly compensation on this basis. In other words, in line with the relevant provisions of the 1987 Act that were introduced by the 2012 legislative amendments, Mr Perry contends he has no current capacity for employment.
24. Ausgrid disputes that Mr Perry is either totally incapacitated or effectively totally incapacitated for employment, that is, it is disputed that Mr Perry has no current capacity for employment.
25. Mr Perry's alternative case is that his capacity for work is minimal, that it would be limited to 12 hours per week performing some low paying work at \$20 per hour and returning him \$250 per week (on his counsel's calculation) and he seeks weekly compensation on this basis in the alternative.
26. Ausgrid disputes that Mr Perry is so limited.
27. Mr Perry seeks an order for weekly compensation.

28. Mr Perry's primary contention is that he is totally incapacitated for work or effectively totally incapacitated for work and has been at all times since leaving the employ of Ausgrid when he took a voluntary redundancy on 4 July 2018. He seeks an order for weekly compensation at the maximum amount payable to him based on the agreed PIAWE of \$1721.30 from 5 July 2018 to date and continuing in accordance with the provisions of the 1987 Act.
29. In the event Mr Perry is unsuccessful in his claim to be awarded weekly compensation on the basis of total incapacity or no current work capacity, he argues in the alternative that his capacity for employment is minimal and that he would only be capable of working 12 hours per week in low paying work returning him \$20 per hour which his counsel estimated would return him \$250 per week. In the alternative he seeks an award of weekly compensation calculated by taking this into account as set out above.
30. Ausgrid disputes that Mr Perry is totally incapacitated for employment or effectively totally incapacitated for employment. Ausgrid conceded that Mr Ausgrid cannot work in his pre-injury employment as a linesman.
31. Counsel for Ausgrid submitted that Mr Perry has capacity to work in some suitable employment that would return him at least the minimum wage rate but he would more probably be able to work in some suitable employment that would earn him between \$1000 and \$1500 per week.
32. I note that Counsel for Ausgrid also submitted that Mr Perry would be able to work in some suitable employment earning him between \$55,000 and \$60,000 per year. \$55,000 per year equates to \$1058 per week and \$60,000 per year equates to \$1154 per week. This is not as high as the \$1500 per week that counsel for Ausgrid went onto suggest and base some of his calculations on when submitting what the quantum of the award should be. \$1500 per week actually equates to \$78,000 per year.
33. All of the earnings suggested by counsel for Ausgrid that Mr Perry could earn in some suitable employment result in an award of weekly compensation for the section 36 period from 5 July 2018 to 4 October 2018. Earnings at the minimum wage rate, earnings between \$55,000 and \$60,000 per year and earnings of \$1000 per week (all as submitted by counsel for Ausgrid) result in an award of weekly compensation to Mr Perry in the period covered by section 37. Only the earnings of \$1500 per week (as suggested by counsel for Ausgrid) would result in no award under section 37 from 5 October 2018. As I said earnings of \$1500 per week equate to \$78,000 per year which is much higher than the upper limit of \$60,000 that counsel for Ausgrid was suggesting Mr Perry could earn in some suitable employment.
34. I must make a determination in this matter on the balance of probabilities, on the evidence and in accordance with the law.
35. The relevant legislation is found in Division 2 of the 1987 Act, specifically section 32A, 33, 36 and 37 as follows:

"Division 2—Weekly compensation by way of income support

Subdivision 1—Interpretation

32A Definitions

(1) In this Division and in Schedule 3—

"fair work instrument" means—

(a) a fair work instrument (other than an FWA order) within the meaning of the *Fair Work Act 2009* of the Commonwealth, or

(b) a transitional instrument within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* of the Commonwealth.

"first entitlement period", in relation to a claim for compensation in the form of weekly payments made by a worker, means an aggregate period not exceeding 13 weeks (whether or not consecutive) in respect of which a weekly payment has been paid or is payable to the worker.

"maximum weekly compensation amount" means the maximum weekly compensation amount under section 34.

"second entitlement period", in relation to a claim for compensation in the form of weekly payments made by a worker, means an aggregate period of 117 weeks (whether or not consecutive) after the expiry of the first entitlement period in respect of which a weekly payment has been paid or is payable to the worker.

"suitable employment", in relation to a worker, means employment in work for which the worker is currently suited—

(a) having regard to—

(i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and

(ii) the worker's age, education, skills and work experience, and

(iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and

(iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and

(v) such other matters as the Workers Compensation Guidelines may specify, and

(b) regardless of—

(i) whether the work or the employment is available, and

(ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and

(iii) the nature of the worker's pre-injury employment, and

(iv) the worker's place of residence.

"work capacity assessment" means a work capacity assessment under section 44A.

"work capacity decision" —see section 43.

"worker with high needs" means a worker whose injury has resulted in permanent impairment and—

(a) the degree of permanent impairment has been assessed for the purposes of Division 4 to be more than 20%, or

(b) an assessment of the degree of permanent impairment is pending and has not been made because an approved medical specialist has declined to make the assessment on the basis that maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable, or
[Note: Paragraph (b) no longer applies once the degree of permanent impairment has been assessed.]

(c) the insurer is satisfied that the degree of permanent impairment is likely to be more than 20%,

and includes a worker with highest needs.

"worker with highest needs" means a worker whose injury has resulted in permanent impairment and—

(a) the degree of permanent impairment has been assessed for the purposes of Division 4 to be more than 30%, or

(b) an assessment of the degree of permanent impairment is pending and has not been made because an approved medical specialist has declined to make the assessment on the basis that maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable, or
[Note: Paragraph (b) no longer applies once the degree of permanent impairment has been assessed.]

(c) the insurer is satisfied that the degree of permanent impairment is likely to be more than 30%.

(2) Words and expressions in this Division that are defined in Schedule 3 have the meanings provided by that Schedule. The regulations may amend Schedule 3.
[Note: Definitions include **"current work capacity"**, **"current weekly earnings"** and **"pre-injury average weekly earnings"**.]

Subdivision 2—Entitlement to weekly compensation

33 Weekly compensation during total or partial incapacity for work

(cf former s 9 (1))

If total or partial incapacity for work results from an injury, the compensation payable by the employer under this Act to the injured worker shall include a weekly payment during the incapacity.

[Note: Chapter 3 of the 1998 Act (Workplace injury management) provides that, if a worker fails unreasonably to comply with a requirement of that Chapter after being requested to do so by an insurer, the worker has no entitlement to weekly payments of compensation for the period that the failure continues.]

36 Weekly payments during first entitlement period (first 13 weeks)

(1) The weekly payment of compensation to which an injured worker who has no current work capacity is entitled during the first entitlement period is to be at the rate of 95% of the worker's pre-injury average weekly earnings.

(2) The weekly payment of compensation to which an injured worker who has current work capacity is entitled during the first entitlement period is to be at the lesser of the following rates—

(a) 95% of the worker's pre-injury average weekly earnings, less the worker's current weekly earnings,

(b) the maximum weekly compensation amount, less the worker's current weekly earnings.

37 Weekly payments during second entitlement period (weeks 14–130)

(1) The weekly payment of compensation to which an injured worker who has no current work capacity is entitled during the second entitlement period is to be at the rate of 80% of the worker's pre-injury average weekly earnings.

(2) The weekly payment of compensation to which an injured worker who has current work capacity and has returned to work for not less than 15 hours per week is entitled during the second entitlement period is to be at the lesser of the following rates—

(a) 95% of the worker's pre-injury average weekly earnings, less the worker's current weekly earnings,

(b) the maximum weekly compensation amount, less the worker's current weekly earnings.

(3) The weekly payment of compensation to which an injured worker who has current work capacity and has returned to work for less than 15 hours per week (or who has not returned to work) is entitled during the second entitlement period is to be at the lesser of the following rates—

(a) 80% of the worker's pre-injury average weekly earnings, less the worker's current weekly earnings,

(b) the maximum weekly compensation amount, less the worker's current weekly earnings."

36. In *Wollongong Nursing Home Pty Ltd V Dewar* [2014] NSWCCPD 55 (*Dewar*), Deputy President Roche dealt with meaning of the phrases "no current work capacity", "current work capacity" and "suitable employment" in s 32A of the 1987 Act. More specifically the appeal concerned the challenge to the Arbitrator's finding in that case that the worker, whose treating general practitioner had certified her fit for suitable duties, had "no current work capacity" because, before employment can be viewed as "suitable employment", as defined in s 32A, there must be a capacity "which is at least potentially able to be realised for financial reward on the labour market". In that case, the worker was given light duties by her employer. Whilst that is not the case here, the Deputy President usefully outlines the approach that is to be taken when assessing a worker's capacity for employment in light of the 2012 amendments as follows:

“In light of the 2012 amendments, care must be exercised in relying on *Lawarra Nominees* and *Woods*. Under those authorities, the task of assessing whether a worker was wholly or partially incapacitated was a “practical exercise” that “involve[d] the assessment of a capacity ‘for work’ having regard to the realities of *the labour market in which [the worker] is to be engaged*” (Mahoney P at [30] in *Lawarra Nominees*).

This approach was consistent with the High Court’s decision in *Arnotts Snack Products Pty Ltd v Yacob* [1985] HCA 2; 155 CLR 171, where Mason, Wilson, Deane and Dawson JJ said (at 178) that “the concept of partial incapacity for work is that of reduced physical capacity, by reason of physical disability, for actually doing work *in the labour market in which the employee was working or might reasonably be expected to work*” (emphasis added).

It is the emphasised words in the two preceding paragraphs that have effectively been eliminated by the directions in s 32A that employment for which the worker is currently suited is determined “regardless of” whether the work or employment is “available” and regardless of whether it is “of a type or nature that is generally available in the employment market”. However, other aspects of *Lawarra Nominees* and *Woods* remain relevant in determining whether a worker is “suited” for suitable employment.

There is nothing in the context of the definition of suitable employment to suggest that “available” should be given anything other than its relevant dictionary meaning. The third meaning attributed to “available” in the *Shorter Oxford English Dictionary* (Oxford University Press, 6th ed, 2007) is “[a]ble to be used or turned to account; at one’s disposal; within one’s reach, obtainable”. Thus, just because the suitable employment the worker is able to perform is not “available” in the labour market in which the employee was working or might reasonably be expected to work does not justify a finding that the worker has no current work capacity.

However, while the new definition of suitable employment has eliminated the geographical labour market from consideration, it has not eliminated the fact that “suitable employment” must be determined by reference to what the worker is physically (and psychologically) capable of doing, having regard to the worker’s “inability arising from an injury”. Suitable employment means “*employment in work* for which the worker is currently suited” (emphasis added).

The word “employment” is not defined in the legislation. Its common meaning is “the state of being employed”. However, “worker” is defined. It means, subject to specified exclusions, “a person who has entered into or works under a contract of service or a training contract with an employer” (s 4 of the 1998 Act). In context, the phrase “employment in work”, in the definition of suitable employment, “in relation to a worker”, must refer to real work in the labour market. That is, it must refer to a real job in employment for which the worker is suited.

Therefore, the determination of whether a worker is “able to return to work in suitable employment” is not a totally theoretical or academic exercise and Mason P’s reference to the “eye of the needle” test may still be relevant in many cases. To use his Honour’s example, a labourer who is rendered a quadriplegic may well be able to perform tasks using only his voice. However, whether, under the new provisions, he or she would be found to have no current work capacity will depend on a realistic assessment of the matters listed at (a) and (b) of the definition of suitable employment. Depending on the evidence, it is difficult to see that work tasks that are totally artificial, because they have been made up in order to comply with an employer’s obligations to provide suitable work under s 49 of the 1998 Act, and do not exist in any labour market in Australia, will be suitable employment.

If the Arbitrator meant to say that Mrs Dewar's light duties with the Nursing Home were artificial in the sense referred to in the preceding paragraph, and therefore not suitable employment within the terms of s 32A, he did not properly explain how that was so. That is because the evidence about the light duties performed by Mrs Dewar was inconsistent and the Arbitrator did not resolve that inconsistency. In any event, even if it were accepted that the light duties were not "suitable employment" that did not relieve the Arbitrator of his obligation to apply the remaining provision of s 32A to determine if Mrs Dewar was able to return to work in suitable employment.

The determination of what is suitable employment is a practical exercise that is conducted "having regard to":

- a) the nature of the incapacity and the details provided in medical information;
- b) the worker's age, education, skills and work experience;
- c) any return to work plan, and
- d) any occupational rehabilitation services that have been provided to the worker.

However, without regard to:

- (a) whether the work or employment is available, that is, obtainable;
- (b) whether the work or the employment is of a type or nature that is generally available in the employment market;
- (c) the nature of the worker's pre-injury employment, and
- (d) the worker's place of employment.

Thus, the task requires the identification of whether there are any "real jobs" (*Giankos v SPC Ardmona Operations Ltd* [2011] VSCA 121 at [102]) which, having regard to the matters in sub-s (a) of the definition, the worker is able to do, regardless of whether those jobs are "available" (to the worker) or are "of a type or nature that is generally available in the employment market". The Arbitrator did not properly undertake that task and did not resolve the conflict in the evidence about the nature of the light duties Mrs Dewar performed (see [4] and [5] above).

In determining if a worker is "not able to return to work" in suitable employment there will often be issues about the suitability of the work in question. Such issues will be determined on a case-by-case basis, depending on the available evidence dealing with the issues in sub-s (a) of the definition. In the present case, the only evidence that addressed the issue, including the evidence from Mrs Dewar, was that she was fit for suitable employment, but with the restrictions noted by Dr Sherrell. Though the evidence of the kinds of jobs Mrs Dewar could now perform, given her present inability arising from her injury, was in a most unsatisfactory state, that did not relieve the Arbitrator from performing his statutory task.

The Arbitrator's reliance on s 35 does not assist. That section identifies the factors to be used to determine the rate of weekly compensation payable. Before one considers that section, one must determine whether the worker has a current work capacity. The words "the worker is able to earn in suitable employment" in s 35 do not govern the meaning of "current work capacity" or "suitable employment". Those terms are defined in s 32A.

If there is a current work capacity, that is relevant to calculating “E” (the amount to be taken into account as the worker’s earnings after the injury, where the worker is not employed), which is then used in the equations in ss 36(2) and 37(2) and (3). If there is no current work capacity, one looks to s 36(1) or s 37(1), depending on whether the claim is in the first or second entitlement period.

Thus, the words “the amount the worker is able to earn in suitable employment” in s 35 are not relevant to the preliminary question of whether a worker has a current work capacity. They are, however, relevant to determining the amount to be taken into account as the worker’s earnings after the injury where he or she is not employed. In assessing that amount, the reference to “the amount the worker is able to earn in suitable employment” is a reference to the amount the worker is able to earn in suitable employment, as that term is defined in s 32A.

I accept, as Mr Wilson has submitted, that Mrs Dewar has an incapacity, and that ss 36 and 37 provide the methodology for calculating the amount of weekly compensation payable. However, that does not mean that the phrases “current work capacity” and “no current work capacity” have no purpose other than to determine which of the subsections in ss 36 and 37 applies. Before getting to ss 36 and 37, there must be a determination of whether the worker has a “current work capacity” or “no current work capacity”. That is determined by reference to the definitions in s 32A.”

37. The question to be answered is whether Mr Perry has a “current work capacity” or no “current work capacity”. This is to be determined by reference to the definitions in section 32A.
38. Each case will of course turn on its own facts. Turning then to an examination of the evidence in this case.
39. Mr Perry gave evidence in a statement dated 19 June 2019. He gave evidence about his employment history after leaving school in year 11, working in labouring roles until obtaining a job as a linesman in 1989 with Ausgrid and it’s predecessors as follows:

“I left school in 1983 during Year 11 of high school.
My first job was as a labourer for a truck tyre re-treading company. I did that work for about 3 years.
My next jobs were lawn mowing and labouring roles. I did this work until about 1989.

Employment with Ausgrid (and its predecessors)

I commenced employment with Sydney Electricity on 26 June 1989. I transferred to Shortland Electricity on 4 February 1993 and my employment was transferred to various entities namely Orion Energy and Energy Australia and eventually Ausgrid. I worked as a linesman and I gained qualifications through in-house training for that role. I also obtained a truck driver's licence and I previously held a forklift truck licence.”

40. He gave evidence about the physical demands of his work as a linesman as follows:

“My work as a linesman was very physically demanding work and it included the following:

- a) Climbing power poles and ladders.
- b) Shovelling and digging including the shovelling of cement and concrete.

- c) Lifting and carrying heavy wooden extension ladders.
- d) Lifting, carrying and pulling heavy cables.
- e) Lifting and carrying heavy hardwood timber cross-arms which weigh 40 or 50 kgs. A lot of the lifting of cables and cross-arms was done standing on a ladder in awkward positions or alternative leaning out from the bucket of cherry pickers.
- f) I had to look up to inspect power poles and to observe and supervise lining inspection work.
- g) I had to lift and carry heavy tools and equipment including a tool bag which was around my waist.
- h) All of my work involved considerable strain upon my lower back, neck and knees.
- i) Use of sledgehammers.
- j) Climbing in and out of the buckets of elevated work platforms.
- k) Climbing in and out of trucks.”

41. Mr Perry took a voluntary redundancy on 4 July 2018. He gave evidence that in 2016 his work as a linesman had ceased at the direction of Ausgrid (and independent of any question of his capacity as a result of any injury and at the time in any event he was certified fit for full duties). This was two years prior to the voluntary redundancy and Mr Perry was placed by Ausgrid in a job seeking program as follows:

“My employment was terminated due to "voluntary redundancy" on 4 July 2018. For about 2 years prior to that date I, along with about 40 other employees, had to sit in an administrative building and carry out job seeking work to try and find an alternative position. Our roles as linesmen had become redundant but under the Award, there were no forced redundancies and for that reason, we were kept on at work but had no meaningful work to do. The Award was eventually changed and as from 4 July 2018, forced redundancies could be implemented. I, along with my other work colleagues, were put in a position where we had no real option but to take the voluntary redundancy. If we did not take the voluntary redundancy, there was a possibility that we would be put into meaningless jobs such as cleaning toilets. Most of us ended up taking the so-called voluntary redundancy because there was no realoption.”

42. Mr Perry gave evidence that, after he took the voluntary redundancy on 4 July 2018, his plan to look for a job after taking a break but this was precluded by severe neck and back pain. He gave evidence:

“My plan was to have a break and then start to explore employment opportunities but I have not been able to apply for work because my back and neck pains have become quite severe and I do not think that I can do any physical work at the present time.”

43. Mr Perry went onto give evidence about the treatment history that followed:

“In paragraph 8 above, I explained that the last 2 years of my employment with Ausgrid involved me (and my co-workers) sitting in an office for the purpose of carrying out job seeking activities. My role as a linesman was redundant. There was no meaningful work to do. I had to sit at work all day. The prolonged sitting caused the pain and aching in my back and neck to become worse. My neck and back problems were more manageable when I could move about and frequently change position. I put up with these problems.

In January 2018, I attended Charlestown Family Medical Services about my ongoing back problems and explained the difficulties that I was having with prolonged sitting. I was referred for and had a CT scan.

My employment was eventually terminated (July 2018); Ausgrid called it a voluntary redundancy but there was nothing voluntary about it; there was no job for me.

After my employment was terminated (July 2018), I tried to manage my back pain with exercise but the pain, aching and restriction of movement in my back did not improve.

In December 2018, I returned to Charlestown Family Medical Services about my ongoing back and neck problems. I was referred to Dr Simon Abson (Spinal Surgeon) to assess these problems.

My further treatment for my back has been as follows:

- a) Ongoing management by Charlestown Family Medical Services.
- b) Consultations with Dr Simon Abson (30 January 2019 and 13 February 2019).
- c) Exercise and swimming.
- d) Ausgrid agreed to pay for some physiotherapy including a further 8 sessions from 2 May 2019.

Since 17 December 2018 I have obtained workers' compensation certificates from Dr Stafford (GP) in relation to my back, neck/left shoulder and left knee injuries.

Dr Abson has recommended that I undertake physiotherapy and a core strengthening program. I would like to continue with that treatment recommendation.”

44. Mr Perry gave evidence that he has not been unable to look for work since taking the redundancy on 4 July 2018 for the following reasons:

- “1. I have been unable to look for work since July 2018 when my employment was terminated. I needed to give myself time to try to overcome my ongoing problems with my back and neck. I do not have the physical fitness to be able to do physically demanding work and I have not received retraining to go into a different occupation.

2. When I was going through the job seeking process prior to the termination of my employment, I started a horticulture course through "Oten". Work paid for the course but it was not really suitable for me because it was too physically demanding and inconsistent with the limitations of my injuries.
3. My present situation is that I cannot apply for work because I do not have the physical capacity to do physically demanding work. I have difficulty with prolonged sitting and standing and physically demanding work. All of my work experience is in my trade as a linesman; I do not have skills, training or experience to do anything else."

45. Mr Perry gave evidence about his ongoing symptomology as follows:

"My ongoing symptoms and disabilities include:

(a) Neck:

- Pain, aching and restriction of movement in my neck and left shoulder.
- The pain, aching and restriction in my neck and left shoulder is worse with heavy lifting and carrying, bending, sitting for prolonged periods, looking up and looking down for extended periods and keeping my head in a fixed position (such as looking at a computer screen).
- My neck movement is restricted and turning my head is difficult. I have trouble with turning my head while driving. I use my mirrors and avoid reverse parking.
- The pain extends from my neck to my left shoulder.
- Physical activity makes my neck pain worse.
- My sleep is disturbed because of my neck pain.

(b) Back:

- I have ongoing problems with pain, aching and restriction of movement in my back.
- The pain extends from my back to my legs at times and particularly with prolonged sitting.
- My back problems are worse with physical activity and with heavy lifting or carrying, bending, twisting, prolonged sitting, prolonged standing and walking long distances can be painful.
- I manage my back pain by alternating between sitting, standing and lying down and stretching.
- I usually swim and exercise in the pool; this gives me some relief from my back pain.
- My sleep is disturbed by my back pain and the pain usually wakes me up 3 or 4 times each night.
- I take Panadol Osteo for pain relief and I take anti-inflammatory medication when my back is bad.

(c) Left knee:

- Pain, aching and restriction of movement in my left knee.
- I have difficulty with stairs and uneven terrain.

- My left knee gives way with pain at times and when this happens, my knee pain becomes worse.
- I can no longer climb ladders.”

46. Mr Perry gave evidence as follows:

“I would like to get the dispute about my workers' compensation claim resolved and go ahead with the physiotherapy and core strengthening program which has been recommended by Dr Abson. I will also need help with rehabilitation and retraining. I worked in the one job for 29 years and I do not have any current qualifications or experience to work in another role. I would like to work on core strengthening and once that is achieved, I would like to focus upon finding a suitable job. I do not think that I currently have the physical fitness to work in any role where I am required to do manual handling tasks or tasks requiring bending, twisting, prolonged sitting, prolonged standing, kneeling, squatting, looking up or down, keeping my hand in a fixed position (such as looking at a computer screen). I need a flexible workplace where I can vary my posture as required and lie down when I need to relieve my pain. I do not know what type of job that I can do with my restrictions.”

47. Mr Perry says in his statement dated 18 June 2019 that he has been obtaining medical certificates since December 2018 however with the exception of the four medical certificates referred to below covering a limited period of the claim, ongoing medical certificates have not been put in evidence and counsel for Ausgrid specifically put to me in submissions that there were no medical certificates after April 2019. Counsel for Mr Perry made submissions in reply but did not address this point. There are no medical certificates in evidence after April 2019. There are four medical certificates dated 7 December 2018, 30 January 2019, 4 March 2019 and 1 April 2019. The first three certify that Mr Perry has no current work capacity. The certificate dated 1 April 2019 covers the period 1 April 2019 to 8 May 2019 certifies that Mr Perry has a current work capacity for suitable employment for four hours per day three days per week, that is, 12 hours per week. This certificate expired on 8 May 2019 and there are no certificates in evidence after that date which cover the period of the claim which runs from 5 July 2018 to date and continuing. Nor are there any certificates which cover the period prior to 7 December 2018, noting the claim runs from 5 July 2018. Workcover medical certificates are not determinative of a claim. They are evidence which must be weighed in the balance with all the other evidence in the case, including the specialist medical evidence.
48. It is clear on the evidence from Mr Perry that Mr Perry considers he has no capacity for employment. This is not determinative of the matter. I must have regard to the totality of the evidence including the medical evidence and the specialist medical opinions and weigh all the evidence in the balance to determine, on the balance of probabilities, whether Mr Perry has no current work capacity or whether he has a current work capacity.
49. Mr Perry's treating GPs (principally Dr Fekerty but also on occasion Dr Stafford) are from Charlestown Family Medical Services. There is a report from Dr Elaine Stafford of this practice dated 10 January 2019. This report was provided in response to a request from Ausgrid. The report is filed in evidence in Mr Perry's case. Dr Stafford answers a series of questions comprehensively with reference to the clinical records. Dr Stafford notes that she has “closely read all correspondence available within the practice including hand written and computerised notes dating back to 1998, nothing is available prior to this. I have completed this report as my colleague Dr Susan Feketey has been on leave and I have previously been involved in Mr Perry's care.”

50. Dr Stafford details various consultations since 1998 (when the practice records commence) in relation to the back, neck and left knee resulting from workplace injury. As injury is not in dispute, I need not repeat the detail of that evidence. On each occasion Mr Perry returned to full duties. It is clear on the evidence from the GP that Mr Perry was certified fit for full duties at the time he commenced the retraining program in 2016. That certification did not change prior to the voluntary redundancy on 4 July 2018. However, it is the opinion of neurosurgeon Dr Spittaler, the IME qualified on behalf of Ausgrid, that Mr Perry was not fit for his pre-injury duties at the time of the redundancy. On this basis counsel for Ausgrid properly made the concession that Mr Perry was incapacitated for his pre-injury employment as a linesman for all relevant periods of the claim which commences from 5 July 2018.

51. Dr Stafford outlined Mr Perry's presentation on 28 January 2018 as follows:

"28/1/2018 Stephen presented with low back pain extending to both upper buttocks similar to previous episodes, worse when sitting, Stephen described pain when carrying shopping. He was taking Panadol osteo for pain, doing daily exercises as he had been taught by prior physiotherapy. Examination revealed extension causing pain, straight leg raises to 80 degrees bilaterally, normal reflexes. CT lumbar spine was arranged which showed mild to moderate intervertebral disc degeneration at all levels, worst at L1/2, L2/3, no narrowing or nerve compromise."

52. Dr Stafford outlined the detail of Mr Perry's next presentation which was not until almost the end of the year in December 2018 as follows:

"Seen again on 4/12/2018 and referred to back specialist Dr Simon Abson and this appointment has not yet taken place. 07/12/2018 Stephen presented for completion of Workcover paperwork."

53. Dr Stafford saw Mr Perry on 2 January 2019 for the purpose of her report and she records the history of symptoms described by Mr Perry as follows:

"02/01/20 19 seen by myself to request this report. On that occasion I found that his current level of function was that lifting and bending cause pain which radiates down both legs and around the hips and this is exacerbated by prolonged sitting or walking, relieved by lying down and stretching, swimming helps. Stephen uses resistance bands for stretching, uses heat for relief. He takes NSAIDs and panadol osteo for pain relief, his sleep is affected by pain, he wakes 3-4 times at night to get up"

54. Dr Stafford notes that Mr Perry medication regime for the conditions is confined to the following:

"Medication for these conditions have only consisted of simple anti-inflammatory and paracetamol".

55. Dr Stafford is asked to the degree of capacity for each condition of the neck, back and left knee. She opined as follows:

"Capacity

A full work medical was conducted at this practice by Dr S Feketey on 1st March 2016 at which time Mr Perry was cleared for work with full duties at this occasion it included examination of left knee, cervical spine and lumbar spine with movements described as normal. At this examination Stephen disclosed ongoing low back, neck and left knee pain. The next examination of Stephens back occurred on 28/11/2018 whereby

it was found tilt at forward flexion induced pain and he could straight leg raise bilaterally to 80 degrees. I examined Stephen on 02/01/2019 and my findings were that his knee range of motion was normal but full extension caused pain, he had some limitation of neck movement when looking upwards and also on turning to left or right. He had some tenderness over the upper lumbar spine and could straight leg raise to 70 degrees bilaterally, his lower limb reflexes were intact, his gait was normal.

Stephen describes his pain as affecting his sleep, he will wake 3-4 times at night, he gets flare of neck pain when hammering or using a vibrating tool, he has chronic back pain worsened by bending or lifting and this pain will radiate to his hips and down both legs, prolonged sitting also exacerbates, he finds relief with lying down, walking also exacerbates but swimming provides some relief.

Mr Perry's capacity to work would depend upon the nature of the job involved, with regards to his back pain he would need to avoid prolonged walking, sitting or standing, have limitations to the weight he could lift. For his knee pain he would benefit from taping of the knee and avoiding excessive use of stairs. For his neck pain he would need to avoid repetitive hammering/ vibratory tool use or prolonged posturing of the neck to look upwards."

56. I note that Dr Stafford has provided a comprehensive report on the basis of a thorough review of the clinical notes. She has the benefit of conducting her own examination on 2 January 2019 for the purposes of the report. She does not consider that Mr Perry has no current capacity for work or is totally unfit for work. She does note that there are some restrictions upon his capacity as set out above. She does not take the opportunity to place restrictions on the number of hours Mr Perry could work each week.
57. Dr Stafford was asked "what treatment/management plan have you developed to assist with Mr Perry's recovery?" and she answered as follows:
- "On 28/11/2018 Stephen was assessed and a WorkCover certificate of capacity was issued along with a referral to a spinal specialist Dr S Abson. On 02/01/2019, I assessed Stephen solely for the purpose of this report. Currently there are no plans for physiotherapy although this may be beneficial for the purpose of the back pain and neck pain. Stephen self reportedly does regular exercises as previously prescribed by physiotherapist, he may also benefit from a further pilates programme. We are waiting on the assessment with Dr Abson."
58. Dr Stafford was asked "What are your initial thoughts about return to work time frames? When do you envisage the above named could return to pre-injury duties? And she answered as follows:
- "Stephen has managed to return to full capacity following each exacerbation of back pain/ neck pain/ knee pain. With appropriate management it is possible he could return to pre-injury duties although less likely as it involves many of the tasks that exacerbate his pain. I would envisage that the time frame would now be in the order of months not weeks and will be dependent also on the outcome of his specialist review."
59. Further on the question of capacity, Dr Stafford was asked "You have certified Mr Perry with reduced capacity. What has contributed to this, noting he was fit for pre-injury duties prior to leaving Ausgrid and has not worked for us since July 2018?" and she answered as follows:

“The certificate of capacity was issued by my colleague Dr S Feketey so I do not presume to account for her and this question would be best addressed to Dr Feketey however I will say that Stephen has informed me that he has had a worsening of his back pain since May 2018, he was seen at another medical centre in June and given some time off. I do not have this correspondence.. On assessment here he had pain and his current level of function was that he had ongoing pain which affected his sleep and meant that he couldn’t do any activity prolonged, including sitting/standing/walking.”

60. Finally, Dr Stafford is asked: “We note Mr Perry was certified fit for pre injury duties on February 2011 for the last claim he has had with Ausgrid (lower back strain) and the claim was finalised. He subsequently took a redundancy and left Ausgrid on 7 July 2018. We are unsure of his employment history since leaving Ausgrid. Can you please detail your reasoning for linking Mr Perry’s recent injuries/ recurrence back to his employment and or workers compensation claims with Ausgrid, considering it has been over seven years since Mr Perry was certified fit for pre injury duties?” She answered as follows:

“My understanding is that Stephen has not been employed since taking redundancy. As stated, above Mr Perry tells me his back pain flared prior to leaving employment with Ausgrid although he was not seen here at the initial time of that flare so I do not have documentation of this. At this stage the reasoning stems from the flare occurring whilst he was still employed and secondly that the initial injuries occurred as part of working duties and low back pain is known to be a problem that can flare as can the cervical spine pain. Stephen has chosen to self-manage his pain with utilising exercise/ stretches and heat packs so that whilst the problem may remain present, he has not necessarily sought medical assessment.”

61. Mr Perry has seemingly, on the evidence before me, not sought ongoing medical treatment at the hands of his GP and it is noted that there are no medical certificates in evidence which cover the period of claim after April 2019.
62. Mr Perry was referred by his GP Dr Fekerty to Dr Abson, spinal surgeon. Dr Abson reported back to the GP on 30 January 2019 as follows:

“Thanks for referring Stephen regarding his neck and back pain.

ISSUES:

1. Acute on chronic midline axial back pain with recent exacerbation in July of 2017.
2. Acute on chronic cervical neck pain with some radicular pattern into the left shoulder not fitting in the dermatomal distribution.
3. Intermittent lateral thigh pain worse with sitting. The pain in his back and his legs is approximately 50 percent in each.

PLAN:

1. Whole spine bone scan looking for areas of inflammation or any underlying pathology given that he has had 6 months of severe pain
2. A standing lumbar spine x- ray throughout the spondylolisthesis given the hamstring tightness.

Stephen has recently been made redundant in July last year after having long term issues with his lower back and spine . The pain has always been in the middle of his neck with some radiation down in to the left shoulder with no radicular pattern. In the lower back he has had chronic pain which he managed at home by himself. This was again exacerbated late last year and he was required to stop normal duties. Eventually he was made redundant and hasn't worked since. He has recently been diagnosed with depression and started on some medications however he can't recall the name of that. He has tried Panadol Osteo for his pain. He did have some Naprosyn but was taking it very regularly and ended up with stomach ulcers. On examination he has got completely normal myotomes and dermatomes, reflexes are brisk and symmetrical. Lumbar spine CT shows only mild degenerative changes at L4/ 5 and L5 / S1 but certainly nothing to explain his symptoms.

I have reassured Stephen that I think this is mainly musculoskeletal pain in the neck and the back and it usually responds to isometric exercises and core strengthening and I have given him a letter for his physiotherapist today. Due to the longevity of his symptoms and severity I have arranged for a bone scan as well as a standing x-ray to make sure that there is no underlying pathology of a rarer nature that we are missing.”

63. I note that the subsequent bone scan was reported to be normal. In this regard Dr Abson reported to the GP by letter dated 13 February 2019 as follows:

“Stephen had some great news today in that his bone scan has come back completely normal with no underlying pathology to explain his pain or to be of concern. His standing x- ray shows a mild spondylolisthesis at L5/S1 but this has probably been there since birth.

Moving forward I have reiterated to Stephen that he has got mechanical back pain which is best treated with exercise physiology and core strengthening. It may take 12 months for him to notice a benefit of 50 percent but surgery certainly isn't indicated.

I have discharged him from my care but if there are any changes or concerns please feel free to let me know.”

64. I note that Dr Abson was providing a treating doctors report and was not asked to provide an opinion specifically on capacity. However, it is evidence, at least in respect of the back, that the back pain is considered to be mechanical, the treatment options recommended are conservative and surgery is not indicated. Dr Abson does not take the opportunity to profer an opinion that Mr Perry should restrict any activity including any activity that would be associated with employment.
65. Dr Kleinman saw Mr Perry at the request of his lawyers on 23 July 2019 and he provided a report of the same date.
66. Dr Kleinman referred to the fairly extensive list of documents he reviewed including his own treating reports back in 2001 and the radiology prior to 2009. He also had the more recent material which then dates from 2018, including Mr Perry's statement as follows:

“Dr Alexander Miteff, Radiologist, Report on CT Scan of Lumbar Spine, dated 29/11/2018.

Dr Elaine Stafford, General Practitioner, Report, dated 10/01/2019.

Dr Simon Abson, Spinal Surgeon, Letter, dated 30/01/2019.

Dr Kirk Brown, Radiologist, Report on X-Ray of Lumbar Spine, dated 04/02/2019.

Dr Demetrius Voutnis, Radiologist, Report on Bone Scan, dated 04/02/2019.

Dr Simon Abson, Spinal Surgeon, Letter, dated 13/02/2019.

Mr Stephen Perry, Claimant, Statement, dated 19/06/2019.”

67. Dr Kleinman took a work history consistent with the other evidence before me as follows:

“After he left school halfway through Year 11 of High School.

After he left school he obtained employment a labourer with a tyre re-treading company and worked for the company for three years.

He then worked in lawn mowing and labouring roles until 1989.

In June 1989 he obtained employment with Sydney Electricity. He was subsequently transferred to work for Shortland Electricity in February 1993 and he has worked for various other entities. At the time of his injuries at work he was employed as a linesman by Ausgrid. His duties as a linesman involved climbing power poles and ladders, shovelling and digging, lifting and carrying heavy weights, using a sledgehammer, frequent looking up to inspect power poles and observe and supervise lining work, climbing in and out of buckets of elevated work platforms and climbing in and out of trucks. He took a voluntary redundancy from Ausgrid on 04/07/2018. He says that for about seventeen months prior to this he was put into a room where he sat at a desk until he took a redundancy package. He has not returned to work since then.”

68. Professor Kleinman noted present treatment is limited to:

“He takes 2 tablets of Panadol Osteo, 3 times a day and he rubs Diffiam Gel on his neck for pain relief.

He attends a gymnasium.”

69. Professor Kleinman records Mr Perry’s present complaints as follows:

“He has ongoing pain in the back of his neck.

He has limitation of the extremes of movement in his neck.
If he works with his neck in extension, his neck becomes painful.

He says that he gets pain in his left shoulder if he flexes and extends his cervical spine. This is pain radiating from his neck and not pain arising from the shoulder.

He still gets pain behind the patella of his left knee.

When going up or down stairs he gets a feeling of insecurity in his left knee but his left knee never actually gives way underneath him.

He sometimes gets an episode of pseudo locking of his left knee when he lifts up his left leg because his left knee is painful and he cannot move it.

He has difficulty using stairs.

He can kneel on his left leg if he hangs onto something like the edge of the table and he has to hang onto something to help push himself up again.

He can only do a half squat.

When he sits for prolonged periods he gets what he calls hip pain but he indicates the pain as being in the anterolateral thigh region in both legs”

70. Professor Kleinman recorded restrictions on the activities of daily living as reported by Mr Perry as follows:

“At home his wife does all of the housework.

If there are any repairs or handiwork to be done around the house, he has to employ someone to do them.

His wife and son do all of the shopping.

He is able to dress and undress himself, although he has some difficulty putting on his shoes and socks.

His wife and son mow the lawns and do the gardening.

He used to play golf but he has not played golf for about two or three years because of his back and neck.

He is a recreational fisherman but he now only occasionally goes fishing. He has a boat which he cannot use because it is too hard on his back so he now occasionally fishes off a friend's boat.

He and his wife walk for about five kilometres every day on the flat in Charlestown.”

71. I note that on the history given to Professor Kleinman Mr Perry is able to and does walk for 5 kilometres each day on flat ground.

72. Professor Kleinman conducted a thorough physical examination and recorded his findings as follows:

“On examination, he is a pleasant, rather withdrawn man who appears to be in good physical condition. He is 182 centimetres tall and weighs 89.5 kilograms.

Pressing down on the vertex of his skull does not aggravate the pain in his back. Twisting his trunk on his hips from side to side does not aggravate the pain in his low back.

He is able to get on and off the examination couch without difficulty.

All movements were conducted in an active manner by Mr Perry. Where passive movement has been induced it has been recorded in the examination findings. No passive movements were performed beyond the limits of comfort.

On examination of his neck, his neck is stiff. He has virtually no cervical flexion beyond neutral. He has about three quarters of the normal range of cervical extension and 50 degrees of left and right lateral rotation of his cervical spine.

There is no spasm in the muscles of his cervical spine.

He is tender to palpation in the midline, just above the vertebra prominens, at about the level of C5/6.

There is no tenderness to palpation of the facet joints of his cervical spine.

He has brisk biceps, triceps and supinator reflexes in his upper limbs.

Power and sensation in his upper limbs is normal.

On examination of his back, he has no obvious deformity in his lumbar spine.

He can flex his back until his fingers are about three quarters of the way down his shins.

He has equivalent loss of lumbar extension and three quarters of the normal range of left and right lateral lumbar flexion.

He complains of slight tenderness on palpation at the L5/S1 interspace.

Straight leg raising is 90 degrees bilaterally short sitting, long sitting and recumbent.

He has brisk medial hamstring jerks bilaterally, brisk knee and ankle jerks and bilateral flexor plantar responses in his lower limbs.

Sensation in his lower limbs is normal. Muscle power in his lower limbs is normal.

There is no muscle wasting in his lower limbs.

On examination of his right lower extremity, he has a full range of movement in his right hip.

He has a negative Trendelenburg test in his right hip.

He has a negative Thomas' test in his right hip.

On examination of his left lower extremity, he has a full range of movement in his left hip.

He has a negative Trendelenburg test in his right hip.

He has a negative Thomas' test in his right hip.

He has a full range of movement in his left knee.

He has very faint patella-femoral crepitus on motion of his left knee. He does not have an effusion in his left knee.

The patella-femoral joint of his left knee is stable. He has a negative Apley's grinding test.

The cruciate and collateral ligaments of his left knee are stable”

73. Professor Kleinman noted he reviewed the radiological investigations made available to him on the day of examination.

74. Professor Kleinman made the following diagnosis:

“He has one level of degenerative change in his cervical spine which has been aggravated by the nature and conditions of his work, particularly the incidents on the 11/11/1999, 11/05/2004 and the 23/04/2007.

He has pain in his left shoulder which is due to referred pain from his neck.

He has non-specific back pain.

He is complaining of pain in his hips but on consultation today I can find no clinical signs of any abnormality in his hips or thighs.

He has early degenerative change in the patello-femoral joint of his left knee.

The degenerative in the patello-femoral joint of his knee could have been aggravated by the nature and conditions of his work as a linesman.”

75. Professor Kleinman was specifically asked to address the issue of Mr Perry's fitness for work and he answered the following questions about incapacity for work:

"a) Your opinion as to whether, as a result of the subject injuries, the patient is incapacitated for and unable to return to his pre-injury employment as a linesman.

He is not fit to return to his pre-injury employment as a linesman.

b) Your opinion as to the nature of the patient's incapacity for work and the ongoing restrictions arising from the subject injuries (including restrictions as to walking, standing, bending, lifting/carrying, pulling/pushing, stairs, climbing, driving, physical activity and limitations as to hours which are appropriate to manage the injuries and its effects.

He is not fit to return to any occupation which involves working with his neck in the extremes of flexion and extension, lifting and carrying more than ten kilograms or ascending, descending ladders and poles and repeated squatting and kneeling."

76. I note that it was not disputed by counsel for Ausgrid that Mr Perry is unfit for his pre-injury employment as a linesman. Counsel for Ausgrid said he would not submit to the contrary because such a submission is not supported by the medical evidence including the opinion of Dr Spittaler, the IME qualified on behalf of Ausgrid whose opinion on this point accords with that of Dr Kleinman. This was a concession properly made on the evidence by counsel for Ausgrid.

77. I note that Mr Perry seeks a finding that he is totally incapacitated for employment or that he has no current capacity for employment. Professor Kleinman is the IME qualified on behalf of Mr Perry. Professor Kleinman has taken a detailed history (including work history, history of injuries, effect of activities of daily living) consistent with the other evidence. He conducted a thorough physical examination. He reviewed the radiological evidence. He has reviewed the extensive list of documentation provided to him, including a review of Mr Perry's statement of evidence dated 19 June 2019 which is the statement relied on in these proceedings. On the basis of such a thorough review, Professor Kleinman comes to his opinion about Mr Perry's capacity for employment. Professor Kleinman does not consider that Mr Perry is totally incapacitated for employment or that he has no current capacity for employment. Dr Kleinman sets out the restrictions on Mr Perry's capacity. Professor Kleinman does not restrict the hours per week which Mr Perry could work.

78. Mr Perry is supported by the opinion of Dr Spittaler, neurosurgeon, who was the IME qualified on behalf of Ausgrid. Dr Spittaler supports Mr Perry on injury (now not in dispute as counsel for Ausgrid has made proper concessions on the evidence) and that he is unfit for pre-injury employment (now not in dispute as counsel for Ausgrid again made proper concessions on the evidence).

79. Dr Spittaler has provided reports dated 22 March 2019 and 10 September 2019.

80. Dr Spittaler saw Mr Perry at the request of Ausgrid on 22 March 2019 and provided a report the same day.

81. Dr Spittaler took a history of Mr Perry's "present complaints" as follows:

"Mr Perry tells me that whilst working for Shortland Electricity in 2001, he was hitting a pin used to stabilise a telegraph pole with a sledge hammer when he developed neck and left shoulder pain. This continued although at a reasonably manageable level until the patient underwent a "neck block" he thinks in 2007 which reduced his symptoms. Soon

after this however he walked into a ladder which was secured to the back of a truck and hit his hard hat. This led to a recrudescence of his neck pain which over the years persisted although he continued working on his usual duties. He told me however that his mates tended to do the heavier work to protect him. There have been no other injuries other than the two outlined above. Mr Perry told me his current symptoms are of neck pain radiating into the left shoulder. He does not have any arm pain.

The patient also told me of a back injury which occurred in 2009 when he was pulling cables. This was treated with physiotherapy and improved but recurred in 2010 when he was bending at work. Again, he was treated with physiotherapy and his symptoms resolved although he has had intermittent lower back pain but no specific incident since this time.

The patient told me that his symptoms recurred in about May 2018 due to sitting in what he described in a non-ergonomic chair for long periods presumably in the "Career Transition Centre" you refer to in your letter of instruction. The sedentary period of Mr Perry's employment led to a worsening of his back pain but not necessarily his cervical symptoms which appear to have been at a reasonably low level since the frank injuries described.

Mr Perry told me that his current treatment is physiotherapy which he has second weekly. He also uses heat bags and swims and walks, in other words self-directed exercise. He takes anti-inflammatories and Panadol Osteo. He saw a spinal surgeon, Dr Abson about two months ago who did not recommend surgery."

82. Dr Spittaler conducted a physical examination of the lumbar and cervical spines the results of which he recorded as follows:

"On examination on 22 March 2019, the worker appeared the stated age. He was well tanned and had a full beard which was fairly close cropped. Flexion and extension of the cervical spine were very limited due to complaints of cervical pain in the posterior cervical spine in about the mid-cervical level. No movement produced any arm symptoms. Lateral flexion was less limited. The neurological examination of the upper limbs was normal.

On examination of the lumbar spine, flexion and extension were both full but the patient complained of some lower back pain at the extremes of both movements. The lower limb neurological examination was normal. There was no lumbar tenderness."

83. Dr Spittaler reviewed the available radiological investigation as follows:

"Mr Perry brought a number of investigations for review. Firstly, he had an MRI scan of the cervical spine performed by Hunter Imaging Group at East Maitland at the request of Dr Leon Kleinman, an orthopaedic surgeon. This was performed on 3 August 2001 and demonstrates degenerative change with some left C5/6 foraminal stenosis. A plain x-ray of the cervical spine performed at the request of Dr Angus Feketey on 26 April 2007 demonstrates degenerative change at C5/6 with loss of disc height and some mild osteophyte formation.

A CT scan of the lumbar spine performed by Hunter Imaging Group on 17 July 2009 demonstrates a minor L5/S1 disc bulge. A bone scan performed at the request of Dr Abson in February of this year is to my eye essentially normal as is plain lumbar x-rays (EOS) also performed in February of this year. The sagittal balance to my eye looks reasonably good.

In summary, there is evidence of cervical disc degeneration at C5/6 with some foraminal stenosis which is asymptomatic in the absence of arm pain but no canal stenosis. There is also evidence of lumbar disc degeneration.”

84. Dr Spittaler made the following diagnosis:

“The condition is cervical spondylosis/disc degeneration and lumbar spondylosis/disc degeneration.”

85. Dr Spittaler opined on “causation” as follows:

“My understanding of Mr Perry' s work duties is that they were heavy and physical requiring prolonged neck extension looking up at poles as well as bending and lifting. On this basis, coupled with the history of specific injuries outlined and the absence of any other risk factors such as obesity, cigarette smoking or diabetes, I think it is more likely than not that Mr Perry's long term heavy physical employment with Ausgrid and its predecessor was responsible for bis cervical and lumbar pathology. I think it is unlikely that Mr Perry would have the symptoms and condition he has now if he had not performed the heavy physical work referred to above.”

86. I note that counsel for Ausgrid has made proper concessions on the evidence and injury is not disputed and is not part of my determination as I have only been asked to determine the question of capacity.

87. Dr Spittaler specifically addressed the question of capacity as follows:

“Fitness for Work

I think it is very likely that Mr Perry will escalate his lumbar and cervical symptoms if he performs the duties of a linesman. If one considers his history in somewhat more detail it is apparent that he was not really performing preinjury duties prior to leaving the employment of Ausgrid. On the other hand I think the patient would be fit for more sedentary work although he would need to seek work where he was not bending and lifting repetitively or frequently and where he did not have his neck flexed or extended for long periods as this would lead to a worsening of his cervical and lumbar symptoms.

Finally, a comment regarding the nexus between his symptoms and Mr Perry's work. I do not consider from his history that he was truly fit for preinjury duties when he left Ausgrid. I have formed this opinion when considering the history provided by the patient.

I think it is unlikely that Mr Perry will have a worsening of his symptoms unless he performs heavy work particularly bending and lifting. I think, however, unfortunately that full recovery is unlikely.”

88. Dr Spittaler has taken a detailed history, conducted a thorough physical examination, reviewed the radiological investigations. After this thorough review, Dr Spittaler does not come to the opinion that Mr Perry is totally unfit for work. Dr Spittaler's opinion does not support a case for total incapacity or no current work capacity as a result of the work injuries to the neck and back. I note further that Dr Spittaler places no restrictions on Mr Perry's capacity to work full time hours in some suitable employment within the restrictions outlined by him, that is, the avoidance of heavy work.
89. Dr Spittaler provided a further report at the request of Ausgrid's lawyers on 10 September 2019. He is asked: "Could you please comment on Mr Perry's fitness for work and whether you feel in light of his new evidence anything has changed with your view on his capacity, duties he is capable of performing and the reason for his current symptoms. Of note, how was he able to work so many hours in overtime when he is claiming he was not fit to perform this work." Dr Spittaler answered as follows:
- "I don't know that the duration of the work rather than the nature of the work, in other words whether it was truly heavy and physical and whether Mr Perry performed these duties is really the issue here. In the correspondence to you dated 22 March 2019, on the first page "present complaints" I have recorded that Mr Perry that "his mates tended to do the heavier work to protect him". If this history is true, then I don't see that there would be any issue with Mr Perry doing these more limited (although according to his certification or employer not restricted) duties. Regarding the certification for pre-injury duties, I have also expressed my opinion that I think it was inaccurate to state that the worker was truly fit for his normal duties. From his history, examination and investigations it would be my expectation that the worker would have significant cervical and lumbar symptoms if he performed heavy work or extended his neck upwards for long periods."
90. Again, Dr Spittaler has opined that it is heavy work that Mr Perry needs to avoid. He does not opine that he can't work at all or that his hours of work should be restricted.
91. As set out above, there is certification (three certificates) from the GP Dr Fekerty that Mr Perry has no current work capacity which cover the period from 7 December 2018 to 6 March 2019. There is no GP certification for the relevant period prior to this date (5 July 2018 to 6 December 2018). This certification is one piece of evidence that must be weighed in the balance with the other evidence in the case. It represents an unexplained medical opinion. It is not consistent with the opinion of the treating specialist Dr Abson who reported back to the GP on 30 January 2019 as set out above. It is not consistent with the opinion of the GP Dr Stafford who saw Mr Perry on 2 January 2019 and examined him for the purpose of her report dated 10 January 2019 as set out above. Nor is it consistent with the opinions of the IME's qualified for both Mr Perry and Ausgrid who don't express the opinion that Mr Perry has been unfit for work.
92. There is then one certificate only, which is dated 1 April 2019 and covers the period 1 April 2019 to 8 May 2019 which restricts the hours Mr Perry can work to four hours per day three days a week (a total of 12 hours). There is then no GP certification after April 2019. The certification by the GP for the period must be weighed in the balance with the other evidence. It is at odds with the opinions of the IME qualified on behalf of Mr Perry Professor Kleinman who does not consider Mr Perry is totally unfit and at odds with the opinion of the IME qualified on behalf of Ausgrid Dr Spittaler who also is expressly asked to consider capacity for employment and does not consider that Mr Perry is totally unfit for employment.
93. Mr Perry's primary case that he is totally incapacitated for employment, or more strictly speaking that he has no current work capacity, for all relevant periods of the claim from 5 July 2018 to date and continuing is not supported by the weight of the medical evidence and other evidence.

94. This means that Mr Perry must rely on a finding that he is effectively totally incapacitated (in the words of his counsel) or more strictly speaking that he has effectively no current work capacity for work by reason of the restrictions and his age, educational and occupational experience.

95. As Deputy President Roche said in *Dewar*:

“The determination of what is suitable employment is a practical exercise that is conducted “having regard to”:

- a) the nature of the incapacity and the details provided in medical information;
- b) the worker’s age, education, skills and work experience;
- c) any return to work plan, and
- d) any occupational rehabilitation services that have been provided to the worker.

However, without regard to:

- (a) whether the work or employment is available, that is, obtainable;
- (b) whether the work or the employment is of a type or nature that is generally available in the employment market;
- (c) the nature of the worker’s pre-injury employment, and
- (d) the worker’s place of employment.”

96. The medical evidence is clear that Mr Perry must avoid heavy work. He is 50 years old having left school in year 11. Whilst he has performed manual work over the years, including as a linesman with Ausgrid, he has also had the requisite skills to obtain a forklift licence and truck drivers licence. In other words, he is not without skills that are transferable to other employment.

97. Counsel for Mr Perry submitted that if he was unsuccessful in obtaining a finding of total incapacity or no current work capacity, then I should find that his capacity to earn would be limited to low paying work at \$20 per hour. He did not submit on what this work would be. He said this would equate to a capacity to earn of \$250 per week. This seemed to be based on the limitation of 12 hours per week provided for in the Workcover certificate of 1 April 2019 and not repeated in any subsequent certification because there is none before me. For the reason set out above, the weight of the evidence does not support a limitation on capacity to work full time hours.

98. I note there has been no evidence such as a vocational assessment or labour market analysis which might assist a determination of what jobs Mr Perry could do and what the rates of earning would be.

99. Counsel for Mr Perry said he could do low paying work at \$20 per hour. This would equate to \$760 per week for a 38 hour week.

100. Counsel for Ausgrid referred to Mr Perry having the capacity to earn in a job that would pay at least the minimum wage. He specified this to be \$790 per week according to his recollection from a “few weeks ago”. According to Fair Work the national minimum wage rate is \$19.49 per hour or \$740.80 per week for a 38 hour week.

101. Counsel for Ausgrid went onto submit that Mr Perry could work at Bunnings or that he could be a light courier driver and that he can't imagine a truck driving working for less than \$60,000 a year. He submitted Mr Perry could earn between \$55,000 and \$60,000 per year in some suitable employment. There was no evidence to support these figures. Counsel for Ausgrid went on to submit that Mr Perry could earn between \$1000 and \$1500 per week when he was doing the calculations under section 36 and section 37. I note that the top end figure of \$1500 per week suggested by counsel for Ausgrid in fact equates to \$78,000 per annum. Again I note that there was no evidence tendered that supports the wage rates nominated by counsel for Ausgrid.
102. All of the earnings suggested by counsel for Ausgrid that Mr Perry could earn in some suitable employment result in an award of weekly compensation for the section 36 period from 5 July 2018 to 4 October 2018. Earnings at the minimum wage rate, earnings between \$55,000 and \$60,000 per year and earnings of \$1000 per week (all as submitted by counsel for Ausgrid) result in an award of weekly compensation to Mr Perry in the period covered by section 37. Only the earnings of \$1500 per week (as suggested by counsel for Ausgrid) would result in no award under section 37 from 5 October 2018. As I said earnings of \$1500 per week equate to \$78,000 per year which is much higher than the upper limit of \$60,000 that counsel for Ausgrid was suggesting Mr Perry could earn in some suitable employment.
103. Whilst counsel for Ausgrid submitted that Mr Perry could work full time as a light truck driver for example as a courier, I am not satisfied on the evidence that his restrictions as supported by the opinions of Professor Kleinman and Dr Spittaler would allow this as it would involve Mr Perry climbing in and out of the truck on a repetitive basis.
104. I am however satisfied that having regard to the nature of Mr Perry's incapacity and the medical evidence which I have considered in detail as set out above and his age, education, skills and work experience, that Mr Perry has a current work capacity and hat he could earn in some suitable employment which utilised his transferable skills such as forklifting driving and truck driving on an occasional basis, for example, working in Bunnings or other hardware stores, the retail side of a light industrial business or landscaping centre. Employment in these occupations according to Fair Work earn below what Counsel for Ausgrid submitted could be earned and again I note no evidence was tendered to support wage rates nominated by Counsel for Ausgrid. The wage rates for these occupations are at the minimum wage rate or slightly above. Counsel for Mr Perry used a figure of \$20 per hour for low paying work. The hourly rate submitted by counsel for Mr Perry of \$20 per hour (which equates to \$760 per week is slightly above the minimum wage rate of \$740.80 per week or \$19.49 per hour and I am satisfied is representative of Mr Perry's capacity to earn in some suitable employment. There is no basis on the medical evidence to restrict the hours able to be worked.
105. Accordingly, my order will be (I have used the rates agreed upon by the parties and deducted from these the amount of \$760 per week) that the Respondent pay the Applicant weekly compensation as follows:
- (a) Under section 36 of the 1987 Act at the rate of \$876.82 per week from 5 July 2018 to 4 October 2018;
 - (b) Under section 37 of the 1987 Act at the rate of \$618.37 per week from 5 October 2018 to date and continuing in accordance with the provisions of the 1987 Act.

