WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1019/20**
Applicant: **Mark Andrew Kenny**
Respondent: **Bindaree Beef Pty Limited**
Date of Determination: **25 June 2020**
Citation: **[2020] NSWWCC 213**

The Commission finds:

1. The applicant was injured in the course of his employment on 11 February 2019.

2. As a result he has not been able to work, and has no current earning capacity.

3. The application pursuant to s 14(2) of the *Workers Compensation 1987 Act* (the 1987 Act) is dismissed.

The Commission orders:

1. The respondent will pay to the applicant $1,170.78 per week from 11 February 2019 to 12 May 2019 pursuant to s 36 of the 1987 Act.

2. The respondent will pay to the applicant $985.92 per week from 13 May 2019 to date and continuing pursuant to s 37 of the 1987 Act.

3. The respondent will pay the applicant's s 60 expenses upon production of accounts, receipts and/or HIC charge.

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

John Wynyard
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 JOHN WYNYARD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mark Andrew Kenny, the applicant, brings an action against Bindaree Beef Pty Limited, the respondent for payments of weekly compensation in respect of injuries caused by an incident on 11 February 2019.

2. A s 78 notice was issued on 17 May 2019 and the Application to Resolve a Dispute (ARD) and Reply were duly lodged thereafter.

ISSUES FOR DETERMINATION

3. The parties agree that the following issue remains in dispute:

    (a) were the injuries solely attributable to the applicant's serious and wilful misconduct.

PROCEDURE BEFORE THE COMMISSION

4. The matter was heard by teleconference on 17 April 2020. Mr Stephen Hickey of counsel appeared for the applicant with Ms Madeline Smith, his instructing solicitor, and Mr Ross Hanrahan of counsel appeared for the respondent instructed by Ms Jennifer Gair. 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.

EVIDENCE

Documentary evidence

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

    (a) ARD and attached documents,
    (b) Application to Admit Late Documents (ALD) and attached documents dated 28 February 2020,
    (c) ALD and attached documents dated 9 March 2020, and
    (d) Reply and attached documents.

6. At teleconference on 17 April 2020 a timetable for the provision of written submissions was set. In accordance therewith the respondent lodged submissions on 24 April 2020, the applicant on 1 May 2020, and the respondent's reply on 8 May 2020.

Oral evidence

7. An application by the respondent to cross-examine the applicant was refused at teleconference on 17 April 2020.

FINDINGS AND REASONS

8. As indicated, the issue in this matter is whether the respondent is able to avoid liability by virtue of the provisions of s 14(2) of the *Workers Compensation Act 1987* (the 1987 Act) which provides:

> "If it is proved that an injury to a worker is solely attributable to the serious and wilful misconduct of the worker, compensation is not payable in respect of that injury, unless the injury results in death or serious and permanent disablement."

9. The s 78 notice declined liability on the basis that a drug test carried out on 7 February 2019 tested positive on 11 February 2019 for significant levels of methamphetamines. The notice recited that Mr Kenny was then terminated for "serious misconduct as a result of being at work under the influence of illegal narcotics".

10. At hearing Mr Hanrahan applied to cross-examine Mr Kenney. That application was refused and I published short reasons on 17 April 2020. I now reproduce them:

> "**Short Reasons**
>
> 1. Mr Hanrahan, who appears for the respondent, has made an application to cross-examine the applicant, Mr Mark Kenny. The basis of this application is that Mr Kenny has not admitted that he ingested the drugs that he tested positive for, and the cross-examination was designed to highlight that point, and also that Mr Kenny had not made any admissions. In fact Mr Kenny said in his statement that he was not under the influence of drugs at the time of his fall in the early hours of 11 February 2019.
>
> 2. Mr Hanrahan submitted that the cross-examination would accordingly impugn Mr Kenny's credit. The damage thereby occasioned to his evidence would present problems in establishing whether Mr Kenny is incapacitated, what level his incapacity reached, and it would also leave open the question of whether there was any other cause for Mr Kenny's condition.
>
> 3. I reject the application. It is founded upon the assumption that the statement that Mr Kenny was not under the influence of drugs at the time of the accident, implies that he was making a blanket denial as to whether he took the drugs.
>
> 4. We discussed in conciliation the time line evidence, if I can call it that. The case brought by the respondent depends very much upon its expert evidence regarding the effect of amphetamine or methamphetamine that was discovered upon the testing of the samples taken from Mr Kenny in the early hours of 7 February 2019.
>
> 5. I do not think anything turns on the question of whether Mr Kenny did or did not admit that he ingested the drugs. The evidence is quite clear in my opinion that he had taken drugs and whilst he has not admitted it, he certainly did not challenge the findings of the testing.
>
> 6. The respondent is taking a responsible and proper attitude to the results of that testing, and it immediately terminated Mr Kenny's employment. There could be no criticism of the respondent for doing so. However, the question as to whether the accident was as a result of wilful misconduct under s 14 of the 1987 Act is another matter altogether, and the answer will depend upon an analysis of the expert evidence that has been lodged.

7. Therefore I reject the application. I do not think the question of whether Mr Kenny has or has not admitted taking drugs carries such probative weight that such a cross-examination would assist me to determine the real issues in this case."

11. I shall return to the issues raised in those short reasons shortly, but it is convenient to set out the factual background upon which this action and defence is based. I should note in passing that the s 78 notice also put in issue Mr Kenny's entitlement to weekly payments of compensation and payment of his medical and related treatment.

12. Mr Kenny commenced employment with the respondent in November 2013. He was employed as a maintenance fitter and his hours of work were between 9.00 pm and 5.00 am.

13. The injury occurred in the early hours of 11 February 2019 and the insurer arranged a factual investigation by "Verifact". Statements were obtained from five fellow employees which are germane to the defence regarding serious and wilful misconduct.

Ricke Stafford James Kent

14. Mr Kent was the maintenance manager at the time of the accident. He said in a statement dated 23 May 2019[1] that his duties included overseeing the full maintenance department at the plant, and that Mr Kenny was his responsibility from March 2018 when Mr Kent started as manager of the maintenance department. At that time Mr Kenny was on day shift and Mr Kent thought that Mr Kenny had "a lot of difficulties on day shift due to his poor skill level". Mr Kent moved Mr Kenny to the night shift between 9.00 pm and 5.00 am and he thought that Mr Kenny was very happy working those hours. He said that the tasks appropriate to the late shift were "possibly more in keeping with his level of skill as the late shift attends to more routine [issues] and setting up for production".

15. He noted there was only one issue that came to his attention involving Mr Kenny and that was where there had been a heated conversation between Mr Kenny and one Glen Ible who was Mr Kenny's leading hand. The issue was a minor matter regarding whether Mr Kenny had heard a radio call, and Mr Kent accepted that Mr Kenny might not have.

16. He noted, as did many of the respondent witnesses, Mr Kenny was a keen fisherman.

17. Mr Kent said that on 6 February 2019, he became aware that one of Mr Kenny's workmates had concerns with his behaviour, particularly that he was working whilst under the influence of prohibited drugs and also that he might be dealing in illegal drugs at work.

18. A drug test was accordingly arranged for 7 February 2019 at 4.30 am. Mr Kent said that he called Mr Kenny to the First Aid office at the plant where he was told that there were allegations that he might have been working under the influence of drugs "due to his behavioural changes". Mr Kent said that Mr Kenny consented to the test and signed the paperwork. Mr Kent witnessed the sample of urine and two salvia samples being provided. The urine test showed positive for methamphetamine. When told that, Mr Kenny said that he was on Valium. The person conducting the test, Mr Aaron Childs, who was the Work Health & Safety Manager for the respondent, checked and saw that Valium could have an effect on the test. Accordingly Mr Kent said:[2]

> "It was decided that Mark Kenny could continue working and that his next shift would [commence] on Sunday 10 February 2019 at 9pm."

[1] Reply page 40.
[2] Reply page 43.

Glen Stacey Ible

19. Mr Ible made a statement, also on 23 May 2019.[3] Mr Ible was a Leading Hand in the maintenance department, and worked the same hours as Mr Kenny. He said that Mr Kenny's work performance was not good. He said that Mr Kenny was "forever standing around and talking about fishing". On several occasions Mr Ible had to tell Mr Kenny that he was there to work and not to talk.

20. Mr Ible said that he also caught Mr Kenny asleep on several occasions. "He used to sneak to the hide power pack room where it is really warm in winter. I caught him asleep there on several occasions." He said that Mr Kenny did his job "OK, but he could have done more if he did not stand around talking". He confirmed that he had had a run in with Mr Kenny and that they were both told to "settle down".

21. Mr Ible said[4]:

> "17. I had picked up on things with Mark Kenny. He would be fine and then he would disappear and then he would return and when he returned he would be talking at one hundred miles an hour.
>
> 18. On occasions he told me that he had just had a V drink. I have some experienced with seeing others with a drug problem and I could tell that he was not acting like he was. due to a V drink. It was more than that.
>
> 19. It was like he would be dead tired and then he would duck down to his Mitsubishi utility and when he came back he would be bouncing with energy and very talkative.
>
> 20. I sort of had my suspicions for possibly a couple of months that Mark Kenny was using illegal drugs. I had noted that he was on occasions jumpy and not real coherent. He would start to say something and he would get tongue tied.
>
> 21. I reported my suspicions to Brad Newman who is the Afternoon Plant Manager. Also present at the meeting with Ms Newman was Graham Connolly who is the Afternoon Shift Supervisor and Paul Sayer who is a Leading Hand for the afternoon shift.
>
> 22. I had reported this only a few days before Mark Kenny was tested."

22. Mr Ible said that the first time he noticed Mr Kenny going to his ute was about two or three months prior to his making of his statement.

23. Mr Ible said that he was aware that Mr Kenny was tested for drugs and his warning of 7 February. He said[5]:

> "32. After he had given the test I worked with him on the Thursday night and then again on the Sunday night.
>
> 33. I noticed on both these nights that Mark Kenny was very tired and lethargic. I noticed that he was not like he normally was full of energy. Even when we went for our lunchbreak he was falling asleep on the table. He had his arms on the table with his head down resting on his arms."

[3] Reply page 53.
[4] Reply page 54.
[5] Reply page 56.

The injury

24. Mr Ible was present at the time of the injury. He said that he and Craig Milne were together patching a bone belt about 8-10 metres from where Mr Kenny was working on the number 4 boning chain. He was cleaning the chain, which meant that he needed to stand on a step ladder which was an A frame ladder, no more than three feet high. Mr Ible noted that Mr Kenny was wearing blue rubber light weight gloves, designed to protect from grease and solvent. Mr Ible thought that Mr Kenny was alongside the stop and start button, starting and stopping the chain as he was cleaning it.

25. Mr Ible said:

> "All I heard was a dull thud and then I turned around and I saw Mark Kenny lying on the ground on his back. The ladder was in front of him still standing upright and the bucket had not been knocked over."

26. He said that Mr Kenny had been getting up and down the ladder to rinse the cloth out in the solvent and he noted that when he saw Mr Kenny on the ground that the chain was not moving. He said:

> "I know this for certain as I would have been required to shut the chain down if it had of been still moving and it wasn't moving as it was switched off."

27. Mr Ible observed that Mr Kenny's eyes were closed but that behind his eye lids his eyes were moving very rapidly up and down and he was not responsive.

28. He said that he went off to ring Mr Kent, but he was called on the radio and told that Mr Kenny was trying to sit up. He said that Mr Jamie Lind turned up and they used Mr Lind's wagon to get Mr Kenny to the hospital. He said at that stage Mr Kenny was talking and seemed to be "alright". He asked Mr Milne to get his keys as he had to get someone to feed his dog.

Craig Scott Milne

29. Mr Craig Scott Milne was a fellow boilermaker welder working with Mr Kenny at the time, and he provided a statement on 23 May 2019. He said he worked with Mr Kenny a couple of times a week on average. He thought Mr Kenny was a person with "high anxiety". Mr Milne identified with Mr Kenny's symptoms "as I have personally experienced a nervous breakdown about 30 years ago". He said[6]:

> "I did speak on a minor scale to Mark Kenny about his condition but he did not open up too much. All I knew was that he had separated from his Mrs and this caused him problems."

30. He thought Mr Kenny was normally a happy person although on occasions he would be very quiet. Mr Milne was surprised when Mr Kenny was tested for drugs as he did not know anything about Mr Kenny's use of drugs.

The injury

31. Mr Milne said that he saw Mr Kenny at work on "10 February 2019". He confirmed that Mr Kenny was cleaning the chain and the pushers on chain 4 in the boning room, using a little two step ladder to do so. He said he confirmed he was working with Mr Ible about 8-10 metres away when he realised that Mr Kenny was on the ground and moaning.

[6] Reply page 47.

32. Mr Milne said that neither he nor Mr Ible heard anything. Mr Kenny did not scream, swear or make any sound to indicate he was losing his balance. Mr Milne noted that Mr Kenny's helmet was off and on the floor. His memory was that Mr Kenny's eyes were open but he would not acknowledge that Mr Milne and Mr Ible were there:

> "He was just moaning. We could not get any verbal out of him."

33. Mr Milne then confirmed that Mr Ible went to ring Mr Kent and that Mr Kenny then "sort of come to and he went to get up". Mr Milne said Mr Kenny "grabbed the area around his left hip. He was lying on his left side."[7]

34. Mr Milne said that the last time he saw him before the accident was when Mr Kenny was standing on the top platform of the ladder. He confirmed Mr Ible's evidence that there were "stop/starts" and an emergency stop beside where he was working.

35. Mr Milne had seen Mr Kenny's working method. He said[8]:

> "36. I had seen how he was working on the chain. He would get down off the ladder and he would hit the start button and [the chain] would move around to a section. He would then turn the chain off and then climb back up on the ladder and then clean that section.
>
> 37. He would then repeat this over and over with the objective to clean the whole chain"

36. Mr Milne confirmed that Mr Kenny was wearing blue rubber light gloves to protect his hands from the grease and solvent. He confirmed also that Mr Kenny's job was to use solvent to get the grease off the chain.

37. Mr Milne confirmed that Mr Kenny's work method was to come down off the ladder, clean his rag in the solvent in the bucket of solvent and then go back up the ladder and clean the chain.

38. Mr Milne said that they put Mr Kenny on a stretcher and carried him to the first aid area and he, Mr Ible and two other workers carried him out and slid him into the back of Mr Lind's four-wheel drive. Mr Lind then drove Mr Kenny to Inverell Hospital.

39. Mr Milne visited Mr Kenny in the next day or so at Inverell Hospital. Mr Kenny asked if he still had his thumb. Mr Milne said[9]:

> "I asked him why he was worried about his thumb. He said that as he was getting down his hand got caught. He said he did not remember anything else".

40. Mr Milne repeated that he had never seen Mr Kenny work on the chain whilst it was moving and he did not say whether the chain was stopped or moving at the time of the incident. He said:

> "The chain moves very slow and is the full length of the boning room. You would only move at about 1 metre every 30 seconds".

[7] Reply page 49.
[8] Reply page 49.
[9] Reply page 50.

Roburt Graham Deamon

41. Mr Deamon was the Human Resources Officer. His statement was made on 24 May 2019.[10] Mr Deamon confirmed that Mr Kenny was moved to the night shift due to performance issues. Mr Deamon related a conversation with Mr Kenny about three to four months after Mr Kenny had commenced work in which Mr Kenny disclosed that he had been institutionalised for attempting suicide "a while back" after his marriage broke down.

42. He also learnt that Mr Kenny had sold his earthmoving business to ensure that his children would be looked after financially, and the suicide attempt then followed.

43. Mr Deamon was told however that Mr Kenny was fine since that episode, and was happy to come to work, do his job and go fishing with his dog at any chance he got.

44. He said that he was informed about Mr Kenny's "suspicious behaviour" by Mr Kent which resulted in the drug test of 7 February 2019.

45. Mr Deamon said that he was advised that Mr Kenny had fallen off the ladder at about 2.30 am on Monday, 11 February 2019.

46. Mr Deamon spoke to Mr Kenny regarding the outcome of the drug test on 15 March 2019. Mr Deamon said[11]:

> "54. Mark Kenny told that he had no idea why he had returned a positive result of the drugs and that he considered that maybe someone had spiked his drinks or because he had been intimate with a lady he did not really know and who he had met at the pub.
>
> 55. His friends had implied that the women was of a disreputable reputation and that she could be taking 'gear'."

47. Mr Deamon said on a further occasion Mr Kenny said that the drug test could have been positive due to Valium and Codral cold and flu tablets mixing together.

48. Mr Deamon said that there was a handwritten response to the letter he delivered pursuant to the disciplinary process seeking an explanation. The document was before me. It read[12]:

> "To Bindaree Beef. After we had our lunch break around 2.00am I felt a [migraine] headache starting, I went to my locker to get some Panadol Forte, I'm not sure now , but if there were any in there, or there was Codral flu tablets, I may have taken them because I know they are also headache tablets, if so they should be in my locker."

49. Mr Deamon then advised that Mr Kenny's employment was terminated.

Aaron Childs

50. Mr Childs also provided a statement dated 23 May 2019. Mr Childs is the Work Health & Safety Manager and was the person that supervised the drug test.

51. He said the test took place on 7 February 2019 at about 4.30 am. Mr Childs recorded that Mr Kenny said that he had taken a Valium as a prescription drug at 5.30 am on 6 February. Mr Childs accounted for the security of the samples taken.

[10] Reply page 26.
[11] Reply page 30.
[12] Reply page 78.

52. Mr Childs did not witness the incident as he did not start work until about 6.00 am. He was aware that Mr Kenny spent about two weeks in hospital and went out to see him there, where he took a statement. He was told that Mr Kenny had just finished greasing the boning room chain when he spotted a bit of grease on the chain and climbed the ladder to wipe it off. He said that the rag and the glove got caught in the chain and he pulled back on his hand to try and get his hand out of the glove and that threw him off the ladder.

53. Mr Childs was told that Mr Kenny had fallen onto the concrete floor but at that stage doctors were not able to identify precisely what the problem was. X-rays had shown up clear. Mr Childs established that Mr Kenny had fallen on the concrete floor but that he did not really remember what part of his body had hit the floor, although he had a sore hip which Mr Childs thought was the right hip.

54. In an unsigned document entitled 'Injury/Incident Investigation Form', in handwriting the following appeared, ostensibly written by Mr Kenny[13]:

> "I was cleaning the pushes on boning room chain and my glove got caught. I pulled back and came off the ladder.
>
> At the time of the injury, I was cleaning the pushes on the boning room chain.
>
> I believe that the injury occurred because the chain was moving and my glove got caught making me pull back hard to get my hand out and fell off ladder."

The applicant

55. Mr Kenny made a statement on 18 February 2020.[14] Mr Kenny described that on the morning of 11 February 2019 he completed his regular job and was working on additional servicing. He said that one of the big chains that pushed carcases along had been replaced that day. It was 50-60 metres long and extremely heavy. He said:

> "At the time of installation they didn't have time to complete the adjustments so I was directed ….. to complete the adjustments".

56. He said[15]:

> 14. I was in the process of cleaning the chain. To clean the chain I used a bucket filled with Solvex, which is a strong acid type chemical that cleans through grease and rust. I had the bucket in my right hand and in my left hand I had a cloth. I was standing on the top tier of a 1.8 metre ladder. I was also wearing a makeshift harness that wraps around my waist. The harness is then wrapped around a post. The harness is utilised while I am working at that height but has to be disconnected when I descend from the ladder. I then run the cloth down the chain as I clean it. While cleaning the chain, the chain has to be turned on so it is moving. The chain is set up in a way that while at ground level it has a covering over it so you can't get anything caught in it, then up higher the cover finishes and you have the bare chain where it feeds through the sprocket. The sprocket is the size of a car wheel so it is a very large contraption. It was at the bare chain section that I was cleaning the chain. While cleaning with Solvex I also wear two pairs of gloves otherwise it can cause a chemical burn if it touches your bare skin.

[13] Reply page 101.
[14] ARD page 1.
[15] ARD page 2.

15. I am 5ft 2 and in order to get to the right height to clean the chain above the cover, and also so that Solvex doesn't splash in my face I have to be on the top tier of the ladder. I had finished the cleaning job and was ready to come down the ladder. I had to disconnect my harness from the pole otherwise I would not have been able to come down. I then put the safety harness away and climbed back up the ladder with a clean cloth to make sure I hadn't missed anything and did a final wipe over. I was then ready to come down the ladder. The cloth dipped into the Solvex and then a bit of it splashed into my eye underneath my safety glasses. I tried wiping my eye with the back of my sleeve but the Solvex was irritating my eye. I then tried to get back down quickly to reach the paper towel dispenser and water on the ground floor to wipe the Solvex from my eye. As I was descending the ladder and carrying the bucket still filled with Solvex and the cloth, I lost my footing. *I wasn't unwell at all and I wasn't under the influence of any drugs. At the time I was fit and healthy, and not impaired in anyway* apart, from the Solvex irritating my eye. There has been no suggestion by my employer that I wasn't working as directed or following instructions in my role. I was simply performing my normal duties in my employed role at the Abattoirs." (Emphasis added).

57. Mr Kenny said that in reaction to losing his footing he automatically started to grab something to hold onto, which turned out to be the moving chain very close to the sprocket opening. His glove got caught in the sprocket over the chain. He said that as the chain was still moving it was feeding his thumb into the sprocket and he became very concerned that the sprocket and chain would take his thumb off. He said:[16]

> "17. I pulled as hard as I could to free my thumb and as I did I launched myself off the ladder, my right hand was still carrying the bucket. I let go of the bucket. I landed on the ground. I am unsure if I hit my head on the stainless steel table or whether I missed that and hit the concrete floor. I don't remember anything after that.

58. As to his injuries, Mr Kenny said that the hospital medical staff did not realise that he had been lying in the Solvex until the nurses were cutting his clothes off that they saw the Solvex on his clothes and he said that he was red raw where the Solvex had landed and touched his skin. It had, he said, healed up since.

59. He said that he was bedridden in hospital for the first four to five days and his lower back was in pain on the right side and his neck was sore and stiff. He started walking with a walking frame about six days after the injury.

60. He discharged himself from hospital on 19 February 2019 as he had to attend to his dog who was by then in the pound.

61. He said that when he got home and was doing things for himself, he noticed a burning sensation in his neck and right shoulder. He could not turn his neck to the right very much and he began to get shooting pains of pins and needles down his right arm.

62. On 21 February 2019, he attended his GP, Dr McKee, and was referred for physiotherapy.

63. He was referred to Dr Siu, Neurosurgeon and was recommended for six to eight weeks of physiotherapy.

[16] ARD page 3.

64. Mr Kenny relocated to the Gold Coast to live with his daughter in mid-March 2019. He saw a new GP at Eastbrooke Family Clinic at Burleigh Waters, Dr Barry.

65. He was then referred to an Orthopaedic Surgeon, Dr Michael Tong. Dr Tong also referred him for physiotherapy.

66. Mr Kenny transferred to another GP Dr Carly Williams, as Dr Barry did not bulk bill. Mr Kenny said that he had been advised by her that he now had a frozen shoulder. He described an ache in his left knee from favouring the right side. He said that he could only hobble, and that he had an altered gait.

67. Mr Kenny then said that his claim was denied by the insurer on 17 May 2019 and that he did not realise that he should have continued to obtain WorkCover Certificates.

68. He applied for Centrelink benefits originally under Dr Barry and later with Dr Williams, which he now receives. He said between 20 July 2019 and 13 October 2019 when he was waiting for Centrelink to be approved he did not obtain any certification as to his capacity for work, although he was still receiving treatment from Dr Williams.

69. He said that his injuries and limitations continued to be the same as they were both before and after that period. He relied on the certificates issued before 20 July 2019 and after 13 October 2019 as evidencing his lack of capacity during that missing period.

70. Mr Kenny said that his life had changed dramatically since the injury. He used to be independent and would be outdoors hiking or fishing when he was not at work. Now he said, he remained at home the majority of the time and used a walking frame. He said he was unable to put his right hand behind his back and that he used his left hand a lot, including for personal care and using an electric shaver.

71. Mr Kenny said he was unable to drive any more as he was unable to turn his neck and his back was too painful to sit for long periods.

Inverell Hospital

72. At the hospital, investigations were made of the brain, the cervical and lumbar areas of the spine and the abdominal and pelvis. A consistent history of a fall from a ladder was taken and it was noted that the complaints were of tenderness on the base of the skull, painful lumbar region and pelvis. No fractures were seen[17].

73. The CT of the brain found no acute intracranial finding. The CT scan of the cervical spine found that there was no fracture evident, although mild degenerative changes were present. Similarly, degenerative changes were found on the CT scan on the lumbar spine.

Dr Barry

74. Dr Barry reported on 2 April 2019.[18] He took a consistent history of the fall and noted that the two main symptoms at that point were in the right shoulder in the trapezius area, and in the pelvis.

75. On 9 April 2019, Dr Barry noted the reasons for the visit on that day was “anxiety”[19].

76. Complaints continued to Dr Barry of shoulder pain and sacroiliac pain.

[17] ARD page 61.
[18] ARD page 64.
[19] ARD page 65.

Physiotherapy

77. On 20 February 2019, Dr McGilvray referred Mr Kenny to a physiotherapist, Mrs Trish Bellinger advising that Mr Kenny had minor disc bulges at L5/S1 and some bone bruising after a fall off the ladder at work and he was limited in the right dorsi flexion of his foot by pain.[20]

78. A further report by Mr Andrew Ridley, Physiotherapist was lodged dated 28 April 2019.[21]

79. He took a history that Mr Kenny had fallen heavily onto his right side and he was reporting right sided neck and arm burning pain with intermittent pins and needs into his thumb and sharp lateral shoulder pain. He was also reporting lower back and right sided hip pain, anterior and posterior. Mr Ridley noted a right sided local quadrant sign and restrictions through the neck. There was a painful shoulder movement and there was a significant loss of abduction and external rotation both passive and active.

80. Mr Ridley noted very little lumbar movement in standing due to pain and minimal movements through the right hip. He also noted that Mr Kenny was "quite tender on palpation of his right sacroiliac joint". Mr Ridley was concerned about the lack of mobility on the hip and thought that Mr Kenny might also be developing a right frozen shoulder.

81. Mr Ben Harris, physiotherapist reported to Dr Barry on 18 June 2019 that there had been an initial consultation "for cuff and core strengthening". The shoulder was examined and it was noted that Mr Kenny's gait was stiff from CX to knees (presumable coccyx to knees). The rest of the report was in jargon that was difficult to follow.[22]

Medical certificates

82. The ARD helpfully set out a table of medical certificates that had been issued between 11 February 2019 and 4 February 2020, all of which showed that Mr Kenny has had no capacity for work in that time. The table also showed the gap between 19 July 2019 and 14 October 2019 discussed by Mr Kenny in his statement, as indicated above.

83. The certificates, initially issued by Dr McGilvray, described the work related injury as "fall off ladder" and that Mr Kenny was suffering from "low back injury bone bruising".[23]

84. The remaining certificates issued by Dr McGilvray described the injury as "fall off ladder".

85. The certificates issued by Dr Barry indicated under "Symptoms" - "right shoulder impingement – pain – limited ROM"[24] and "pain weakness, paraesthesia"[25].

86. In his certificate of 21 February 2019, Dr McGilvray identified "physio/mobilising slow-MRI-Bone bruising, L5/S1 – still pain, mild disc bulges – needs mobilisation/has walking frame/neurosurgeon referral Dr Sui"[26].

Dr Tong

87. On 23 April 2019, Dr Michael Tong, Orthopaedic Surgeon in Palm Beach Queensland reported to Dr Barry. Dr Tong took a consistent history of the fall noting that Mr Kenny was unconscious and taken to Inverell Hospital. He noted there were cuts on his back and that he fell in solvent which was the most painful part of his experience.

---

[20] ARD page 47.
[21] ARD page 56.
[22] ARD page 57.
[23] See e.g. ARD 159.
[24] ARD page 178.
[25] ARD pages 179 and 181.
[26] ARD page 13.

88. Dr Tong said:

> "After a while he noticed more of his pain to be felt in the right lower back/buttock and right scapular".

89. Dr Tong examination showed no wasting about the shoulder musculature but noted an ultrasound scan showing a high grade partial thickness tear of the supraspinatus. There was limited range of motion in the shoulder.

90. Dr Tong noted that Mr Kenny was using crutches at the consultation. He was satisfied that there was "no neurology". Dr Tong noted mild lower lumbar spine tenderness but none over the sacroiliac joint.

91. Investigations were considered and Dr Tong found that Mr Kenny had significant degenerative disc disease and noted a left posterior lateral disc prolapse at L3/4 on the MRI scan.

92. Dr Tong thought that probably accounted for the pain he was experiencing in his back.

93. Dr Tong thought that no surgery was necessary and that Mr Kenny's symptoms would settle with time.[27]

Dr Tim Anderson

94. Mr Kenny relied on the medico-legal opinion of Dr Tim Anderson, Occupational Physician dated 23 October 2019. Dr Anderson began his report by recording that there had been a fall from a ladder. He said[28]:

> "This resulted in dysfunction of his right forequarter, possibly with neurological features and also his lower back, again possibly with neurological features. At this assessment, he was very dysfunctional".

95. Dr Anderson took a consistent history of the fall and of the subsequent treatment with Dr Barry and Dr Williams.

96. On examination, Dr Anderson noted that Mr Kenny seemed to be in a great deal of discomfort. He said:

> "I note several documentary remarks from his earlier doctor in Inverell that he seemed rather 'odd'. No specific deals are described to elaborate on this".

97. Dr Anderson repeated his general comment in his diagnosis saying:

> "Mr Kenny currently has significant dysfunction of his right forequarter and right hindquarter. There appears to be a distinct possibility of neurological involvement of the cervical spine and also the lower lumbar spine as well. The radiological picture may be rather confusing, particularly with the described **L**3/4 posterior protrusion deviated towards the **left** causing possible compression on the **left** L4 nerve root. Mr Kenny's current clinical picture is all on the **right** side therefore this radiological finding is likely to be incidental." (As written).

[27] ARD page 54.
[28] ARD page 34.

98. Dr Anderson took a history (repeated elsewhere in the clinical notes) that the insurer had refused his claim because he had unhitched his safety harness when the fall occurred. Dr Anderson noted that Mr Kenny felt "very hard done by" because of this.

99. Dr Anderson thought that the prognosis "did not seem all that good," but he thought that remedial treatment such as physiotherapy or an exercise physiologist was the appropriate treatment. Invasive procedure was not indicated.

100. As to Mr Kenny's fitness when assessed on 23 October 2019, Dr Anderson thought that Mr Kenny was "completely unfit" to return to any form of occupation he had pursued before.

101. Dr Anderson noted Mr Kenny's ambition to become involved in writing for fishing magazines, which Dr Anderson thought would be appropriate.

102. When asked as to whether the proposed treatment is reasonably necessary, Dr Anderson noted that he had not seen any proposed treatment. His own proposal for managing Mr Kenny's condition would be to refer him to a rehabilitation physician for further clinical management.

103. Dr Anderson thought that Mr Kenny had some features which suggested neurological issues in the right upper and lower limbs, but repeated that any invasive surgical procedure would not be the answer.

SafeWork Laboratories

104. A report was tendered by Mr Phil Tynan, National Toxicologist from SafeWork Laboratories in Perth. It was dated 16 May 2019 and noted that the drug test results had been obtained on 7 February 2019 at 4:53 "pm". This is clearly an error, as the witnesses agree that the drug test was taken at 4:30 am whilst Mr Kenny was at his workplace[29].

105. The results of the drug test was summarised as being consistent with the consumption of a significant dose of methamphetamine within the last 24-36 plus hours. The summary also included the following[30]:

> "(i) the donor would likely have had some significant complex task performance impairment three days after the collection date when he was involved in an accident".

106. The explanation that followed stated that:[31]

> "Methamphetamine was a 'potent and restricted amphetamine-class CNS stimulant. When taken orally, approximately 30-54% of the dose is excreted as methamphetamine and 10-23% as amphetamine, which is the drug's principal metabolite (authority omitted).
>
> The donor's Amphetamine: Methamphetamine ratio is well above 0.10 (in this case being -0.14) which is consistent with methamphetamine use sometime within the 24-36 plus hour period prior to the collection of the sample".

107. The report then stated that the levels of methamphetamine and amphetamine detected in the oral fluid were "well above the standard-mandated reportable cut-off and were consistent with ingestion of a significant dose of the drug methamphetamine".

[29] Reply page 218.
[30] Reply page 219.
[31] Reply page 219.

108. The report then said:

> "Methamphetamine - associated direct impairment persists for at least 72 to 96 hours - i.e., there would be some degree of methamphetamine – associated complex task performance deficit present at the time the donor was reported to have been involved in an accident. Given only one specimen has been taken, the specimen Is of oral fluid and the donor's past drug use history is unknown, it is not possible to reliably quantitate the associated level of impairment but it would be significant."

109. The authors of the report stated that the issue of methamphetamine - induced impairment was complex. A 2005 report was cited to the effect that methamphetamine increases overall alertness of the psychomotor vigilance after 64 hours without sleep to a substantially greater effect than caffeine and marginally greater than Modafinil, although the general performance scores and tests of executive function were mixed, that is to say, there was some level of functional impairment.

110. Reference was made to a further study in 2007. Doing the best I can with the information given by the authors, it seems that the opinions given were in relation to the effects of the consumption of ATS (amphetamine-type stimulant) drugs on motorists. The authors concluded that amphetamines used for managing operational fatigue and maintaining wakefulness were on a par with modafinil, but were significantly worse at maintaining appropriate levels of all executive function. This effect was even more marked with methamphetamine.

111. Side-effects were also said to be a particular problem, inducing acute excitability, high levels of distraction, agitation and hyperreflexia which gave poor performance of complex everyday tasks.

112. It was stated that whilst amphetamine classed drugs can blunt the effects of fatigue, they also can "dangerously distort judgment".

113. Another 2005 study, also related to motorists, was referred to in a boxed paragraph that "theoretical arguments aside", there was a 300% greater accident rate per mile travelled by this class of drug user as compared to non-users[32]. The high motor vehicle accident rate appeared to be associated with impaired sleep, distractibility, impaired judgment, diminished spatic-temporal perception and increased risk taking. This class of drug, the authors of the report continued, affected driving performance. It was stated that impairment of judgment was a major problem for all commonly abused amphetamine class drugs but most markedly so for methamphetamine, which was known to increase the prevalence of risk taking behaviour (often associated with active risk-seeking behaviour) as well as to impair both gross and to a lesser extent, fine motor skills.

114. There was, the authors said, a marked propensity for risk taking associated with unrealistically rosy self-appraisal of one's own current past and estimated future performance – independent of underlying personality type.

115. More papers were referred to with regard to the effect of this class of drug on driving motor vehicles.

[32] Reply page 220.

116. Mr Tynan said[33]:

> "Finally, It should be noted that even full clearance of the drug from circulation (i.e., after 72 to 92 hrs post-dose) does not necessarily imply no residual methamphetamine-associated deficit may be present. In addition to impairing judgment and increasing risk taking during the acute phase, the effects of withdrawal from methamphetamine use including fatigue, hypersomnolence, and depression were also considered likely contributors to many ATS-associated accidents. ATS drug withdrawal is also associated with a unique impairment profile (markedly worse with methamphetamine), which while 'relatively' minor in infrequent low-dose users (compared to regular or higher dose users) is still significant, and is marked in long term, frequent and *I* or high dose amphetamine users. The symptoms of ATS withdrawal, including dysphoria, commonly associated with varying degrees of depression, irritability and rebound fatigue (often marked by extreme sleepiness and chronic fatigue)…".

Dr Robin Mitchell

117. The respondent retained Dr Robin Mitchell, Occupational Physician as its medico-legal referee. Dr Mitchell reported on 8 May 2019.[34]

118. His opinion was mainly related to the effect that the ingestion of the drugs detected in Mr Kenny's system would have had on his ability to carry out his duties. No opinion was obtained as to Mr Kenny's capacity for work, nor as to whether the medical and related treatment was reasonably necessary.

119. Dr Mitchell was asked to assume a chronology that was not accurate. The date on which the drug testing was done, 7 February 2019 was correct, but Dr Mitchell was incorrect to assume that the subject injury occurred on 10 February 2019. It in fact occurred one day later, on 11 February 2019. Dr Mitchell accurately assumed that the results of the drug tests were obtained on 11 February 2019.

120. Dr Mitchell assumed that the result of the testing was a finding of both methamphetamine and amphetamine, although he did not identify the results with any further particularity.

121. He said, not surprisingly, that the result indicated an intake of methamphetamine in the period prior to the date a positive result was given.

122. Dr Mitchell then said[35]:

> "Given that the half-life of methamphetamine varies considerably but can be up to 30 hours, it would appear highly likely that the methamphetamine taken prior to the time the sample was taken on 7 February 2019 would still be present at the time of the reported fall at work on 1 0 February 2019.
>
> Therefore, in my opinion, on the balance of probabilities the worker would have been under the influence of those drugs at the time of the alleged injury on 10 February 2019."

[33] Reply page 222-223.
[34] Reply page 225.
[35] Reply page 226.

123. In an answer to a question from his retaining solicitors, Dr Mitchell then referred to what he described as stereotypical motor behaviour. He said:[36]

> "Peculiar to methamphetamine and related stimulants is 'punding', a stereotypical motor behaviour in which there is an intense fascination with repetitive handling and examining of objects, such as picking at oneself or sorting and arranging common objects.
>
> Methamphetamine use also has a high association with anxiety, depression,
>
> amphetamine psychosis, suicide, and violent behavior.
>
> A number of those side-effects, considered individually or together, would constitute a significant risk of safety when undertaking physical tasks such as climbing a ladder."

SUBMISSIONS

Mr Hanrahan

124. For the respondent, Mr Hanrahan referred to the evidence which I have discussed above. He submitted that Mr Kenny's statement that he was not unwell at all, and was not under the influence of drugs when he fell from the ladder, constituted a denial that he had consumed drugs. Mr Hanrahan noted that Mr Kenny did not indicate that there was any "other external cause" for his injury. I was referred to Mr Kenny's statement that he was simply performing his normal duties in his employed role at the abattoirs.

125. Mr Hanrahan referred to the circumstances of the accident and noted that the activities Mr Kenny was performing at that time involved the worker alone. He submitted that the accident, notwithstanding that it occurred in the course of Mr Kenny's employment, resulted solely from "the worker's behaviour and likely misjudgment of his capacity, in the context of his deliberate and intentional drug consumption."

126. Mr Hanrahan submitted that the duties with which Mr Kenny was involved at the time of his accident "required the application of an unimpaired mental facility for judgement of heights and spatial orientation." All the features of the accident involved both passive and active descriptions, Mr Hanrahan said. The fact that the worker's glove was caught in the machinery and that he "launched himself" of the ladder, could only be explained by reference to the side-effects of amphetamine consumption, Mr Hanrahan concluded.

127. Mr Hanrahan relied on the opinion given by Dr Mitchell that the side-effects of amphetamine consumption would constitute a significant risk of safety in such activities as climbing a ladder.

128. Mr Hanrahan then referred to the histories given to various medical practitioners, including an apparent conflict that a complaint to Dr Williams in August 2019 referred to Mr Kenny's landing on his left shoulder/side, when the preponderance of the histories spoke of symptoms on the right shoulder and hip.

129. Mr Hanrahan then referred to the provisions of s 14 (2) of the 1987 Act, and submitted that Mr Kenny's credit was crucial to any determination. Mr Hanrahan referred to the refusal by the Commission of his application to cross-examine Mr Kenny. He conceded that Mr Kenny denied that he was under the influence of any drugs at the time of his accident. In view of the fact that Mr Kenny tested positive for the presence of methamphetamine, Mr Hanrahan submitted that "[Mr Kenny's] denial of drug consumption cannot be accepted."

[36] Reply page 227.

130. Mr Hanrahan submitted that Mr Kenny's drug consumption was "wilful." Mr Hanrahan submitted that as Mr Kenny had not been cross-examined, Mr Kenny's assertion that he was not impaired by drug consumption at the time of his accident could not be accepted.

131. Mr Hanrahan referred to the "time line evidence", as I had described it in my short reasons, and said:

> "An approach to the *'time line evidence'* that seeks to minimise the effect of the drug taking cannot be in the spirit of the prohibition set out in S 14 (2)."

132. Mr Hanrahan made no further submissions about that evidence.

133. He then referred to the question of incapacity. He submitted that the description of the injury as "low back injury bone bruising" issued by Dr McGilvray did not demonstrate any serious consequences of the injury.

134. Mr Hanrahan submitted that the opinion of Dr Anderson was given without taking into account any history of the drug consumption. Had Dr Anderson taken that history, he may well have found that it explained the mechanics of the injury, Mr Hanrahan said.

135. He submitted that Dr Anderson's opinion had not been provided in a fair climate, conceding as he did so that Dr Anderson accepted that employment appeared to be the only factor that contributed to Mr Kenny's current condition.

136. Mr Hanrahan submitted that Mr Kenny did not advise any of the medical practitioners whom he attended of the fact that he had been dismissed for methamphetamine use. Mr Hanrahan submitted that Mr Kenny had misled those practitioners because he knew full well that he had been terminated over his drug use.

137. Mr Hanrahan then referred to the apparent failure by Mr Kenny to give up smoking. Mr Hanrahan asserted that the worker eschewed medical advice and that he "continued to present exaggerated symptoms of injury." Mr Hanrahan suggested that Mr Kenny's rejection of medical advice to quit smoking raised an inference, as I understood him, that Mr Kenny did not stop smoking because he was smoking "ice."

138. It was submitted that the worker had not produced evidence of any earnings since his injury. Mr Hanrahan alleged that the consequences of the fall were limited to bruising and could not be said to be serious.

Mr Hickey

139. Mr Hickey gave a comprehensive overview of the relevant evidence. He traced Mr Kenny's medical management since the fall, including the move to Queensland in acceptance of his daughter's offer to live with her because his daughter and his son were concerned that he was not coping well.

140. Mr Hickey referred to the evidence contained in the medical certificates and he submitted that I would accept the evidence of Dr Anderson, supported as it was by the general practitioners involved in the case and the evidence of the physiotherapists.

141. Mr Hickey kindly calculated the pre-injury average weekly earnings for a person with no current capacity for employment, submitting that the evidence justified such a finding.

142. Turning to the respondent's submissions, Mr Hickey referred to the expert evidence contained in the reply. He submitted that an analysis of that evidence demonstrated that over 100 hours had passed between the administration of the drug test and the time of the accident. I will deal with the submissions more closely later in these reasons. The problems with the time factors meant, he submitted, that the respondent was unable to satisfy the onus of proof laid on it by s 14 (2).

143. Mr Hickey referred to the report of Dr Mitchell and submitted that his opinion could not be accepted, as it also failed to discharge the evidentiary onus of proof.

144. Mr Hickey submitted that the evidence of Mr Ible contradicted the assertions made by the respondent and its expert evidence.

145. Mr Hickey concluded by referring to *Karim v Poche Engineering Services Pty Ltd*[37].

Mr Hanrahan in reply

146. Mr Hanrahan submitted that the applicant's submissions did not sufficiently address the question of cause. He submitted "there is no support in the evidence, for any cause of the injury to be related to any risk inherent to the activity required, by the employer, to be undertaken by the worker." The meaning of that submission I found to be somewhat opaque.

147. Mr Hanrahan submitted that the acts of the worker with respect of the tasks required of him were the sole cause of the injury. These acts, it was submitted, entailed a detailed recital of the events leading up to the injury.

148. Mr Hanrahan returned to Mr Kenny's statement. As I understood him, there was an inconsistency when Mr Kenny said that the job of completing the adjustments was a two to three man job, but he could do it by himself. Mr Kenny did not explain why the task he was doing required more than one person to accomplish.

149. Mr Hanrahan challenged the assertion by Mr Hickey that cleaning the chain involved Mr Kenny ascending and descending the ladder repetitively. There was nothing in Mr Kenny's evidence to confirm that assertion, let alone whether it was relevant to the occurrence of the injury, Mr Hanrahan contended.

150. Mr Hanrahan repeated his contentions as to the factual aspects of the injury. He thought that the episode of solvent coming into contact with Mr Kenny's eyes through inadvertence could be consistent with an impairment to Mr Kenny's judgement and spatial awareness. I could also infer that was how Mr Kenny lost his footing, Mr Hanrahan argued. There was nothing defective about the ladder itself, Mr Hanrahan thought, therefore Mr Kenny must have lost his balance on account of the overall effect of the drugs remaining in his system. This thinking could also be applied to Mr Kenny's concern that his glove was becoming caught in the chain, Mr Hanrahan continued. The language used by Mr Kenny in saying that he "launched himself of the ladder" could also constitute an admission, Mr Hanrahan said.

151. Mr Hanrahan concluded that the sole cause of the injury was Mr Kenny's consumption of "ice" which, Mr Hanrahan asserted, led to Mr Kenny's "inadvertence, loss of balance and overconfidence in negotiating his final daring manoeuvre…". This behaviour, Mr Hanrahan said, was consistent with defects and judgement and mental ability as described by Dr Mitchell. It was the singular most important aspect which informed the context in which the accident occurred. In fact, Mr Hanrahan said, it was the "crucial factor." Hence, his argument ran, the main contributing factor to Mr Kenny's injury was not any workplace activity, but rather the workers mental state before the injury, as well as his lifestyle and activities, both inside and outside the workplace.

152. Mr Hanrahan then discussed the terms of s 14 (2) of the 1987 act. He submitted that the respondent had shown that Mr Kenny had bought himself within the terms of that subsection.

[37] [2013] NSWWCCPD 24 (*Karim)*.

153. Mr Hanrahan acknowledged that a question had arisen as to the residual effect of any drugs in Mr Kenny's system, having regard to the timeframes set out by the respondent's expert evidence. Whilst it was submitted by Mr Kenny that the period between the ingestion of the drugs and the accident meant that there were no drugs in his system at the time of the accident, there was nothing in the evidence to "challenge the notion that the worker was a long-term, frequent or high dose user of amphetamines."

154. It would be a travesty, Mr Hanrahan said, if the blatant wrongful denial that Mr Kenny had not taken the drugs at all had no consequences. He submitted that there was nothing in the workers evidence to deny that drugs were consumed either the night before or indeed on the morning in question.

DISCUSSION

155. Section 14(2) of the 1987 Act provides:

> **"14 CONDUCT OF WORKER ETC**
>
> (1) ….
>
> (2) If it is proved that an injury to a worker is solely attributable to the serious and wilful misconduct of the worker, compensation is not payable in respect of that injury, unless the injury results in death or serious and permanent disablement."

156. This subsection has been the topic of much curial discussion.[38] However the issue raised in this case relates to an uncontroversial principle as described by DP Roche in the decision relied on by the applicant, *Karim*. At [12] the learned DP stated that the onus of proof to establish serious and wilful misconduct lies upon the employer.

157. There can be no controversy about the proposition that a person operating machinery whilst under the influence of illegal drugs, and amphetamine-type stimulant drugs in particular, is acting in serious and wilful misconduct of his employment duties.

158. The respondent sought to satisfy its onus of proof by retaining expert evidence to establish that Mr Kenny's injuries were solely attributable to serious and wilful misconduct.

159. There was no challenge to the evidence that Mr Kenny underwent a drug test at 4.30 am on 7 February 2019. This was the date and time given by the maintenance manager, Mr Kent, and confirmed by the evidence of Mr Childs, who supervised the test.

160. It is also common ground that on 11 February 2019 the samples were delivered to and tested by Safe work Laboratories in Perth. There was also no challenge to the findings of that testing, as advised by the toxicologist, Mr Phil Tynan, which were that Mr Kenny had consumed a "significant dose of methamphetamine within the last - 24 to 36+ hrs." Mr Tynan noted that there had been a claim that Mr Kenny had ingested Valium at 5:30 PM on 6 February 2019, and he found that the testing was not consistent with such ingestion.[39]

161. The report also noted that Mr Kenny had been involved in an accident "3 days after specimen collection." I have already noted the error made by Mr Tynan that he assumed the test was taken at 4.53 in the evening of 7 February 2019, when in fact had been taken at 4.53 in the morning, or thereabouts.

[38] See eg the discussion in *Scharrer v The Redrock Co Pty Ltd* [2010] NSWCA 365.
[39] Reply page 218.

162. There are thus two errors of assumption in the final opinion given in this report. As has been seen, Mr Tynan referred to a number of reports and studies on the effect of ATS drugs, including the driving of motor vehicles. These tests formed the basis of the conclusions reached by Mr Tynan.

163. As indicated, the first proposition advanced by Mr Tynan was that the testing established the consumption of methamphetamine within the last "-24 to 36+" hours. In discussion with counsel it was not disputed that Mr Tynan's meaning was that Mr Kenny could have ingested the drugs not less than 24 hours and possibly over 36 hours before the test was taken. Thus, the respondent established that the ingestion took place no later than 4.30 am on 6 February 2019, and possibly earlier than 4.30 am on 5 February 2019.

164. Mr Tynan also concluded that impairment caused by methamphetamine persisted for at least 72 to 96 hours. Mr Tynan put a rider to that conclusion, saying that because only one specimen had been taken, and that it had been oral, and that Mr Kenny's past drug use history was not known, it was "not possible to reliably quantitate the associated level of impairment, but it would have been significant." Mr Tynan was referring to the time the donor was reported to have been involved in an accident. This, Mr Tynan assumed, was three days after the drugs had been ingested. On Mr Tynan's evidence the ingestion of the amphetamine occurred at the latest at 4.30 am on 6 February 2019, so there was actually a time lapse of five days, or 120 hours between the taking of the drugs and the accident.

165. Mr Tynan's reporting of the other studies and papers upon which he based his opinion was of some use, as it was of general application, but it appeared to relate to the effects of methamphetamine type drugs on driving performance. However he did indicate at the end of his report that even if full clearance of the drug from circulation in a person's system had taken place, a process that takes "72 to 92 hours post-dose", it did not "necessarily" imply that no residual methamphetamine-associated deficit might still be present. Mr Tynan referred to fatigue, hypersomnolence and depression as being amongst the effects of withdrawal from methamphetamine use. Further symptoms were described of dysphoria, irritability and "rebound fatigue." This last symptom was often marked by extreme sleepiness and chronic fatigue.

166. Thus, full clearance of the ATS drugs in Mr Kenny's system would take between 72 and 92 hours, or 72 and 96 hours, from the time they were taken, in Mr Tynan's opinion.

167. Interpreting that evidence most favourably to the respondent's case, the scientific opinion as represented by Mr Tynan would have Mr Kenny ingesting the drugs at 4:30 am on 6 February 2019. Allowing for the maximum time given for full clearance of the drug from Mr Kenny's system of 96 hours, that would have occurred by 4.30 am on 10 February 2019.

168. Accordingly, the report from Safe work Laboratories does not satisfy the respondent's onus to prove that Mr Kenny was under the influence of methamphetamine and similar drugs at the time he suffered his accident. Before returning to Mr Tynan's report it is necessary to consider the opinion of Dr Mitchell.

169. This report also is flawed. As I have noted, Dr Mitchell was asked to assume that the subject injury occurred on 10 February 2019, an assumption that is at odds with the established facts. Moreover, I consider his report to be speculative. He conceded that the half-life of methamphetamine "varied considerably", and that it "could be" up to 30 hours. These two reservations as to the basis of his opinion did not sit well when he concluded that those factors made it "highly likely" that the methamphetamine would still have been present at the time of the accident.

170. Further, his assumption that the drugs were taken on 7 February 2019 contradict the findings of the scientific evidence from Safe work Laboratories which estimated that the drugs would have been taken at the latest on 6 February 2019 and, of course, Dr Mitchell assumed that the accident had occurred on 10 February 2019. I accordingly cannot agree with Dr Mitchell's opinion that on the balance of probabilities Mr Kenny would have been under the influence of drugs at the time he suffered his injury.

171. Dr Mitchell described stereotypical motor behaviour which I have reproduced above, in answer to a question from his retaining solicitors. That question concerned "... the extent of the drugs identified in the worker's system and the influence of those drugs on his functioning capacity at work."

172. It was in the context of that question that Dr Mitchell thought that physical tasks such as climbing a ladder would cause a significant risk to safety. The side-effects to which he was referring were those experienced whilst a person still had the drugs in his system. Dr Mitchell erroneously assumed that Mr Kenny still had the drugs in his system at the time of his accident.

173. As I have already noted, the respondent did not challenge this interpretation. Mr Hanrahan simply submitted that this approach to this evidence was not in the spirit of the prohibition provided by s 14(2). He referred to it as "*timeline evidence*", adopting the expression I had used in my short reasons for rejecting his application to cross-examine.

174. Again, I found Mr Hanrahan's submission somewhat opaque, with respect. The proposition that evidence should not be analysed and rejected or accepted in cases involving s 14(2) has no legislative or evidentiary basis. Such an analysis in the present case has proved to be vital to prevent a determination based on prejudice from being made. As I said in my short reasons on 17 April 2020, no criticism can be made of the respondent for immediately terminating Mr Kenny's employment once he had been found to be ingesting illegal drugs whilst using machinery. Such behaviour by an employee must also engender distrust and suspicion regarding that employee's credit and has in this case clearly created a prejudice in the respondent's camp as to any assertion that was made on Mr Kenny's behalf.

175. Mr Hanrahan approached the difficulties thrown up by the deficiencies in the expert evidence by relying on the passage from Mr Tynan's report that I referred to above which related to possible side-effects after full clearance of the drug from circulation had occurred.

176. Mr Hanrahan based many of his submissions on a number of assumptions which were not borne out by the evidence. He submitted that Mr Kenny's denial that he was under the influence of drugs when he suffered his accident constituted a denial that he had consumed drugs. I have referred to this passage at [56] above, and it can be seen that Mr Kenny was describing his state of health at the time he lost his footing.

177. Nevertheless, Mr Hanrahan sought to attribute the actions described by Mr Kenny during the accident as being caused by the residual effects of the drug taking, notwithstanding that he could not prove that Mr Kenny had any drugs in his system at the time. I have described Mr Hanrahan's submissions above and how he made the following factual assertions:

- the solvent which contacted the applicant's eye had occurred because of inadvertence caused by residual impairment to Mr Kenny's judgement and spatial awareness;
- the applicant lost his footing for the same reason;
- the applicant lost his balance as there was nothing wrong with the ladder therefore his residual impairment was the cause;

- the applicant's glove became caught in the chain because of the residual impairment;

- the language used in Mr Kenny's statement, that he "launched himself" was further proof of the residual impairment (notwithstanding that the statement was made on 18 February 2020);

- this manoeuvre was caused by the consumption of 'ice', and

- the applicant had not given up smoking because he smoked 'ice'.

178. It is perhaps pertinent to record that the word 'ice' was not mentioned in the expert evidence. The respondent has conflated the evidence that Mr Kenny was taking amphetamines with the proposition that he was an addict of a drug commonly known as 'ice.'

179. The evidence before me demonstrates that Mr Kenny's actions in going to his Ute whilst at work and returning therefrom full of energy and "talking at 100 miles an hour," aroused the suspicions of Mr Ible, who had some experience of seeing others with a drug problem. Mr Ible said that he had noticed this behaviour for "possibly a couple of months" as a result of which the drug test was administered.

180. An inference is accordingly available that Mr Kenny was a user of methamphetamine for as much as a couple of months prior to the test being administered. Other evidence points to Mr Kenny having been through a marriage breakup at a time when he had owned a business concerned with earthmoving. Mr Deamon related that the earthmoving business had been sold to ensure that Mr Kenny's children were financially secure. Mr Kenny appears to have been well liked at work, although there appeared to be a personality clash with Mr Ible. Mr Milne spoke of how Mr Kenny was a normally happy person. He was surprised that Mr Kenny was using drugs.

181. It is quite possible that Mr Kenny had turned to drugs at this particular point in his life as a result of the disappointments he had experienced in his personal life. However I reject any suggestion that he has been proved to be an 'ice' addict regularly smoking the drug.

182. Mr Hanrahan's inventive submissions that all the actions that occurred during Mr Kenny's accident had been caused by the residual effects of amphetamine consumption have no support in the evidence. Mr Hanrahan relied on Dr Mitchell as authority for the factual basis of his assumptions. However, Dr Mitchell's opinion was given on the basis that the effects he described would be present whilst the drugs were still in Mr Kenny's system. This has not proved to be the case. In any event Dr Mitchell's opinion was that, in such a state, Mr Kenny's ability to climb the ladder would be compromised by those side-effects. He did not deal with the mechanics of the injury.

183. There has been no evidence that would suggest the individual components of Mr Kenny's accident had been caused by residual symptoms. The evidence regarding residual symptoms came from Mr Tynan, and was somewhat conditional. Mr Tynan said that full clearance of the drug from circulation did not "necessarily" imply there would be no residual deficit. However the symptoms he then described being fatigue, hypersomnolence and depression were not evident when Mr Kenny was doing his work on 11 February 2019.

184. I accept Mr Kenny's description of the mechanics of the accident. The crucial event that caused it was the fact that his glove became entangled with the moving chain. That evidence finds contemporaneous support from Mr Milne, who was asked by Mr Kenny when Mr Milne visited him in hospital whether he still had his thumb.

185. It must be observed that this was an unfortunate time to have an accident. The circumstances under which it occurred might well be regarded with suspicion. This worker had been taking illegal drugs at work whilst operating machinery. Worse still, he has an accident on the day that the results of the drug testing became known. The respondent was quite correct to regard the timing as convenient, to say the least.

186. Neither has Mr Kenny assisted his case by misleading his doctors as to why his claim had been denied, by referring to difficulties with his harness. It can however be appreciated that he would not necessarily want to indicate to his medical practitioners that he had been involved in the use of methamphetamine abuse.

187. It is true also that Mr Kenny lied to management when confronted with the drug test results by misdirecting attention to his consumption of Valium. He also gave exculpatory statements to Mr Daemon. There is no evidence that he admitted or denied the deliberate use of the methamphetamine. In any event, as I said in my Short Reasons of 17 April 2020, nothing turns on whether there was such an admission or not. Mr Kenny has never challenged the results of the drug test

188. Nonetheless, the respondent has alleged that it is entitled to the protection afforded by s 14(2) of the 1987 Act. It was required to prove that the injuries were solely attributable to the applicant's serious and wilful misconduct. For the reasons given above, it has failed to do so.

189. As to the question regarding Mr Kenny's ability to earn, the s 78 notice of 17 May 2019 alleged that Mr Kenny had no entitlement to weekly compensation or medical and related treatment, but that was related to the defence based on s 14(2). No evidence has been lodged from a medico-legal expert as to those matters.

190. Dr Mitchell referred to the medical evidence at page 227 of the Reply. Dr Mitchell's opinion was based on a file review and he did not have the benefit of interviewing Mr Kenny. Dr Mitchell thought there were some "possible" inconsistencies in the certification, but he suggested that clarification be sought from the treating doctors. There is no evidence that any further enquiries were made.

191. Mr Kenny said that this injury had changed his life dramatically, and for the worse. No evidence was tendered by the respondent to contradict that statement and the medical evidence is that Mr Kenny has made consistent complaints to the various medical practitioners who have examined him. Whilst one GP, Dr Williams, recorded symptoms in the left shoulder/side, the other complaints are consistent that it is the right forequarter and hindquarter, to use Dr Anderson's expression, that is the cause of Mr Kenny's dysfunction. Dr Tong also recorded complaints of symptoms in the right lower back/buttock and right scapula. Investigations obtained for Dr Tong demonstrated significant degenerative disc disease and a left posterior lateral disc prolapse at L3/4. This was also noted by Dr Anderson, who thought the imaging was incidental, considering the symptoms were on the right. All medical certificates up to 4 February 2020 certified Mr Kenny as being without current work capacity. Dr Anderson in his report of 23 October 2019 thought the same.

192. Accordingly I am satisfied that the applicant suffered injury on 11 February 2019 whilst in the employ of the respondent. I am satisfied that the provisions of s 14(2) of the 1987 Act do not apply and I am satisfied that the applicant has no current work capacity.

193. There has been no challenge to the appropriate pre-injury average weekly earnings submitted by the applicant, and I accept the calculation by the applicant in that regard.

194. The pre-injury average weekly earnings accordingly is $1,232.41 per week. The s 36 rate is $1,170.78 per week, and the s 37 rate is $985.92 per week.

SUMMARY

195. The Commission finds:

(a) The applicant was injured in the course of his employment on 11 February 2019.

(b) As a result he has not been able to work, and has no current earning capacity.

(c) The application pursuant to s 14(2) of the 1987 Act is dismissed.

196. The Commission orders:

(a) The respondent will pay to the applicant $1,170.78 per week from 11 February 2019 to 12 May 2019 pursuant to s 36 of the 1987 Act.

(b) The respondent will pay to the applicant $985.92 per week from 13 May 2019 to date and continuing pursuant to s 37 of the 1987 Act.

(c) The respondent will pay the applicant's s 60 expenses upon production of accounts, receipts and/or HIC charge.