WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **2716/20**
Applicant: **Jay Sardi**
Respondent: **CXC Corporate Services Pty Limited**
Date of Determination: **3 September 2020**
Citation: **[2020] NSWWCC 300**

The Commission determines:

1. The applicant suffered injury to his neck, low back, knees and right hand in the course of his employment with the respondent on 18 July 2019 and employment was a substantial contributing factor to those injuries.

2. The respondent is to pay the applicant weekly compensation:

    (a) In the sum of $775.13 per week from 19 July 2019 to 17 October 2019 pursuant to section 36 (2) (a) of the *Workers Compensation Act 1987*, and
    (b) in the sum of $642.63 per week from 18 October 2019 to date and continuing pursuant to section 37 (2) (a) of the *Workers Compensation Act 1987*.

3. On the evidence before the Commission, the applicant is not entitled at the present time to a declaration pursuant to section 60(5) of the *Workers Compensation Act 1987* in respect of the surgery proposed by Dr Darwish, L5/S1 laminectomy, discectomy and posterior lumbar interbody fusion.

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

W Dalley
Arbitrator

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

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Jay Sardi (Mr Sardi / the applicant) was employed by CXC Corporate Services Pty Ltd (the respondent) as a computer field technician. He was injured in a motor vehicle accident on 18 July 2019 when returning in his car from a worksite at Matraville (the subject accident).

2. The motor vehicle accident occurred on General Holmes Drive at Brighton Le Sands. Mr Sardi's vehicle was struck in the rear by another vehicle and was forced forward into collision with a van in front.

3. Mr Sardi made a claim for workers compensation which was declined by the insurer. In its notice pursuant to section 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) dated 31 July 2019, the insurer asserted that the injury had occurred in the course of a journey from work to Mr Sardi's place of abode (a journey claim) and that the respondent was not liable pursuant to section 10(3A) of the *Workers Compensation Act 1987* (the 1987 Act) as there was no real substantial connection between the employment and the accident out of which the injury arose.

4. Mr Sardi's solicitor sought review of the decision and provided the insurer with a statement in which Mr Sardi asserted that he had been returning to the respondent's premises at Homebush Bay Drive at Rhodes for the purpose of delivering a USB key.

5. Upon review, the insurer maintained that it was entitled to decline the claim pursuant to section 10(3A) of the 1987 Act and further disputed that Mr Sardi had suffered any incapacity for work or that he had any need for medical treatment resulting from the accident.

6. Mr Sardi also made a claim against the Compulsory Third-Party insurer. That claim was accepted and Mr Sardi received benefits in respect of that claim for a period of 26 weeks following the accident.

7. In January 2020, a claim was made on workers compensation insurer for approval for lumbar spine surgery recommended by Mr Sardi's treating neurosurgeon, Dr Darwish. That claim was rejected on the same basis as the earlier claim and the insurer further asserted that the injury had not occurred in the course of, or arising out of, employment with the respondent.

8. In May 2020, Mr Sardi's solicitor filed an Application to Resolve a Dispute in the Commission seeking an award of weekly payments from the date of the subject accident and a declaration pursuant to section 60(5) of the 1987 Act that surgery proposed by Dr Darwish, L5/S1 laminectomy, discectomy and PLIF (posterior lumbar interbody fusion) (the proposed surgery) constituted reasonably necessary treatment resulting from the subject injury.

9. By its reply, the respondent maintained denial of liability in accordance with the dispute notices.

ISSUES FOR DETERMINATION

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

    (a) Did the applicant suffer an injury in the course of, or arising out of, his employment, or

(b) Did the applicant suffer injury in the course of a journey to which section 10 of the 1987 Act applies?

(c) Whether proposed surgery constitutes reasonably necessary treatment resulting from the subject injury?

(d) Did the applicant suffer incapacity for employment as a result of the subject injury and, if so, to what extent?

PROCEDURE BEFORE THE COMMISSION

11. 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.

12. The matter proceeded to hearing by way of telephone conference on 13 July 2020. The respondent sought to have admitted on hearing a report by an independent medical expert, Dr Smith which had been served upon the applicant late on 9 July 2020 and 47 other documents which appear to have been assembled as part of an investigation carried out on behalf of the respondent in June 2020.

13. Counsel for the applicant objected to the tender on the basis that the applicant had not had the opportunity to adduce evidence in reply to the report or the other documents and was unfairly prejudiced.

14. The respondent did not press the tender of the 36 documents listed under the heading “WHS Policies Folder” but pressed the tender of the remaining documents. I rejected that application on the basis that there was no satisfactory explanation as to why these documents (apart from Dr Smith’s report) were sought to be introduced in the proceedings at such a late stage and the unfair prejudice to the applicant which could not be addressed.

15. The matter proceeded to hearing and oral submissions were presented by counsel for the applicant. Those submissions were audio-recorded and are noted below. Time constraints did not allow further submissions and a direction was made for filing of written submissions by the respondent and submissions in reply by the applicant.

16. Those submissions were duly supplied and have been considered together with the submissions advanced on behalf of the applicant at the hearing.

17. Leave was refused to the respondent to dispute that Mr Sardi had suffered “injury” in the sense of altered pathological state as a result of the motor vehicle accident. The evidence established that Mr Sardi presented to the Accident and Emergency Department of the Campbelltown Hospital on the evening following the accident complaining of pain in his neck low back right-hand and other parts of the body.

18. Mr Sardi consulted his general practitioner the following day, giving a history of the motor vehicle accident with the general practitioner noting that Mr Sardi limped and was reporting exacerbation of low back pain and neck pain as well as other symptoms. There was no evidence to suggest that Mr Sardi had not suffered injury and accordingly no basis upon which the respondent could reasonably rely to deny injury.

EVIDENCE

Documentary Evidence

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

    (a) Application to Resolve a Dispute and attached documents;

    (b) Reply and attached documents.

    (c) Documents attached to Application Admit Late Document by the applicant (applicant's statement dated 29 June 2020 and statement of Divyanshu Sharma dated 30 June 2020.)

Oral Evidence

20. The respondent sought and was granted leave to cross examine Mr Sardi with respect to the nature of his journey at the time of the subject injury and with respect to his pre-injury condition. The relevant portions of the cross examination referred to by Counsel for the respondent in his written submissions are noted below.

FINDINGS AND REASONS

Issue 1 – Injury in the course of employment, and

Issue 2 – Journey Injury

21. The applicant submitted that the injury occurred either in the course of employment or in the course of a journey to which section 10 of the 1987 Act applied. Depending upon the characterisation of the journey, consideration is required as to whether employment was a substantial contributing factor (section 9A of the 1987 Act) or there was a "real and substantial connection" connecting the employment with the accident (section 10(3A) of that Act). It is therefore convenient to discuss these issues together.

22. Counsel for the applicant submitted that the evidence established that the applicant was travelling to deliver USB keys (or a USB key) to the Unisys site at Rhodes when he suffered the subject injury. He submitted that the applicant was therefore in the course of his employment when the accident occurred.

23. Counsel for the applicant further submitted that the provisions of section 9A of the 1987 Act were made out, noting the contractual obligations of the applicant and the manner in which his work was to be performed pursuant to his contract of employment.

24. In the alternative, Counsel for the applicant submitted that, if it was found that Mr Sardi was in fact on a journey to his home, then he was entitled to compensation pursuant to section 10 of the 1987 Act.

25. The respondent submitted that Mr Sardi was engaged in driving home (his "place of abode" for the purposes of section 10 of the 1987 Act) and was neither in the course of his employment nor engaged in any activity causally related to his employment so that the provisions of section 9A were not satisfied as employment could not be shown to be a substantial contributing factor to the injury.

26. It is convenient to first determine the issue of fact as to Mr Sardi's intended destination at the time of his injury. The applicant submitted that the evidence established that Mr Sardi was intending to return to either the Rhodes office (Unisys) or to Homebush (DHL depot) to deliver a "USB key" which was required by a fellow worker the following day.

27. The respondent submitted that it was more probable than not that Mr Sardi had set off from Matraville intending to drive to his home at Harris Park. It is common ground that the site of the subject accident was on a road convenient for reaching the three possible destinations suggested, Harrington Park, Homebush Bay or Rhodes.

28. The Incident Reporting Form in evidence completed by Mr Sardi includes the statement; "I was in the far left lane south-west direction heading to Campbelltown/MacArthur region." Counsel for the applicant submitted that Mr Sardi's presence in the left lane was consistent with Mr Sardi intending to leave General Holmes Drive to travel on the M5 freeway. This, it was submitted, was consistent with Mr Sardi intending to travel to Rhodes or Homebush Bay.

29. The respondent submitted that Mr Sardi was intending to travel to the "Campbelltown/MacArthur region" which was consistent with travelling to his home at Harrington Park.

30. It is clear from the map that the M5 East motorway was the most convenient route from General Holmes Drive to the turnoff at Beverley Hills onto the A3 (King George's Road) leading to Rhodes and Homebush Bay as well as for travel in a westerly direction towards Harrington Park. At the point where the injury occurred the turnoff was many kilometres ahead on the A5. The presence of the applicant on General Holmes Drive in the left hand lane does not assist in determining whether Mr Sardi was intending to travel to Rhodes or Homebush Bay, or to his home at Harrington Park.

31. I accept the submission of the respondent that Harrington Park can be described as being within the Campbelltown/Macarthur region. I am satisfied that Rhodes and Homebush Bay are not in that region. These are matters of common knowledge, confirmed by inspection of public maps.

32. I therefore accept that the inference to be drawn from the CXC incident reporting form is that Mr Sardi was intending to convey that he was on a journey to his home. That is not to say, however, that he did not intend to travel via Homebush Bay or Rhodes for the purpose of delivering the USB keys.

33. In his statement dated 4 November 2019, Mr Sardi said that he had completed his work at the Matraville site. He said:

> "I was able to duplicate a number of USB keys from an original USB which is a vital tool used to update the serial and model number of PCs when replacing key components. At the time the team didn't have enough USB keys for everyone, so I had organised to go to the Unisys building 1G Homebush Bay Drive Rhodes NSW 21387 [sic – 2138] and drop them off to my manager Adam if he was still on site or put them in his pigeonhole for the following day as I would not be going to DHL the following morning as I had a project to continue with at Matraville."

34. A Casual Employment Agreement which was in evidence records agreement between the respondent and Mr Sardi. That agreement (which postdates the accident and is presumably tendered as some evidence of the agreement in place at the time of the accident) notes that Mr Sardi is to perform services for a client of the respondent, identified as Randstad Pty Ltd and the contact person is to be Adam Whitfield. The place of work is identified as "Unisys - 1G Homebush Bay Drive, Rhodes, NSW, 2138, Australia". I draw the inference that the person referred to as "Adam" by Mr Sardi in his statement is Adam Whitfield.

35. A memorandum dated 22 July 2019 records:

> "pc to Adam. Introduction provided. Adam advised that he'd been in touch with the worker a number of times since the accident. CONS provided update about his RTW status and plan to obtain a COC. CON attempted to clarify worker's journey destination. Adam advised "home". KKT asked if there was any reason that he might have headed back to the office and Adam advised he couldn't think of any….. Adam confirmed that worker's normal role is based 100% at clients locations and he does not have anything immediately available re alternative duties."

36. In its dispute notice dated 3 December 2019, the insurer informed Mr Sardi:

> "The evidence from your employer is that you told your supervisor that you were heading home when the motor vehicle accident occurred."

37. In a further statement dated 13 May 2020, Mr Sardi said:

> "At the time of the accident, I was travelling from a client's location back to the head office to drop off some USB keys needed by my co-workers.
>
> In my previous statement, I had indicated that I was returning to the Unisys building to drop off the USB keys. However, my memory has been severely affected from the accident.
>
> After speaking with Divyanshu [Sharma] I recalled that I was in fact giving him the USB keys and organised to meet him at either the DHL depot or Unisys head office. The reason for the different locations was because Divyanshu was also working off-site and I was going to call him when I was close to the locations to see which location was most convenient for him to attend.
>
> Both locations are within five minutes of each other. I was originally going to meet Divyanshu at DHL as this was more convenient to attend as it is close to the motorway. However, if Divyanshu was already at the Unisys head office then I would have travelled to the head office to give him the USB keys there. As noted above, I was going to call Divyanshu when I was close to the locations to find out where he was so that we could confirm a final meeting point for me to provide the USB keys to him."

38. A statement by Divyanshu Sharma dated 29 January 2020 was in evidence. Mr Sharma said that he was employed by the respondent as a field service technician and had been working with Mr Sardi for a period of three weeks for the purpose of receiving training.

39. Mr Sharma said:

> "On 18 July 2019, Jay and I had organised to meet up in the afternoon at Homebush DHL depot or at Unisys head office as Jay had created a number of working USB golden keys which we require to update serial numbers on Lenovo system boards.
>
> Unfortunately, this didn't happen as the next call I received from Jay was to inform me that he was involved in a motor vehicle accident while on the way to meet me."

40. In the course of cross-examination, counsel for the respondent drew Mr Sardi's attention to his statement dated 4 November 2019 where he had asserted that he was travelling to Rhodes to hand the USB sticks to Adam or place them in his pigeonhole. Mr Sardi confirmed that this had been his recollection of the time.

41. Mr Sardi was asked if it was the case that his later statement dated 13 May 2020 was made after he had received the dispute notice from the insurer. Mr Sardi said this was possible but he did not remember. He agreed that he had been shown the dispute notice after 3 December 2019 and that his later statement had been made after seeing that notice. He denied that he had told his manager that he was heading home and said that he had not spoken to his manager until after the accident. Mr Sardi said: "I said to him I won't be able to hand over the USB's and that I was heading home as my vehicle was no longer driveable."

42. It was put to Mr Sardi that this was a significant change in his previous statement that he now said that he was going to deliver the memory sticks to Mr Sharma. Mr Sardi said that it was not unusual for the manager to make an appointment to meet him and then to change his mind and have Mr Sardi meet someone else.

43. Counsel for the respondent submitted that this was the first time that a suggestion of change of mind by the manager had been suggested and noted the following cross-examination:

> "Q. Okay. Did Adam call you and say I don't want the USBs now, I want them to go to Mr Sharma?
>
> A. No, he never said that to me.
>
> Q. Then why do you say it was changed?
>
> A. He said to me make sure the team has USB's, that was his specific words. Whether it went directly to him in his pigeonhole or directly to the team it didn't matter they had to have the USB's and that's what I was instructed to do which is it was just (sic).
>
> Q. So it's fair to say, it's fair to say that your account in your statement of 4 November 2019, is completely wrong in that you weren't dropping the USB sticks to Adam?
>
> A. I wouldn't say completely wrong as I still had to drop the USB's. I was still heading.
>
> Q. Well it was wrong in that respect isn't it?
>
> A. It was wrong in the respect that I didn't have to give it to Adam, I could have given it to Mr Sharma or Adam. I chose to give it to Mr Sharma.
>
> Q. And your account that you had to give it to Adam or drop it in his pigeonhole is that just made up is it?
>
> A. No. Like I said to you before I was originally instructed to give them either to Adam or to my team members. Sharma was one of my team members if I wasn't giving it to Adam I had to give it to Sharma. I already said that three times."

44. I accept the submission of the respondent that the evidence of the applicant with respect to his intended destination appears to be unreliable. Counsel for the respondent submitted that the only finding available on the evidence was that Mr Sardi was travelling to his home in the Campbelltown/Macarthur region.

45. That submission does not take into account the statement by Mr Sharma that he had arranged to meet with Mr Sardi at either Homebush Bay or Rhodes but this meeting did not take place because of the motor vehicle accident.

46. In his further statement dated 30 June 2020, Mr Sharma confirmed that he had been expecting to receive the USB keys from Mr Sardi at either the Homebush Bay depot or at Unisys head office. He responded to the suggestion that he had not been at work on that day by providing his timesheet showing that he was in fact performing work for the respondent on the day of the accident. I accept his evidence.

47. As Counsel for the applicant submitted, the file note dated 22 July 2019 apparently by a person identified as 'P Korchok' is a second hand report of what was alleged to have been said by Mr Sardi's manager, Adam. The memo relevantly records: "CON attempted to clarify worker's journey destination. Adam advised "home". KKT pressed as to whether this was assumed or whether it was discussed. Adam advised that IW [injured worker] told him he was heading home."

48. The memo does not assist in shedding substantial light on Mr Sardi's intentions as to his destination at the time of the accident. The memo does not clarify whether the conversation that apparently took place between Mr Sardi and Adam was after the accident had occurred in which case it would have been correct for Mr Sardi to report that he was then heading home.

49. It is by no means clear that it was the writer of the memo who spoke to Adam. The identities of "CON" and "KKT" are not disclosed and neither is the role of 'P Korchok'[1]. There is no statement from Adam to clarify the situation. The only direct evidence is from Mr Sharma who is clear that he had arranged to meet with Mr Sardi at either Rhodes or Homebush Bay for a purpose connected with their employment, the handing over of a USB stick which performed a necessary function in the performance of their respective duties on behalf of the respondent.

50. The statement in the incident report by Mr Sardi that he was "heading to Campbelltown/MacArthur region" is also equivocal. Clearly Mr Sardi's ultimate destination would have been his home in the Campbelltown/Macarthur region. The dispute is as to whether he was intending to travel via Rhodes or Homebush Bay in order to deliver the USB key.

51. In an email from Paul Korchok to the insurer, Mr Korchok notes that although the incident report refers to travelling to the Campbelltown Macarthur region and the applicant's supervisor had reported "that he was heading home when the accident occurred", in conversation with Mr Sardi on 22 July 2019 Mr Sardi had stated that he was planning to return to the main office. Mr Korchok comments on the likelihood, commenting that there did not appear to be any reason to divert to the head office.

52. Weighing the incident report wording together with the memorandum of the telephone conversation with Adam and the emails in evidence against the statements of Mr Sharma, I am satisfied that greater weight should be given to the latter and that I should accept that, although Mr Sardi's ultimate destination may have been his home, he intended to travel to a meeting with Mr Sharma at either Rhodes or Homebush Bay.

53. That finding is, I think, incidental to the issue of whether Mr Sardi was in the course of employment at the time of his subject injury. The course of employment is not confined to the normal work hours nor the place of work. Dixon J in *Whittingham v Commissioner of Railways (WA)*[2] said: "There can no longer be any doubt that the accident must happen while the employee is doing something which is part of or is incidental to his service".

[1] A 'P Korchok' is identified in a rehabilitation report as a representative of the respondent's rehabilitation provider.
[2] [1931] HCA 49; (1931) 46 CLR 22

54. In *Hatzimanolis v ANI Corporation Ltd*[3] Mason CJ, Deane Dawson and McHugh JJ said:

> "Accordingly, it should now be accepted that an interval or interlude within an overall period or episode of work occurs within the course of employment if, expressly or impliedly, the employer has induced or encouraged the employee to spend that interval or interlude at a particular place or in a particular way. Furthermore, an injury sustained in such an interval will be within the course of employment if it occurred at that place or while the employee was engaged in that activity unless the employee was guilty of gross misconduct taking him or her outside the course of employment. In determining whether the injury occurred in the course of employment, regard must always be had to the general nature, terms and circumstances of the employment "and not merely to the circumstances of the particular occasion out of which the injury to the employee has arisen"(20) Danvers (1969) 122 CLR, at p 537."

55. In *Comcare v PVYW*[4] French CJ, Hayne, Crennan and Kiefel JJ said:

> *"Applying the Hatzimanolis principle*
>
> [38] The starting point in applying what was said in Hatzimanolis, in order to determine whether an injury was suffered in the course of employment, is the factual finding that an employee suffered injury, but not whilst engaged in actual work. The next enquiry is what the employee was doing when injured. For the principle in Hatzimanolis to apply, the employee must have been either engaged in an activity or present at a place when the injury occurred. The essential enquiry is then: how was the injury brought about? In some cases, the injury will have occurred at and by reference to the place. More commonly, it will have occurred while the employee was engaged in an activity. It is only if and when one of those circumstances is present that the question arising from the Hatzimanolis principle becomes relevant. When an activity was engaged in at the time of injury, the question is: did the employer induce or encourage the employee to engage in that activity? When injury occurs at and by reference to a place, the question is: did the employer induce or encourage the employee to be there? If the answer to the relevant question is affirmative, then the injury will have occurred in the course of employment."

56. As noted above, a "Casual Employment Agreement" was in evidence. It is clear that the particular document in evidence was not the agreement applicable to the applicant's duties on the day of the subject injury as the start date is expressed to be 1 January 2020.

57. The agreement in evidence describes Mr Sardi's role:

> "4. ROLE
>
> 4.1 During the life of this agreement, the Company may offer an Assignment to the Employee to perform work for a Client having regard to the Employee's availability, skills, training and experience.
>
> 4.2 Each time the Employee is offered the opportunity to work for a Client, the Company will issue to the Employee Assignment Terms substantially in the form of Schedule 1.
>
> 4.3 The Employee may accept or reject the offer of an Assignment in the Employee's absolute discretion.

[3] [1992] HCA 21; 173 CLR 473
[4] [2013] HCA 41; 303 ALR 1

4.4 If the Employee accepts an offer of an Assignment, this Agreement and any Assignment Terms issued to the Employee from time to time in relation to an Assignment with the Client shall form the terms and conditions of the Employee's employment in relation to that Assignment."

58. Schedule 1 to the agreement notes the client as "Randstad Pty Ltd" and the work to be performed at "Unisys — 1G Homebush Bay Drive, Rhodes, NSW, 2138, Australia".

59. The schedule provides "Mileage claim, Tolls and Parking reimbursement amounts will be processed as agreed and approved by the Client".

60. In his earliest statement, Mr Sardi refers to himself as having been "a computer engineer for Unisys for over three years now." I accept that the "Client" referred to in the agreement at the time of the injury would have been Unisys.

61. Mr Sardi described his work:

> "my daily duties include driving to Homebush DHL in the morning and arriving on site by no later than 8:30 AM where I collect my parts for the day. I then go back to my car where I would call my customers (while parked) and booking jobs depending on customer availability on a mobile application on my mobile phone or laptop.
>
> ….
>
> Mostly based in the field my car is also considered as my mobile office. Furthermore, because a lot of my paperwork and emails are done from home this would be considered as my place of business as well. I also to work at home as well like additional study and certifications."

62. Mr Sardi noted that work with Dell, Lenovo and the Department of Defence combined on-site work as well as off-site work. He said that he met with his manager, Adam, at either Homebush DHL depot or the Unisys building at Rhodes.

63. Mr Sardi said that he would make work-related phone calls from home as well as doing employment-related work on the computer and sorting out parts for the following day. He also had a role in assisting newer employees.

64. I accept Mr Sardi's description of his work pattern as credible and uncontradicted. I accept that Mr Sardi was employed by the respondent to perform duties which were assigned by the respondent's client in this case Unisys. This would necessarily involve travelling to the various worksites required by Unisys under the direction of Adam Whitfield.

65. There is no evidence that Mr Sardi was compelled to travel by motor vehicle to the various worksites but the provision in the contract clearly contemplates travel by Mr Sardi's personal motor vehicle as it provides for reimbursement of expenses incurred and mileage as agreed with the "client".

66. In his statement dated 29 June 2020 Mr Sardi explained that he was paid a travel allowance by the respondent when the distance travelled is greater than 40 km "in a single trip for a service call". The respondent would cover his parking expenses and tolls. In addition he said that he was paid for time spent travelling if the distance exceeded 60 km.

67. There is no evidence that Mr Sardi was provided with any particular workspace at either Rhodes or Homebush Bay and his visits to those sites were incidental to his performance of the work tasks assigned to him by Unisys.

68. I accept that Mr Sardi's course of employment included travel to various worksites as assigned by Unisys for the completion of tasks for the benefit of Unisys and its customers. The provision of allowances for parking tolls and mileage to be arranged with the client, in this case Unisys, demonstrates that the respondent contemplated that Mr Sardi would use his motor vehicle in travelling to the worksites nominated by Unisys.

69. I accept that at the time of the subject injury Mr Sardi was travelling from a workplace at Matraville where he was making a service call that had been assigned to him by Unisys and that the use of his motor vehicle was contemplated and encouraged by the respondent.

70. The journey was incidental to the employment and I am satisfied that Mr Sardi was in the course of employment when he suffered the subject injury.

71. In order to succeed in his claim the employment concerned was a substantial contributing factor to the injury in accordance with section 9A of the 1987 Act. Counsel for the applicant submitted that the provisions of section 9A were satisfied in the circumstances.

72. Section 9A provides:

> "WORKERS COMPENSATION ACT 1987 - SECT 9A
>
> 9A NO COMPENSATION PAYABLE UNLESS EMPLOYMENT SUBSTANTIAL CONTRIBUTING FACTOR TO INJURY
>
> (1) No compensation is payable under this Act in respect of an injury (other than a disease injury) unless the employment concerned was a substantial contributing factor to the injury.
>
> Note : In the case of a disease injury, the worker's employment must be the main contributing factor. See section 4.
>
> (2) The following are examples of matters to be taken into account for the purposes of determining whether a worker's employment was a substantial contributing factor to an injury (but this subsection does not limit the kinds of matters that can be taken into account for the purposes of such a determination)--
>
> (a) the time and place of the injury,
>
> (b) the nature of the work performed and the particular tasks of that work,
>
> (c) the duration of the employment,
>
> (d) the probability that the injury or a similar injury would have happened anyway, at about the same time or at the same stage of the worker's life, if he or she had not been at work or had not worked in that employment,
>
> (e) the worker's state of health before the injury and the existence of any hereditary risks,
>
> (f) the worker's lifestyle and his or her activities outside the workplace.
>
> (3) A worker's employment is not to be regarded as a substantial contributing factor to a worker's injury merely because of either or both of the following--
>
> (a) the injury arose out of or in the course of, or arose both out of and in the course of, the worker's employment,

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

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

73. The applicant submitted that employment had placed Mr Sardi where he was at the time of injury, noting the decision of the Court of Appeal in *Da Ros v Qantas Airways Ltd*[5] (*Da Ros*). That case concerned injury suffered by a Qantas employee who was knocked off his bicycle during slip time in Los Angeles. Qantas encourage staff to engage in activities which managed fatigue while on layover and provided access to facilities including bicycles.

74. On appeal to the Court of Appeal, Basten JA (with whom the other members of the court agreed) said that section 9A did not require or authorise a weighing of the negligence of the other bicycle rider compared with the employment related factors. His Honour said:

> "21 The second and more important error arose from what the Deputy President referred to as "employment factors". Those factors were to be weighed against the other causal element, which was seen to be the negligent riding of the other cyclist. That, however, is not the exercise required by s 9A. In simple terms, the accident occurred because the two bicycles were in the same place at the same time. The appellant was there, on his bicycle, "in the course of his employment". That finding having been made, it would appear to follow that the employment concerned was a substantial contributing factor. That conclusion would not seem to be in doubt if the appellant had himself been a bicycle courier and had been carrying goods in the course of his employment as a courier. Some other consideration thus appears to have been introduced into the Deputy President's analysis in order to support a contrary conclusion in this case. The employment concerned appears to have been discounted on the basis that, although the class of conduct in which the appellant was engaged was both permitted and encouraged by the employer, the specific activity was not required by it. Alternatively, it may have been thought that riding a bicycle for relaxation, exercise or recreation whilst in a "slip port" was too far removed from the activities for which the appellant was employed, namely as a flight attendant on an international flight. If reasoning of either kind were applied, it would have been erroneous.
>
> 22 The activity in which a claimant may be involved when he or she suffers injury is either within the course of employment or it is not; if it is, it is usually neither necessary nor appropriate to ask whether it constitutes an essential incident or core element of the employment. Similarly, it is usually neither necessary nor appropriate to inquire whether the particular activity was the subject of a specific direction by the employer or was simply a permissible activity, chosen by the employee. The "employment concerned" as referred to in s 9A(1) is the same concept as the "employment" referred to in s 4(a) when determining whether the injury arose "in the course of employment". In *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; 110 CLR 626 at 632-633, Kitto J rejected the proposition that the word "employment" in the definition of injury was confined to "the inherent features or essential incidents of the employment, to the exclusion of occurrences in the course of the work". In rejecting that approach, and in dealing with the concept of a factor contributing to the aggravation of a disease, his Honour concluded:

[5] [2010] NSWCA 89

> "Where it is possible to identify as a contributing factor to the aggravation ... of a disease some incident or state of affairs to which the worker was exposed in the performance of his duties and to which he would not otherwise have been exposed, I see no misuse of English in condensing the statement of the fact by saying simply that the employment was a contributing factor to the aggravation ...."
>
> 23 It is true that in *Semlitch* Kitto J was considering exposure "in the performance of [the worker's] duties", but given his Honour's rejection of the distinction between inherent features or essential incidents of employment on the one hand and occurrences in the course of the work on the other, it is apparent that his Honour was not seeking to distinguish between performance of duties and other activities.
>
> 24 In the present case, the collision with the courier was an incident or state of affairs to which the appellant was exposed in the course of his employment and to which he would not otherwise have been exposed. Because it was one of two contributing factors (the other being the presence of the courier at the same place at the same time) it is difficult to understand why it would not be a substantial contributing factor. No satisfactory alternative having been proffered on behalf of Qantas, and in accordance with the reasoning in *Badawi,* there was only one conclusion reasonably open on the findings of primary fact."

75. I am satisfied that Mr Sardi was engaged in a journey which was incidental to his employment. He was travelling from a workplace at a location appointed by his manager at Unisys. He was also in the course of delivering a USB key to Rhodes or Homebush Bay.

76. The journey upon which he was engaged when he was injured was contemplated by his contract of employment with the respondent. Mr Sardi was obliged to provide the service calls that Unisys required of him and his agreement made provision for arrangements to be made for reimbursement of tolls, parking charges and mileage.

77. As noted by Basten JA in *Da Ros*, the collision "was an incident or state of affairs to which the [applicant] was exposed in the course of his employment and to which he would not otherwise have been exposed."

78. The time and place of injury were dictated by the location of the worksite when Mr Sardi had been performing his work. The nature of that work required Mr Sardi to drive to and from sites that varied from time to time. The timing of the accident relates solely to the time at which Mr Sardi completed the necessary services at Matraville on the day. He was not tied to particular hours attending at that site.

79. The duration of the employment is irrelevant to the injury, as are Mr Sardi's state of health, any hereditary risks or his lifestyle and activities outside the workplace.

80. There is no probability that the injury or a similar injury would have happened anyway about the same time or same stage of Mr Sardi's life had he not been at work or had not worked in his then employment with the respondent. He was in the act of returning from a service call assigned to him by Unisys in furtherance of his employment with the respondent.

81. I am satisfied on the balance of probabilities that Mr Sardi suffered injury to his neck and lumbar spine on 18 July 2019 in the course of his employment with the respondent and that Mr Sardi's employment was a substantial contributing factor to his injury.

82. It is therefore unnecessary to consider the alternative basis of the applicant's claim that Mr Sardi was engaged in a periodic journey to which section 10 of the 1987 Act applied.

Issue 3 –Need for Surgery

83. The respondent submitted that the evidence did not establish that the surgery proposed by Dr Darwish represented reasonably necessary treatment or that such treatment resulted from the subject injury.

84. The respondent submitted that Dr Darwish had been supplied with an incorrect history. Although Dr Darwish acknowledged that Mr Sardi had suffered a low back injury in the motorcycle accident on 23 August 2013 he had incorrectly understood that Mr Sardi had made a "full recovery".

85. I accept that Dr Darwish's belief that Mr Sardi had made a "full recovery" from the motorcycle accident in 2013 was not well-founded. Mr Sardi was clearly provided with strong medication (Targin – oxycodone with naloxone moderator) by his general practitioner and had shortly before the subject accident required an increase in the dosage of his anti-depressant, Endep. The medical records of Dr Mohammed in evidence notes "chronic pain" on 4 June 2019. On 30 June 2019 Dr Mohammed recorded prescribing both Endep and the opioid, Targin.

86. I accept the respondent's submission that Mr Sardi had a significant pre-existing lumbar spine condition as a result of motor vehicle accident which occurred in 2013.

87. The applicant acknowledged in cross-examination that he did have continuing pain although he said he was "normal enough". I do not accept that the requirement to take opioid medication represents anything approaching a "normal" physical state.

88. The applicant submits that "the fact that the applicant has been prescribed similar medication before and after his injury does not relieve the respondent from the liability to pay for post injury treatment so long as there is a causal connection between the work injury and the need for treatment." The applicant also notes that liability is subject to "the reasonably necessary requirements as referred to in Diab[6]".

89. The clinical notes in evidence from Dr Mohammed establish that treatment of the lumbar spine condition was being managed by the general practitioner. Following the subject injury and referral was made to Dr Darwish for specialist treatment. I accept that the subject injury made the signs and symptoms in the lumbar spine worse and I am satisfied that this is indicative of an aggravation of the pre-existing condition.

90. I am satisfied that the need for treatment by a neurosurgeon, Dr Darwish, results from the subject injury. The respondent however submits that the evidence does not establish that the proposed surgery constitutes "reasonably necessary medical treatment" in respect of the applicant's injury to the low back.

91. Deputy President Roche in *Diab* said:

> "[76] The standard test adopted in determining if medical treatment is reasonably necessary as a result of a work injury is that stated by Burke CCJ in Rose v Health Commission (NSW) [1986] NSWCC 2; (1986) 2 NSWCCR 32 (Rose) where his Honour said, at 48A—C:
>
> > "3. Any necessity for relevant treatment results from the injury where its purpose and potential effect is to alleviate the consequences of injury.
> >
> > 4. It is reasonably necessary that such treatment be afforded a worker if this Court concludes, exercising prudence, sound judgment and good sense, that it is so. That involves the Court in deciding, on the facts as it finds them, that the particular treatment is essential to, should be afforded to, and should not be forborne by, the worker.

[6] *Diab v NRMA Ltd* (2014) NSWWCCPD 72

> 5. In so deciding, the Court will have regard to medical opinion as to the relevance and appropriateness of the particular treatment, any available alternative treatment, the cost factor, the actual or potential effectiveness of the treatment and its place in the usual medical armoury of treatments for the particular condition."

92. A number of reports from the treating neurosurgeon, Dr Darwish, were in evidence. In a report dated 19 August 2019 to the general practitioner, Dr Mohammed, Dr Darwish noted the motor vehicle accident on 18 July 2019. He reported that Mr Sardi had developed lower back pain and right sciatica following that accident. This pain was associated with paraesthesia over the lateral aspect of the right leg.

93. Dr Darwish noted the previous motorcycle accident in August 2013 in which he understood Mr Sardi had "sustained hip fractures and required open fixation and made a full recovery". He noted that Mr Sardi was walking with the aid of a stick and was limping. On examination, he noted "straight leg raising test was 45° on the right side with positive nerve stretch test. He had decreased sensation over the lateral aspect of the right leg. Muscular power was normal in both lower limbs."

94. Dr Darwish arranged a MRI scan of the lumbar spine. The report of that scan dated 10 September 2019 was in evidence. The findings with respect to the lumbar spine are recorded as follows:

> "Findings were compared with the previous study dated 18/5/15. Prior surgery is seen in S1 vertebral body. Previously present minimal loss of height of L1 and L2 vertebral bodies remains stable. Grade 1 anterolisthesis is seen of L5 over S1 vertebra. Other vertebrae maintain normal corpus heights and alignment. There is bilateral spondylolysis at L5. Other posterior elements appear normal. Disc desiccation is seen at L1/2 and L2/3 levels with Schmorl's nodes. No significant disc herniation is seen. Central spinal canal and neural foramina appear patent throughout. Lower spinal cord appears normal. The prevertebral and paraspinal soft tissues appear normal."

95. In a report to the general practitioner dated 16 September 2019, Dr Darwish noted complaints of lower back pain radiating to both lower limbs more on the right side. He noted that
Mr Sardi was taking Targin, Endone and Endep. With respect to the scan of the lumbar spine Dr Darwish reported:

> "The MRI scan of the lumbosacral spine on the 9 September 2019 showed a grade 1 L5/S1 spondylolisthesis secondary to bilateral L5 Pars defect and bilateral L5/S1 foraminal stenosis with potential compression of both L5 nerve roots in the foramina. He also has L1/L2, L2/L3 and L3/L4 disc dehydration."

96. Dr Darwish proposed treatment of the lower back pain and leg symptoms by way of right L5/S1 epidural cortisone injection and he recommended physiotherapy and a gym program.

97. In his report dated 18 November 2019, Dr Darwish noted continuing complaints of neck and back pain, the latter radiating to both lower limbs. He noted that physiotherapy had not resulted in improvement. With respect to the lumbar spine he said: "Regarding his back and leg symptoms I recommended L5/S1 laminectomy, discectomy and fusion." Dr Darwish noted the risks of the operation as including and not limited to "nerve root injury, spinal fluid leak, infection, haemorrhage, adjacent level disease and cardiopulmonary complications."

98. A copy of Dr Darwish's letter to the motor vehicle insurer seeking approval for L5/S1 laminectomy, discectomy and PLIF fusion detailed his own fees at $20,947.50. This figure did not include the additional fees for the assistant, Private Hospital accommodation nor the "costs of the prosthesis".

99. Further investigations requested by Dr Darwish were reported on 20 December 2019. With respect to the lumbar spine at L5/S1 the report notes; "mildly active discovertebral arthritis. No significant the active facet joint arthritis." The conclusion with regard to the lumbar spine notes:

> "
> - There is a loss of vertebral body height involving C5 with some anterior wedging. This is likely to reflect old trauma.
> - In the lumbar spine there is mildly active discovertebral arthritis at L5/S1. There is no significantly active facet joint arthritis in the lumbar spine.
> - There is very mild bony reaction in the region of the L4 pars bilaterally. This may reflect a stress reaction or old injury. Correlation with clinical findings is recommended.
> - There is mildly active arthritic change involving the left sacroiliac joint."

100. In a report to a private health insurer on 13 February 2020, Dr Darwish noted the history as previously recorded and provided a diagnosis: "L5/S1 spondylolisthesis secondary to bilateral L5 pars defect, right L5 radiculopathy. Mechanical neck pain, no evidence of cervical radiculopathy or myelopathy." He noted that physiotherapy, analgesics and epidural cortisone injections had not improved the situation. He recommended the proposed surgery. Dr Darwish estimated the total cost of the surgery at $50,000.

101. Dr Darwish was asked "Whether the proposed surgery, namely L5/S1 laminectomy, discectomy and fusion is recently necessary as a result of the accident on 18/7/19?" He replied:

> "The L5/S1 spondylolisthesis secondary to bilateral L5 Pars defect is most likely pre-existing however before the injury he was completely asymptomatic. The car accident on 18 July 2019 was the cause of the right radiculopathy and hence, he need for surgery. He failed to respond to all forms of conservative treatment and hence, surgery is reasonable and necessary and acceptable treatment option by all practising neurosurgeons and spinal surgeons."

102. Mr Sardi was seen by an orthopaedic surgeon, Dr Matthew Giblin, on 17 February 2020. Dr Giblin's report of that date was in evidence. Dr Giblin noted the history of the subject motor vehicle accident with continuing complaints of pain in the neck, both shoulders, cervical/thoracic spine, low back, down both legs, right hand and both knees. He also noted the motorcycle accident in 2013 with a fracture of the pelvis, left hand, left foot and ruptured spleen. He recorded that, following the 2013 accident, Mr Sardi had had bilateral buttock pain with radiation down the legs, but following the subject accident the leg pain had become worse and Mr Sardi had suffered the onset of low back pain in addition to the buttock pain experienced as a result of the 2013 accident.

103. On examination of the lumbar spine, Dr Giblin reported:

> "On examination of his lumbar spine, he got around the room with a walking stick; he could forward flex below the knees, he had pain on rising, pain getting on and off the examination couch. Straight leg raising was 70° bilaterally and there were no significant peripheral neurological signs. He has obvious scars from his previous injury which is a pfannenstiel type incision and a longitudinal abdominal incision and some stab incisions on his low back over his pelvis. These are all from his old injury."

104. Dr Giblin noted the report of the MRI scan of the lumbar spine of 10 September 2019 which he recorded as showing "prior surgery seen in the S1 vertebral body. Grade 1 spondylolisthesis at L5/S1 with bilateral pars defects. Some Schmorl's nodes at L2/3". He noted that the bone scan of 20 December 2019 relevantly showed disco vertebral arthritis at L5/S1 and "mild bony reaction in the region of the L4 pars bilaterally."

105. With respect to the lumbar spine, Dr Giblin diagnosed "most likely an aggravation of his lumbar spondylolisthesis at the L5/S1 level". He commented:

> "It is possible that at the time of the fracture of his pelvis he had injured his L5/S1 level which had given him some buttock and leg discomfort, but this last accident has significantly aggravated it to the extent that he now has low back pain as well as increasing pain in his buttocks and legs. The other possibility of course, is that his buttock and leg pain is purely related to his pelvis. Unfortunately, there is no way to determine one way or the other. In summary however, this last motor vehicle accident has significantly aggravated his buttock and leg pain and given him low back pain as well. The surgery proposed by Dr Darwish, which is an L5/S1 decompression and fusion, is not unreasonable."

106. The applicant bears the onus of proving not only that the need for the proposed treatment results from the subject injury, but also that the proposed treatment is reasonably necessary with respect to the pathology.

107. The issue of whether the proposed treatment is reasonably necessary has to be considered in the light of the factors referred to in *Rose*;

> "medical opinion as to the relevance and appropriateness of the particular treatment, any available alternative treatment, the cost factor, the actual or potential effectiveness of the treatment and its place in the usual medical armoury of treatments for the particular condition."

108. The reports of Dr Darwish provide little assistance in determining the relevance and appropriateness of the particular treatment and the actual or potential effectiveness of the treatment. They do not explain what outcome is expected as a result of the proposed treatment. Dr Darwish refers to pathology; "potential compression of both L5 nerve roots in the foramina". It is by no means clear that Dr Darwish regards the proposed treatment as necessary to stabilise the L5/S1 level so as to guard against the possibility of future compression of these nerves.

109. The CT scan of the lumbar spine carried out at Campbelltown Hospital on the date of injury reported:

> "Internal fixator through the right S1 joint with internal fixating plate and screws through the symphysis pubis associated with some local beam hardening artefact. Bilateral L5 spondylolysis with grade 1 L5 – S1 spondylolisthesis. Probably old and united fracture through the posterior inferior aspect of the spinous process of L4. No acute fracture is identified. Schmorl's nodes formation into the superior end plate of L2 and L3. At soft tissue windows and no epidural haematoma is identified. No acute post-traumatic intervertebral disc herniation is seen. No retroperitoneal or psoas haematoma."

110. Dr Darwish does not refer to these findings in his reports although the earlier MRI scan disclosed previous lumbosacral surgery. The evidence is silent as to what bearing this has, if any, on the appropriateness of Dr Darwish's proposed surgery.

111. The report of Dr Giblin is of very limited assistance. Dr Giblin found “no significant peripheral neurological signs”. He regarded the surgery as “not unreasonable” but does not provide assistance as to the purpose of the surgery.

112. The appropriateness of the proposed treatment needs to be assessed in the light of the clinical signs and symptoms as disclosed on examination and investigation. Neither Dr Darwish nor Dr Giblin relate the proposed treatment to any particular aspect of the pathology at L5/S1.

113. I accept the applicant’s submission that the opinions of Dr Darwish and Dr Giblin are uncontradicted by medical evidence in the respondent’s case. The weight of that submission is substantially reduced, however, by the difficulties inherent in obtaining a medicolegal report during the Covid 19 restrictions, given that the claim in respect of the proposed surgery was not made until January 2020.

114. I take into account the other factors in *Rose*, the cost of $50,000 and the potential adverse outcomes listed by Dr Darwish.

115. In my view, the evidence as a whole including the statements of the applicant, the reports of Dr Darwish and the report of Dr Giblin, do not provide an evidentiary basis for concluding that the proposed treatment is relevant and appropriate. Nor does that evidence assist in assessing the actual or potential effectiveness of the treatment.

116. I accept that acceptance of the opinion of an expert requires that the expert provides proper and cogent reasons for the opinion (*Makita (Australia) Pty Ltd v Sprowles*[7]). In *Hancock v East Coast Timber Products Pty Ltd*[8] (*Hancock*), Beazley JA said (Giles and Tobias JJA agreeing):

> “82. Although not bound by the rules of evidence, there can be no doubt that the Commission is required to be satisfied that expert evidence provides a satisfactory basis upon which the Commission can make its findings. For that reason, an expert's report will need to conform, in a sufficiently satisfactory way, with the usual requirements for expert evidence. As the authorities make plain, even in evidence-based jurisdictions, that does not require strict compliance with each and every feature referred to by Heydon JA in Makita to be set out in each and every report . In many cases, certain aspects to which his Honour referred will not be in dispute. A report ought not be rejected for that reason alone.
>
> 83. In the case of a non-evidence-based jurisdiction such as here, the question of the acceptability of expert evidence will not be one of admissibility but of weight. This was made apparent in Brambles Industries Limited v Bell [2010] NSWCA 162 at [19] per Hodgson JA”.

117. The reports of Dr Darwish and Dr Giblin do not allow an understanding of the basis upon which they conclude that the treatment is appropriate and what amelioration of the applicant’s condition is expected or intended.

118. I do not think that the incorrect history obtained by Dr Darwish is a significant problem. Although the referral letter from the general practitioner to Dr Darwish[9] records “past history of MBA 23-8-2013 has had Chronic Sciatica” the general practitioner notes “now the pain has flared up”

[7] [2001] NSWCA 305
[8] [2011] NSWCA 11;80 NSWLR 43
[9] ARD p.41

119. I accept that Mr Sardi's level of symptoms increased following the subject accident to the extent that he has been unable to return to work and has problems with mobility. Mr Sardi was managing with the assistance of medication prior to the subject accident but not coping as well following that accident. Whatever the situation prior to the subject accident, it is the present level of symptoms that calls for treatment.

120. In *Hancock,* Beazley JA accepted the analysis by Spigelman CJ in *Australian Securities & Investments Commission v Rich*[10] of the admissibility of experts reports. The Chief Justice said:

> "Although expressed in terms of "usefulness", the starting point for Heydon JA's detailed analysis of the case law on admissibility does not suggest any focus on the true historical process by which the expert first formed the relevant opinion. The focus of attention - the "prime duty" - is to ensure that the court, as the tribunal of fact, is placed in a position where it can examine and assess the evidence presented to it. That can occur without adopting the true factual basis approach. What Heydon JA identified as the expert's "prime duty" is fully satisfied if the expert identifies the facts and reasoning process which he or she asserts justify the opinion. That is sufficient to enable the tribunal of fact to evaluate the opinions expressed."

121. Although it is a question of weight rather than admissibility in the Commission, I do not think the reports of Dr Darwish and Dr Giblin identify the facts and reasoning process justifying their conclusions. I do not think that they can be afforded sufficient weight to outweigh the cost and potential risks as detailed by Dr Darwish and do not provide a satisfactory basis for concluding that the proposed treatment is reasonably necessary.

122. I take into account that the opinion expressed by Dr Darwish is that of an experienced specialist who relies upon his training and experience when forming his opinion. Nevertheless I do not think the evidence forms a satisfactory basis for concluding that the proposed surgery constitutes reasonably necessary treatment in respect of the injury.

123. That is not a finding that the proposed treatment is not reasonably necessary, but simply a finding that the current evidence does not satisfy the tests accepted in *Rose* and *Diab* and is insufficient to support a declaration pursuant to section 60(5) of the 1987 Act.

Issue 4 - Incapacity

124. Counsel for the applicant submitted that Mr Sardi had no capacity for work following the subject accident. Counsel for the applicant noted that Mr Sardi had suffered injury to his neck and low back as well as injuries to his shoulders, knees and right hand.

125. Counsel for the applicant submitted that the certificates of capacity issued by Dr Mohammed should be accepted as uncontradicted. Although Dr Darwish reported a limited series of restrictions, this was based upon referral only of the neck and low back conditions and did not take account of the other areas of injury.

126. Counsel for the respondent submitted that Mr Sardi had a capacity to undertake full-time duties "with some light restrictions concerning lifting". Counsel for the respondent submitted that Dr Darwish's opinion was of little weight due to the incorrect history and did not take account of pre-existing problems.

127. Assessment of capacity for work requires consideration of the definitions found in section 32A of the 1987 Act;

[10] [2005] NSWCA 152

"no current work capacity, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to work, either in the worker's preinjury employment or in suitable employment."

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."

128. I accept that Mr Sardi had suffered injury to his neck and low back as a result of the subject accident and that these injuries affect his capacity for work. It is not disputed that Mr Sardi had suffered injuries to his shoulders, knees and right hand but there does not appear to be any evidence that these injuries restricted his capacity for employment.

129. There is an allegation of psychological injury in the Application to Resolve a Dispute. The evidence of the general practitioner's notes establishes that Mr Sardi was taking an antidepressant prior to the subject injury but there is no evidence supporting a view that any psychological condition contributes to his incapacity.

130. Mr Sardi was aged 40 when he suffered the subject accident. He had in earlier years been employed as a panel beater/spray painter and a truck driver[11]. He had obtained a Certificate IV in Information Technology and held certification as a technician for Lenovo, Dell and Apple. His statement records that he had been performing work for Unisys for over three years at the time of his accident. Apart from performing technical support work for clients of Unisys, Mr Sardi stated that he was a team trainer and helped other technicians obtain the necessary skills.

131. Mr Sardi was employed as a casual employee by the respondent and submitted timesheets for the work that he performed on behalf of Unisys.

[11] Rehab Consulting Pty Ltd Report 8 October 2019 – Application to Resolve a Dispute Page 52

132. Mr Sardi said that, since the subject accident, he had difficulty with moving his neck and had restricted ability to look up for any period of time. He said that he found reading and writing troublesome and had difficulty sitting at a computer for any length of time.

133. He said his ability to drive was affected by limited neck movement and also by a restricted capacity to sit. He said that he could walk around 10 minutes and used a walking stick for extended periods of time. He said that he would not be able to work with computers.

134. In his statement, Mr Sardi said that he had not been having problems with his neck or back prior to the subject accident but acknowledged under cross examine that he had been experiencing sciatica and other symptoms referable to his earlier motorcycle accident in 2013. As noted above the referral to Dr Darwish acknowledges a history of "chronic sciatica".

135. Certificates of capacity/fitness issued by Dr Mohammed note injuries: "whiplash, right knee pain, exacerbation of low back pain." Pre-existing factors are noted as "previous pelvic fracture, compressed discs in the neck and right knee pain". Mr Sardi was certified as having no current capacity for work up to 21 October 2019 which point he was assessed as having a capacity to work one hour two days a week with restrictions of lifting up to 2 kg, sitting limited to 20 minutes and standing to 5 minutes with a maximum of 10 minutes walking with a walking stick.

136. A certificate issued on 19 November 2019 adds right third knuckle pain to the description of injury. The next certificate issued on 30 December 2019 adds tenosynovitis. The certificate issued on 3 February 2020 once again certifies Mr Sardi as having no capacity for employment. This remained his status, in the opinion of the general practitioner, up to the current time.

137. The respondent asserted that the applicant has a capacity "to undertake full-time duties with some light restrictions concerning lifting". I do not accept that submission. The restriction suggested by Dr Darwish is "not to lift objects heavier than 5 kg. He should avoid sitting or standing for more than one hour time and avoid excessive bending and twisting his back." I accept that the restrictions suggested by Dr Darwish do not appear to limit Mr Sardi from completing a normal workload subject to those restrictions. However, it is necessary to consider the whole of the evidence.

138. The report of the occupational therapist, Caroline Frewer[12], provides a detailed consideration of Mr Sardi's capacity and restrictions. The occupational therapist notes the use of a walking stick on the right side, limited capacity for walking and sitting, restricted neck movement and restrictions on bending and lifting.

139. Although I approach Mr Sardi's statement as to his capacity with some caution, read in the light of the opinions of the occupational therapist, the general practitioner, Dr Darwish and Dr Giblin, I accept that Mr Sardi has substantial restrictions on his capacity to work.

140. The restrictions on driving and sitting would preclude employment as a driver and restrictions on bending and lifting would preclude employment as a panel beater/spray painter. Mr Sardi has no experience as a salesperson or clerk and it is difficult to find that he would be suitable for employment in those roles.

141. The occupational therapist regarded Mr Sardi as having a capacity at that time for one hour per day, two days per week, with restrictions similar to those noted by Dr Darwish. The occupational therapist conducted a physical assessment of Mr Sardi and had the benefit of the radiological reports up to that time. I am satisfied that her opinion should be given substantial weight.

[12] ARD p.45

142. Although the general practitioner accepted that Mr Sardi was capable of performing work within the restrictions for one hour on two days per week, he subsequently again assessed Mr Sardi as being unfit. There is no evidence which explains why Mr Sardi in October 2019 was assessed as being fit for very limited employment but subsequently as wholly unfit.

143. It seems to me that Mr Sardi could provide training sessions online or in person for one hour per day two days per week. I am satisfied that this represents the extent of his capacity to date. From the earnings records it appears that the appropriate rate would be about $32 per hour.

144. I am satisfied that Mr Sardi had the capacity to earn $64.00 per week from the date of injury to the present and continuing.

145. The parties were unable to agree on the calculation of pre-injury average weekly earnings. The respondent did not dispute the applicant's assertion that he was employed by the respondent and performed work between 7 February 2019 and 18 July 2019.

146. Two "PAYG payment summary – individual non-business" documents issued by the respondent were in evidence. The earlier document relates to a period from 7 February 2019 to 23 May 2019 and certifies gross payments in that period of $12,741. The second relates to a period, 13 May 2019 to 30 June 2019 and certifies payments totalling $3622. This represents the documentary evidence with respect to Mr Sardi's earnings up to 30 June 2019, a period of 24.3 weeks.

147. A number of payslips in evidence record payments made in respect of periods commencing 17 June 2019 to 18 July 2019. The respondent summarised the payments in a table:

Document	Date paid	Pay period from	Pay period to	Weeks	Gross	Gross per week
PAYG (12/7/19)		7/02/2019	23/05/2019	15.14	$12,741	$841.39
PAYG (11/7/19)		13/05/2019	30/06/2019	7.00	$3622	$517.43
Payslip	4/07/2019	17/06/2019	23/06/2019	1.00	$920.86	$920.86
Payslip	11/07/2019	24/06/2019	30/06/2019	1.00	$846.44	$846.44
Payslip	1/08/2019	1/07/2019	7/07/2019	1.00	$1112.62	$1112.62
Payslip	1/08/2019	8/07/2019	14/07/2019	1.00	$615.42	$615.42
Payslip	1/08/2019	15/07/2019	18/07/2019	0.57	$457.44	$457.44
Total				26.71	$20,315.78	$760.48

148. The respondent submitted that the two payslips of 4 July 2019 and 11 July 2019 were for periods prior to 30 June 2019 and would have been subsumed in PAYG statements of 11 July 2019. The respondent submitted: "Excluding those two payslips, the respondent submits the total gross payments were $18,548.48 across 24.71 weeks which is $750.52".

149. The applicant pointed to the fact that year-to-date figure in the first payslip which shows monies paid at 4 July 2019 indicated that these figures had not been included in the PAYG statements by reference to the "year-to-date" figure shown on the payslip. I accept that the PAYG statements dated respectively 12 July 2019 and 11 July 2019 certify actual payments made to Mr Sardi in the periods indicated and do not include payments made after 30 June 2019 even though the monies may have been earned in that period.

150. The respondent's submissions addressed only the evidence produced by the applicant. No additional wage material was supplied by the respondent. The respondent's assertion that the applicant's formulation of the claim shows double accounting is not accepted for the reasons set out above. The respondent has also fallen into error in calculating the number of weeks during which Mr Sardi was employed and paid.

151. I accept the evidence of the PAYG summaries and payslips as showing that, in the period 7 February 2019 to 18 July 2019 Mr Sardi was paid a total of $20,315.78.

152. The applicant drew attention to the fact that the respondent had miscalculated the number of weeks. The period 7 February 2019 to 18 July 2019 is not 26.71 nor 24.71 weeks but is in fact a total of only 23 weeks. The average weekly earnings in the period 7 February 2019 to 18 July 2019 are therefore $883.29 ($20,315.78 divided by 23).

153. In the first entitlement period, Mr Sardi is entitled to be paid in accordance with the formula found in section 36(2)(a) of the 1987 Act: "(AWE x 95%) – (E + D)" where AWE equals $883.29 and E is equal to $64.00. There is no evidence to suggest that any value needs to be given to the variable, 'D'. Applying those figures yields a weekly payment of $775.13 in the first entitlement period, 19 July 2019 to 17 October 2019.

154. In the second entitlement period, Mr Sardi is entitled to be paid in accordance with the formula found in section 37(2)(a) of the 1987 Act: "(AWE x 80%) – (E + D)". Applying the same values to the variables yields a weekly payment of $642.63 in the second entitlement period commencing 18 October 2019

SUMMARY

155. I am satisfied on the balance of probabilities that Mr Sardi suffered injury to his neck, low back, shoulders, knees and right hand in the course of his employment on 18 July 2019. Employment was a substantial contributing factor to those injuries.

156. As a result of his injuries, Mr Sardi has a reduced capacity for employment of only two hours per week at the rate of $32 per hour. He is entitled to receive weekly payments in the sum of $775.13 in the first entitlement period to 17 October 2019 and the sum of $642.63 in the second entitlement period commencing 18 October 2019.

157. I am not satisfied that the applicant is entitled to a declaration pursuant to section 60(5) of the 1987 Act in respect of the surgery proposed by Dr Darwish at the present time in the light of the evidence currently before the Commission.