WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **4778/19**
Applicant: **Robert Grimshaw**
Respondent: **Tomago Aluminium Company Pty Ltd**
Date of Determination: **15 May 2020**
Citation: **[2020] NSWWCC 156**

The Commission determines:

1. The matter is remitted to the Registrar for referral to an Approved Medical Specialist to assess the degree of permanent impairment, if any, of the lumbar spine as a result of injury deemed to have occurred on 30 May 2012, such injury consisting in the aggravation, acceleration, deterioration or exacerbation of the degenerative disease in the lumbar spine, to which employment was the main contributing factor to the aggravation, acceleration, deterioration or exacerbation of the degenerative disease in the lumbar spine.

2. The documents to be referred to the Approved Medical Specialist are the documents admitted into evidence in these proceedings by consent as follows:

    (a) Application to Resolve a Dispute and all attached documents.

    (b) Late documents filed by the Applicant as follows:

        (i) Tomago Medical Centre notes filed 28 November 2019;
        (ii) Statement of the Applicant filed 20 December 2019;
        (iii) Physiotharapist notes filed 20 January 2020.

    (c) The Reply and all attached documents.

    (d) Late documents filed by the Respondent as follows:

        (i) Dr Millons report dated 9 October 2019 and filed 14 October 2019;
        (ii) Clinical notes and wages records filed 11 November 2019;
        (iii) Email from Ms Katrina Whitely filed 17 January 2020.

3. The matter to be placed in the medical assessment pending list.

4. By consent the matter to be relisted before me for a telephone conference in respect of the claim for weekly compensation and medical expenses once the Medical Assessment Certificate is issued.

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

Jane Peacock
Arbitrator

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

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. By Application to Resolve a Dispute (the Application), Mr Grimshaw seeks lump sum compensation, weekly compensation and compensation for medical expenses as a result of injury to his lumbar spine alleged deemed to have occurred on 30 May 2012.

2. The Respondent is Tomago Aluminium Company Pty Ltd (Tomago). The relevant insurer for the purposes of workers compensation is AAI Limited t/as GIO (the insurer).

3. Tomago denied liability for the claim.

ISSUES FOR DETERMINATION

4. Mr Grimshaw alleges that he suffered an aggravation, acceleration, exacerbation or deterioration of a pre-existing disease in his lumbar spine as a result of the nature and conditions of his employment with Tomago, to which his employment is alleged to be the main contributing factor to aggravation, acceleration, exacerbation or deterioration of a pre-existing disease in his lumbar spine.

5. Mr Grimshaw alleges this injury is deemed to have occurred on 30 May 2012 (when he was last employed with Tomago). Tomago disputes he suffered such an injury but agrees that 30 May 2012 is the date such injury would be deemed to have occurred if he is successful in his claim. Given this agreement about the date of injury, my determination will not traverse the issue of the correct date of injury.

6. Tomago disputes that Mr Grimshaw suffered injury as alleged.

7. Tomago also relies on the notice and claim provisions to assert that Mr Grimshaw is barred from recovery of compensation because he failed to give notice of injury and his claim is brought out of time.

8. Tomago seeks an award in their favour.

9. In the event Mr Grimshaw is successful, the parties have agreed that the matter should be referred to an Approved Medical Specialist (AMS) to assess the degree of permanent impairment, if any, of the lumbar spine as a result of injury deemed to have occurred on 30 May 2012. It is agreed that once the Medical Assessment Certificate is issued, the matter should be re-listed for a telephone conference before me in respect of the claim for weekly compensation and medical expenses.

PROCEDURE BEFORE THE COMMISSION

10. The parties attended a conciliation arbitration in Newcastle. Both parties were represented by counsel with Mr Carney appearing for Mr Grimshaw and Mr Hunt appearing for Tomago. 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

11. The following documents were in evidence before the Commission being admitted by consent, and taken into account in making this determination:

    For Mr Grimshaw:

    (a) Application and all attached documents.
    (b) Late documents filed variously as follows:

        (i) Tomago Medical Centre notes filed 28 November 2019;
        (ii) Statement of the Applicant filed 20 December 2019;
        (iii) Physiotharapist notes filed 20 January 2020.

    For Tomago:

    (a) The Reply and all attached documents
    (b) Late documents filed variously as follows:

        (i) Dr Millons report dated 9 October 2019 and filed 14 October 2019;
        (ii) Clinical notes and wages records filed 11 November 2019;
        (iii) Email from Ms Katrina Whitely filed 17 January 2020 (It is noted that the evidence from Ms Whitely was admitted in this form by consent and no objection was taken by experienced counsel appearing for the Applicant at the arbitration as to the form in which this evidence has been presented).

Oral evidence

12. Mr Grimshaw did not seek leave to adduce further oral evidence.

13. Counsel for Tomago sought leave to cross-examine Mr Grimshaw and this was granted by consent. No objection was taken by counsel for Mr Grimshaw to the questions asked under cross-examination.

FINDINGS AND REASONS

14. Mr Grimshaw started work for Tomago in 1984. His employment ended on 30 May 2012, when he took a voluntary redundancy offered to him by Tomago.

15. He worked at various areas of the Tomago plant over the years, in the refractory, on the pot lines and lastly as a storeman/labourer in the store.

16. Mr Grimshaw has a degenerative disease in his lumbar spine as evidenced in all of the radiological reports that are in evidence. This accords with all of the medical opinion in the case.

17. Mr Grimshaw alleges that the work he performed over the years for Tomago was heavy and the injury is alleged to consist in the aggravation, acceleration, exacerbation or deterioration of any underlying degenerative disease in his lumbar spine, to which his employment is alleged to have been the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of any underlying degenerative disease in his lumbar spine.

18. Tomago disputes Mr Grimshaw's claims. Tomago disputes that Mr Grimshaw suffered injury as alleged.

19. I must make a determination on the balance of probabilities on the evidence in this case in accordance with the law.

20. The applicable law on injury is set out in sections 4, 9, 9A and 16 of the *Workers Compensation Act 1987* which provide as follows:

> "**4 Definition of "injury"**
>
> (cf former s 6 (1))
>
> In this Act—
>
> **"injury"** —
> (a) means personal injury arising out of or in the course of employment,
>
> (b) includes a **"disease injury"**, which means—
>
> (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and
>
> (ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease,…"
>
> **9 Liability of employers for injuries received by workers—general**
>
> (cf former s 7 (1) (a))
>
> (1) A worker who has received an injury (and, in the case of the death of the worker, his or her dependants) shall receive compensation from the worker's employer in accordance with this Act.
>
> (2) Compensation is payable whether the injury was received by the worker at or away from the worker's place of employment.
>
> **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.]

16 Aggravation etc of diseases—employer liable, date of injury etc

(cf former ss 7 (4A), (5), 16 (1A))

(1) If an injury consists in the aggravation, acceleration, exacerbation or deterioration of a disease—

(a) the injury shall, for the purposes of this Act, be deemed to have happened—

(i) at the time of the worker's death or incapacity, or

(ii) if death or incapacity has not resulted from the injury—at the time the worker makes a claim for compensation with respect to the injury, and

(b) compensation is payable by the employer who last employed the worker in employment that was a substantial contributing factor to the aggravation, acceleration, exacerbation or deterioration.

(2) Any employers who, during the 12 months preceding a worker's death or incapacity or the date of the claim (as the case requires), employed the worker in any such employment shall be liable to make to the employer by whom compensation is payable such contributions as, in default of agreement, may be determined by the Commission.

(2A) The Commission is to determine the contributions that a particular employer is liable to make on the basis of the following formula, or on such other basis as the Commission considers just and equitable in the special circumstances of the case—

$$C = T \times \frac{A}{B}$$

"C" is the contribution to be calculated for the particular employer concerned.

"T" is the amount of compensation to which the employer is required to contribute.

"A" is the total period of employment of the worker with the employer during the 12 month period concerned, in employment that has been a substantial contributing factor to the aggravation, acceleration, exacerbation or deterioration concerned.

"B" is the total period of employment of the worker with all employers during the 12 month period concerned, in employment that has been a substantial contributing factor to the aggravation, acceleration, exacerbation or deterioration concerned.

(3) In this section, a reference to an injury includes a reference to a permanent impairment for which compensation is payable under Division 4 of Part 3.

(4) This section does not apply to an injury to which section 17 applies."

21. Turning to an examination of the evidence in this case.

22. Mr Grimshaw gave evidence in two statements, one dated 12 September 2019 and a further statement dated 20 December 2019. Mr Grimshaw was cross-examined about his evidence by counsel for Tomago.

23. Mr Grimshaw gave evidence in a statement dated 12 September 2019 that he commenced working for Tomago in 1984 and that his duties included "looking after the warehouse, bricklaying and constant heavy lifting". He says that the heavy lifting he performed was "extensive". He gave evidence that he first started to notice problems with his back in 1990:

> "In around 1990, I started to notice problems with my back. I was constantly required to lift broken clamps and stems and organise for them to be fixed. I would have to bend over and arch my back to lift the claps and stems by myself. The clamps and stems were of varying sizes and weights. On average, I would say they weighed between 15 to 20 kg."

24. Mr Grimshaw gave evidence that he injured his back again in 1996 but was able to return to work on full duties:

> "In 1996, I injured my lower back again. I am fairly certain I was lifting clamps when the injury occurred. Despite my injury, I was able to return to work on full duties."

25. He gave further evidence about the heavy nature of his duties when he had to undertake bricklaying in the refractory as follows:

> "At one point, I had to undertake bricklaying in the back ovens. I was required to demolish the wall s of old bricks and lay new fire bricks. The bricks weighed about 30 kg each."

26. Mr Grimshaw gave evidence of an incident in 2011 or 2012 as follows:

> "In or around 2011 or 2012, I aggravated my back condition again when I bent down to pick up some equipment. My back locked up on me and I could not straighten up. I was unable le to continue with my duties and had to seek medical attention."

27. Mr Grimshaw was adamant and this was tested under cross-examination that this incident did occur. There are however no records which support the reporting of this incident. Mr Grimshaw gave evidence that the incident in 2011 or 2012 "was just an aggravation of ongoing pain and problems with my back."

28. Mr Grimshaw gave evidence about why he took the redundancy offered in 2012:

> "I had always enjoyed my job and would have loved to continue. However, my back condition was continuing to deteriorate to the point where I was getting cramping in my legs almost every day."

29. Mr Grimshaw gave evidence about his reporting of injuries and his understanding of the workers compensation claims process in respect of disease injuries:

> "I dispute that I did not report my injuries to my employer. Each time I suffered an injury, to the best of my recollection, I presented to Tomago's on-site clinic and told them what had happened. This should be in my employee file.
>
> In addition, I did not realise the seriousness of my injury until I consulted with Dr Ferch who recommended surgery. I do not consider that my injuries had settled until after my surgery.

> It was only after I consulted my solicitors did I fully understand the workers compensation claims pro cess. Further, my solicitor explained to me the difference between a frank injury and a disease injury. It is at this stage that I lodged officially a claim."

30. Mr Grimshaw gave evidence that during the course of his employment he complained of back pain to his GP Dr Martin on several occasions but that Mr Grimshaw "did not think it was serious enough to warrant further investigation or specialist treatment."

31. Mr Grimshaw gave evidence that after he resigned from Tomago his back continued to get worse. In 2014, some two years after he left work, Dr Martin referred him for an x-ray of his lumbar spine which took place on 17 June 2014. He underwent further radiological investigations and on 3 September 2015 he had an MRI of the lumbar spine. He was referred for physiotherapy and injections. Conservative treatment had no lasting effect and ultimately he sought referral to a specialist Dr Ferch, a neurosurgeon, who undertook decompressive surgery at the L3-4 level on 1 February 2016.

32. Mr Grimshaw was cross-examined about his evidence. It was put to him repeatedly that he was not experiencing symptoms in his back after he recovered from the incident in 1996 and that he was able to return to full duties and work without difficulty. Under cross-examination, Mr Grimshaw impressed as a witness of truth and as a witness endeavouring to give genuine and truthful responses to questioning about events that occurred over the last 20 or so years. He maintained under repeated questioning that he was never pain free in his back after the 1996 injury but he was able to tolerate the pain. He said the pain was always there. He said that his duties were heavy and that even when he went to the store it was lighter work but it wasn't light work. There was still manual lifting involved. He said he "put up with the pain all them years until it just got worse and worse". He said he tolerated the pain until the pain became intolerable and that is when he asked for a referral to a specialist Dr Ferch in 2015 and came to surgery in 2016. Whilst this was obviously after Mr Grimshaw left work in 2012, this is not determinative of the issue as to whether Mr Grimshaw has suffered an aggravation of a disease injury as a result of the heavy nature of his work and to which his work has been the main continuing factor to the aggravation injury . All of the evidence has to be weighed in the balance. Mr Grimshaw was credible under cross-examination when he maintained that he was never symptom free but he was able to tolerate the pain. He maintained under cross-examination that the symptoms in 2014 were not of spontaneous onset but they were a "build up", they just got "worse and worse". He gave evidence under cross-examination that he had good days, the severity of his symptoms depending on what he did at a work that day. He gave evidence under cross-examination that he was able to tolerate the pain whilst he was working.

33. The fact that Mr Grimshaw has made no report of symptoms of back pain after 1996 and indeed until after he left work is not determinative of the issue of injury although it is part of the evidence that I must weigh in the balance.

34. I also have to weigh in the balance the medical opinion in the case.

35. Dr Martin has been Mr Grimshaw's treating GP for some 40 years.

36. Mr Grimshaw gave evidence that he reported his back pain to Dr Martin from time to time over the years. He was cross-examined about this and the absence of Dr Martin's contemporaneous records of these complaints. Counsel for Mr Grimshaw took me to an entry in Dr Martins' notes in 2008, whilst Mr Grimshaw was still employed with Tomago, which notes longstanding back pain.

37. Dr Martin provided a report in support of Mr Grimshaw's case that is attached to the Application wherein he highlights the heavy and repetitive nature of the duties performed by Mr Grimshaw over the years at Tomago:

> "Robert Grimshaw has suffered many Injuries at work due to the nature of the work practices which were necessary to run the jobs efficiently and to completion. These practices included picking up heavy hazards (15-20kg pot hoods), laying heavy fire bricks, man-handling 50kg bags of furnace linings which were eventually limited to 25kg later on, as well as 200kg aluminium stems attached to anodes, these stems were magnetically pulled as they were lifted (up to 35kg).
>
> There were a number of frank incidents including 2-3 crushed fingers, tom biceps tendon at left shoulder, many repeats of back pain and hernia repairs to abdominal wall.
>
> An eventual L3/4 laminectomy by Dr Fetch gave substantial improvement in his leg pain but since that operation he has had constant leg cramps and back pain. He was also still getting radicular pain in his arms and fingers from his cervical spine.
>
> All his injuries are due to years of unrealistic and repetitive work practices which were necessary for the work. to be completed. His prognosis is very poor due to the repetitive severe injury to his body which will never heal."

38. Dr Martin referred Mr Grimshaw to Dr Ferch, neurosurgeon, who first saw him on 15 December 2015 and he operated on Mr Grimshaw's lumbar spine on 1 February 2016. I note this referral is in 2015 some three years after Mr Grimshaw left work on 30 May 2012. Mr Grimshaw said this referral took place at his request when he could not handle the pain anymore.

39. Dr Ferch provided a report to Mr Grimshaw's lawyers. Dr Ferch notes a history as follows:

> "Mr Grimshaw presented on I5/12/1015 with a history of increasing bilateral lower limb pain over the previous two years. His symptom; came on spontaneously but become progressively limiting."

40. Mr Grimshaw denied under cross-examination that the symptoms came on spontaneously maintaining that the pain was always there when he was at work, it just got worse and worse after he left work. He said it was a "build-up" of pain.

41. Dr Ferch conducted a physical examination which had positive findings. He reviewed the MRI of 13 September 2015 which "confirmed marked degenerative change al L4-5 and LS-SI and these segments were thought to be stiff. At the L3-4 level there was disc bulging and focal joint hypertrophy compromising the spinal canal."

42. Dr Ferch diagnosed "L3-4 spinal stenosis and spinal claudication."

43. Dr Ferch supported a causal link with Mr Grimshaw's employment which involved repetitive lifting and heavy lifting with Tomato, opining as follows:

> "Mr Grimshaw's symptoms developed gradually and became progressively limiting. Repetitive lilting and heavy lifting are likely to have exacerbated degenerative change within his back and could have contributed to his injury."

44. Dr Ferch noted that Mr Grimshaw had a good result from the surgery but cautioned that he had advised Mr Grimshaw "to avoid lifting >20kg in order to protect his back from progressive degenerative change." I note that Mr Grimshaw's evidence, which is untraversed by Tomago, is that over the years he was required to lift greater than 20 kilograms on a repetitive basis.

45. Dr Ferch considered that "the surgery performed on Mr Grimshaw was reasonable to treat spinal stenos is. The spinal stenosis is a degenerative phenomena which may have been accelerated by repetitive lifting and loading of his back."

46. Nothing turns on the use of the word “may” in this last paragraph. Dr Ferch’s report is not a medico-legal report. It is a treating doctor’s report. It must be read as a whole. Earlier in the report Dr Ferch said that the heavy and repetitive work performed by Mr Grimshaw over the years was “likely” to have exacerbated the degenerative changes in Mr Grimshaw’s back. I consider that Dr Ferch’s report supports Mr Grimshaw’s case on causation but of course it is one opinion that must be weighed in the balance with the other evidence.

47. Dr Bodel saw Mr Grimshaw at the request of his lawyers and provided a report dated 3 May 2017.

48. Dr Bodel recorded an occupational history broadly consistent with Mr Grimshaw’s evidence as follows:

> **“OCCUPATIONAL HISTORY**
>
> Mr Grimshaw indicates that he was employed at *Tomago Aluminium Co Pty Ltd* and commenced work at this facility in1984.
>
> He worked there for a total of 29 years. He was made redundant in 2013.
>
> Over his years of employment he did refractory work, operating work and also work in the stores area.
>
> The refractory work is bricklaying work This is in the ovens and it is a very large area He would do that bricklaying work every day and it would take a year or two to fully go around all of the areas replacing the bricks as they are needed.
>
> These bricks are very heavy bricks as they are "fire rated".
>
> The work as an operator was not as heavy but it was stiII fairly physical work but then in his later work he worked in the stores which was again very heavy work with a lot of heavy lifting involved.”

49. Dr Bodel summarised the injuries as “recurring episodes of injury to the back” and recorded the history relating to the injury as follows:

> “This gentleman had a number of episodes of in1ury to the back while at work at Tomago Each episode would occur with bending and lifting but he had a particularly severe episode of pain on 16 March 2011.He bent down to pick up a piece of equipment while in the stores area and his back locked up on him. He could not straighten up and he could not continue.
>
> He took two or three weeks off work at that time and was seen by his local doctor, Dr Paul Martin and he was treated conservatively with rest and analgesic medication and some physiotherapy.
>
> He slowly settled and went back to work up until about 2013 when he was made redundant.
>
> Over time, his back pain steadily deteriorated without additional accident or injury and he also began to develop intermittent claudication in both lower limbs and he found that eventually he was struggling to walk more than 100 metres without having to stop because of thigh and calf pain. When he sat down or leant forward the pain would ease and he could then walk again.

Dr Martin advised various conservative treatments including analgesic and anti-inflammatory medication and physiotherapy.

He had epidural block injection and these did not help.

He was investigated by means of CT scans on 29 August 2014 and again on 29 May 2015 and on careful viewing of those scans there is extensive disc pathology and there is 1s quite a large central disc prolapse at the L3/4 level and at L4/5 and to a lesser extent at L5/S1.

Dr Martin persisted with the conservative care until his walking tolerances was rapidly deteriorating. Mr Grimshaw eventually demanded that he see a specialist because of the seventy of his pain.

I have seen a report from Dr Richard Ferch which is dated 15 December 2015. He is writing to Dr Martin and indicates that this gentleman has developed increasing back pam and "increasing bilateral lower limb pain over the last two years". He is also reporting pain radiating into his "buttocks and into the posterior thighs and calves and this limits his capacity to walk He finds it difficult to walk more than 100 metres but does find relief on sitting down. Bending forward provides him with some relief'

He also indicated that his back pain was rated as 8/10 where 10 is the most severe pam imaginable and the leg pain was 6/10.

He arranged for an MRI scan which showed a very large central disc prolapse at the L3/4 level which was causing severe canal stenosis. There was longstanding degenerative change at the L4/S level with a significant central bulge at that level but no canal stenosis and a less marked disc injury at the LS/S1 level.

Because of the clinical findings seen on examination, Dr Ferch recommended a micro discectomy at the L3/4 level only and this was done on 01 February 2016.

It is just over a year since this surgery was done and Mr Grimshaw is pleased with the outcome. The back pain is much more tolerable and the leg pam has improved although it has not completely recovered. He has a better walking tolerance and can walk several hundred metres without worrying too much. He still can have a disturbed sleep pattern or difficulty with bending and lifting.

No other mtervent1onal treatment has been recommended and in particular there is no recommendation for a long fusion at L3/4, L4/5 or L5/S1.

This gentleman has not been able to return to work since he was made redundant. He is now 64 years of age. He indicates to me that he did not think to make a claim for compensation in regards to this and went ahead and had it done privately."

50. Dr Bodel noted:

> "He has had the minor episodes of back pain over the years at work and each of these were covered for his period by time off work and for his physiotherapy treatment."

51. Dr Bodel conducted a physical examination of the back and reviewed the radiological investigations dating from 2014.

52. Dr Bodel reviewed the operation report from Dr Ferch and the clinical notes of Dr Martin and made the following comments:

> "I have carefully perused the documentation provided.
>
> I note the operative report from Dr Ferch which is dated 01 February 2016 confirming the tight vertebral canal stenosis at the L3/4 level. The level of operation was confirmed on the image intensifier and the medial facet joints were resected to widely decompress the canal. A large disc prolapse was identified and surgically removed.
>
> The preoperative and postoperative reports from Dr Ferch confirm that he had a large disc prolapse at the L3/4 level with vertebral canal stenos1s and associated mterm1ttent claud1cat1on for which he has had the decompress 1ve surgery The postoperative result has been pleasing although incomplete resolution of symptoms has occurred This 1s largely associated with the widespread add1twnal pathology at the upper levels
>
> The clinical notes from the local doctor are also noted and they are consistent with this gentleman's medical management I also note that he is troubled with gout."

53. Dr Bodel went onto answer a series of specific questions that had been put to him as follows:

> "In response to your specific questions I would indicate the following
>
> Causation
> 1 Did our client sustain a work related injury during the course of his employment? If so, was it by way of an acceleration, exacerbation and/or aggravation of a pre-existing injury or another form of injury ?
>
> This gentleman has suffered a work related injury.
>
> This is an injury over time associated with widespread degenerative change.
>
> This is clearly evident on the scans that I have seen and there is quite marked narrowing of the L4/S disc space.
>
> He reports that he had minor episodes of back pam over the years but these were easily managed while he was still at work.
>
> Over the years he did develop increasing leg pain.
>
> He had quite clear symptoms of spinal claudication at the time that he saw Dr Ferch in 2015 which was some two years after ceasing work.
>
> On balance I believe therefore that this gentleman does have a disease process of gradual onset (degenerative disc disease) and that that nature and conditions of heavy work over 29 years at Tomago Aluminium Co Pty Ltd has caused Injury by means of aggravation, acceleration, exacerbation and deterioration of that disease process.
>
> Which body parts have been impaired as a result of the injury, the subject of the claim?
>
> The body parts involved in this Injury are the lumbar spine.

Do you consider that our client's employment is the main substantial contributing factor to his injury? If so, what is the mechanism by which he sustained his injury?

Employment is the main substantial contributing factor by way of aggravation, acceleration, exacerbation and deterioration of an underlying disease process being the degenerative disc disease

It is also probable that the episode on 16 March 2011 has caused some additional structural damage but in the absence of any acute onset of leg pam at that time that is not the mam contributing factor to the injury.

The main contributing factor is as I have indicated the nature and conditions of his work over 29 years which was very heavy work including the brick-laying work when doing the refractory work and the stores work in particular.

The mechanism by which this Injury has occurred is by the nature and conditions of work in general."

54. I consider that Dr Bodel had a fair climate for his opinion. He had a history of ongoing symptoms, which accords with Mr Grimshaw's evidence under cross-examination, that he was able to manage whilst he was at work. Dr Bodel had a consistent history that the symptoms became worse after Mr Grimshaw left work until ultimately he was operated on. Dr Bodel had a consistent history of the heavy nature of Mr Grimshaw's duties with Tomago as performed in various different parts of the plant at Tomago in employment that spanned some 29 years.

55. Dr Millons, was qualified on behalf of Tomago to provide an opinion as an Independent Medical expert (IME). Dr Millons saw Mr Grimshaw on 9 November 2017 and provided a report on the same day.

56. Dr Millons took a consistent employment history which he recorded, noting that the duties involved in the brickworks were heavy and the duties at the store were also heavy, as follows:

"Mr Grimshaw left school when he was fifteen.

He completed an apprenticeship as a roof tiler and stayed in that trade for some 17 or 18 years before starting work at Tomago where he was for 29 years through until 2013 when he was made redundant.

For ten years. he worked in effect as a brickie, re-laying bricks in the ovens on site. The work was quite heavy and demanding.

After ten years. he moved into the stores where there was a lot of heavy lifting of tools and equipment involved. He worked there 5 days per week. He states that he was working in what was described as a "sub store. "

Mr Grimshaw continued working there through until 2013 when all the sub stores at Tomago were closed down and he was made redundant.

He does not appear to have worked since that time."

57. Dr Millons records the “history of current matters” as follows:

> “Mr Grimshaw has been having problems with his back.
>
> Back problems really seem to have come to the fore during his last five years at work in the store at Tomago. He would often have to lift loads up to 50kg. There were forklifts available. Sometimes he would have to carry a bundle of tools past the magnetic pots and his back would be twisted as he passed the pots with magnetic attraction.
>
> He put up with his ongoing symptoms. He thinks that he did tell Dr Martin about his problems on occasion and states that Dr Martin may have some records in regard to that.
>
> Somewhere along the way, possibly in May 2011, Mr Grimshaw bent over to pick up something at work and he had a severe pain in the back and he was stuck with a bent back. He went off work and had some physiotherapy.
>
> He states that it was reported but there is no record of that incident at Tomago.
>
> He returned to work after a few weeks, still with pain in his back. He just put up with that.
>
> He states that in his last years at Tomago, he was finding it hard to walk or drive far. He just took occasional medication for his pain and put up with it.
>
> He was made redundant in 2013.
>
> As time passed, his back symptoms increased and he started to get pain spreading through both lower limbs to the feet. He was getting cramps in his thighs, calves and ankles. He put up with his ongoing symptoms then. His wife became quite sick and she died in 2014.
>
> Mr Grimshaw was subsequently investigated and there were found to be considerable problems in his lower back. He was having difficulty walking and bending.
>
> An opinion was sought from Dr Ferch in December 2015.
>
> Further investigations followed and, in February 2016, in Lingard Hospital, Mr Grimshaw came to an operation on his back, apparently a microdiscectomy at L3/4. That was funded through his Health Fund.
>
> Mr Grimshaw was an inpatient for two days. There was not a lot of immediate relief of his back and leg pain but, as the months progressed, things did seem to ease off a little. He saw Dr Ferch on a couple of occasions over the subsequent months.
>
> Dr Ferch advised him to take things quietly and avoid lifting. There has been no talk of any further surgical intervention.”

58. Dr Millons recorded a history of the current situation where he records the reported ongoing symptoms Mr Grimshaw suffers from and about which he gave evidence in his statement.

59. Dr Millons conducted a physical examination of which there were positive findings in respect of the lumbar spine and he noted Mr Grimshaw made no attempt to embellish his complaints.

60. Dr Millons reviewed the radiological investigations which dated from June 2014.

61. Dr Millons noted that he did not have access to the treating doctor's report but was in possession of Dr Bodel's opinion of May 2017:

> "I am party to a report from Dr Bodel dated Mav 2017 but I am not party to any reports from his treating doctors. Dr Bodel notes that pre-operative and postoperative reports from Dr Ferch indicate that there had been a large disc prolapse at L3/4 with vertebral canal stenosis and associated intermittent claudication for which he had had decompressive surgery."

62. Dr Millons went on to opine as follows:

> "Mr Grimshaw is clearly suffering from multi-level constitutionally based attritional changes in the back.
>
> He describes episodes of back pain during his last five years working in the store at Tomago. His work in the store appears to have been heavy and demanding with a lot of lifting involved.
>
> He claims to have seen Dr Martin on occasion about his back. It would be interesting to review Dr Martin's records in that regard. He has seen Dr Martin for some 40 years.
>
> Mr Grimshaw does recall a definite incident, possibly in March 2011, when he bent to pick something up at work and was bent with pain. He was off work then for a few weeks.
>
> That appears to have been a significant aggravation of the underlying changes. There are no records of that incident.
>
> Mr Grimshaw worked until he was made redundant in 20I3 when sub store where he was working closed down.
>
> His symptoms worsened and were fairly classical of spinal claudication. When he did come to radiological investigations in June 2014, there were noted to be severe degenerate changes at L4/5 and L5/S1. Subsequent investigations revealed a very large disc protrusion at L3/4 and lesser protrusions at L4/5 and L5/S I.
>
> In the light of continuing symptoms, Dr Ferch elected to perform a decompressive procedure and 'microdiscectomy at L3/4, the major troublesome area.
>
> There was a downturn in symptoms.
>
> Mr Grimshaw has been left with some ongoing pain in his back and some restricted sitting, standing. walking with some ongoing lower limb cramping symptoms but no real frank neurological deficit.
>
> His ongoing complaints can be explained on the basis of the activities of daily living playing on the attritional changes that are present in his back. He modifies his lifestyle to suit his disability and relies on his son to do most of the work at home and around the property.
>
> Basically, I would see his condition as being a disease of gradual onset, perhaps not occasioned by his work but certainly aggravated by the nature and conditions of his work at Tomago. Symptoms really seem to have come in in the last five years of bis time there when working in the store where the work was heavy and demanding. He had done a lot of heavy work prior to that time, spending some ten years as a brickie.

Mr Grimshaw suffers from gout of many his joints but that does not appear to be relevant to the matters in hand."

63. Dr Millons opinion contained in his report dated 9 November 2017 clearly supports Mr Grimshaw's case. He opines in no uncertain terms that Mr Grimshaw suffers from a disease in his lumbar spine that has "certainly" been aggravated by the nature and conditions of his work at Tomago. He notes the heaviness of the work both in the store and before that in the brickworks where he was effectively a brickie. I note that Mr Grimshaw's evidence is that the bricks which were fire bricks weighed some 30 kilograms each.

64. I note that Mr Grimshaw has given evidence in his statement about the heavy nature of his work. He was cross-examined and the cross-examination in no way undermined the veracity of this evidence. Mr Grimshaw was credible under cross-examination.

65. Dr Millons, IME for Tomago, in this report, accepts with certainty Mr Grimshaw's account of the heavy nature of his work at Tomago and the effect on Mr Grimshaw's underlying spinal disease.

66. There is no evidence from Tomago that controverts in any way Mr Grimshaw's account of the heavy and physically demanding nature of his duties performed over time and in different areas of Tomago – pot lines, brickworks, and lastly in the store.

67. Dr Millons proceeded to answer a series of questions from Tomago's lawyers as follows:

"You note that there were recurring episodes of back pain but a particularly severe episode on 16 March 2011 when he bent down to pick up a piece of equipment.

Mr Grimshaw told me that he was off work for some three weeks. Dr Martin's records should be able to clarify that.

You note that the last injury reported by the applicant was actually on 30 November 2005 and that from 1984 until 30 November 2005, he had reported 25 separate injuries which would suggest that there were, indeed, symptoms coming from the degenerate change in his back over that period.

Again. it would be reasonable to review Dr Martin's records to clarify the situation. You note that in fact he worked following the alleged incident in March 2011. Clearly, a forensic review of Dr Martin's -records should help clarify the situation.

The injuries allegedly sustained including details of the medical treatment afforded immediately following the injury

Mr Grimshaw states that he did have intermittent problems with pain in his back with lifting in the store environment particularly. He put up with that and may have seen Dr Martin on occasion.

He put up with his ongoing symptoms through until the time he was made redundant. In the years after that time symptoms, which he claims have not left him, have worsened with symptoms and radiological findings indicative of spinal canal stenosis as a result of quite severe degenerate change at 13/4/5/SI with spinal canal stenosis as a result of a large disc protrusion at L3/4.

His alleged period of incapacity following the injury

If one is referring to the injury in March 2011, he told me that he was off work for some three weeks and had physiotherapy, returning to work in pain.

I understand from your instructing letter that there is some doubt about the period of incapacity following that incident.

Past medical history

Mr Grimshaw clearly has a history of intermittent back pain going back some way in time with symptoms gradually worsening as the degenerate change advanced. He worked through until the time of his redundancy.

It was a couple of years later that he came to the surgery at Dr Ferch's hands.

Previous claims

Mr Grimshaw claims to have had intermittent issues with his back over the years.

Subsequent accidents or injuries

There do not appear to have been any significant subsequent incident after he left work. just a gradual deterioration in his condition consistent with the worsening degenerate change.
Current complaints

Mr Grimshaw seems to have had a reasonably good outcome from the L3/4 discectomy that Dr Ferch performed.

He has been left with a back that remains quite stiff and irritable as a result of the ongoing degenerate change there.

There are some cramps in the lower limbs but no frank radiculopathy at this stage.

Current and proposed treatment

Mr Grimshaw takes Arthrexin for his gout but he is not on any other particular medication and he just adapts his lifestyle to suit his disability to cope with his ongoing symptoms.

He does not require any formal treatment at this stage.

If spinal canal stenosis reared its head again, he may need a further decompressive procedure since there are quite marked degenerate changes across the lower three lumbar levels.

Social history

Outlined above. Mr Grimshaw moved to Scone after his wife died. He lives there with his son who tends to do most of the work in and around the property.

Mr Grimshaw has been unable to return to his fishing activities.

Activities of daily living

Mr Grimshaw is independent in his personal activities of daily living but does not involve himself in much of the domestic activities.

Diagnosis

Constitutionally based attritional changes lumbar spine at L3/4/5/S l with a large disc protrusion at L3/4 causing spinal claudication.

Underlying problem constitutionally based. Probably aggravated by the nature and conditions of his work at Tomago over the years, particularly during the last five years of his time working in the store.

Possible significant aggravation in March 2011 causing a more marked increase of symptoms for a few weeks.

Your opinion on the applicant's fitness for his pre-injury employment and employment generally

Mr Grimshaw would only be fit for work of a light nature, avoiding excessive bending. lifting more than 5kg or working in awkward or confined spaces.

I believe that he would have difficulty returning to the work he was performing in the store prior to being made redundant.

He would certainly be unfit to return to any bricklaying activities.

He is, of course, now 65 and has just gone onto the Age Pension. There is no suggestion that he will return to the workforce.

If the applicant did suffer an injury as alleged, is it consistent that he would have been able to perform his normal duties on the following days and indeed work overtime on the days detailed above?

Presumably. you refer to the incident in March 2011.· If he did sustain an aggravation of the degenerate changes at that time, there would have been an increase in symptoms for a while which would then have settled back down to a lower level.

Being as well motivated as Mr Grimshaw seems to have been, he would have been able to work at his normal duties in the face of some probable intermittent symptoms.

If you accept that the applicant sustained some injury as alleged at work but was able to work the above periods of overtime and indeed continue in his normal duties until being made redundant, do you believe that the applicant· would have been suffering from any ongoing capacity subsequent to him being made redundant?

The degenerate change in his spine is a disease of gradual onset, not occasioned by his work but aggravated by the nature and conditions of his work and the normal activities of daily living.

It is a progressive condition and he would have had ongoing symptoms in the back after he left work which appears to have been the case with him.

Your opinion on the applicant's fitness for his pre-injury employment and employment generally

See above.

Your opinion on the work related whole person impairment as a result of any back injury that may have been sustained by the applicant as alleged

His condition can be considered to have reached maximum medical improvement for the purpose of assessment of Whole Person Impai1ment in accordance with the SlRA Guides JV and AMA V.

WPI Assessment-SI RA Guides 4th Edition & AMA 5						
Body Part/S·stem	**Ch11pter**	**Fig/T11ble**	**Impairment of Part**	**WPI**	**Deduction**	**WPI after deduction**
Lumbar Spine	15	T15-3	DRE Lumbar Category III: L3i4 discectomy Moderate impact on ADL No radiculopathy	12%	*One tenth (12-1.2)	**11%**

*I make that deduction on the basis off some pre-existing constitutionally based attritional changes in the lumbar spine. On the history that he gives, the rest of the figure would seem to relate to the nature and conditions of his work including the incidents described by him.

There is no percentage impairment for scarring. The scar is fine and almost invisible."

68. Despite Dr Millon's support, back in 2017, for Mr Grimshaw's having suffered injury in the form of an aggravation of underlying disease as a result of the heavy nature of his work performed over many years and a resultant impairment, liability was disputed.

69. On 30 September 2019, Tomago's lawyers wrote to Dr Millons requesting a supplementary report which was provided on 9 October 2019 without further review of Mr Grimshaw.

70. Dr Millons resiled from his earlier opinion that the heavy nature of Mr Grimshaw's work with Tomago over 29 years aggravated the underlying disease in his back. Dr Millons wrote:

"Further to my report to you dated 9 November 2017, I am now in receipt of your communication dated 30 September 2019 in regard to the above matter.

You outline there the circumstances of Mr Grimshaw's back issues. There are clearly considerable differences between what he told me and what you indicate is the actual case.

Mr Grimshaw indicated to me that he was at Tomago for 29 years through until 2013 when he was made redundant. In his last years at Tomago, he was working what he describes as a sub-store where there appears to have been some heavy lifting ofloads.

He told me that in the last five years of his work in the store, he developed some pain in his lower back. He put up with that. He may have told his LMO, Dr Martin. As I had indicated before, review of Dr Martin's records might clarify that.

Mr Grimshaw did tell me about an incident possibly in May 2011 when he had bent over to pick up something at work, had a severe pain in the back and was stuck with a bent back. He was off work for a few weeks.

He did indicate that that was reported but there is no record of that incident at Tomago.

Mr Grimshaw claimed that after he was made redundant and as time passed, back symptoms increased and he started getting symptoms in both lower limbs.

He saw Dr Ferch in December 2015 and came to surgery in February 2016.

In your instructing letter dated 30 September 2019, you ask me to assume that the insured's records disclose that the applicant was not at work on the day of the alleged injury and that the insured's records further disclose that the applicant did not lose any time from work around that period and he was able to continue with his normal duties until he accepted the voluntary redundancy in 2012.

You note that during the period I January 2011 to 31 May 2012, Mr Grimshaw had only had two sick days. He was working 2 hours' overtime every day.

Dr Ferch, in a report dated 10/05/17, has a history of Mr Grimshaw presenting on 15 December 2015 with a history of increasing bilateral lower limb pain over the previous two years with symptoms coming on spontaneously but becoming progressively limiting with pain radiating from the buttocks into the thighs and calves with difficulty walking more than 100m.

Mr Grimshaw had undergone decompressive surgery at the L3/4 level in Lingard Private Hospital on I February 2016.

On p3 of Dr Ferch's report, he notes that in answer as to whether the employment with Tomago Aluminium was a substantial contributing factor, he notes that symptoms developed gradually and became progressively limiting and that repetitive lifting and heavy lifting may have exacerbated degenerate change within the back and could have contributed to his injury.

The fact that Mr Grimshaw had symptoms for two years prior to seeing Dr Ferch would suggest that symptoms came on some time after he had taken his redundancy in 2012.

You note that prior to accepting his redundancy in 2012, the last documented back injury sustained by him while employed at Tomago was in July 1996 following which he was off work for one week.

You note that while there were numerous other minor injuries to other parts of his body, there were no reported back injuries subsequent to that time.

You note that in 2007, Mr Grimshaw transferred to the stores department where the work was essentially light duties. I am not party to what those duties were. He indicated that they were potentially heavy.

I note that, given the records prove that the applicant was not injured as initially alleged in March 2011, proceedings have now been instituted no longer relying on specific injury but in regard to the nature and conditions of his employment with the deemed date of injury of the last date of employment of 30 May 2012.

It would seem from Dr Ferch's report that symptoms actually came on sometime after that.

You ask me to address the following:

If Doctor was to assume that the applicant last sustained a minor aggravation to his back in 1996 and was then able to continue in normal duties until 2007, when he transferred to lighter duties in a store environment and then continued in those duties not receiving any medical treatment or losing any time working overtime every shift until accepting a voluntary redundancy 31 May 2012, do you believe the applicant would have been suffering from an ongoing work-related incapacity at the time he ceased work in May 2012 even though he was performing his normal duties, including overtime?

There would appear to be nothing to indicate that Mr Grimshaw was actually suffering from any ongoing work related incapacity at the time he ceased work in May 2012.

lf Doctor assumes that the history obtained by Dr Ferch is correct that the applicant suffered a spontaneous onset of symptoms in his back some 18 months
after ceasing work in May 2012, what is your diagnosis?

The diagnosis is of spinal canal stenosis at L3/4 as a result of some constitutionally based degenerate changes in the back with symptoms gradually worsening over the two years prior to seeing Dr Ferch, consistent with the progression of the degenerate change.

If you believe the diagnosis is of an underlying disease in the lumbar spine, do you believe that employment is the main contributing factor to the spontaneous onset of symptoms as recorded by Dr Ferch or the aggravation, acceleration, exacerbation or deterioration of the degenerative condition in the applicant's back?

On the history that you give and a review of Dr Ferch's records, it would appear that his employment at Tomago is not the main contributing factor to the spontaneous onset of symptoms some 18 months after he stopped work in May 2012.

Do you believe that employment was the main contributing factor to the need for surgery performed by Dr Ferch in 2016?

It would appear that the employment was not the main contributing factor to the need for surgery performed by Dr Ferch. It appears that there were no recorded back issues while working at Tomago apart from that in 1996 which caused only a short period of incapacity.

Would Doctor please provide his opinion on the work related WPI in relation to the applicant's lumbar spine having regard to the above history.

I refer to assessment of whole person impairment in accordance with the SIRA Guides (Fourth Edition) and AMA 5.

WPI Assessment-SIRA Guides 4th Edition &AMA 5						
Body Part/System	**Chapter**	**Fig/Table**	**Impairment of Part**	**WPI**	**Deduction**	**WPI after deduction**
Lumbar Spine	15	*TIS-3*	DRE Lumbar Category III: L3/4 discectomy **Moderate impact on ADL** No radiculopathy	12%	***12%**	**0%** ,

*I make that deduction on the basis of the history that I am presented with no record of any complaints of pain in the back at Tomago apart from that in 1996. That figure is on the basis of a decompression at LJ/4 performed for constitutionally based spinal canal stenosis as a result of advancing degenerate change."

71. The test is whether employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the degenerative disease in the lumbar spine. Dr Millons in his 2019 report opined that:

> "On the history that you give and a review of Dr Ferch's records, it would appear that his employment at Tomago is not the main contributing factor to the spontaneous onset of symptoms some 18 months after he stopped work in May 2012."

72. I accept Mr Grimshaw's evidence, tested under cross-examination, that the onset of symptoms was not spontaneous after he left work but he always had back pain after the last reported back injury in 1996. He was able to tolerate it. It's severity would depend on what he had done at work. He was able however to manage the pain until it just got "worse and worse" and that is when he sought a referral to a specialist in 2015 after the failure of more conservative options in 2014 and ultimately came to surgery at Dr Ferch's hands in 2016. This was some years after he left work and whilst that factor is taken into account, the medical opinions of Dr Martin, Dr Ferch and Dr Bodel all support the view that the heavy nature of Mr Grimshaw duties which involved heavy and repetitive lifting over some 29 years at Tomago, have been the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of his underlying degenerative disease. Mr Grimshaw's evidence about the heavy nature of his duties over the 29 years of working with Tomago was not traversed by any competing statement evidence or other evidence from Tomago. I accept Mr Grimshaw's evidence under cross-examination that the last years of employment in the store, whilst lighter work than the refractory and pot line work, was still not light work. Dr Millons takes the 29 years of heavy work into account in his 2017 report but takes no account of the 29 years of heavy work in his 2019 report. When all of the evidence is weighed in the balance, including the evidence of Mr Grimshaw tested under cross-examination, I prefer the opinions of Dr Martin, Dr Ferch and Dr Bodel to that of Dr Millons in his 2019 report. When I weigh all of the evidence in the balance, I am satisfied, on the balance of probabilities, that Mr Grimshaw has suffered an injury to his lumbar spine consisting in the aggravation, acceleration, exacerbation or deterioration of degenerative disease in his spine to which his employment with Tomago has been the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of that disease. The parties agreed that in the event this was my finding the date the injury is deemed to have occurred is 30 May 2012. In light of the parties' agreement on this issue I have not traversed the issue of the date of injury in my determination.

73. In the event Mr Grimshaw was successful, the parties agreed that the matter should be referred to an AMS to assess the degree of permanent impairment, if any, of the lumbar spine as a result of injury deemed to have occurred on 30 May 2012. It is agreed that once the Medical Assessment Certificate (MAC) is issued, the matter should be re-listed for a telephone conference before me in respect of the claim for weekly compensation and medical expenses.

74. This leaves the question of the notice provisions and whether the claim is out of time. Counsel for Tomago made submissions at the arbitration that Mr Grimshaw had not given notice of injury. Counsel for Mr Grimshaw did not address these submissions at the arbitration. To accord procedural fairness counsel for Mr Grimshaw was given the opportunity to make written submissions and of course that opportunity was afforded counsel for Tomago in reply. Counsel for Tomago took that opportunity to amplify his submissions beyond what was submitted at the arbitration in relation to failure to report the injury. Given that a determination on this issue relies in part on a finding that Mr Grimshaw has suffered serious and permanent disablement as a result of injury, I propose to await the assessment of the AMS in relation to the degree of permanent impairment, if any, that Mr Grimshaw has suffered as a result of the injury so found to his lumbar spine. This will assist in the determination of whether Mr Grimshaw has suffered a serious and permanent disablement. Accordingly, this matter will be dealt with once the MAC issues when the matter is relisted for a telephone conference, as per the agreed approach of the parties, in respect of the claim for weekly compensation and medical expenses.