WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **2722/20**
Applicant: **Karen Michele Ross**
Respondent: **Laverty Pathology**
Date of Determination: **13 August 2020**
Citation: **[2020] NSWWCC 273**

The Commission determines:

1. The applicant sustained injury arising out of or in the course of her employment on 17 February 2016.

2. The injury is in the form of aggravation of a pre-existing degenerative condition in the lumbar spine.

3. The applicant has not recovered from the effects of such injury.

4. The surgery proposed by Dr Mitchell Hansen in his report dated 7 November 2019 is reasonably necessary as a result of the injury on 17 February 2016.

5. The respondent is to pay the costs of and incidental to such surgery.

6. The applicant is a worker who has current work capacity.

7. Award for the respondent in respect of the applicant's claim for weekly benefits from 6 January 2020.

8. Award for the respondent in respect of the claim for injury to the thoracic spine.

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

Brett Batchelor
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 BRETT BATCHELOR, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Karen Michele Ross (the applicant/Mrs Ross) seeks compensation from her former employer, Laverty Pathology (the respondent), for weekly benefits from 6 January 2020 to date and continuing pursuant to s 38 of the *Workers Compensation Act 1987* (the 1987 Act) and for medical expenses pursuant to s 60 of that Act. The medical expenses are for the cost of future surgery, in the form of a posterior single level fusion at L5/S1, recommended by the applicant's treating neurosurgeon, Dr Mitchell Hanson.

2. In 2012, Mrs Ross suffered a low back strain as a result of the continuous bending over required of her in her employment as a phlebotomist. She did not take any time off work following this incident.

3. On 17 February 2016, Mrs Ross sustained an aggravation of her back condition during the course of her employment with the respondent. She had finished collecting blood from a patient on that day when the patient suffered a seizure. The patient became confused and aggressive towards the applicant and tried to punch her. The applicant twisted her lower back while moving out of the patient's way; she had to remain in a crouched position for a period of time before help was forthcoming, causing pain in the back.

4. Following this incident the applicant was off work until 4 April 2016, during which time she underwent physiotherapy treatment and relied upon analgesic and anti-inflammatory medication for pain relief.

5. The applicant returned to work in a limited capacity but says that she suffered a further aggravation of symptoms after having to move heavy chairs to venesect obese patients. She says that the general nature and conditions of her employment also contributed to her back symptoms, as she was required to stand for prolonged periods in fixed postures to collect blood. Mrs Ross says that she ultimately ceased work in October 2016. Prior to the incident on 17 February 2016 she says that she had no restrictions with respect to her work capacity and was largely asymptomatic. The occasional back pain was manageable with conservative treatment and she had no impediment to her day to day life and abilities.

6. The foregoing summary is taken from the applicant's statement dated 18 May 2020[1].

7. The "Injury Description" in the Form 2 Application contains an allegation that the applicant sustained injury to both her lumbar and thoracic spine.

8. Since the date of her injury on 17 February 2016, the applicant has undergone extensive conservative treatment from a number of different practitioners, culminating in the advice from Dr Hansen to undergo surgery.

9. In notices issued to the applicant pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) dated 15 November 2019 and 19 February 2020[2], the respondent denied liability for the applicant's claims. Relying upon opinions expressed by independent medical examiner, Dr John Stephen, orthopaedic surgeon, following his examination of the applicant on 3 November 2017 and 25 October 2019, the respondent asserts that the applicant has recovered from the effects of any work related injury on 17 February 2016, that she has no further entitlement to payment of weekly compensation pursuant to s 33 of the 1987 Act and that she has no further entitlement to medical expenses, relying on s 60 of the 1987 Act. Dr Stephen's reports produced following his examination of the applicant are in evidence[3].

[1] Application to Resolve a Dispute (the Application) p 2.
[2] Reply pp 146 and 153.
[3] Reply pp 2 & 9.

10. In support of her claim that the respondent pay for the cost of the surgery proposed, the applicant relies upon the opinions of her treating practitioners and on the opinion of Dr Graeme Doig, general orthopaedics and trauma surgeon, who examined her on 3 February 2020 and produced a report dated 6 February 2020[4].

11. At the arbitration hearing referred to hereunder, the applicant submitted that the respondent had not, in the two s 78 notices referred to above, properly put the applicant's total or partial incapacity for work as a result of injury on 17 February 2016 in issue. The applicant submitted that reference to s 33 of the 1987 Act in the notices was only in the context of a denial that the applicant continued to suffer the effects of the injury on that date. The applicant submitted that the respondent would have to seek leave pursuant to s 289A(4) of the 1998 Act to put incapacity in issue. Following argument on this issue, a ruling was given and recorded in the transcript of the proceedings (T), that the respondent did not require such leave.

ISSUES FOR DETERMINATION

12. The following issues remain in dispute:

    (a) Has the applicant recovered from the effects of the injury of 17 February 2016?

    (b) If not, is the applicant entitled to an award of weekly compensation in her favour pursuant to s 38 of the 1987 Act?

    (c) Is the surgery proposed by Dr Hansen reasonably necessary as a result of injury to the lumbar spine on 17 February 2016?

    (d) Did the applicant suffer injury to the thoracic spine on 17 February 2016?

13. The respondent concedes that the applicant had, as at 6 January 2020, received weekly benefits for in excess of 130 weeks, that is, beyond the 'second entitlement period' as defined in s 32A of the 1987 Act. Therefore any weekly benefits to which the applicant may be entitled from that date will be determined in accordance with s 38 of the 1987 Act.

14. Pre-injury average weekly earnings (PIAWE) are agreed at $768.89, 80% of which is $615.

PROCEDURE BEFORE THE COMMISSION

15. The parties attended a conciliation/arbitration conducted by telephone conference on 5 August 2020. 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.

16. Mr L Morgan instructed by Ms A Josipovic appeared for the applicant, who attended with her solicitor. Dr D Saul instructed by Mr T Murray appeared for the respondent.

EVIDENCE

Documentary evidence

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

[4] Application p 40.

(a) the Application and attached documents;

(b) Reply and attachments;

(c) Application to Admit Late Documents (AALD) dated 6 July 2020 lodged by the applicant with the following attachments:

(i) report of Craig Little, physiotherapist, dated 1 July 2020;
(ii) report of Dr Tim Francis, general practitioner, dated 3 July 2020;

(d) Application to Admit Late Documents dated 31 July 2020 lodged by the respondent with the following attachments:

(i) letter dated 31 July 2020 Astridge & Murray to Ticli Blaxland Lawyers, and
(ii) report dated 31 July 2020 Dr John Stephen, orthopaedic surgeon.

Oral evidence

18. There was no application to adduce oral evidence or to cross-examine the applicant.

SUBMISSIONS

19. The submissions of the parties are recorded in the Transcript, a copy of which can be obtained on request. I will not repeat them in full. In summary they are as follows.

Applicant

20. The applicant refers in detail to the evidence in her statement dated 18 May 2020, stressing the extensive treatment she has undergone, and the degree of her incapacity since injury on 17 February 2016. She submits that she had no incapacity for work prior to that date, notwithstanding the condition in her back from the 2012 incident. Clauses [17]-[37] set out details of the post injury treatment; after four and a half years Mrs Ross submits that she has exhausted all conservative means of treatment with no relief of her symptoms. In this circumstance she submits that little weight should be given to the opinion of Dr Stephen that she has recovered from the effects of the injury on 17 February 2016.

21. The applicant refers to the extensive treatment paid for by the respondent, set out in the respondent's list of payments[5]. These include payment for regular attendances on her general practitioner, regular physiotherapy treatment, extensive rehabilitation management, home care assistance, and pain management by Dr Shaun G Clarke, anaesthetist and pain specialist. Dr Clarke's treatment included bilateral diagnostic injections into the lumbar spine, bilateral radiofrequency neurotomy in the lumbar spine and diagnostic injection of pseudoarthritis. It was following this treatment by Dr Clarke that referral was made to Dr Hansen on 20 August 2019.

22. Dr Hansen arranged for a further MRI scan of the lumbar spine on 5 September 2019 which demonstrated "lumbar spondylosis with facet arthrosis." A further high resolution CT scan was undertaken at the request of Dr Hansen[6].

23. The applicant also notes her referral to Dr Hanish Bagga, rheumatologist, in October 2017[7] who suggested treatment by Dr Clarke.

[5] Application pp 28-39.
[6] See reports of Dr Hansen dated 23 October and 7 November 2019 Application pp 60 & 62.
[7] Application pp 77-78.

24. The applicant notes her intake of Nexium, a drug for the relief of gastrointestinal discomfort caused by the intake of analgesic medication.

25. The applicant submits that little or no weight should be given to the opinion of Dr Stephen in his report dated 3 November 2017 on the issue of injury, noting that his opinion that the applicant's employment is not the "main contributing factor contributing to Ms Ross's alleged condition" is the wrong test. The doctor's opinion is the only view contrary to the opinions of all other doctors who have treated the applicant, and is contrary to the course of clinical treatment of the workplace injury.

26. The applicant relies on the opinion of Dr Doig in his report dated 6 February 2019 that, assuming that she was asymptomatic prior to the incident on 17 February 2016 and that her condition has failed to resolve, the incident is still contributing to her symptoms. The applicant submits that Dr Doig, in accordance with the view of Dr Hansen, gives her a 50% chance of improvement in her condition post surgery, and that this is better than a 100% chance of no relief in the symptoms should she not undergo surgery. The applicant cites with approval the observation to this effect by Arbitrator G Egan at [74] in *Shannon McKay v NSW Police Force*[8]. All Dr Doig is advocating is that surgery should be delayed as long as possible in view of the applicant's relatively young age. However, the applicant rhetorically asks how much longer should she have to put up with the pain after four and a half years of no relief, and no prospect of improvement.

27. The applicant also submits that the opinion of the medical experts on this issue of the reasonable necessity of surgery should be taken with a degree of caution relying, inter alia, on what the Court of Appeal said in *Murray v Shillingsworth*[9] in respect of the acceptance of expert evidence. Rather the Commission should be guided by the approach taken by Burke J in *Rose v Health Commission (NSW)*[10], endorsed by Roche DP in *Diab v NRMA Ltd*[11] at [76]-[88].

28. On the issue of incapacity, the applicant submits that she has no capacity for suitable employment, notwithstanding the views expressed by both Dr Stephen and Dr Doig. In accordance with the definition of 'suitable employment' in s 32A of the 1987 Act she says that, having been out of the workforce since cessation of her employment with the respondent, there is no 'real job' available to her in the employment market.

29. The applicant submits that it can be inferred that the respondent has made a work capacity decision by the fact that it continued to pay the applicant weekly benefits beyond the 130 week second entitlement period, and made such payments in accordance with the certification of incapacity contained in the WorkCover certificates of capacity in evidence. In this regard the applicant notes that from October 2017 until December 2019 these certificates contain certification that she has no current work capacity for any employment. There should therefore be a finding as such, and that she is therefore entitled to weekly payments from the date claimed in accordance with s 38 of the 1987 Act in the sum of $615 per week, 80% of the agreed PIAWE of $768.89.

Respondent

30. In opening submissions, the respondent cautions against of paying attention to the list of payments as evidence of an admission by it as to the incapacity of the applicant for suitable employment. It relies on what Spigelman CJ stated in *Department of Education and Training v Sinclair*[12] that it would be an error to draw any such admission and, if drawn at all, should be of the slightest weight. Rather one should look at the medical evidence in the proceedings and in particular that of Dr Doig and Dr Stephen.

[8] [2018] NSWWCC 89.
[9] [2006] NSWCA 376.
[10] (1986) 2 NSWCCR 32 (*Rose*).
[11] [2014] NSWWCCPD 72 (*Diab*).
[12] [2005] NSWCA 265 (*Sinclair*).

31. The respondent notes that the applicant is seeking to diminish the opinion of Dr Doig, the specialist on whom she relies to support the claim for the reasonable necessity for surgery. It submits that the opinion of Dr Doig is consistent with that of Dr Stephen both in respect of the claim that the respondent fund the cost of the surgery proposed by Dr Hansen and in respect of the capacity of the applicant for suitable employment. In particular, the Commission would not be satisfied that the applicant has no capacity for suitable employment within the meaning of that term in s 32A of the 1987 Act.

32. The respondent submits that for the applicant to succeed in her claim for weekly benefits pursuant to s 38 of the 1987 Act she has to show that she has no current work capacity or that she has returned to work for not less than 15 hours a week. This she cannot do.

33. The respondent submits that the chronology of events after the work injury of 17 February 2016 must be examined to support its position, in accordance with the opinion of Dr Stephen, that the applicant has recovered from the effects of that injury.

34. The respondent notes that the applicant is relying on one date of injury only, 17 February 2016, and that no injury before or after that date is relied upon.

35. The respondent notes that after giving a history at [9]-[11] of her statement as to what happened after the incident of 17 February 2016, at [12] the applicant refers to a further aggravation of her symptoms after having to move heavy chairs to venesect heavy patients. Further, at [14] of her statement, the applicant refers to the general nature and conditions of her employment, and there is no indication as to whether she is referring to such conditions either before or after 17 February 2016.

36. The respondent notes the applicant's evidence that she ceased work in October 2016, which is consistent with what is recorded by Dr Doig in his report[13]. The respondent also notes however that Dr Doig records that the applicant managed to upgrade to pre-injury status in July 2016, but had a flare up in her condition while moving heavy chairs to venesect heavy patients.

37. The respondent submits that an examination of the WorkCover certificates of capacity in evidence reveals that, after certification of capacity for some type of employment with restrictions in the certificates up until the certificate dated 18 August 2016[14], the following certificate dated 15 September 2016 contains certification that the applicant is fit for pre-injury duties[15]. The next certificate of capacity in evidence dated 26 September 2017 contains certification that the applicant has capacity for some type of employment from 15 March 2017 to 15 October 2017 for 7.5 hours per day for 4 days a week (the number of days per week that the applicant was working pre-injury).

38. The respondent then draws attention to the "Employee's Recurrence Claim Form" dated 6 October 2017[16] wherein it is stated that the applicant had not ceased work as a result of that recurrence but had "…just been struggling to keep coming." From this evidence the respondent submits that it is apparent the applicant had been working in her pre-injury duties from September 2016 until October 2017.

39. The respondent stresses that the applicant is only relying upon what occurred in 17 February 2016, and that in accordance with what was stated by the High Court in *Federal Broom Co Pty Ltd v Semlitch*[17], she can only rely upon the aggravation of a disease in respect of what occurred on that day.

[13] Application p 41.
[14] Reply p 51.
[15] Reply p 54.
[16] Application p 14.
[17] (1964) 110 CLR 426 (*Semlitch*).

40. The respondent submits that Dr Stephen, in his reports, is dealing with the ongoing effects of injury in the context of the applicant having returned to work until further aggravation at work in October 2017. This reinforces the doctor's opinion that whatever happened in February 2016, it does not contribute to the current situation. Dr Stephen found that the applicant, at the consultation on 3 November 2017, was suffering from mechanical back pain which was basically constitutional but was accentuated by the prolonged bending involved in her job as a pathology collector. Dr Stephen in his late report dated 31 July 2019[18] confirms this view.

41. In respect of the injury claimed to have been occasioned to the thoracic spine on that day, the respondent submits that there is no evidence to support such a claim and that there should be an award for the respondent.

42. The respondent submits that neither Dr Stephen nor Dr Doig endorse surgery. Dr Doig did not diagnose radiculopathy on his examination of the applicant and raised the possibility that Mrs Ross may have disrupted the pseudo-arthritis between L5 and S1 in her spine. He did not accurately identify the pain source. Further Dr Doig did not have a proper chronology in respect of the applicant's certified fitness for work. He did not have the correct sequence of the applicant's return to work after October 2016.

43. The respondent submits that what Dr Doig is saying in his report is that there is a more than 50% chance of failure of the surgery proposed by Dr Hansen, and that the applicant will have further problems if she does undergo the procedure.

44. The respondent submits that Dr Hansen in his first report dated 23 October 2019, does not endorse surgery as a chance of improving the applicant's condition. Further, in his later report dated 7 November 2019, he does not provide the basis on which he recommends surgery in accordance with the principles set out in *Makita (Aust) Pty Ltd v Sprowles*[19] and *Hancock v East Coast Timber Products Pty Ltd*[20]*.* He does not specify the incident of 17 February 2016 as causing the reasonable necessity for the surgery that he recommends to the applicant.

45. The respondent also relies upon what Roche DP stated at [88] in *Diab* in respect of the reasonable necessity of surgery, emphasising also what Burke J stated in *Rose* that a court must exercise prudence, sound judgement and good sense in deciding whether treatment is reasonably necessary as a result of injury.

46. The respondent submits that, whatever happened on 17 February 2016, there is not an unbroken line of causation between that event and the applicant's current condition, including the need for surgery. In summary, the respondent submits that:

    (a) the proposed surgery is not required as a result of injury on 17 February 2016, and in any event, and

    (b) it is not reasonably necessary.

47. In respect of the applicant's claim for weekly benefits, the respondent submits that the Commission must have regard to what was decided in *Sabanayagam v St George Bank Limited*[21] in considering whether or not the Commission had jurisdiction to make an award of weekly benefits pursuant to s 38 of the 1987 Act. The applicant must show that she has no current work capacity before she is entitled to such an award. In this regard the respondent had, in its s 78 notices, squarely raised the issue of the respondent's capacity for suitable employment.

[18] AALD dated 6 July 2020 p 3.
[19] (2001) 52 NSWLR 705.
[20] [2001] NSWCA 305.
[21] [2016] NSWCA 145.

48. Both Dr Doig and Dr Stephen are of the opinion that the applicant has capacity for suitable employment, and therefore she is not entitled to an award of weekly benefits. The respondent submits that, having regard to the definition of suitable employment in s 32A of the 1987 Act, there is a wide variety of employment for which the applicant would be suited, such as light process work, "meet and greet" type work, driving short distances and sign language type work. The applicant indicated to Dr Doig that she was training for sign language type work. This employment does not need to be generally available in the employment market, and can be anywhere in NSW.

Applicant in response

49. The applicant submits that Dr Stephen, while he is of the opinion that aggravation of the back condition has ceased, has not put forward any alternative theory on the causation of the applicant's current condition. Further, there is no evidence of the applicant's medical condition either before or after the incident on 17 February 2016. All of the doctors deal with the effects of the injury on that day.

50. The applicant eschews the opinion of Dr Doig in so far as he recommends that the surgery be delayed, pointing to the lengthy time during which she has put up with the symptoms resulting from her injury and the lack of success of conservative treatment.

51. In respect of her capacity for suitable employment, the applicant submits that there is no evidence that she has undergone any training for sign language type work.

52. The applicant relies upon the decision of Keating J in *NSW Trustee and Guardian on behalf of Robert Birch v Olympic Aluminium Pty Ltd*[22] in support of her submission that the Commission should infer that a work capacity decision was made by the respondent as a result of its continued payment to her of weekly benefits after expiration of the 130 week second entitlement period. Accordingly there should be a finding that the applicant has no current work capacity and is entitled to an award under s 38(2) of the 1987 Act; s 38(3) has no application to her in this case.

FINDINGS AND REASONS

Injury

53. Dr Stephen in his report dated 3 November 2017 made a diagnosis of the applicant suffering from ongoing non-specific mechanical lower back pain with some radiation to the right buttock and thigh in particular as her main source of pain. He went on to say:

> "This is the product of work related aggravation of mild congenital abnormalities of the lumbo-sacral level consisting of sacralisation of L5 with an pseudarthrosis which may be symptomatic, some mild associated tilting and quite marked facet joint degenerative changes. There is mild degenerative change elsewhere in the thoracic spine including the upper thoracic spine. There Is no evidence of any radiculopathy."

54. Dr Stephen said that the applicant's mechanical back pain is basically constitutional but does tend to be accentuated by the prolonged bending involved in her job as a pathology collector:

> "This bending occurs throughout the spine, including the neck. Ms Ross spoke to me about this and made the quite reasonable suggestion that some alteration in the work situation might improve this."

Dr Stephen said that the aggravation was the result of the injury of 17 February 2016 "…and has indeed ceased."

[22] [2016] NSWWCCPD 54 (*Birch*).

55. Earlier in the report under "BACKGROUND HISTORY", Dr Stephen recorded that the applicant was currently employed by the respondent, had been for almost 10 years and worked out of the Arundel Medical Centre. He said:

> "She had been off work for the last 3 months with those symptoms described below. She told me that, after the incident of February 2016, she had been off work for about 7 weeks before returning to work, initially part time and later her usual 4 days. She got back to full time work in July 2016 until 3 weeks ago, losing no time at work in between. Hers was a 4 day week, 7½ hours a day."

Later in the report, Dr Stephen said that after being off work for about seven weeks following the incident of 17 February 2016 she returned to work although with intermittent back and right thigh pain, particularly on forward bending. He went on:

> "Ms Ross continued to work until approximately 3 weeks ago but was troubled, in particular, by prolonged bending."[23]

56. It appears from this history recorded by Dr Stephen that the applicant had been working up until three weeks prior to the appointment with the doctor, although the meaning of the statement "[S]he had been off work for the last 3 months…" is not clear. In any event the history is at odds with the applicant's evidence that she ceased work with the respondent in October 2016.

57. Dr Stephen did not change his opinion when he saw the applicant on 25 October 2019 and reported on 6 November 2019. He noted that the applicant had not worked since he had last seen her, referred to the treatment by the pain specialist, Dr Shaun Clarke and to the applicant's appointment with Dr Hansen the previous day. Dr Stephen agreed with the result of the bone scan that Dr Hansen had reviewed that "*The pseudoarthrosis of the right transverse process of L5 and S1 is associated with the minimal increased activity and is of uncertain significance*." (emphasis in original). The doctor's opinion was that "…the incident of 17/10/2016 is no longer a significant contributing factor." He said that ongoing treatment in the form of injections or surgery was in his opinion not reasonably necessary.

58. In his last report dated 31 July 2020 Dr Stephen said he did not believe that a high resolution CT scan (requested by Dr Hansen) was reasonably necessary and that it followed that a fusion procedure was not indicated as the exact source of pain had not been identified. There was no nerve root compression and no indication for any decompressive procedure. Dr Stephen noted that in a letter dated 2 [sic, 7] November 2019 Dr Hansen recommended surgery, quoting exhaustion of conservative management. He said that while exhaustion of conservative management may be applicable in some cases, this is by no means the case with mechanical back pain in the majority of instances. He said:

> "The fact remains that spinal fusion for mechanical back pain has in general a poor outcome in workers' compensation cases. This especially the case when no specific pain source can accurately be identified."

59. Dr Doig saw the applicant on 3 February 2020 and reported on 6 February 2020. He diagnosed aggravation of a pre-existing degenerative lumbo-sacral spine particularly at the facet joints of L4/5 and L5/S1, with the possibility that the applicant may have disrupted the pseudo-arthrosis between L5 and S1. Dr Doig said that there had been an aggravation to a pre-existing condition which remained on-going and in view of the fact that it was nearly four years since the incident, it was unlikely to resolve in the future. The doctor had perused Dr Stephen's response to a specific question in his report dated 6 November 2019, in which it was stated that the work related aggravation had ceased, and that the ongoing complaints were in relation to constitutional change. Dr Doig said:

[23] Reply p 4.

> "In the absence of any prior problems to the lower back before the incident of 17 February 2016, assuming Ms Ross was asymptomatic at that stage, the fact that her condition has failed to resolve would appear to indicate that the incident at work is still contributing to her persistent restrictions and symptoms, on a background of the pre-existing condition."

60. The applicant presented her case at arbitration on the basis of the injury of 17 February 2016. This was notwithstanding reference under "Injury Details – 17/10/2016" in the Form 2 Application to the nature and conditions of the applicant's employment as a Phlebotomist, and having suffered further aggravation of symptoms after having to move heavy chairs to venesect obese patients. Dr Doig referred to a flare up in the applicant's condition while moving heavy chairs, and his belief that Mrs Ross stopped work in October 2016. In his report dated 3 November 2017 Dr Stephen referred to the tendency of the applicant's back pain to be accentuated by prolonged standing involving her job as a pathology collector, and also noted the applicant's quite reasonable suggestion that some alteration in the work situation might improve her pain.

61. There is no doubt that the applicant has undergone very extensive conservative treatment. This is evident from a perusal of the list of payments made by the respondent, attached to the Application, and the reports from Dr Clarke, Dr Bagga and Dr Hansen. In the list of payments, payment for treatment by Urunga Medical Centre, physiotherapy providers, rehabilitation management providers, a pain management provider (Dr S Clarke – Pathia Pain Management)) and Dr H Bagga, spans the period from February 2016 to December 2019. There is also payment for lawn care and podiatry services, although it is not clear how podiatry services may be causally related to the applicant's back condition.

62. Dr Bagga treated the applicant in October 2017[24] and referred her to Dr Clarke.

63. Dr Clarke carried out:

    (a) bilateral diagnostic injections at L3-L5 on 26 September 2018[25];

    (b) bilateral radiofrequency neurotomy of L3-L5 on 24 October 2018 and 10 April 2019[26], and

    (c) diagnostic injection of pseudoarthrosis on 24 July 2019[27].

    When these measures did not assist the applicant he referred her to Dr Hansen on 20 August 2019 seeking assistance with managing the applicant's pain suffered from mechanical low back injury following a workplace injury. Dr Clarke made the comment that he felt that the applicant's pain was emanating from the pseudoarthrosis rather than the facet joints, and wondered whether Dr Hansen had a good surgical fix for Bertolottis syndrome[28].

64. I accept that there has been a continuation of the applicant's symptoms emanating from her lower back from the initial incident on 17 February 2016, and that extensive treatment has failed to relieve such symptoms. Having regard to the evidence summarised above I find that the aggravation of the pre-existing condition on the applicant's lumbar spine has not ceased and that the opinion of Dr Doig that this incident at work is still contributing to the applicant's persisting restrictions and symptoms should be accepted.

[24] Application pp 77-78.
[25] Application p 55.
[26] Application pp 56-57.
[27] Application p 59.
[28] Application p 54.

Surgery

65. There are two reports of Dr Hansen in evidence dated 23 October 2019 (addressed to Dr Clarke)[29] and 7 November 2019 (illegible in the Commission's file, but the contents of which were read onto the transcript by counsel for the applicant)[30]. There is also a surgery fee estimate from Dr Hansen[31].

66. In his first report, Dr Hansen suggested that the applicant needed a high resolution CT scan which he proposed to discuss with her over the phone. When that was done the doctor proposed looking at the option for surgical intervention, either in the form of decompression or fusion.

67. Notwithstanding Dr Stephen's opinion that such a scan was not required, it was obtained, and discussed with the applicant on 7 November 2019. The scan showed the spina bifida occulta at L5/S1and the right sided pseudoarthrosis at L5/S1. As noted in his previous report, Dr Hansen said that this could be related to Bertolottis syndrome, and said:

> "She had no pain before catching the seizing patient and I think the back pain is causally related to the incident at work."

Dr Hansen then went on to say:

> "Looking at the literature, the best surgical option as she seems to have exhausted her conservative management would be a posterior fusion to reduce the movement of the pseudoarthrosis. I think the chance of it helping her is not great at around 50-60 per cent chance of improvement in her pain by 50%. Procedure I would look at doing for her would be MAS PLIF at L5/S1. This would require three to four days in hospital before commencing on return to work program with physiotherapy, exercise physiology and a graduated return. The item numbers I would use would be MZ731, MZ741, MZ751 and MZ 761."

68. Dr Doig said in his report in answer to a question at [8] as to whether the surgery proposed by Dr Hansen was reasonably necessary that Dr Hansen provided the applicant with a 50/50 chance of improvement in her condition at best. He said:

> "These results, in my clinical experience, are far superior to patient's [sic] having undergone spinal fusion surgery upon being reviewed through my practice over the years. It is therefore my opinion that the proposed inter-segmental fusion should be delayed as long as possible in view of Ms Ross' relatively young age and the fact that she has degeneration in the more proximal. L4/5 segment on her medical imaging which remains hot on her medical imaging.
>
> Ms Ross would be prone to adjacent-segment disease and may ultimately require an additional fusion of this segment in the future. I therefore believe that this type of procedure would be as a last resort. It is my opinion there is a much greater than 50% chance of failure."

69. Quite clearly Dr Doig and Dr Hansen differ in their assessment of the chance of success of the proposed surgery. Dr Hansen takes a more optimistic view of the chance of reduction in the applicant's pain by 50%, whereas Dr Doig puts the chance of failure at much less than this. Dr Doig does not however rule out the surgery; he says that it would be as a last resort.

[29] Application p 60.
[30] Application p 62 and T pp 21.10 – 22.20.
[31] Application p 64.

70. The applicant submits that after four and a half years of symptoms and pain, she has exhausted all means of conservative treatment to improve her condition, and that surgery is now reasonably necessary.

71. In *Diab,* after a review of the authorities, Roche DP at [88] summarised the relevant matters in the context of s 60 of the 1987 Act according to the criteria of reasonableness as follows:

    (a) the appropriateness of the treatment;

    (b) the availability of alternative treatment, and its potential effectiveness;

    (c) the cost of the treatment;

    (d) the actual or potential effectiveness of the treatment, and

    (e) the acceptance by medical experts of the treatment as being appropriate and likely to be effective.

72. At [89], the Deputy President said that with respect to (d), it should be noted that while the effectiveness of the treatment is relevant to whether the treatment is reasonably necessary, it is certainly not determinative. The evidence may show that the same outcome could be achieved by a different treatment, but at a much lower cost. Similarly, bearing in mind that all treatment, especially surgery, carries a risk of a less than ideal result, a poor outcome does not necessarily mean that the treatment was not reasonably necessary. As always, each case will depend on its own facts.

73. The respondent referred to what Burke CCJ said in *Rose,* referred to at [76] in *Diab*. It was stressed that a court (or tribunal) should exercise "…prudence, sound judgement and good sense" in determining whether proposed treatment is reasonably necessary. Burke CCJ stated 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."

74. At [77]-[79] of *Diab,* Roche DP also stated that the Commission has applied the test in *Rose* in several cases, and that in addition the Commission has been guided by, and generally followed, the decision of Burke CCJ in *Bartolo v Western Sydney Area Health Service*[32]*,* where his Honour said at 238D:

> "The question is should the patient have this treatment or not. If it is better that he have it, then it is necessary and should not be forborne. If in reason it should be said that the patient should not do without this treatment, then it satisfies the test of being reasonably necessary."

75. The Deputy President said that subsequent appellate authority suggests that this approach may not be strictly correct. He then went on to review that authority before reaching his conclusion at [88]-[89].

76. In my view, having regard to the facts of this case, the surgical treatment proposed by Dr Hansen is reasonably necessary as a result of the injury on 17 February 2016. Mrs Ross has engaged in all forms of conservative treatment recommended by her treating practitioners without obtaining any long lasting relief. On the evidence there is little or no prospect of further conservative treatment alleviating her symptoms which she has endured for four and a half years. Her current treating neurosurgeon recommends the surgery with a 50-60% chance of reducing her pain by 50%, although this view is not shared by Dr Doig. Dr Doig however does not rule out the surgery completely, opining that in view of the applicant's age it should be a last resort and deferred as long as possible.

[32] 14 NSWCCR 233.

77. The applicant's current treating general practitioner, Dr Tim Francis, at the practice at which Mrs Ross appears to have attended since the injury, concurs with the opinion of Dr Hansen. Although the opinion of the physiotherapist, Craig Little, expressed in his report dated 1 July 2020 should not be given as much weight as those of the medical practitioners on the question of the reasonable necessity of the proposed surgery, Mr Little does set out the applicant's current symptoms, pain and restriction on activity which are significant.

78. In terms of the criteria at [88] in *Diab*, I note that:

    (a) Dr Clarke referred the applicant to Dr Hansen to consider the surgical option after his treatment did not relieve the applicant's condition, and Dr Hansen considers the treatment he proposes as appropriate, albeit with a qualified prospect of success in relieving the back pain;

    (b) alternative treatment is unlikely to be effective in relieving the applicant's symptoms;

    (c) the cost of the treatment has not been put in issue;

    (d) the actual and potential effectiveness of the treatment has been addressed by Dr Hansen and Dr Doig, and

    (e) Dr Hansen in particular accepts the treatment as being appropriate in the circumstances of the case and likely to be effective, with the qualification he puts thereon.

79. I do not accept that the report of Dr Hansen dated 7 November 2019 should not be accepted for the reason put forward by the respondent in [44] above. As noted in [67] above, Dr Hansen accepts that the applicant's back pain is causally related to the incident at the applicant's work on 17 February 2016. Dr Hansen's report was that of a treating specialist to Dr Clarke, who made the referral to him. The history on which he based his opinion on 7 November 2019 that surgery was appropriate for the applicant in the circumstances of the case is set out in Dr Hansen's earlier report to Dr Clarke dated 23 October 2019.

80. There will be a finding that the surgery proposed by Dr Hansen in his report dated 7 November 2019 is reasonably necessary as a result of injury on 17 February 2016. The respondent will be ordered to pay for the cost of and incidental to that surgery.

Weekly benefits.

81. The applicant submits that an inference should be drawn that the respondent, due to the fact that it continued to pay weekly benefits to the applicant after the expiration of the 130 week second entitlement period, made a work capacity decision, and that decision was that the applicant had no current work capacity. 'No current work capacity' is now defined in Sch 3 to the 1987 Act as follows:

    > "An injured worker has ***no current work capacity*** if the worker has a present inability arising from an injury such that the worker is not able to return to work, the worker's pre-injury employment or in suitable employment."

82. The respondent acknowledges that it paid the applicant beyond the second entitlement period, but cautions that it would be an error for the Commission to draw an inference from the list of payments that it has made a work capacity decision, relying on what Spigelman CJ stated in *Sinclair*. His Honour dealt with "The 'Admission' Issue" at [88]-[93] of his judgement. That was a case in which the respondent employer relied on a defence under s 11A of the 1987 Act in response to the applicant's claim for compensation as a result of a psychological injury. The applicant worker (appellant) submitted that the respondent employer, by not

contesting liability between two specified dates, had made an admission of some character that ought to bear on the Court's assessment of the evidence. His Honour referred to some authority for the proposition that payment of compensation is prima facie evidence of a compensable injury, but rejected the submission. He said at [91] that "[W]hile it may be appropriate to attach some small weight to such an admission in cases involving simple questions of fact (e.g. whether there was an employment injury), it would not be appropriate to develop that principle to cases of this complexity." He said at [92] that any weight that could be attached to such an admission must be of the slightest weight given that medical reports have been tendered. At [93] his Honour concluded:

> "93. Finally, I would particularly reject any suggestion that an employer might adversely affect their position in the Commission by not fully investigating each possible defence prior to making their first payment. Such an outcome would have the effect of deterring precisely the kind of reasonable behaviour that beneficial legislation such as the workers compensation scheme seeks to encourage."

83. The applicant relies upon the decision of Keating P in *Birch*. The applicant did not develop her submissions with reference to the facts of that case. I note that in that case the appellant worker submitted that an inference should be drawn on the basis of a letter sent from the employer's insurer following an assessment of work capacity and assessing an entitlement to payment of compensation under s 38 of the 1987 Act. The letter was sent in consequence of changes to the Workers Compensation Scheme introduced by the Government in June 2012. The inference sought to be drawn by the worker was that the insurer had assessed him as having no work capacity when the effects of the accepted work injury were considered in conjunction with his non-work related condition. His Honour found that there was nothing in the evidence before him upon which such an inference could be drawn. He cited *Sabanayagam v St George Bank Limited*[33] at [119] as authority that the making of findings and the drawing of inferences in the absence of any evidence to support them is an error of law.

84. In this case the only material that the applicant relies upon to support an inference that the respondent made a work capacity decision to the effect that the she had no work capacity is the list of payments. In accordance with the decision in *Sinclair*, either no weight, or the slightest weight, should be given to such evidence. I decline to draw the inference sought by the applicant.

The applicant's current work capacity

85. To assist in the determination of this issue, it is necessary to decide when the applicant ceased working for the respondent. Dr Doig records an upgrade to pre-injury status by the applicant in July 2016; Dr Stephen records the applicant getting back to full time work in July 2016. The WorkCover certificates of capacity dated 21 June 2016[34] and 12 July 2016[35] contain certification that the applicant has capacity for some type of employment with restrictions to 12 July 2016 for five hours a day, 4 days a week, and to 4 August 2016 for 7.5 hours a day, 4 days a week (the applicant's pre-injury hours). This certification continues in the certificates until that dated 15 September 2016[36] in which the applicant is certified fit for pre-injury duties. The next certificate in evidence is that dated 26 September 2017[37] certifying capacity for some type of employment with restrictions for 7.5 hours a day, 4 days a week for the period 15 March 2017 to 15 October 2017. Thereafter the applicant is certified in the certificates of capacity in evidence as having no current work capacity for any employment from 17 October 2017.

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[33] [2016] NSWCA 145 (*Sabanayagam*).
[34] Reply p 41.
[35] Reply p 44
[36] Reply p 53.
[37] Reply p 56.

86. In a report of Dr Bagga, undated but with a date stamp October 2017 thereon[38], Dr Bagga discusses help for the applicant to mobilise her spine and refers to an occupational therapist being called upon who "…could assist with workplace modification and how she is doing her work…" She also refers to the applicant having to maintain fixed thoracic flexion postures during the day.

87. The applicant informed Dr Stephen that she ceased work three weeks before she saw him on 3 November 2017. When the applicant saw Dr Clarke on 21 June 2018[39] she told him that "[S]he recently ceased working due to ongoing back pain and is currently on Workers Compensation."

88. The respondent refers to the "Employee's Recurrence Claim Form" dated 6 October 2017[40] in which the date of original injury is noted as "February 2016" and the duties since the injury at [7] as:

> "collecting blood – all duties related to e.g. ecg's
> Helping patients
> Cleaning"

89. At [8] in that document in response to the question "[W]hen did you cease work as a result of this recurrence?" the answer is "[I] haven't I have just been struggling to keep coming." At [9] the applicant's treating doctors are listed as Dr Milli Kelly and Dr James Williams of Urunga Medical Centre and Dr Hanish Bagga of Scarba St Coffs Harbour. The document is signed and witnessed, and dated 6 October 2017.

90. From this evidence I conclude that the applicant is mistaken in her statement when she says that she ceased work in October 2016; I think that it was in October 2017 after a recurrence of symptoms which resulted in lodgement of the recurrence claim form.

91. The applicant did work from July 2016 until October 2017 performing her duties as a phlebotomist for the respondent with the restrictions set out in the WorkCover certificates of capacity until the certificate dated 26 September 2017. This finding is consistent with the applicant's evidence in [12]-[14] of her statement. Mrs Ross refers to the general nature and conditions of her employment as having contributed to the aggravation of her back symptoms, and it seems that it was this aggravation that put her off work in October 2017.

92. Dr Doig is of the opinion that the applicant is fit for alternative duties and when she saw him, and was retraining with a view to re-entering the workforce. The restrictions he placed on her were a less than 10 kgs lifting limit, pushing and pulling restriction with limited bending and twisting through the spine, and the requirement for regular breaks from prolonged sitting and driving.

93. In his first report Dr Stephen gives a generally reasonable prognosis in respect of the applicant's period of incapacity, given the appropriate work circumstances. In his report dated 6 November 2019 Dr Stephen states that Mrs Ross is fit for light work of various descriptions with a restriction in particular on prolonged bending, sitting and standing. Short five minute breaks every hour or so would be necessary.

94. These restrictions are generally consistent with the restrictions listed in the WorkCover certificates of capacity which contain certification for capacity for some type of employment with restrictions. Notably, the sitting and standing tolerance specified therein is 30 minutes and driving ability two hours.

[38] Application p 78.
[39] Application p 45.
[40] Application p 14.

95. The respondent's submissions as to what would be suitable employment for the applicant are referred to above at [48]. Section 32A of the 1987 Act defines suitable employment as meaning 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;
> (ii) the worker's age, education, skills and work experience, and
> (iii) any return to work plan, and
> (iv) any occupational rehabilitation services that have been provided to 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.

96. The applicant submits that any employment that is suitable for the applicant must be a 'real job' and that having regard to the applicant's restrictions, there is no such job. In this submission the applicant may have been referring to what the Commission found in cases such as *Wollongong Nursing Home Pty Ltd v Dewar*[41] and *Cronje v Leighton Contractors Pty Ltd*[42]*.*

97. The applicant lives in Bellingen and is aged 49 years. It appears that she worked for the respondent as a pathology collector for about 10 years. There is no other evidence as to the applicant's education, skills and work experience. I was not taken to any evidence of a return to work plan for the applicant. It is evident from the list of payments that the applicant has apparently undergone rehabilitation, but the nature and extent of that is not in evidence.

98. The fact that the applicant was able to engage in employment with restrictions from July 2016 to October 2017 is indicative that she was able work in suitable employment before the aggravation which caused her to cease work. On the evidence, this was 'real work' and not tasks that were "…totally artificial, because they have been made up in order to comply with an employer's obligations to provide suitable work under s 49 of the 1998 Act, and do not exist in any labour market in Australia"[43].

99. In *Cronje*, Roche DP (who decided *Dewar*) dealt with the assessment of economic incapacity of a worker employed in his own business. He said at [60] that it is necessary to have regard to, among other things, the nature of the incapacity and the details provided in the medical evidence. At [64] he noted that one must look at a worker's ability to earn in suitable work or employment as an employee.

100. In the presentation of her case, the applicant does not rely on the nature and conditions of her employment; she relies on the frank incident which occurred on 17 February 2016. On 15 September 2016, Mrs Ross was certified as fit for pre-injury duties. Thereafter, from 15 March 2017 until 15 October 2017, she was certified as having capacity for some type of employment for 7.5 hours per day for four days a week, and engaged in this type of employment with the respondent.

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[41] [2014] NSWWCCPD 55 (*Dewar*).
[42] [2015] NSWWCCPD 16 (*Cronje*).
[43] See *Dewar* at [60].

101. The evidence of Dr Doig, Dr Stephen and of the general practitioners at the Uranga Medical Centre who completed the WorkCover certificates of capacity, is evidence of the applicant's ability to engage in suitable employment.

102. I find that the applicant is a worker who has current work capacity. As a result of the injury on 17 February 2016 she could engage in the type of light work referred to by Dr Doig and Dr Stephen, and suggested by the respondent in submissions. I think that she could also work as a shop assistant or similar role on a casual basis for a limited number of hours each week. Such work would not impose upon her the strains that she experienced while working as a phlebotomist. Pursuant to s 38(2) of the 1987 Act, the applicant is not entitled to compensation after the second entitlement period. Subsection (3) of s 38 does not assist the applicant as she has not returned to work for a period of not less than 15 hours per week.

103. The applicant is therefore not entitled to an award for weekly benefits pursuant to s 38 of the 1987 Act.

Injury to the thoracic spine

104. The applicant did not make any submissions in respect of injury to the thoracic spine claimed in the Application. I was not taken to any evidence to suggest such an injury. There will be an award for the respondent in respect of injury to the thoracic spine.

SUMMARY

105. The applicant sustained injury arising out of or in the course of her employment on 17 February 2016.

106. The injury is in the form of aggravation of a pre-existing degenerative condition in the lumbar spine.

107. The applicant has not recovered from the effects of such injury.

108. The surgery proposed by Dr Mitchell Hansen in his report dated 7 November 2019 is reasonably necessary as a result of the injury on 17 February 2016.

109. The respondent is to pay for the costs of and incidental to such surgery.

110. The applicant is a worker who has current work capacity,

111. Award for the respondent in respect of the applicant's claim for weekly benefits from 6 January 2020.

112. Award for the respondent in respect of the claim for injury to the thoracic spine.