WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **5761/20**
Applicant: **Hugo Dominguez**
Respondent: **De Martin and Gasparini Pty Ltd**
Date of Determination: **7 January 2021**
Citation No: **[2021] NSWWCC 5**

The Commission determines:

1. The applicant has established special circumstances under section 254 (3)(a) and (b) of the *Workplace Injury Management and Workers Compensation Act 1998,* which allows him to recover workers compensation benefits.

2. The failure to make a claim within six months after the injury happened was occasioned by ignorance as provided for under section 261 (4) of the *Workplace Injury Management and Workers Compensation Act 1998*.

3. The applicant sustained an injury to his lumbar spine and left shoulder in the course of his employment with the respondent by way of a disease injury as provided by section 4 (b)(ii) of the *Workers Compensation Act 1987* (the 1987 Act), with a deemed date of injury of 14 October 2016.

4. An award for the respondent for the claims of injury to the cervical spine and right shoulder.

5. The applicant has had no current work capacity from 2 October 2018 as a result of the injury sustained to his lumbar spine and left shoulder.

The Commission orders:

1. The respondent is to pay the applicant weekly payments of compensation as follows:

   (a) $2,145.30 per week from 2 October 2018 to 1 January 2019, pursuant to section 36 (1) of the 1987 Act;

   (b) $1,997.77 per week from 2 January 2019 to 1 October 2019, pursuant to section 37 (1)(a) of the 1987 Act, and

   (c) $1,006.40 per week from 2 October 2019 to date and continuing, pursuant to section 37 (1)(a) and section 44C (1) (preserved) of the 1987 Act.

2. The respondent is to pay the applicant's reasonably necessary medical expenses for treatment of the injury to the lumbar spine and left shoulder.

3. The matter is remitted to the Registrar for referral to an Approved Medical Specialist as follows:

   Date of injury: 14 October 2016 (deemed)
   Body Part: Lumbar spine; left upper extremity (shoulder)
   Method of Assessment: Whole Person Impairment

4. The following documents are to be forwarded to the Approved Medical Specialist:

(a) Application to Resolve a Dispute with attachments;

(b) Reply with attachments;

(c) Application to Admit Late Documents filed by the applicant on 4 November 2020;

(d) Application to Admit Late Documents filed by the respondent on 21 December 2020, and

(e) This Certificate of Determination and Statement of Reasons.

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

John Isaksen
Arbitrator

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

A MacLeod

Ann MacLeod
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND TO THE DISPUTE

1. The applicant, Hugo Dominguez, claims that heavy and repetitive work which he performed over many years in the course of his employment with the respondent, De Martin and Gasparini Pty Ltd, resulted a disease injury to his lumbar spine, cervical spine and left and right shoulders.

2. The applicant states that he arrived from Uruguay in 1988 and that the respondent was his only employer in Australia. He states that he worked as a linesman and yardman with the respondent.

3. The applicant states that he sustained an injury to his lower back in 2005 due to heavy lifting at work; an injury to his right hand in 2011 when using a bench grinder at work; and an injury to his left ankle on 30 May 2016 at work.

4. The applicant states that he was off work due to the injury to his left ankle until 2 August 2016. The clinical notes from the applicant's general practitioner, Dr Khanom, record that the applicant did "admin" and cleaning work, before undertaking a trial of his pre-injury duties in September 2016.

5. The applicant's position with the respondent was made redundant on 14 October 2016. He states that no reason was given for this.

6. The applicant completed a claim form on 29 September 2017, claiming that repetitive heavy lifting and bending in the course of his employment with the respondent caused "back pain, hip pain, shoulder pain + limited range of motion, neck pain, hearing loss."

7. In a statement dated 22 February 2019, the applicant states that due to limping which results from the injury to his left ankle, he experiences pain in the left hip, left knee and lumbar spine. He also states:

   > "I was also often required to engage in repetitive heavy lifting and squatting which caused me to develop lumbar spine pain. In the course of my work I was required lift heavy bags of cement weighing up to 20 kilograms. Over many years of doing this repetitive heavy lifting I developed pain in my shoulders, neck and lower back."

8. GIO issued a dispute notice on behalf of the respondent on 2 August 2018 wherein liability was disputed on the grounds that notice of injury had not been given by the applicant as soon as possible after the injury happened and a claim for compensation had not been made within six months after the injury happened; that the applicant did not sustain an injury to his lumbar spine, thoracic spine, cervical spine, both upper extremities and hips in the course of his employment with the respondent; and that the applicant had no entitlement to weekly payments of compensation.

9. In the Application to Resolve a Dispute (ARD), the applicant claims weekly payments of compensation from 2 November 2017. However, a list of payments made in regard to the applicant's left ankle injury indicates that the applicant was paid weekly payments for that injury until 1 October 2018.

10. The applicant also claims a lump sum payment of 20% permanent impairment for injury to his lumbar spine, cervical spine and both shoulders, and the cost of medical treatment to those same parts of his body.

ISSUES FOR DETERMINATION

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

    (a) whether the applicant can recover compensation on the grounds that notice of injury was not given by the applicant as soon as possible after the injury happened (section 254 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act));

    (b) whether the applicant can recover compensation on the grounds that a claim for compensation was not made within six months after the injury happened (section 261 of the 1998 Act);

    (c) whether the applicant sustained injury to his lumbar spine, cervical spine and both shoulders in the course of his employment with the respondent (section 4 of the *Workers Compensation Act 1987* (the 1987 Act);

    (d) the extent of any total or partial incapacity as a result of injury to the applicant's lumbar spine, cervical spine and both shoulders (sections 32A, 33, 36 and 37 of the 1987 Act);

    (e) whether medical treatment for any injury to the applicant's lumbar spine, cervical spine and both shoulders is reasonably necessary (section 60 of the 1987 Act), and

    (f) whether the applicant is entitled to any lump sum payment for permanent impairment as a result of injury to his lumbar spine, cervical spine and both shoulders (section 66 of the 1987 Act).

PROCEDURE BEFORE THE COMMISSION

12. The parties attended a conference/hearing on 18 December 2020. 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.

13. Mr Morgan appeared for the applicant, instructed by Ms Wong. Mr Stockley appeared for the respondent, instructed by Mr Thomas Murray. Ms Brown from GIO was also in attendance.

14. The hearing was conducted by telephone in accordance with protocols set out by the Commission due to the coronavirus pandemic.

15. At the end of the hearing I made a direction that the respondent file and serve a list of payments by 23 December 2020 in regard to the claim for the left ankle injury, as Mr Murray for the respondent had advised that weekly payments were made to the applicant for this claim until October 2018.

EVIDENCE

Documentary evidence

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

    (a) ARD and attached documents;

    (b) Reply and attached documents;

(c) Application to Admit Late Documents filed by the applicant on 4 November 2020, and

(d) Application to Admit Late Documents filed by the respondent on 21 December 2020.

Oral evidence

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

FINDINGS AND REASONS

Notice of injury and claim for compensation

18. Section 254 of the 1998 Act relevantly provides:

> "(1) Neither compensation nor work injury damages are recoverable by an injured worker unless notice of the injury is given to the employer as soon as possible after the injury happened and before the worker has voluntarily left the employment in which the worker was at the time of the injury.
>
> (2) The failure to give notice of injury as required by this section (or any defect or inaccuracy in a notice of injury) is not a bar to the recovery of compensation or work injury damages if in proceedings to recover the compensation or damages it is found that there are special circumstances as provided by this section.
>
> (3) Each of the following constitutes special circumstances:
>
> (a) the person against whom the proceedings are taken has not been prejudiced in respect of the proceedings by the failure to give notice of injury or by the defect or inaccuracy in the notice,
> (b) the failure to give notice of injury, or the defect or inaccuracy in the notice, was occasioned by ignorance, mistake, absence from the State or other reasonable cause,
> (c) the person against whom the proceedings are taken had knowledge of the injury from any source at or about the time when the injury happened,
> (d) the injury has been reported by the employer to the Nominal Insurer in accordance with this Act;
> (e) the employer has contravened section 231;
> (f) the injury has been treated in the first aid room at the place of work;
> (g) if the employer is the owner of a mine – the injury has been reported by or on behalf of the employer to an inspector of mines or an inspector under the Work Health and Safety Act 2011."

19. The applicant states in a statement dated 22 February 2019 that he is "very unfamiliar with the workers compensation system as a whole", and that it was only when he consulted his lawyers, Turner Freeman, that he started to gain an understanding of his entitlements under the Workers Compensation Act.

20. The applicant states in a statement dated 22 May 2019 that it was only when he conferred with Dr Ryan on 1 May 2018, who the applicant saw at the request of his solicitors, that he became aware of the extent of his injuries.

21. The applicant states in a statement dated 28 September 2020 that he first became aware that his injury, which occurred as a result of the nature and conditions of his employment, was compensable, when he saw Dr Lim in 2017. He states that he had never heard of a nature and conditions claim before he saw Dr Lim. He states that Dr Ryan confirmed the diagnosis of the injuries that was made by Dr Lim.

22. In all three statements, the applicant states that he has limited English. In the first two of those statements he states that he often has his son Victor available to interpret for him. In the third statement he states that he always needs the assistance of his son or an interpreter to assist with understanding doctors and lawyers.

23. Victor Dominguez has provided a statement dated 3 November 2020. He states that he often needed to assist his father with interpreting due to his father's inability to properly speak English. He states that he tried to help out with his father's claims but that his father would often ask questions on their way home from an appointment with a doctor or lawyer and it was obvious that his father had not fully comprehended what he had been told and that he was often confused.

24. Section 254 of the 1998 Act only requires one of the special circumstances set out in sub-section (3) to be satisfied for the bar on the recovery of compensation to be removed due to the failure of a worker to give notice of injury to the employer as soon as possible after the injury happened.

25. I am satisfied that sub-section (3)(a) has been met by the applicant as the respondent has not been prejudiced in respect of these proceedings. There are no particulars of any prejudice set out in the dispute notices dated 2 August 2018 or 19 March 2020. Nor could I identify any prejudice to the respondent in the material contained in the Reply.

26. The respondent does not complain that it has not been able to contact any witness who may have provided evidence to dispute the details of the work undertaken by the applicant which is set out in his statement and in the records made by doctors who have examined the applicant. The clinical notes from the applicant's general practitioners are in evidence, and the respondent has had the opportunity provided by the commencement of proceedings in the Commission to issue Directions for Production upon any doctors or other institutions it considered relevant to the issue of notice of injury.

27. I would add that I do not consider that the applicant satisfies sub-section (3)(c), which Mr Morgan submits that the applicant is able to establish by the provision of a report from Dr Hitchen to QBE Workers Compensation (NSW) Ltd (QBE) dated 12 November 2013. That report indicates that Dr Hitchen examined the applicant principally in regard to an injury to his right hand in 2011. Dr Hitchen records a history of the applicant sustaining injuries to his back and shoulders about 13 years before this report, but there are no details recorded by Dr Hitchen of any duties being undertaken by the applicant which were causing any symptoms in the applicant's back, neck or shoulders.

28. The applicant also claims that the failure to give notice of injury was occasioned by ignorance. I will address the excuse of ignorance in regard to the provisions of section 261 of the 1998 Act, as that term appears in both sections 254 and 261.

29. Section 261 of the 1998 Act relevantly provides:

> "(1) Compensation cannot be recovered unless a claim for the compensation has been made within 6 months after the injury or accident happened or, in the case of death, within 6 months after the date of death.
>
> …..

(3) For the purposes of this section, a person is considered to have made a claim for compensation when the person makes any claim for compensation in respect of the injury or death concerned, even if the person's claim did not relate to the particular compensation in question.

(4) The failure to make a claim within the period required by this section is not a bar to the recovery of compensation if it is found that the failure was occasioned by ignorance, mistake, absence from the State or other reasonable cause, and either:

(a) the claim is made within 3 years after the injury or accident happened or, in the case of death, within 3 years after the date of death, or
(b) the claim is not made within that 3 years but the claim is in respect of an injury resulting in the death or serious and permanent disablement of a worker."

30. I do not accept that sub-section (3) is satisfied by what is included in the report of Dr Hitchen to QBE dated 12 November 2013 for the same reason that I did not accept that the provision of that report met the requirements of section 254 (3)(c), being that the report does not record any details of work duties undertaken by the applicant in the course of his employment with the respondent which has caused any injury to the applicant's back, neck or shoulders.

31. Mr Morgan submits the applicant's failure to report the injury to his back, neck and shoulders, and make a claim for compensation for those injuries, was occasioned by ignorance. Mr Morgan refers not only to the evidence of the applicant and his son regarding the applicant's difficulties in comprehending details relayed to him in English, but also observations made by doctors of the applicant having poor English and being a vague historian.

32. Those observations are made in the report of Dr Hitchen dated 12 November 2013, and a report from Dr Anthony Smith dated 20 June 2018. When Dr Ryan first sees the applicant at the request of the applicant's solicitors and provides a report dated 1 May 2018, Dr Ryan writes: "His recall is poor. At times he had difficulty comprehending instructions or responding to enquiries." It is also recorded by Dr Ryan and Dr Giblin, Approved Medical Specialist, in a Medical Assessment Certificate (MAC) dated 24 July 2019, that the applicant has industrial deafness.

33. Mr Stockley for the respondent refers to clinical notes from Dr Khanom in early November 2016 which record the applicant wanting to re-open workers compensation claims for his left ankle and hand injuries. There is also a note on 31 October 2016 of a lawyer requesting information in regard to the applicant's left ankle injury. Mr Stockley submits that this evidence is not consistent with the level of ignorance of the workers compensation system claimed by the applicant.

34. Mr Stockley also points out that the applicant does not provide evidence of what was said to him by his lawyer in regard to the injuries he now claims to his back, neck and shoulders, or what the applicant was told by Dr Lim. Mr Stockley submits that the applicant has not availed himself of the opportunity to properly explain his ignorance of the workers compensation system as it relates to these claimed injuries, either because he has made a forensic decision not to or it has been overlooked.

35. Burke CCJ in *Gregson v L & M R Dimasi Pty Ltd* [2000] NSWCC 47; 20 NSWCCR 520 (*Gregson*) said at [61]:

> "The ignorance referred to is ignorance of the rights deriving from the Act and the obligations imposed by it. Effectively the Court is required to be satisfied that the applicant was unaware of those rights and obligations and thus failed to make the requisite claim."

36. In *Irvin v LA Logisitics Pty Ltd* [2011] NSWWCCPD 23 (*Irvin)*, DP O'Grady said, in rejecting a worker's reliance upon 'ignorance', at [64]: "There is no evidence of any weight before the Commission as to Mr Irvin's state of knowledge concerning his rights and obligations under the Acts."

37. The applicant had sustained a number of frank injuries in the course of his employment with the respondent and received some compensation for those injuries. The applicant was clearly familiar with the entitlement he had to claim compensation for any injuries he believed he had sustained in the course of his employment with the respondent.

38. There is a report from Dr Barrera dated 12 January 2008, and addressed to Villari Lawyers, which refers to a hernia injury, an ankle injury, back injury and left shoulder injury. In regard to the back injury, Dr Barrera writes:

> "I could presume that given the nature of his job as a concreter for so many years, the process of wear and tear of his spine would be worse and at a younger age than the normal population."

39. That observation made by Dr Barerra may have been in support of a claim for an injury to the lower back caused by the work being undertaken by the applicant with the respondent, but there is no other evidence to indicate whether the observation made by Dr Barrera was communicated to the applicant, or indeed the context in which that report was prepared.

40. I accept from the evidence of the applicant, his son Victor Dominguez, and from the observations of some doctors in their reports, that the applicant has poor English, has difficulty in comprehension, and is a vague historian. I accept that these limitations, which are understandable for a man from a non-English speaking background and who has worked for the one employer for almost 30 years in no more than a semi-skilled job, would have limited his state of knowledge in understanding how symptoms in his lower back, neck and shoulders, which developed over many years, could form the basis of a workers compensation claim.

41. Certainly, additional information as to what the applicant discussed with Dr Khanom between October 2016 and September 2017 regarding potential claims which the applicant could have pursued against his former employer, and what was discussed with Dr Lim once the applicant transferred to his care, would have been helpful. However, I accept from the applicant's evidence that he was ignorant in his state of knowledge of being able to claim workers compensation for symptoms he was experiencing in his lower back, neck and shoulders, until the explanation of injury caused by the nature and conditions of employment was provided to him by Dr Lim.

42. That there is evidence that the applicant had sought advice regarding further claims for frank injuries he sustained while employed with the respondent, does not mean that the applicant had a similar level of knowledge in regard to whether the symptoms he had in his lower back, neck and shoulders could be the subject of a workers compensation claim.

43. I am therefore satisfied that the failure by the applicant to make a claim for compensation within six months after the injury happened was occasioned by ignorance, and that the applicant can recover compensation so long as he is able to establish that the injuries to his lower back, neck and shoulders were sustained in the course of his employment with the respondent.

Whether the applicant sustained injury to his back, neck and both shoulders in the course of his employment with the respondent

44. The statement made by the applicant which is set out in "Background to the Dispute" in regard to his work duties with the respondent, and how he believes those duties caused him to develop pain in his shoulders, neck and back, is very much the extent of the evidence from the applicant of his work duties throughout his employment with the respondent. Not much information from nearly 30 years of employment.

45. The details recorded by Dr Ryan of the applicant's work duties are also brief. In his first report dated 1 May 2018, Dr Ryan records that the applicant was required to do forklift driving and lift heavy bags of cement weighing 20 kilograms. In a report dated 28 November 2018, Dr Ryan expands on that information by recording that the applicant manipulated heavy hoses and that his work involved repetitive bending, lifting and carrying, and working in challenging positions for his back.

46. Dr Lim reports following his initial consultation with the applicant on 29 September 2017 that the applicant "suffered a Neck/Shoulders/Back injury due to repetitive lifting, bending and rotating at the work place for over 20 years." The applicant's treating orthopaedic surgeon, Dr Soo, writes in a report dated 15 June 2018 that the applicant originally worked as a yardman, which was physically demanding work.

47. Dr Giblin in the MAC dated 24 July 2019 (which was for an assessment of permanent impairment of the left ankle, knee and hip), records that the applicant's work as a linesman was "much harder, having to carry lines of wet cement as well as undo the blocking when it occurred."

48. Dr Barrera records in the report dated 12 January 2008 that the applicant worked as a concreter until 2003, and then transferred to work as a yardman. I have already referred to the opinion of Dr Barrera that the process of wear and tear in the applicant's spine would be worse because of his work as a concreter.

49. Dr Powell, orthopaedic surgeon, who was qualified by the respondent, records in his report dated 4 December 2017 that the applicant sustained an injury to his lower back sometime in 2009 and that at the time the applicant's work "involved controlling concrete pumping sites on building sites and various areas of construction, doing concrete pours." Dr Powell records that after this injury the applicant worked as a yardman, which involved a variety of activities, including loading and unloading trucks, cleaning work areas, and shifting materials with forklifts.

50. Dr Smith, orthopaedic surgeon, was also qualified by the respondent, records in his first report dated 20 June 2018 that concreting "was extremely hard and arduous work", and that this was undertaken by the applicant until about 2008 when the applicant transferred to work in the yard. Dr Smith otherwise recites details of the applicant's work duties from the reports of Dr Lim and Dr Ryan.

51. Mr Stockley is critical of the paucity of evidence from the applicant, which is provided despite the benefit of legal assistance. He submits that the applicant does not provide a coherent description of his work duties or of the onset of symptoms which are the subject of this dispute.

52. Mr Stockley refers to the applicant endeavouring to supplement that meagre evidence by bits and pieces of details obtained from the reports of both treating and medicolegal doctors, but submits those details must be the subject of doubt by the applicant's own admission that he has had difficulties in communicating with those doctors.

53. I agree that the applicant could have done much more with his evidence to advance his cause. However, there is no evidence from the respondent which challenges the evidence which is relied upon by the applicant that he was engaged in heavy work while employed with the respondent.

54. I can conclude from a review of all the evidence that the applicant undertook concreting work with the respondent up until at least 2003. Dr Barrera identifies the time when the applicant ceased concreting work as being 2003, following the recurrence of a hernia injury.

55. Dr Bye, Approved Medical Specialist, records in a MAC dated 22 October 2014 that the applicant sustained an injury to his left shoulder in 2003 and an injury to his lower back in 2005, and thereafter transferred from a concreter position to yardman after these injuries.

56. Dr Hitchen in 2013 also records the applicant's transfer from concreter to yardman following injuries to his lower back and shoulders, although Dr Hitchen places those injuries at about the year 2000.

57. Both Dr Powell and Dr Smith record the transfer of the applicant from concrete work to yardman following a lower back injury, although those doctors record that frank injury to be in 2009 and 2008 respectively. Those dates of injury are some years later than more contemporaneous records, but the respondent does not dispute that there was a change in the applicant's work duties sometime after the applicant sustained a frank injury to the lower back.

58. I therefore accept that the applicant undertook heavy work as a concreter for at least the first 15 years or so of his employment with the respondent. No evidence to the contrary is provided by the respondent.

59. I also accept that although the applicant was placed on lighter duties after a recurrent hernia injury or lower back, he continued to undertake work of an arduous nature until he sustained an injury to his left ankle on 30 May 2016. That is recorded by Prof Ryan, Dr Lim, Dr Soo and Dr Powell. Again, there is no evidence from the respondent to dispute this.

60. The applicant claims that he has sustained a disease injury pursuant to section 4 (b)(ii) of the 1987 Act, which relevantly provides:

> "In this Act:
>
> Injury:
>
> ………….
>
> (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 is 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."

61. The application of section 4 (b)(ii) of the 1987 Act was well summarised recently by DP Snell in *AV v AW* [2020] NSWWCCPD 9 (*AV v AW*) at [76-78]:

> "76. Where the relevant aggravation involves both employment and non-employment factors, the evaluative process involves a consideration of the causative role of both. An evaluation that involved only employment factors would leave the provision with no work to do. This would be inconsistent with the context of the provision. It would also be inconsistent with the plain meaning of the words. There is a general presumption against surplusage in statutes.
>
> 77. It follows that the test of 'main contributing factor' involves consideration of whether there were competing causal factors (both work and non-work related) of the aggravation, and whether on a consideration of relevant causal factors the employment represented the main contributing factor.
>
> 78. The following may be taken from the above:
>
> - (a) The test of 'main contributing factor' in s 4(b)(ii) is more stringent than that in s 4(b)(ii) in its previous form, which applied in conjunction with the test in s 9A. There will be one 'main contributing factor' to an alleged aggravation injury.
> - (b) The test of 'main contributing factor' is one of causation. It involves consideration of the evidence overall, it is not purely a medical question. It involves an evaluative process, considering the causal factors to the aggravation, both work and non-work related. Medical evidence to address the ultimate question of whether the test of 'main contributing factor' is satisfied is both relevant and desirable. Its absence is not necessarily fatal, as satisfaction of the test is to be considered on the whole of the evidence.
> - (c) In a matter involving s 4(b)(ii) it is necessary that the employment be the main contributing factor to the aggravation, not to the underlying disease process as a whole."

62. I have accepted that the applicant did undertake arduous, physical work throughout the course of his employment with the respondent, especially when doing concreting work, but also after a transfer to the work of a yardman after he sustained a lower back injury and hernia injury. The question becomes whether that employment became the main contributing factor to the aggravation of degenerative conditions in the applicant's lower back, neck and shoulders.

63. Mr Stockley submits that the applicant's employment is only one factor of many that is involved in the aggravation of the disease affecting the applicant's spine and shoulders, and therefore the applicant must fail on proving injury within the meaning of the 1987 Act.

64. The observations made by Dr Barrera in 2008 are helpful. Dr Barrera writes that Dr Papatheodorakis has treated the applicant for his lumbar spine injury. Dr Barrera refers to a MRI scan of the lumbo sacral region which reports disc desiccation from L2-3 to L5-S1 and other wear and tear changes. Dr Barrera presumes that the wear and tear is worse for the applicant given the nature of his work as a concreter.

65. The report from Dr Barrera dated 12 January 2008 states that the applicant had been a patient at that doctor's surgery since 2001. I would accept from the contents of the report that Dr Barrera had a good knowledge of the applicant's health, and at that point in time Dr Barrera had signalled the potential role that the applicant's work had in accelerating the degeneration of at least the applicant's lumbar spine.

66. The clinical notes that are in evidence from Advance Liverpool Medical Centre record consultations for treatment from 23 January 2009 to 13 September 2017, although there are only four consultations prior to 30 May 2016. Thereafter the notes are dominated by consultations in regard to the applicant's left ankle injury. There is no reference in those notes to any treatment for the lower back, neck or shoulders, except for a complaint of left shoulder pain on 27 April 2017.

67. I consider the concentration in those clinical notes on treatment for the left ankle between 30 May 2016 and 13 September 2017 to be understandable given that the applicant ultimately underwent two operations on his left ankle on 12 July 2017 and 6 September 2017.

68. The lack of any reference to complaints involving the lower back in those notes does not mean that the applicant was not experiencing difficulties with his lower back. When the applicant attends an orthopaedic surgeon for the first time in several years in relation to his lumbar spine, being Dr Powell in December 2017, it is recorded that the applicant complains of constant pain in the lower back and that he takes Panadeine Forte about three times a week for both his ankle pain and back pain.

69. Dr Powell sees the applicant three months after his second left ankle operation and opines that the applicant is not fit for any form of employment "as he is post-operative from the ankle injury." However, Dr Powell also writes that the applicant has chronic lumbar spine difficulties, and opines:

> "There is little information available with regard to the lumbar spine, other than Mr Dominguez's testimony, but it would appear that he has had some mechanical aggravation of pre-existing lumbar spine disease which may also have an injury component to it, given his history. However, little else can be clarified from the information available."

70. Dr Powell does not provide an opinion as to whether the applicant's employment was the main contributing factor to the aggravation of his degenerative lumbar spine, but he does acknowledge a relationship between the arduous work undertaken by the applicant over the years of employment with the respondent and symptoms complained of by the applicant in the lower back.

71. Prof Ryan has provided two reports dated 1 May 2018, and further reports dated 28 November 2018, 11 November 2019 and 27 March 2020. Some of those reports also address the applicant's left ankle injury.

72. In his first report dated 1 May 2018, Prof Ryan records that the applicant developed pain in his shoulders, neck and low back over many years. However, he does not provide any opinion on causation, other than to state the applicant's "injuries and his employment at work were of substantial contributing factor to his injuries and his impairments." In the other report dated 1 May 2018, Prof Ryan assesses the applicant as having 19% impairment for injuries to the neck, lower back and bilateral shoulders, but then writes: "It is reasonable to state that all of Mr Dominguez's impairment pre-existed."

73. In a fourth report dated 11 November 2019, Prof Ryan is asked whether the applicant sustained injuries to his bilateral shoulders, cervical spine and lumbar spine, and he responds: "Mr Dominguez has injured both shoulders and his lumbar spine as a result of the nature and conditions of his work." No mention is made of the cervical spine.

74. In his fifth and final report dated 27 March 2020, Prof Ryan is asked whether the applicant sustained injury due to the nature and conditions of his employment up to October 2016 by way of disease or aggravation of a disease to the lumbar spine, cervical spine or both shoulders. Prof Ryan replies by referring to the right hand injury in 2011 and left ankle injury in May 2016, and then states:

> "It is my opinion that Mr Dominguez aggravated disease in his Lumbar spine, Cervical spine and Shoulders, because of heavy lifting at work, and specific injuries to his right hand and left ankle."

75. Prof Ryan also opines:

> "The chief cause of his low back and cervical spine symptoms and shoulder symptoms are loading of those joints, caused by bending and lifting at work."

76. While some latitude is often given to treating specialists who endeavour to grapple with the tests of causation of injury imposed by the workers compensation legislation, it is disappointing that an expert specifically retained to provide opinions on causation of injury does not properly address the test imposed by section 4 (b)(ii) of the 1987 Act. Mr Stockley submits that despite multiple requests for elucidation of his opinions, Prof Ryan does not reach the point in any of his reports of giving a clear statement of opinion as to the effect the applicant's work had upon the applicant's underlying degenerative condition.

77. However, DP Snell said in *AV v AW* that medical evidence to address this ultimate question is relevant and desirable, but is not necessarily fatal, "as satisfaction of the test is to be considered on the whole of the evidence."

78. In my view, the observations made by Dr Barrera back in 2008 regarding the advanced wear and tear of the applicant's lumbar spine, along with the concession made by Dr Powell that it would appear that there is an injury component to a mechanical aggravation of pre-existing lumbar spine disease, and Prof Ryan's opinion that the "chief cause" of the applicant's low back symptoms is caused by repetitive bending and lifting, along with my acceptance that the applicant did undertake arduous work in the course of his employment with the respondent, is sufficient for me to be satisfied that the applicant's employment was the main contributing factor to at least the aggravation of the degenerative disease affecting his lumbar spine.

79. The claims made by the applicant of disease injury to the cervical spine and both shoulders are more problematic.

80. In regard to the cervical spine, Dr Barrera refers to a CT scan taken of the neck in 2006, with "only the expected wear and tear." Dr Barrera does not draw the same causal connection from those findings to the applicant's work as is done for the applicant's complaints regarding his lumbar spine.

81. Dr Hitchen does not record any neck complaints when he sees the applicant in 2013.

82. There is no reference to any problems with the cervical spine in the notes from Advance Liverpool Medical Centre from 23 January 2009 to 13 September 2017.

83. Dr Powell does not record any complaints regarding the neck when he sees the applicant in December 2017, although he does find tenderness diffusively over the neck on examination. Dr Powell does not provide an opinion regarding any contribution that the applicant's employment might have to any neck symptoms.

84. Dr Soo records the applicant having neck pain and reports disc protrusions in the neck from a MRI scan, but does not provide any opinion on causation other than to state: "Hugo has many problems and widespread arthropathy throughout the joints in his body relating to 31 years of physical labour."

85. In his report dated 11 November 2019, Prof Ryan is asked whether the applicant sustained injuries to his bilateral shoulders, cervical spine and lumbar spine, but then does not include the cervical spine in his answer. I have accepted Prof Ryan's opinion in regard to the applicant's employment being the main contributing factor to the aggravation of his lumbar spine disease because there is other medical evidence, in particular from Dr Barrera and Dr Powell, which allows me to be satisfied that the test imposed by section 4 (b)(ii) can be met.

86. However, there is an inconsistency and lack of sufficient explanation by Prof Ryan on causation in regard to the condition of the applicant's cervical spine. In the absence of any other meaningful medical support, I cannot be satisfied that the applicant has established that his employment has been the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of a disease affecting his cervical spine.

87. Dr Barrera records in 2008 that the applicant "has complained repetitively of L shoulder pain and discomfort, as early as 2003." Dr Bye, Approved Medical Specialist, records in a MAC dated 22 October 2014 that the applicant sustained a soft tissue injury to his left shoulder in 2003, which was the subject of a medico-legal claim.

88. In 2013 Dr Hitchen records that the applicant sustained injuries to his shoulders in about 2000, but does not provide any further details of these injuries.

89. There is a reference to left shoulder pain in the notes from Advance Liverpool Medical Centre on 27 April 2017, although that is some seven months after the applicant had ceased employment with the respondent.

90. Dr Powell does not record any complaints regarding the shoulders when he sees the applicant in December 2017.

91. In June 2018 Dr Soo records the applicant having pain in both shoulders, the right shoulder being worse than the left. He does not provide any opinion on the cause of the applicant's shoulder pain other than a general observation which I have already referred to that: "Hugo has many problems and widespread arthropathy throughout the joints in his body relating to 31 years of physical labour."

92. Prof Ryan does opine that the applicant injured both shoulders as a result of the nature and conditions of his work in his fourth report dated 11 November 2019 and that the chief cause of his shoulder symptoms are loading of those joints caused by bending and lifting at work.

93. There is no explanation from the applicant, or in any of the medical reports, as to why there had been no complaints of right shoulder symptoms in any of the contemporaneous medical records. Prof Ryan and Dr Soo include both shoulders as being affected by the applicant's work duties without attempting to differentiate between the left shoulder, which had been the subject of symptoms since 2003, and the right shoulder which is not the subject of any record of complaint or treatment until the applicant sees Dr Lim in September 2017.

94. I accept that the arduous work undertaken by the applicant in the course of his employment was the main contributing factor to the degeneration of his left shoulder because the applicant had a recorded history of complaints in his left shoulder dating back to at least 2003.

95. However, the absence of any record of complaints in regard to the right shoulder until the applicant sees Dr Lim in September 2017, nearly a year after the applicant ceased employment with the respondent (other than a record made by Dr Hitchen in 2013 that the applicant sustained injuries to both shoulders in about 2000), does not allow me to be satisfied that the applicant's employment has been the main contributing factor to the aggravation of his right shoulder condition.

96. I have not accepted the opinions of Dr Smith on the causation of the applicant's symptoms in his lower back and left shoulder. In a report dated 30 January 2020, Dr Smith opines:

> "His employment is not a substantial contributing factor to his spinal degenerative disease, his bilateral knee osteoarthritis, his bilateral hip osteoarthritis, his bilateral shoulder joint osteoarthritis, or his bilateral hand and wrist osteoarthritis. He could have easily had some aggravations from time to time to any of these degenerative conditions.
>
> The aggravations do not cause these degenerative conditions to get worse. The conditions get worse with the passage of time."

97. In a further report dated 3 August 2020, Dr Smith writes:

> "He will have a large number of orthopaedic comorbidities apart from his injury to the left ankle. He will have spinal degenerative disease. He has osteoarthritis at both ends of the clavicle. He will have rotator cuff disease and probably bursitis in the shoulders. I would expect him to have symptoms from his osteoarthritic neck and low back from time to time. These degenerative conditions are all consequent to the ageing process as it is affecting him and he would be having these problems whether he worked as a concreter or whether he worked as a lawyer or a judge or a clergyman."

98. Dr Smith does record the applicant having back problems since 2008/2009 and that the applicant's shoulders were always aching, but is of the view that the applicant's symptoms in his lower back and left shoulder are simply part of an ageing process and that the applicant's employment does not contribute to the applicant's ongoing symptoms.

99. In my view, the weight of medical evidence, starting with the observations made by Dr Barrera which go back to 2003, and then the observations of Dr Powell, and then the opinion of Prof Ryan, supports a finding that the arduous work undertaken by the applicant in the course of his employment with the respondent was the main contributing factor to the aggravation of a disease affecting the applicant's lumbar spine.

100. There is also consistent evidence, again commencing with the observations made by Dr Barrera which go back to 2003, and then the opinion of Prof Ryan, which supports a finding that the arduous work undertaken by the applicant in the course of his employment with the respondent was the main contributing factor to the aggravation of a disease affecting the applicant's left shoulder.

101. There will otherwise be an award for the respondent for the claims of injury to the cervical spine and right shoulder.

The claim for weekly payments of compensation

102. The ARD claims weekly payments of compensation from 2 November 2017, although the list of payments filed by the respondent indicates that weekly payments of compensation were paid at a maximum rate applicable to the applicant for the injury to his left ankle until 1 October 2018. That list indicates that no weekly payments were made to the applicant from the time of his termination of employment on 14 October 2016 until July 2017, but no claim for weekly payments is made for this period.

103. There are Certificates of Capacity from Dr Lim which cover a period from 23 November 2017 to 16 July 2018, which certifies the applicant having no current work capacity for:

> "Cervical Spine Strain; Cervical Spine Radiculopathy; Bilateral Shoulder injury; Thoracic spine strain; Lumber Spine Strain; Lumbar Spine Radiculopathy; Bilateral carpal tunnel for investigation. Bilateral hip injury."

104. Dr Soo does not provide any opinion on the applicant's work capacity in his only report dated 15 June 2018.

105. In his first report dated 1 May 2018, Prof Ryan writes that the applicant "is best described as in-house invalid" and that the applicant "has no capacity for work now."
106. In his report dated 11 November 2019, Prof Ryan writes:

> "I have taken into account Mr Dominguez's age, qualifications, training, experience, employment skills and the physical findings at this examination. Mr Dominguez is unlikely to qualify to work in any occupation."

107. Dr Smith opines in his first report dated 20 June 2018 that the applicant is fit for sedentary work only because of his general medical unfitness and multiple orthopaedic comorbidities, and that the applicant "is better than he makes out he is."

108. In his further report dated 30 January 2020, Dr Smith considers that the applicant is fit to work on a full time basis but needs to avoid engaging in heavy, repetitive bending and heavy and repetitive overhead work.

109. The clinical notes from Advance Liverpool Medical Centre record some brief details of the applicant's efforts to return to work following the injury he sustained to his left ankle on 30 May 2016. On 20 August 2016, Dr Khanom records:

> "Pt is currently doing restricted duties
> Mainly cleaning and maintaining job
> No heavy lifting
> Doing very well
> Keen to go back to his normal duties and Fork-lift DRIVING"

110. On 4 October 2016, Dr Khanom records:

> "Pt seen with his son and case manager from Boral WC - Ms Noella Green
> Pt was in a trial of pre-injury duties for last 1 month
> Did very well
> No complaint at all
> No ankle swelling/ pain
> Driving fork-lift car without any difficulties"

111. Mr Stockley refers to a report from Dr Chin, orthopaedic surgeon, dated 2 August 2016 wherein Dr Chin writes that the applicant can increase his light duties over the next few weeks back to full hours, and then full duties with climbing, squatting and lifting with no restrictions. Mr Stockley submits that although Dr Chin treats the applicant for his left ankle injury, it would be beyond belief that an orthopaedic surgeon would not have made mention of any other orthopaedic problems complained of by the applicant when providing guidelines for the applicant's return to work.

112. The applicant does not provide his own evidence as to what work he was undertaking with the respondent at the time his position was made redundant. In his first statement in January 2019 he states that felt thoroughly discriminated against after his position was made redundant, especially as he understood from his son that the respondent hired someone else in the same capacity as he was hired for. That evidence would suggest that the applicant considers he would have been able to continue to do some work with the respondent at the time of his redundancy.

113. However, there is also no evidence from the respondent as to the reasons for making the applicant's position redundant. There is a reference in the notes from Dr Khanom on 13 October 2016: "Hugo could not renew his fork-lift driving this year for language barrier as that is one of the mandatory requirement now." The next day the applicant's position with the respondent was made redundant.

114. Prof Ryan in his final report dated 27 March 2020 agrees with Dr Smith that the applicant exhibited signs of pain behaviour. In a prior report dated 11 November 2019, Prof Ryan recorded that very gentle posterior palpation produced an agonised response from the applicant.

115. However, in the two reports where Prof Ryan does record his findings on examination of the applicant – being in May 2018 and November 2019 – Prof Ryan finds significant restriction of movement in the applicant's lumbar spine and left shoulder, notwithstanding exaggerated responses to some movements required of the applicant. Prof Ryan also accepts after performing those examinations and consideration of other medical material that the applicant is "now a house-bound invalid."

116. Dr Powell records restriction of movement causing pain and tenderness in the lumbar region when he examines the applicant in December 2017. Dr Powell does not query the genuineness of the applicant's physical responses during the examination conducted for that report.

117. Dr Soo records restriction of movement in the lumbar spine and left shoulder when he sees the applicant in June 2018.

118. The definition of "suitable employment" in section 32A of the 1987 Act requires me to consider a number of factors in order to determine employment that an injured worker is currently suited for, including the nature of the worker's incapacity and the worker's age, education, skills and work experience.

119. I accept from the findings made by Prof Ryan, Dr Powell and Dr Soo, that the applicant has a substantial incapacity for work due to the ongoing effects of the injury to his lower back. I also accept from the findings made by Prof Ryan and Dr Soo that the applicant has restricted use and function of his left shoulder.

120. The applicant is approaching 64 years of age and was 61 years of age when his claim for weekly payments of compensation for these injuries commence. He has had no education in Australia. His work experience is solely based upon manual labour. He has no specific work skills or trade qualifications. The note made by Dr Khanom that the applicant could not renew his forklift licence has not been challenged by the respondent.

121. The applicant's limited English language skills and comprehension, compounded by some deafness, places him outside of the possibility of any administrative or clerical job, or any job which requires engagement with the public.

122. Although there is reference to the applicant “working in admin” in notes made by Dr Khanom on 9 August 2016, as part of the applicant’s return to work from his left ankle injury, I consider it reasonable to infer that this was a temporary job created by the respondent as part of the applicant’s rehabilitation, and not a job that could be sustained on an ongoing basis. The respondent did not provide that job to the applicant as an alternative to redundancy despite almost 30 years of service provided by the applicant to the respondent.

123. Although it is recorded by Dr Khanom that the applicant “Did very well” following a month trial of pre-injury duties, I do not consider that I can conclude from that evidence alone that the applicant would have continued to undertake the duties of a yardman given the symptoms he has had in his lower back, and which have been identified and recorded by Prof Ryan, Dr Powell and Dr Soo.

124. Nor does any desire by the applicant to return to the work that he was doing before his left ankle injury, which is recorded by Dr Khanom, and which might be inferred from the statement made by the applicant in January 2019, mean that the applicant could have sustained that work given the problems identified and recorded by Prof Ryan, Dr Powell and Dr Soo. The findings made by those doctors confirm that the applicant has a significant disability due to his lower back condition.

125. I also do not consider that it can be inferred from the guidelines set out by Dr Chin in August 2016 for the applicant’s return to work following his left ankle injury, that the applicant had no problems with his lower back or left shoulder. Dr Chin was treating the applicant specifically for an injury to the left ankle. The applicant already had problems with his lower back and left shoulder dating back to 2003, based upon the records of Dr Barrera.

126. Dr Smith initially opines that the applicant is fit for sedentary work only, but later opines that the applicant is fit to work on a full time basis but needs to avoid engaging in heavy, repetitive bending and heavy and repetitive overhead work. In my view, Dr Smith has not properly considered the limitations the applicant has upon his work capacity given the applicant’s age, education, skills and work experience. The analysis that I have made of those factors relative to the injuries which I have accepted that the applicant has sustained to his lumbar spine and left shoulder, means I cannot accept the opinions provided by Dr Smith regarding the applicant’s capacity for work.

127. The applicant’s work experience is limited to semi-skilled manual labour and the medical evidence which I have accepted means, in my view, that the applicant cannot undertake any manual work, even on a part time basis.

128. Having regard to the factors which I have considered pursuant to section 32A of the 1987 Act as it applies to the definition of suitable employment, I find that the applicant has had no current work capacity since 2 October 2018 as a result of the disease injury he has sustained to his lumbar spine and left shoulder in the course of his employment with the respondent.

129. Mr Morgan accepted the calculations of pre-injury average weekly earnings (PIAWE) set out in a determination made by QBE dated 14 June 2016 in relation to the applicant’s left ankle injury, which is as follows:

> “Base Rate = $1,258.00
> Total Overtime =-$41,722.15
> Total Shift Allowance= $21,477.50
> Therefore your PIAWE has been calculated as being $2,497.21.”

130. From that information, the following awards of weekly compensation will made to the applicant:

    (a) $2,145.30 per week from 2 October 2018 to 1 January 2019, pursuant to section 36 (1) of the 1987 Act;

    (b) $1,997.77 per week from 2 January 2019 to 1 October 2019, pursuant to section 37 (1)(a) of the 1987 Act, and

    (c) $1,006.40 per week from 2 October 2019 to date and continuing, pursuant to section 37 (1)(a) and section 44C (1) (preserved) of the 1987 Act.

The claim for medical expenses and permanent impairment

131. There will also be an order that the respondent is to pay the applicant's reasonably necessary medical expenses for treatment for the injuries to the applicant's lumbar spine and left shoulder.

132. There will also be an order for referral to an Approved Medical Specialist for assessment of permanent impairment of the lumbar spine and left upper extremity (shoulder), with a deemed date of injury of 14 October 2016.