

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 4565/20
Applicant: Yogalingham Sellathurai
First Respondent: SPN Supermarket Pty Ltd t/as Sunrise Indian & Sri Lankan Restaurant
Second Respondent: Workers Compensation Nominal Insurer
Date of Determination: 2 February 2021
Citation No: [2021] NSWCC 34

The Commission declares:

1. That the first respondent was not insured at all relevant times as required by the *Workers Compensation Act 1987* (the 1987 Act).

The Commission determines:

1. The second respondent, the Workers Compensation Nominal Insurer, is liable to make payments as if it were the insurer of the first respondent at all relevant times
2. The second respondent, the Workers Compensation Nominal Insurer, to pay the applicant weekly benefits as follows:
 - (a) \$722 from 17 May 2019 to 24 August 2019 pursuant to s 36 of the 1987 Act, and
 - (b) \$608 from 25 August 2019 to date and continuing pursuant to the provisions of s 37 of the 1987 Act.
3. The first respondent to reimburse the second respondent, the Workers Compensation Nominal Insurer for:
 - (a) amounts paid out of the insurance fund in respect of compensation and costs awarded against the first respondent, and
 - (b) the costs of the second respondent, the Workers Compensation Nominal Insurer.

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

Carolyn Rimmer
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 CAROLYN RIMMER, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. On 17 August 2020, the applicant, Yogalingham Sellathurai (Mr Sellathurai) lodged an Application to Resolve a Dispute (the Application) in the Workers Compensation Commission (the Commission). Mr Sellathurai commenced the proceedings against SPN Supermarket Pty Ltd t/as Sunrise Indian & Sri Lankan Restaurant (SPN) and the Workers Compensation Nominal Insurer (the Nominal Insurer).
2. Mr Sellathurai claimed weekly benefits.
3. Mr Sellathurai claimed that he has sustained an injury to his back on 17 May 2019.
4. At all material times SPN was uninsured for workers compensation (Employer's Liability Insurance) liability in the State of New South Wales for the purposes of s140(1)(a) and s140(2)(a) under the *Workers Compensation Act 1987* (the 1987 Act).
5. The Nominal Insurer issued a s 74 Notice dated 25 September 2019 disputing liability for the claim for weekly payments. The notice disputed injury to the lumbar spine, resulting from the alleged incident on 17 May 2019.

ISSUES FOR DETERMINATION

6. The parties agree that the following issues remain in dispute:
 - (a) Did Mr Sellathurai sustain an injury to his lumbar spine that arose out of or in the course of his employment with SPN pursuant to s 4(b)(ii) of the 1987 Act?
 - (b) Whether Mr Sellathurai has any incapacity as a result of the injury on 17 May 2019 and if so, the extent of such incapacity and his weekly entitlements.
 - (c) Whether pursuant to s 142B (2) and s 145 of the 1987 Act, SPN is to reimburse the Nominal Insurer for any compensation and costs awarded against it.

PROCEDURE BEFORE THE COMMISSION

7. The matter was listed for conciliation and arbitration on 9 November 2020. Mr Craig Tanner, who was instructed by Mr Andrew Tohme of Turner Freeman Lawyers, appeared for Mr Sellathurai. Mr Robert Eaves of Eaves Legal, appeared for SPN. Mr Paul Stockley, who was instructed by Ms Ebony Wilcox of Hall & Wilcox, appeared for the Nominal Insurer. On 9 November 2020 the matter was part-heard and listed for further arbitration on 18 January 2021.
8. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary evidence

9. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute (ARD) and attached documents;
 - (b) Reply of SPN dated 23 November 2020 and attached documents;
 - (c) Reply of the Nominal Insurer and attached documents;
 - (d) Application to Admit Late Documents (AALD) filed by Mr Sellathurai and dated 6 October 2020, and
 - (e) AALD filed by the Nominal Insurer and dated 2 November 2020.

Oral evidence

10. No application was made to call oral evidence.

FINDINGS AND REASONS

Evidence of the applicant, Mr Sellathurai

11. In a statement dated 3 July 2019, Yogalingam Sellathurai stated that he was unable to understand English properly without the assistance of an interpreter. He said that he was born in Sri Lanka and had lived in Australia since 2005. He said that he was employed by Partheepan Sivalingam for four years at Sun Catering and then at a restaurant called Sunrise at Wentworthville from September 2018 to 17 May 2019 as a cook in the restaurant. Mr Sellathurai said he was employed on a full time basis and worked a 38 hour week. He stated that his duties included cooking duties and he started work at 4.50 am and usually finished at 3.00pm.
12. Mr Sellathurai said he was working on Friday 17 May 2019 and started work at 4.50 am. He said that he was injured at work at about 7.45 am when Sami and Rukmani there. He said that Mr Sivalingam came later.
13. Mr Sellathurai wrote:
 - “38. At that time I was carrying a pot of prepared food.
 39. It weighed about 30-40kg.
 40. I had carried it on other occasions.
 41. I lifted it from the floor and felt a tightness in my lower back.
 42. I felt pain in my back right away.
 43. I couldn't do anything else after that.
 44. I couldn't talk.
 45. I told Rukmani and Sami that I had hurt my back.”

14. Mr Sellathurai stated that after Mr Sivalingam came to work he told him what had happened. He said that he could not even sit properly because of the pain. He said that they helped him get to a car and he was driven to his doctor at Toongabbie and then went on to Westmead Hospital where he was given pain killers.
15. Mr Sellathurai stated that he had been off work since that day. He said that he had been living with Mr Sivalingam since September 2018 until May 2019 when he then moved to Pendle Hill. He stated that he lived with Mr Sivalingam because the house was close to the business and it was easier for him to get to work.
16. Mr Sellathurai stated that the restaurant at Wentworthville was a new business for Mr Sivalingam and he offered him the new position and the opportunity to stay with him at his home. He denied any allegation that he had injured his back whilst lifting a washing machine on 16 May 2019 outside work.
17. Mr Sellathurai wrote:
 - “66. I did not lift a washing machine.
 67. I remember that a washing machine was delivered to his house after I was discharged from hospital.
 68. I was not involved in moving the washing machine at any time.
 69. Partheepan lived in a house.
 70. I remember Partheepan telling me not to report this matter to WorkCover otherwise he would get fined.
 71. I did not know that he did not have workers compensation insurance.
 72. There were no problems with my back prior to 17 May 2019.”
18. Mr Sellathurai stated that he could not do normal duties as he usually did and could not walk too far. He stated that he could not afford to pay for his medications. He said that the matter had also affected him psychologically.
19. In a statement dated 6 August 2020, Mr Sellathurai stated that he was responding to the evidence of his former co-workers Rukmani, Selyaraja and Nadaraja Sriranganathan, as well as his former boss, Partheepan Sivalingam. He stated that although his duties primarily involved cooking, he was still expected to lift heavy pots which ranged from 10 kg to 40 kg. He said he was often required to work with heavy pots.
20. Mr Sellathurai wrote:
 - “3. On 17 May 2019, I was lifting a pot when I injured my back. My former co-workers state that I was pushing a bin. I confirm I was carrying a pot of prepared food which weighed in or around 30kg. Additionally, I also confirm that I have carried pots like this on other occasions.
 4. I confirm, I lifted the pot from the floor and felt a tightness in my lower back right away. I could not do anything after that. I could not talk due to the pain.
 5. This is when I informed Rukmani and Sami that I hurt my back and they helped me get to the hospital. I could not sit properly due to the pain.
 6. I confirm that I hurt my back by lifting a heavy pot which was filled with prepared food from the floor, not by pushing a bin.

7. I deny any allegation that I injured my back while lifting a washing machine on 16 May 2019 outside of work. I did not lift a washing machine.
 8. The washing machine was delivered to Partheepan's house after I was discharged home from hospital."
21. Mr Sellathurai confirmed that he did "have a pre-existing back condition which had been aggravated by lifting this pot". He stated that he had been given medication, had physiotherapy and had been monitored by doctors due to the injury. He stated that he could not do normal duties and could not walk too far. He said that the injury continued to impact on him physically and psychologically.
 22. In a State Insurance Regulatory Authority (SIRA) Claim form dated 2 July 2019, Mr Sellathurai stated that his tasks at the time of the injury were "cooking". He wrote: "When I am cooking food, I try to pick up the pot my left leg slip and heard [sic] my back". He described the injury as a lower back injury and left leg. In answer to the question "Have you previously had another injury/condition or personal injury claim that relates to this injury/condition? Please give details, including claim number(s) and insurer details", he wrote "Yes but I did not claim because it happens at my home".

Evidence of Partheepan Sivalingam

23. In a statement dated 3 July 2019, Mr Sivalingam said that he was the owner of the Sunrise Restaurant at Wentworthville and the holding company of his business was SPN, the first respondent. He stated that the restaurant had been in business for about nine months and he employed two or three other workers. He stated that his role in the business was an overall responsibility for the work, and he was involved in the work as well. Mr Sivalingam said that he met Mr Sellathurai in about 2015 and then spoke to him when he started the business up at Wentworthville. He said he told him he could stay at his home to make it easier for him, and Mr Sellathurai had been working at the restaurant in Wentworthville since about September 2018 as a cook on a full time casual basis.
24. Mr Sivalingam stated that Mr Sellathurai's role was to prepare curries which they sold in the restaurant. Mr Sivalingam wrote:
 - "27. He was not required to lift anything heavy.
 28. The heaviest he would lift would have been maybe ten kilograms.
 29. He has Sami working with him and Sami did all the lifting duties from the cool storage room to the kitchen where Yogalingam needed anything.
 30. I found Yogalingam to be a good worker.
 31. I would describe his duties as not hard.
 32. He knew what he was doing.
 33. I did not have workers compensation insurance for my workers at the restaurant.
 34. I made that decision for financial reasons."
25. Mr Sivalingam stated that Mr Sellathurai was working on Friday, 17 May 2019, and would have started work at about 5.30 am. He stated that Sami and Rukmani were also working that morning. Mr Sivalingam said that he came to work between 7.30 am and 8.00 am and when he arrived Sami and Rukmani told him that Mr Sellathurai had said he had hurt his back and then sat down because he was in pain.

26. Mr Sivalingam wrote:

“43. I asked Yogalingam what had happened and he said that he had hurt himself pushing a rubbish bin.

44. He did not say anything about lifting a pot of vegetables or soup.

45. The pots that he may have lifted would weigh no more than ten kilograms.

46. The sambar pot is a 10 litre pot and is only ever half-filled at most, so would only weight about 5 kilograms.

47. The rubbish bins in the morning are very light because they are mainly full of paper that we have taken ingredients out of for cooking.

48. The bin is not heavy.

49. He said he was pushing it away from where he was cooking.

50. He had been cooking that morning.

51. We arranged for Sami to take him to his doctor right away.

52. Yogalingam has not worked again since that day.”

27. Mr Sivalingam stated that his washing machine had been broken for about 10 days and he was making arrangements to get a new one. Mr Sivalingam said that he believed that “Yogalingam moved or lifted the old washing machine at my home in order to make room for the new washing machine when it arrived.”

28. Mr Sivalingam said that he remembered seeing Mr Sellathurai at home around 8.00 pm on 16 May 2019 and Mr Sellathurai told him he had pain in his arms and his back from moving or lifting the washing machine. He wrote:

“59. At the time he just put some pain killer spray on his arms and he was alright.

60. He didn’t need to go and see a doctor or go to the hospital.

61. He was able to go to work on 17 May 2019.”

29. Mr Sivalingam said that he was aware that Mr Sellathurai had problems with his back and with his legs for more than 10 years now and he had obtained that information from Mr Sellathurai’s wife.

30. In an unsigned statement dated 21 September 2020, Mr Sivalingam said that this statement was made by him further to the original statement dated 3 July. He said that he wished to make further comments in relation to the delivery of the washing machine to his home on 16 May 2019. He wrote:

“10. There is an invoice dated 16 May 2019 from Bing Lee for delivery of the washing machine to my resident.

11. The washing machine was delivered on 16 May 2019.

12. I was not at home when the new washing machine was delivered by Bing Lee.

13. Yogalingam was the only person home at the time as he was living with me at the time.

14. When I saw Yogalingam at home he told me that he had moved the old washing machine out of the way so the new washing machine could be installed.
 15. He told me that he had moved it on his own.
 16. He said something about having shoulder pain at the time.
 17. I saw the new washing machine in its location on 16 May 2019.
 18. Yogalingam was still able to go to work the next day, on 17 May 2019.”
31. In a second statement dated 21 September 2020 which was signed, Mr Sivalingam, stated that this statement was made further to the original statement dated 3 July 2019. He stated that he wished to make comments in relation to the new washing machine that he had purchased on 16 May 2019. He wrote:
- “10. I purchased the new washing machine myself and paid for it on the day.
 11. There is an invoice dated 16 May 2019 for the purchase.
 12. I took the new washing machine to my home myself and placed in in my living room.
 13. It was not delivered by anyone else.
 14. There was no-one at home at the time I took the new washing machine to my living room.
 15. I left the new washing machine in the living room and went to work.
 16. Yogalingam was the only person at home when I got back from work as he was living with me at the time.
 17. When I saw Yogalingam at home he told me he had moved the old washing machine out of the way and put the new washing machine in its place.
 18. He told me that he had moved it on his own.
 19. He said something about having shoulder pain at the time.
 20. I saw the new washing machine in its location on 16 May 2019.
 21. Yogalingam was still able to go to work the next day, on 17 May 2019.”
32. The two statements dated 21 September 2020 were obtained by Lee Kelly Commercial Investigations.
33. An invoice from Bing Lee at Prospect dated 9 September 2020 but recorded as “Created 16/05/19”, was billed to Mr Partheepan Sivalingam with a delivery address in Wentworthville. The invoice was for a Haier 7kg top load washing machine and it was noted as “previously delivered”.
34. In an undated statement attached to the Reply of SPN, Mr Sivalingam stated that he was the employer at Sunrise Indian and Sri Lankan Restaurant. He stated that he had worked in the food industry for many years and was aware of workplace safety issues in his area of work. He stated that Mr Sellathurai was employed as a cook.

35. Mr Sivalingam then referred to the statement of Mr Nadaraja Sriranganathan dated 3 July 2019 and also to the statement of Ms Rukmani Selyaraja dated 3 July 2020.
36. Mr Sivalingam stated that Mr Sellathurai's denial of injuring himself while lifting the washing machine at his home was false. He rejected the claim that Mr Sellathurai suffered any injury while performing duties for SPN.
37. Mr Sivalingam wrote:
- “Since making the claim, I am informed that the applicant has back injuries for some years before he commenced his employment at Sunrise.
- The first defendant provided a safe system of work for his staff at all times.
- There was no requirement for the applicant to lift any item beyond 10-15kg in the said workplace.”
38. Mr Sivalingam stated that after Mr Sellathurai commenced his employment, or at about the time of the injury, Mr Sellathurai's wife advised over the phone from Canberra that her husband had a prior back injury and had been admitted to hospital for a period of time and therefore the issues he was experiencing were all issues arising from his previous condition.
39. Mr Sivalingam said that he was advised by Mr Sellathurai and Mr Sellathurai's wife that before Mr Sellathurai commenced employment with SPN he worked as a labourer in Canberra moving furniture and household contents. He stated that Mr Sellathurai had no pots, pans or kitchen lids or other items that he was required to “left” [sic] in his employment duties. Mr Sivalingam stated that SPN was “a responsible employer who adopted procedures that were deemed to be appropriate and safe for employees of a restaurant kitchen”, and the workplace duties for Mr Sellathurai did not require any heavy lifting, or any lifting that would cause injuries similar to those the subject of this claim.
40. Mr Sivalingam wrote:
- “Contrary to what was said (ie after the incident), before commencement of his said employment, applicant Sellathurai advised he had no physical impairment and at no time during his employment period did he give notice of injuries to the first respondent.”
41. Mr Sivalingam stated that SPN submitted that the descriptions outlined under injury details were false and not based on any actual employment situation of Mr Sellathurai and that the sworn statement by Mr Sellathurai made on 6 August 2020 was misleading and not true.
42. Mr Sivalingam wrote:
- “...the applicant has since the alleged injury been employed in labouring work on a building site. This is contradiction to the applicant's statement of 3 July 2019 when he says at paragraph 75 ‘I can't do normal duties as I used to do’.”
43. In a letter dated 22 September 2020 from Indran Taxation Services, Mr Indran Kana stated that Indran Taxation Services had been acting as a tax agent for SPN Supermarket Pty Ltd and according to their records Mr Sellathurai started employment with SPN on 25 September 2018 and was paid a gross wage of \$760 per week.

Evidence of Nadaraja Sriranganathan

44. In a statement dated 3 July 2019, Mr Nadaraja Sriranganathan stated that he was employed by Mr Sivalingam to work at Sunrise Restaurant at Wentworthville and had been working there for about three months on a casual basis as an assistant cook. He said that his duties included cutting vegetables, cleaning utensils and bringing things from the cool room. He said that he reported to Mr Sivalingam and also knew Mr Sellathurai for the three months that he had been working at the restaurant. He said that Mr Sellathurai was a cook and was only involved in cooking duties. Mr Sriranganathan wrote:

- “17. I did all the lifting work.
18. I was working on Friday 17 May 2019.
19. I started work that day at about 5.00am.
20. Yogalingam was also working that day.
21. I would carry any pots of sambar if required.
22. Yogalingam would not need to lift the pot for any reason.
23. He was only involved in cooking the food.
24. I remember that he was pushing one of the rubbish bins in the kitchen.
25. The bin is not heavy.
26. It only has paper and empty packets of the food we have used that morning.
27. I remember that Yogalingam then sat down and said he had back pain.
28. He had not been doing anything else that morning apart from cooking.
29. I do all the heavy lifting at work.
30. The heaviest we would lift would be about 10kg or 15kg.
31. We would not lift anything weighing 40kg.
32. I remember that Partheepan came to work and spoke to us and also to Yogalingam.
33. I drove Yogalingam that day to his doctor and also to the Westmead Hospital.”

45. Mr Sriranganathan stated that he recalled Mr Sellathurai saying something many days before 17 May 2019 about moving a washing machine at Partheepan’s home. He said: “I remember him saying that he had back pain at the time.”

Evidence of Rukmani Selyaraja

46. In a statement dated 3 July 2019, Ms Rukmani Selyaraja said that she was employed by Mr Sivalingam to work at the Sunrise Restaurant at Wentworthville. She said she had been working there for about six months on a casual basis, and her duties included working and preparing short eats like rolls and roti. She stated that she had known Mr Sellathurai for about six months and he also worked in the restaurant as a cook and had his own duties to do.

47. Ms Selyaraja stated that she was working on Friday, 17 May 2019 and had started work at about 6am. She stated that Mr Sellathurai and Sami were also working that day and were already at work when she arrived. She recalled that she was cutting onions. She wrote:

“24. I remember that Yogalingam was pushing the rubbish bin in the kitchen.

25. He then suddenly sat down.

26. I don't remember Yogalingam lifting a pot of sambar or anything else like that.

27. Sami usually does all the lifting.

28. Yogalingam is only involved in the cooking.

29. I remember Sami asking Yogalingam why he was sitting down.

30. Yogalingam told him that he had hurt his back pushing the rubbish bin.

31. He was holding his back.

32. He said that he had pulled his back.

33. Partheepan came to work soon after that and we told him what had happened.

34. Partheepan also spoke to Yogalingam.

35. Partheepan arrange for Sami to drive Yogalingam to his doctor and the hospital.”

48. Ms Selyaraja stated that she did not have any recollection of Mr Sellathurai saying anything about being injured the day before 17 May 2019 at home lifting a washing machine.

MEDICAL EVIDENCE

49. In the clinical notes and records from Westmead Hospital, a patient health record dated 17 May 2019 revealed that Mr Sellathurai was admitted at 9.45 am and discharged at 16.50 pm. The presenting problem was reported as low back pain. In the discharge plan Dr Swathi Murugan noted that Mr Sellathurai presented with lower back pain post lifting heavy items at work. Dr Murugan noted that Mr Sellathurai was given analgesia while in ED and discharged with scripts for further analgesia and advised that the pain would likely improve in the next four to six weeks.

50. Under the discharge transfer documents in the “progress in hospital” section, it was noted that Mr Sellathurai presented with acute on chronic back pain. The history was obtained by a phone interpreter and reported as “lifting a heavy box today and felt a pop then immediate pain in the lower back”. It was noted that Mr Sellathurai “went to GP who referred to emergency. 10/10 pain on any movement...”

51. In the Westmead Hospital notes dated 17 May 2019 under “ED to Ward Transfer”, Dr Lim noted that Mr Sellathurai had acute on chronic back pain and “was lifting a box and sudden pain this morning”. She noted “difficulty walking and ongoing 10/10 pain, short stay for regular analgesia. Patient happy for discharge and outpatient physio”.

52. In a referral dated 17 May 2019, Dr Eswararaj Bastismpillai of Parkview Medical Centre, appears to have referred the applicant's wife, Chandrakanth Yogalingam for investigation and observation for “acute back pain with difficulty to walk today morning”. However, on the referral was a stamp clearly made at Westmead Hospital naming Mr Sellathurai Yogalingam. It appears that Dr Bastismpillai made a mistake in the referral concerning the name of the patient. I am satisfied that it was Mr Sellathurai who was referred and attended Westmead Emergency Department on 17 May 2019.

53. In the ED nursing re-assessment, Ms Montibeller noted that Mr Sellathurai presented with low back pain after “lifting a basket this morning at home”. She noted he scored pain 9/10 on any movement. She noted he could understand English with short answers.
54. In the ED medical referral physiotherapy and mobility consultation dated 17 May 2019, Mr Efthimiou, physiotherapist, under “mechanism of injury/onset of symptoms” wrote “Acute onset of LBP after lifting @ work.”
55. A further admission to Westfield Hospital was reported on 24 May 2019. Under “history of presented illness” the following was recorded:
- “49 year old male NESB presenting with 3 day hx of increasing pain/numbness in left leg on b/g of D/C from westmead ed 1/52 for back pain secondary to heavy lifting.
- Was D/C from westmead hospital on 17/05. Done with phone interpreter RAJ.
- Was lifting heavy box 17/05 and felt a pop then immediate pain in the lower back. Went to GP who referred to emergency. 10/10 on any movement.
- ...
- Has developed numbness radiating from lower back down S1 and S2 dermatomal distribution. Increasingly worse over the last 3 days with assoc pain.
- ...
- Has output CT done – moderate sized broad based disc protrusion with more prominent right central and central focal component. Mild impingement of right exiting L4 and contact on left exiting L4 nerve roots – moderate degree of canal stenosis. L5/S1 – small disc protrusion contacting the descending the S1 nerve root bilaterally.”
56. Under “Physical Exam” it was noted that there was subjective sensation difference along S1/S2 distribution on the left compared to right. Mr Sellathurai was reviewed by the spinal team who noted the following impression: “Radicular pain from disc bulge, no evidence of cauda. Medically cleared for discharge home.”
57. In the notes under “Emergency Department Triage WE” dated 24 May 2019 Mr Catahan reported:
- “Triage Presenting Information: 1 week hx of L swelling, numbness, pain and foot drop, states commenced post lifting heavy object 1 week ago. o/e: states nil sensation on L foot. bg: L4/5 radiculopathy 2011.”
58. In the clinical notes and records produced by Westmead Hospital, there are also a number of reports and entries made in 2009 relating to complaints by Mr Sellathurai of low back pain. In a referral dated 11 March 2009 to Dr Dandie at the Neurosurgical Clinic of Westmead Hospital, Dr Jeyachandran referred Mr Sellathurai for further opinion and management of acute on chronic back pain. He noted that Mr Sellathurai complained of increasing back pain especially after sitting for more than one hour, and of left calf numbness for the past 10 months. He noted that a CT of the lumbar spine was reported as L4-5 moderate marked canal stenosis due to midline disc extrusion with congenital spinal canal narrowing. Under details of past history, Dr Jeyachandran noted that on 12 June 2007 “low back pain with radiation to post left leg 1yr”, on 20 October 2008 “left calf numbness for eight months”, on 20 October 2008 “increasing lower back pain whilst sitting for more than 1h”, on 29 October 2008 “congenital canal narrowing (lumbar)”, and on 29 October 2008 “L4/5 moderate mark canal stenosis due to midline disc ext”.

59. In a report dated 18 March 2009, Dr Locke-Wilkinson, Registrar for Dr Dandie, noted that Mr Sellathurai worked as a kitchen hand but had been having difficulties with chronic back pain for about two years. He noted that Mr Sellathurai complained of an increase in pain symptoms particularly after prolonged periods of sitting and had discomfort on lying down. He noted Mr Sellathurai had difficulty working as a kitchen hand due to the debilitating pain symptoms and was currently unemployed. Dr Locke-Wilkinson reported that the CT performed externally demonstrated a significant central disc protrusion at L4/5 level that was causing a significant degree of canal stenosis. Dr Locke-Wilkinson reported that Mr Sellathurai would likely be a good candidate for surgical decompression of L4/5 which would appear to be causing his spinal claudication and symptoms. An MRI study was arranged to investigate the disease further and to investigate whether he might have an S1 radiculopathy that could account for the radiating symptoms down the left leg.
60. In a report dated 10 June 2009, Dr Chung, for Dr Dandie, noted Mr Sellathurai had been reviewed and his symptoms had remained much the same. He reported that on examination Mr Sellathurai did not have any abnormal neurological findings in his lower limbs in terms of tone, power or reflexes. An MRI had been performed which demonstrated an L5/S1 central disc prolapse with moderate canal stenosis. Dr Chung wrote:
- “I suspect that this, along with his sagittally aligned facet joints and congenitally narrowed canal is the cause of his symptoms. His imaging was reviewed with Dr Dandie and we suggest that he should trial a course of facet joint injections and a CT guided nerve root injection.”
61. In the clinical notes and records of Dr Jeyachandran, under “Past medical history - active” Dr Jeyachandran noted “2011: CT-L4/5 disc marked compression of the thecal sac and narrowing (left) of exit foramina” and “2019 L4/S1 radiculopathy.”. Under “Past medical history - inactive” Dr Jeyachandran noted “2006: Low back pain with radiation to post left leg 1yr”, “2008 congenital canal narrowing (lumbar), L4/5 moderate mark canal stenosis due to midline disc extrusion with congenital spinal canal narrowing (lumbar)”, and “2011 back pain: 2yr to L4/5 radiculopathy (left)”.
62. Other entries in the clinical notes and records including the following:
- (a) In an entry dated 13 October 2007, Dr Jeyachandran noted Mr Sellathurai complained of “low back pain with radiation to post-left leg 1yr”. He prescribed Panadeine Forte.
 - (b) In an entry dated 25 October 2007, Dr Jeyachandran referred Mr Sellathurai for a CT of the lumbar spine.
 - (c) In an entry dated 28 July 2008, Dr Jeyachandran noted that Mr Sellathurai complained of “low back pain with radiation to post-left leg 1yr”. He prescribed Mobic.
 - (d) In an entry dated 25 September 2008, Dr Jeyachandran noted Mr Sellathurai complained of right foot numbness for two weeks and a past history of left L4/5-disc herniation with L4 compression. He referred Mr Sellathurai for a CT scan of the lumbar spine.
 - (e) In an entry dated October 20, 2008, Dr Jeyachandran noted a history of increasing lower back pain when sitting for more than 1 hour and also a complaint of left calf numbness for eight months.
 - (f) In an entry dated 16 June 2009, Dr Jeyachandran noted that Mr Sellathurai still had pain and recommended a steroid injection at the L4/5 facet joints.

- (g) In an entry dated 2 February 2011, Dr Jeyachandran noted "Left back pain 2yr to L4/5 radiculopathy."
- (h) In an entry dated 22 February 2011, Dr Jeyachandran noted "left CT =L4/5 disc marked compression of the thecal sac and narrowing".
- (i) In an entry dated 11 May 2011 Dr Jeyachandran noted Mr Sellathurai still complained of lower back pain with radiation pain persisting. He noted that if this persisted, Mr Sellathurai may need to see Dr Dandie.
- (j) In an entry dated 22 August 2011, Dr Jeyachandran noted that Mr Sellathurai complained of persistent lower back pain and was advised to see Dr Kanankara.
- (k) In an entry dated 2 February 2012, Dr Jeyachandran noted there was an "exa [sic] of lower back pain 2 days". He prescribed Mobic and Panadeine Forte.
- (l) In an entry dated 29 February 2012, Dr Jeyachandran noted there was lower back pain worsening.
- (m) In an entry dated 12 June 2012, Dr Jeyachandran noted Mr Sellathurai still complained of lower back pain and there was no improvement.
- (n) In an entry dated 20 March 2013, Dr Jeyachandran noted "Exa [sic] of lower back pain after car wash."
- (o) In an entry dated 12 January 2017 Dr Jeyachandran noted Mr Sellathurai complained of "left buttock pain with radiation 3 days after lifting a heavy weight ? S1 radiculopathy".
- (p) In an entry dated 13 January 2017, Dr Jeyachandran noted: "Patient presents for review of investigations taken at previous consult. L4/5 disc protrusion without impingement, mild canal stenosis."
- (q) In an entry dated 30 January 2017, Dr Jeyachandran noted that Mr Sellathurai complained of "increased left foot burning with left buttock, knee, calf pain ? S1 radiculopathy".
- (r) In an entry dated 20 May 2019, Dr Jeyachandran noted Mr Sellathurai complained of "severe low back pain for 3 days after lifting a heavy weight".
- (s) In an entry dated 23 May 2019, Dr Jeyachandran noted Mr Sellathurai presented for a review of the CT of the lumbosacral spine.
- (t) In an entry dated 24 May 2019, Dr Jeyachandran noted Mr Sellathurai complained of increasing left leg numbness and foot drop.
- (u) In an entry dated 29 May 2019, Mr Sellathurai complained of still having pain in the left leg with numbness.
- (v) In an entry dated 6 June 2019, Mr Sellathurai complained of increasing pain and left leg numbness.
- (w) In an entry dated 12 June 2019, Dr Jeyachandran noted Mr Sellathurai complained of "increasing pain post legs nil foot drop".
- (x) In an entry dated 18 June 2019 Dr Jeyachandran noted Mr Sellathurai complained of left leg numbness after walking and standing for a long time.

- (y) In an entry dated 3 July 2019, Dr Jeyachandran noted Mr Sellathurai still complained of pain with the left leg.
- (z) In an entry dated 9 July 2019, Dr Jeyachandran noted Mr Sellathurai complained of left leg numbness after walking.
- (aa) In an entry dated 18 July 2019, Dr Jeyachandran noted Mr Sellathurai complained of “pain and numbness worsening after the physio assessment for workcover”.
- (bb) In an entry dated 26 July 2019, Dr Jeyachandran noted Mr Sellathurai complained of increasing left leg pain with numbness post-fall workplace 17 May 2019. He wrote: “persistent pain with numbness of left leg since then, c/o increasing left leg numbness + _foot drop, L4/5 radiculopathy”. He referred Mr Sellathurai for an MRI of the lumbar spine.
- (cc) In an entry dated 31 July 2019, Dr Jeyachandran reviewed the MRI scan and noted there had been progression of mild arthritic bulge at L3/4 level.
- (dd) In an entry dated 23 October 2019, Dr Jeyachandran noted that Mr Sellathurai complained of increasing lower back pain with left leg radiation and increased the dosage of Lyrica.
- (ee) In an entry dated 24 October 2019, Dr Jeyachandran noted Mr Sellathurai complained of increasing pain with numbness of the right leg and noted on examination there was no foot drop in either leg.
- (ff) In an entry dated 5 December 2019, Dr Jeyachandran noted Mr Sellathurai complained of lower back pain and was not improving. He noted he was waiting for surgery.
- (gg) In an entry dated 18 December 2019, Dr Thanigasalam noted Mr Sellathurai had lower back pain, L4/5 radiculopathy.
- (hh) In an entry dated 24 December 2019, Dr Jeyachandran noted Mr Sellathurai still had pain and prescribed Panadeine Forte.
- (ii) In an entry dated 4 February 2020, Dr Bastimpillai noted Mr Sellathurai complained of “back pain after lifting in the work on 17 May 2019”. History of L4/L5 disc problem”.
- (jj) In an entry dated 10 March 2020, Dr Jeyachandran noted Mr Sellathurai complained of increasing lower back pain.
- (kk) In an entry dated 28 April 2020, Dr Jeyachandran noted Mr Sellathurai still had back pain with radiation.
- (ll) In an entry dated 13 May 2020 Dr Bastimpillai noted Mr Sellathurai “Complain [sic] of back pain and difficulty to go back to work and WorkCover claim rejected.”
- (mm) In an entry dated 13 May 2020, Dr Jeyachandran noted “still pain, not improving”.
- (nn) In an entry dated 11 June 2020, Dr Jeyachandran noted Mr Sellathurai had stress and could not sleep, his mood was depressed but he was not suicidal. He noted that if this persisted he may need a psychology referral.

- (oo) In an entry dated 15 June 2020 Dr Jeyachandran noted Mr Sellathurai complained of increasing left leg pain with radiation.
- (pp) In an entry dated 29 June 2020, Dr Jeyachandran noted Mr Sellathurai had "increasing pain back, now worsening, feels down".
63. In a referral to Dr Andrew Kam dated 3 August 2019, Dr Jeyachandran noted that Mr Sellathurai had been complaining of "severe lower back pain with left intermittent neurogenic claudication with ? mild foot drop". He noted that this was "post fall at work on 17/5/19".
64. In a report dated 15 October 2019, Dr Andrew Kam, treating neurosurgeon, noted that Mr Sellathurai had a work related injury on 17 May 2019 when he was in the kitchen and lifting a large pot weighing up to potentially 30 kg. He wrote: "He slipped on the wet floor and had to stabilise himself and in the process of doing so, experienced acute lower back pain and left sided sciatica."
65. Dr Kam noted that since that date, Mr Sellathurai had ongoing pain that fluctuated in intensity and frequency. He noted there were some days when he could only walk 10-15 minutes before pain and numbness escalated and sitting down could be quite uncomfortable for him. He noted he had been using Panadeine Forte for pain relief and had not worked since the accident.
66. Dr Kam noted the MRI scan of the lumbar spine showed the presence of a large disc herniation involving L4/5 level which was causing compression of the L5 nerve root at the lateral recess bilaterally, but the remainder of his lumbar spine was normal. Dr Kam recommended, as the symptoms were quite severe and impacted on the quality of life, that Mr Sellathurai proceed with a left-sided L4/5 epidural block and if this failed to improve symptoms, the next option to consider would be a left-sided L4/5 microdiscectomy.
67. In a report dated 12 February 2020 to Mr Sellathurai's solicitors, Dr E Gehr, orthopaedic surgeon, stated that he had examined Mr Sellathurai and reviewed various documents including the clinical notes of Parkview Medical Centre and the worker's claim form dated 2 July 2019. He noted under "past medical history" that:
- "Prior to the subject accident of 17/5/2019, he reports no previous problems with cervical spine, thoracic spine, lumbar spine, upper extremities or lower extremities."
68. Dr Gehr noted that Mr Sellathurai came to Australia in 2005 and had worked as a cook in Sri Lankan restaurants and was working in that job at the time of the accident. He noted that he had been off work since the time of the accident.
69. Under "history of the accident", Dr Gehr noted that the applicant had been employed in a restaurant called Sunrise Indian and Sri Lankan Restaurant. He wrote:
- "Whilst cooking on 17/5/2019, the pot was on the stove, he tried to lift it, and they weighed about 10 to 20kg. His right leg slipped and he turned to the right. He was able to put the pot down on the surface near the stove."
70. Dr Gehr noted that Mr Sellathurai had immediate onset of pain in his mid-lower lumbar spine and the pain radiated down the left leg to the foot. Mr Sellathurai said he told the other person and after about five or six minutes the boss came to the shop and he told the boss. Mr Sellathurai said that because he was not able to move, they put him into a van and took him to see a GP who then sent him to Westmead Hospital. He stated that he had seen his GP for further follow up, and also a neurosurgeon, Dr Andrew Kam.

71. Under “current symptoms”, Dr Gehr noted that Mr Sellathurai still reported pain in the lumbar spine on both sides of the spine and Mr Sellathurai said that the pain was there all the time and still radiated down the left leg. Mr Sellathurai stated that the pain averaged 8 or 9 out of 10 (very severe). Mr Sellathurai said he could walk for about 500 m at a time but could not sit very long and reported stiffness in the back.
72. Under “physical examination”, Dr Gehr noted that Mr Sellathurai walked with an unsteady gait with a limp and had difficulty standing on toes, on heels, inverting or everting and was not able to squat. Examination indicated tenderness in the mid-lumbar area and guarding on both sides of the lumbar spine. Forward flexion was 10 degrees, extension 0 degrees, left lateral flexion 10 degrees, right lateral flexion 0 degrees, and there was dysmetria. Straight leg raising was 70 degrees right and left and there was a positive nerve tension test on the left and slump test positive on the left side. Mr Sellathurai reported decreased sensation in L5/S1 on the left side confirmed by 2-point sensory discrimination. There was muscle wasting in the left calf muscle.
73. Under “summary and conclusion”, Dr Gehr wrote:
- “This is a 50 year old man, injured at work on 17/5/2019, and sustained injury to his lumbar spine with a large disc herniation at the L4/5. He has been under the care of his treating doctor and a neurosurgeon who has recommended epidural injection and possible surgery. An MRI has confirmed the large disc herniation at L4/5 level as per the correspondence of Dr Kam dated 15/10/ 2019. On examination today, I found dysmetria, guarding... he has the following criteria for radiculopathy; positive nerve tension test left side, muscle wasting, left calf muscle, positive nerve tension sign on the left side...”
74. Dr Gehr made a diagnosis of lumbar spine discogenic herniation injury with left radiculopathy. Dr Gehr expressed the view that the lifting incident on 17 May 2019 caused his current condition and there was no pre-existing condition of the low back.
75. Dr Gehr considered that current restrictions in terms of capacity for work would be weight lifting restrictions of 5 kg, limited periods of kneeling, squatting, and use of ladders, but it was highly likely that he may require surgery and relevant restrictions following surgery would need to be considered. Dr Gehr considered that the subject injury was the cause of his current symptoms and diagnosis. He considered that future capacity for work depended on the outcome of surgery. Dr Gehr was of the view that Mr Sellathurai was not fit to return to work at this stage. He considered it was realistic by virtue of Mr Sellathurai’s age, educational background and work experiences that there were no other occupations open to him.
76. In a report dated 25 February 2020, Dr Gehr stated that if Mr Sellathurai had a pre-existing lumbar spine condition he was of the view that the subject lifting accident on 17 May 2019 would have aggravated the condition and the substantial forces involved in the subject accident had caused a significant aggravation of any pre-existing condition. Dr Gehr stated that it was his opinion that the subject accident caused at least aggravation of any previous lumbar spine injury, although he noted that in the past medical history he obtained at the time of his medico-legal report, Mr Sellathurai reported no previous problems with his lumbar spine.
77. In a supplementary report dated 8 May 2020, Dr Gehr referred to his report of 12 February 2020 and wrote:
- “In my report, I found that he had been injured at work on 17 May 2019 with injuries to the lumbar spine with a large disc herniation at L4/5. I diagnosed him as having a lumbar spine discogenic herniation injury with left radiculopathy. In the history I obtained he told me he had no previous problem with thoracic or lumbar spine.

I was given no previous lumbar spine history from 2006, 2008 or 2011. It is my opinion that his lumbar spine problems were caused by the subject accident of 17 May 2019 and I do note that the imaging results show a large disc herniation at L4/5. In my opinion, it would not be possible to be able to continue working in his job with such an injury from 2006, 2008 or 2011. Most likely on a pathophysiological basis, it is most likely to have occurred on 17 May 2019.

... It is my opinion that the lifting injury that occurred during this employment on 17 May 2019 resulted in the significant discogenic injury at L4/5 that he sustained. That has rendered him unfit to continue in his occupation as a cook which involves strenuous physical activities. This is the job he has been in by virtue of his training and educational experience.”

78. Dr Gehr expressed the opinion that Mr Sellathurai’s employment was the main contributing factor to his injury sustained on 17 May 2019.

79. In a supplementary report dated 14 August 2020, Dr Gehr noted that he had stated in his original report of 12 February 2020 that Mr Sellathurai had lifted a 15 kg pot. Dr Gehr noted that in a statement provided Mr Sellathurai confirmed that it was a 30 kg pot. Dr Gehr stated that this did not change his opinion and there was even greater weight that this would have produced the diagnosis outlined in his previous report of a lumbar spine discogenic herniation with left radiculopathy. Dr Gehr wrote:

“Whatever pre-existing lumbar spine condition he had, the significant incident of the subject accident on 17/5/2019 caused a significant aggravation of that pre-existing condition. In fact, the incident on 17/5/2019 was the main contributing factor to any aggravation of a pre-existing or underlying spine pathology.”

80. In a report dated 3 August 2020, Dr Richard Powell, orthopaedic surgeon, noted that Mr Sellathurai attended the consultation with his brother-in-law who acted as an interpreter, Mr Sellathurai speaking little English. Dr Powell was informed that Mr Sellathurai had worked with SPN on two occasions, initially for three and a half years before having a break of two years and then returning in September 2017 to work in a full time capacity as a cook at the Sri Lankan restaurant in Wentworthville. He noted Mr Sellathurai reportedly sustained an injury to his lower back on 17 May 2019 in a workplace incident.

81. Dr Powell noted under history of injury that Mr Sellathurai informed him that the injury occurred when he was lifting a large pot of sambar off the stove. Dr Powell wrote:

“He informed me that it was a 30-litre pot which was three-quarters full, which would give it a weight in excess of 25kg. He indicated that he moved the pot from the stove to the floor before lifting it again to decant it into a number of smaller pots which were also positioned on the floor.

I note the comments made by Mr Sellathurai’s colleagues, Rukmani Selyaraja and Nadaraja Sriranganathan, who were in the kitchen with him that day. They indicated that the largest pot the kitchen had was 10kg and that it was only ever half full. Mr Sriranganathan indicated that Mr Sellathurai would not normally be required to do any heavy lifting and that any such work would normally be undertaken by him. They both indicated that Mr Sellathurai sat down after pushing a rubbish bin, complaining of lower back pain. They indicated the bin was light and contained only empty food packets. The proprietor, Mr Partheepan Sivalingam, indicated that he was advised the injury occurred as a result of pushing the bin. He also suggested it was possible that Mr Sellathurai had sustained the injury while attempting to move a broken washing machine at his home where Mr Sellathurai also resided.

Mr Sellathurai informed me that he was aware of the sudden onset of pain in the midline region of the lower back when his foot slipped out while he was attempting to decant the sambar. He was taken by a colleague to Toongabbie Medical Centre before being transferred to Westmead Hospital.”

82. Under “Current Symptoms” Dr Powell noted that Mr Sellathurai remained symptomatic in relation to the lower back and described a constant sharp pain in the midline region of the lower back which radiated across the left side and down the posterior aspect of the left leg to the foot. He noted this was accompanied by numbness following a similar distribution occurring on an intermittent basis.
83. Under “Past History” Dr Powell noted Mr Sellathurai had suffered a previous injury to the lower back in 2005 while vacuuming at home. He noted that that injury in 2005 was managed conservatively and he made a full recovery. Dr Powell noted Mr Sellathurai was referred for a CT scan of the lumbar spine on 12 January 2017 and that scan identified a moderate broad-based disc bulge at L4/5 with some resultant canal and right-sided foraminal stenosis.
84. Dr Powell noted that Mr Sellathurai’s employment in Australia had been limited to his work as a cook and that he had a similar role in Sri Lanka.
85. On examination Dr Powell noted Mr Sellathurai was in moderate discomfort at times during the assessment, and moved in a stiffened fashion between sitting, standing and supine positions. Dr Powell noted that there was tenderness to palpation over the posterior bony elements of the lumbo-sacral spine in the midline at L5/S1. He reported that there was no paraspinal muscle tenderness or spasm, and observed spontaneous movements were in excess of those determined at the time of formal physical examination. He noted that neurological examination of the lower limbs revealed normal tone and power and there was reduced sensation to light touch, variable distribution below the knee on the left side which could not be localised to a specific dermatomal distribution. Dr Powell reported there was no measurable lower limb wasting. Dr Powell reviewed the reports of the CT scan of the lumbar spine dated 12 January 2017, CT scan of the lumbo-sacral spine dated 20 May 2019, and the MRI of the lumbar spine dated 30 July 2019.
86. Dr Powell under “Diagnosis” noted Mr Sellathurai claimed an injury involving the lower back on 17 May 2019 at the workplace which occurred on a background of lumbar spondylosis maximal at L4/5. He noted that Mr Sellathurai remained symptomatic with ongoing pain, stiffness and restriction in range of motion, though no definite features of lumbar radiculopathy. Dr Powell made a diagnosis of multi-level degenerative lumbar disc disease maximal at L4/5.
87. Under “Causation”, Dr Powell was asked:

“Do you consider the worker sustained an injury to his lumbar spine on 17 May 2019 at work? Please provide detailed reasons for your opinion.”

Dr Powell wrote:

“Explanations have been provided in relation to the cause of the lower back injury sustained on 17 May 2019. I spent some time clarifying the history with Mr Sellathurai through the interpreter and the details prior to the MRI report accurately reflect the information given to me by Mr Sellathurai.

The mechanism was repeatedly clarified with, and confirmed by, the patient. It is at odds with the statements provided by his two colleagues working with him in the kitchen at the time. The proprietor has provided an alternative mechanism. There is a clear history of previous issues with the lumbar spine going back as far as 2005. He sought medical attention again in 2007 and 2017.

There is no doubt Mr Sellathurai is suffering from a degenerative disc disease process involving the lumbar spine, though on the basis of the available information there must be doubt in relation to the mechanism of injury. After taking into account all of the available information, I cannot be certain that Mr Sellathurai sustained an injury of the lower back in the manner claimed. This does not alter the fact that Mr Sellathurai does have pathology in the lumbar spine and that his ongoing symptoms most likely reflect that pathology, though I do not believe there is sufficient evidence to conclude on the balance of probability that his employment represents the main contributing factor to the aggravation of the pre-existing degenerative disease process.”

88. Dr Powell considered that Mr Sellathurai was suffering from a degenerative disease process involving the lumbar spine. He noted that a CT scan back in 2017 identified change of the lumbar spondylosis and L4/5 disc lesion, and subsequent investigation with CT and MRI scan in 2019 demonstrated progression of the pathology at multiple levels. Dr Powell considered this most likely represented a constitutional degenerative disease process as there was no history of any prior history or incidents and his current symptoms and associated disabilities were consistent with a natural history of the underlying degenerative condition.
89. Under “fitness for work” Dr Powell stated that based on the examination he did not believe Mr Sellathurai was fit to return to his full pre-injury duties. He recommended suitable duties with a lifting restriction of 10 kg and instructions to avoid repetitive bending, lifting and twisting manoeuvres. He noted he should alternate tasks where possible with the opportunity to have regular rest breaks. He recommended that he return on reduced hours, for example 5-6 hours a week, 4-5 days a week. He did not believe Mr Sellathurai would tolerate the physical demands of his pre-existing position. He concluded that the current incapacity was the result of the pre-existing degenerative disease process.

Discussion

90. The first issue to determine is whether Mr Sellathurai sustained an injury to the lumbar spine in the incident on 17 May 2019.
91. In the SIRA Claim form dated 2 July 2019, Mr Sellathurai stated that the injury occurred when he was cooking food, tried to pick up the pot and his left leg slipped and he hurt his back. In answer to the question “Have you previously had another injury/condition or personal injury claim that relates to this injury/condition? Please give details, including claim number(s) and insurer details”, he wrote “Yes but I did not claim because it happens at my home”.
92. On 3 July 2019, Mr Sellathurai stated that he started work at 4.50 am on Friday 17 May 2019 and was injured at work at about 7.45 am when Sami and Rukmani were there. He said that he was carrying a pot of prepared food weighing about 30-40 kg. He said that he had lifted it from the floor and felt a tightness and pain in his lower back. He said that he was unable to do anything else after that. He told Rukmani and Sami that he had hurt his back.
93. Mr Sellathurai said that after Mr Sivalingam came to work, he told him what had happened. He said he was helped to a car and driven to his doctor at Toongabbie and then went on to Westmead Hospital where he was given pain killers. Mr Sellathurai stated that he had been off work since that day.
94. Mr Sellathurai said that he had been living with Mr Sivalingam since September 2018 because the house was close to the business and it was easier for him to get to work. He stated that the restaurant at Wentworthville was a new business for Mr Sivalingam who offered him the new position and the opportunity to stay with him at his home. He denied any allegation that he had injured his back whilst lifting a washing machine on 16 May 2019 at Mr Sivalingam’s home.

95. Mr Sellathurai said that he remembered that a washing machine was delivered to the house after he was discharged from hospital.
96. Mr Sellathurai stated that he remembered Mr Sivalingam telling him not to report this matter to WorkCover otherwise he would get fined. He said that he did not know that Mr Sivalingam did not have workers compensation insurance.
97. Mr Sellathurai stated: "There were no problems with my back prior to 17 May 2019."
98. In his second statement dated 6 August 2020, Mr Sellathurai stated that he was responding to the evidence of his former co-workers Rukmani Selyaraja and Nadaraja Sriranganathan, as well as his former boss, Mr Sivalingam. He stated that although his duties primarily involved cooking, he was still expected to lift heavy pots which ranged from 10 kg to 40 kg. He said he was often required to work with heavy pots.
99. Mr Sellathurai stated that on 17 May 2019 he was lifting a pot when he injured his back. He said that his former co-workers state that he was pushing a bin but he confirmed that he was carrying a pot of prepared food which weighed in or around 30 kg and that he had carried pots like this on other occasions. He confirmed that he lifted the pot from the floor and felt a tightness in his lower back right away. He informed Rukmani and Sami that he hurt his back and they helped him get to the hospital.
100. Mr Sellathurai again confirmed that he had hurt his back by lifting a heavy pot which was filled with prepared food from the floor, and not by pushing a bin. He denied that he injured his back while lifting a washing machine on 16 May 2019 outside of work and said that he did not lift a washing machine.
101. Mr Sellathurai confirmed that he did "have a pre-existing back condition which had been aggravated by lifting this pot".
102. The two co-workers present in the kitchen at the time of Mr Sellathurai's injury were Ms Selyaraja and Mr Sriranganathan.
103. In a statement dated 3 July 2019, Ms Selyaraja said that she had been employed by Mr Sivalingam to work at the Sunrise Restaurant for about six months. She stated that on Friday, 17 May 2019 she had started work at about 6.00 am and Mr Sellathurai and Sami (Mr Sriranganathan) were already at work when she arrived. She recalled that she was cutting onions. She said that she remembered that Mr Sellathurai was pushing the rubbish bin in the kitchen and then suddenly sat down. She said that she did not remember Mr Sellathurai lifting a pot of sambar or anything else like that Ms Selyaraja stated that Sami usually did all the lifting and Mr Sellathurai was only involved in the cooking.
104. Ms Selyaraja stated that Mr Sellathurai told Sami that he had had hurt his back pushing the rubbish bin. She said that Mr Sivalingam arrived soon after and he arranged for Sami to drive Mr Sellathurai to the doctor and hospital.
105. Ms Selyaraja stated that she did not have any recollection of Mr Sellathurai saying anything about being injured the day before 17 May 2019 at home lifting a washing machine.
106. In a statement dated 3 July 2019, Mr Sriranganathan stated that he had been employed by Mr Sivalingam as an assistant cook for about three months. He said that his duties included cutting vegetables, cleaning utensils and bringing things from the cool room. He said that Mr Sellathurai was a cook and was only involved in cooking duties. Mr Sriranganathan stated that he did all the lifting work and would carry pots of sambar if required and Mr Sellathurai did not need to lift a pot for any reason and was only involved in cooking the food.

107. Mr Sriranganathan said that he started work about 5.00 pm on 17 May 2019. He said that he recalled that Mr Sellathurai was pushing one of the rubbish bins in the kitchen. Mr Sriranganathan stated that the bin was not heavy and only had paper and empty packets of food used that morning in it. Mr Sriranganathan remembered that Mr Sellathurai then sat down and said he had back pain.
108. Mr Sriranganathan said that he did all the heavy lifting at work and the heaviest that they would lift would be about 10 kg or 15 kg.
109. Mr Sivalingam made a number of statements. He did not witness what occurred in the kitchen before he arrived there on 17 May 2019.
110. In his first statement dated 3 July 2019, Mr Sivalingam said that Mr Sellathurai had been working at the restaurant in Wentworthville since about September 2018 as a cook and his role was to prepare curries which they sold in the restaurant. Mr Sivalingam said that Mr Sellathurai was not required to lift anything heavy and the heaviest that he would lift was about 10 kg. He said that Sami (Mr Sriranganathan) did all the lifting duties did all the lifting duties from the cool storage room to the kitchen when Mr Sellathurai needed anything.
111. Mr Sivalingam stated that he did not have workers compensation insurance for the workers at the restaurant and he had made that decision for financial reasons.
112. Mr Sivalingam stated that Mr Sellathurai would have started work at about 5.30 am on 17 May 2019. He said that he came to work between 7.30 am and 8.00 am and when he arrived Ms Selyaraja and Mr Sriranganathan told him that Mr Sellathurai had said he had hurt his back and then sat down because he was in pain.
113. Mr Sivalingam said that he asked Mr Sellathurai what had happened and he said that he had hurt himself pushing a rubbish bin and did not say anything about lifting a pot of vegetables or soup. Mr Sivalingam stated that the pots that Mr Sellathurai may have lifted would weigh no more than 10 kg. He said that the sambar pot is a 10 litre pot and is only ever half-filled at most, so would only weight about 5 kg. He said that the rubbish bins in the morning were very light because they were mainly full of paper.
114. Mr Sivalingam stated that his washing machine had been broken for about 10 days and he was making arrangements to get a new one. He said that the new one was not delivered to his home until after Mr Sellathurai stopped working. Mr Sivalingam said that he believed that Mr Sellathurai moved or lifted the old washing machine at the house in order to make room for the new washing machine when it arrived. He stated that he remembered seeing Mr Sellathurai at home around 8.00 pm on 16 May 2019 and Mr Sellathurai told him he had pain in his arms and his back from moving or lifting the washing machine. He said that Mr Sellathurai put some t some pain killer spray on his arms and he was alright, did not need to go and see a doctor or go to the hospital and was able to go to work on 17 May 2019.
115. Mr Sivalingam said that Mr Sellathurai's wife told him that Mr Sellathurai had problems with his back and with his legs for more than 10 years.
116. In an unsigned statement dated 21 September 2020, Mr Sivalingam referred to an invoice dated 16 May 2019 from Bing Lee for delivery of the washing machine to his home. He stated that the washing machine was delivered on 16 May 2019 when he was not at home. He said that when he saw Mr Sellathurai at home, Mr Sellathurai said that he had moved the old washing machine out of the way so the new washing machine could be installed and said something about having shoulder pain at the time. Mr Sivalingam said that he saw the new washing machine in its location on 16 May 2019. He said that Mr Sellathurai was able to go to work the next day, on 17 May 2019.

117. In a second statement dated 21 September 2020 which was signed, Mr Sivalingam, stated that he had purchased the new washing machine and paid for it on the day. He referred to the invoice dated 16 May 2019 for the purchase. He said that he took the new washing machine to his home and placed it in his living room. He said that he left the new washing machine in the living room and went to work. Mr Sivalingam stated that when he saw Mr Sellathurai at home Mr Sellathurai told him that he had moved the old washing machine out of the way and put the new washing machine in its place and said something about having shoulder pain at the time. Mr Sivalingam said that he saw the new washing machine in its location on 16 May 2019. He said that Mr Sellathurai was able to go to work the next day, on 17 May 2019.
118. The two statements dated 21 September 2020 were obtained by an investigator from Lee Kelly Commercial Investigations. There was no explanation provided as to why there were two statements dated 21 September 2020, each containing a different version of how the washing machine was delivered.
119. As noted above the invoice from Bing Lee was dated 9 September 2020, but recorded as "Created 16/05/19", for a Haier 7kg top load washing machine was noted as "previously delivered".
120. The final undated statement of Mr Sivalingam was attached to the Reply of SPN. Mr Sivalingam stated that he had worked in the food industry for many years and was aware of workplace safety issues in his area of work. He said that that Mr Sellathurai's denial of injuring himself while lifting the washing machine at his home was false and rejected the claim that Mr Sellathurai suffered any injury while performing duties for SPN. He stated that there was no requirement for the applicant to lift any item beyond 10-15 kg in the workplace.
121. Mr Sivalingam stated that Mr Sellathurai's wife advised over the phone from Canberra that her husband had a prior back injury and therefore the issues he was experiencing were all issues arising from his previous condition. He said that Mr Sellathurai and Mr Sellathurai's wife told him that before Mr Sellathurai commenced employment with SPN, he worked as a labourer in Canberra moving furniture and household contents. He stated that Mr Sellathurai had no pots, pans or kitchen lids or other items that he was required to lift in his employment duties. Mr Sivalingam also alleged that Mr Sellathurai had since the alleged injury been employed in labouring work on a building site.
122. The clinical notes and records from Westmead Hospital dated 17 May 2019, Dr Swathi Murugan noted that Mr Sellathurai presented with lower back pain post lifting heavy items at work. Under the discharge transfer documents in the "progress in hospital" section of the records, it was noted that Mr Sellathurai presented with acute on chronic back pain. The history was obtained by a phone interpreter and reported as "lifting a heavy box today and felt a pop then immediate pain in the lower back" In the ED nursing re-assessment, Ms Montibeller noted that Mr Sellathurai presented with low back pain after "lifting a basket this morning at home". In the ED medical referral physiotherapy and mobility consultation dated 17 May 2019, Mr Efthimiou, physiotherapist, under "mechanism of injury/onset of symptoms" wrote "Acute onset of LBP after lifting @ work."
123. A further admission to Westfield Hospital was reported on 24 May 2019. Under "history of presented illness" the following was recorded: "49 year old male NESB presenting with 3 day hx of increasing pain/numbness in left leg on b/g of D/C from westmead ed 1/52 for back pain secondary to heavy lifting." In the notes under "Emergency Department Triage WE" dated 24 May 2019, Mr Catahan reported:"1 week hx of L swelling, numbness, pain and foot drop, states commenced post lifting heavy object 1 week ago".

124. In an entry dated 20 May 2019, Dr Jeyachandran noted Mr Sellathurai complained of “severe low back pain for 3 days after lifting a heavy weight”. In the Certificate of capacity/certificate of fitness dated 27 May 2019 Dr Jeyachandran after the question “How is the injury related to work...” noted “while lifting a large pot at work felt pop and developed severe back pain”.
125. In a report dated 15 October 2019, Dr Kam noted that Mr Sellathurai had a work-related injury on 17 May 2019 when he was in the kitchen lifting a large pot weighing up to potentially 30 kg. He wrote: “He slipped on the wet floor and had to stabilise himself and in the process of doing so, experienced acute lower back pain and left sided sciatica.”
126. In a report dated 12 February 2020, Dr Gehr noted that Mr Sellathurai while cooking on 17 May 2019, tried to lift the pot on the stove, which weighed about 10 to 20 kg. Dr Gehr noted that Mr Sellathurai said his right leg slipped and he turned to the right. He was able to put the pot down on the surface near the stove.
127. Dr Gehr considered that whatever pre-existing lumbar spine condition Mr Sellathurai had, the significant incident on 17 May 2019 caused a significant aggravation of that pre-existing condition and was the main contributing factor to any aggravation of a pre-existing or underlying spine pathology.
128. Dr Powell noted that Mr Sellathurai informed him that the injury occurred when he was lifting a large pot of sambar off the stove. Dr Powell said that Mr Sellathurai said it was a 30 litre pot which was three-quarters full, and that he moved the pot from the stove to the floor before lifting it again to decant it into a number of smaller pots which were also positioned on the floor.
129. Dr Powell was also provided with the statements of Mr Sellathurai’s co-workers Rukmani Selyaraja and Nadaraja Sriranganathan, who indicated that the largest pot the kitchen had was 10 kg and that it was only ever half full. Dr Powell noted that Mr Sriranganathan indicated that Mr Sellathurai would not normally be required to do any heavy lifting and that any such work would normally be undertaken by him. Both indicated that Mr Sellathurai had sat down after pushing a rubbish bin, complaining of lower back pain. They indicated the bin was light and contained only empty food packets. Dr Powell noted that Mr Sivalingam indicated that he was advised the injury occurred as a result of pushing the bin and also suggested it was possible that Mr Sellathurai had sustained the injury while attempting to move a broken washing machine at his home where Mr Sellathurai also resided.
130. Dr Powell said that Mr Sellathurai informed me that he was aware of the sudden onset of pain in the midline region of the lower back when his foot slipped out while he was attempting to decant the sambar. Dr Powell noted that the mechanism of injury described by Mr Sellathurai was at odds with the statements provided by his two co-workers working with him in the kitchen at the time and Mr Sivalingam had provided an alternative mechanism. Dr Powell had no doubt Mr Sellathurai was suffering from a degenerative disc disease process involving the lumbar spine but considered that on the basis of the available information there was doubt in relation to the mechanism of injury. Dr Powell stated that he could not be certain that Mr Sellathurai sustained an injury of the lower back in the manner claimed. Dr Powell also did not believe there was “sufficient evidence to conclude on the balance of probability that his employment represents the main contributing factor to the aggravation of the pre-existing degenerative disease process.”
131. Dr Powell considered that Mr Sellathurai was suffering from a degenerative disease process involving the lumbar spine. Dr Powell considered this most likely represented a constitutional degenerative disease process as there was no history of any prior history or incidents and his current symptoms and associated disabilities were consistent with a natural history of the underlying degenerative condition.

132. Mr Stockley argued that Mr Sellathurai had stated on 3 July 2019 that he had no problems with his back prior to 17 May 2019 and that was a lie. I accept that Mr Sellathurai had a number of problems with his back before the incident on 17 May 2019 and had treatment for back problems as well as a number of investigations. However, the last complaint recorded before the incident on 17 May 2019 was on 30 January 2017. There appeared to be no complaint made about back pain recorded in the clinical notes and records after 30 January 2017 until 20 May 2019 when Dr Jeyachandran noted Mr Sellathurai complained of severe low back pain for three days after lifting a heavy weight. I noted that Mr Sellathurai attended Dr Jeyachandran at Parkview Medical Centre on a number of occasions after January 2017 and before the incident on 17 May 2019 and no complaint was recorded in relation to back pain. It is reasonable to conclude that Mr Sellathurai had no serious issue with back pain after he commenced work with SPN as a cook until the incident on 17 May 2019. His work as a cook, in my view, is reasonably demanding physical work. Therefore, I do not attach too much importance to Mr Sellathurai's statement that he had no problems with his back prior to 17 May 2019 as he appeared to have had no recent problems with his back. The way in which a statement is phrased depends in my view to a degree on how the investigator puts issues to the witness. It is not clear whether the investigator asked whether Mr Sellathurai had been experiencing problems with his back immediately before 17 May 2019 as opposed to whether he ever had any problems with his back. The statement should also be seen in the context of other evidence that Mr Sellathurai gave. In the claim form dated 2 July 2019, that is the day before the statement dated 3 July 2019, Mr Sellathurai referred to an earlier back injury. Mr Sellathurai in the claim form clearly disclosed that he had an earlier injury to the back. On balance, I do not accept that I should draw adverse inferences about Mr Sellathurai's credit over his statement on 3 July 2019 that he had no problems with his back prior to 17 May 2019.
133. Mr Stockley argued that Dr Gehr in his first report dated 12 February 2020 also recorded that "prior to the subject accident on 17 May 2019, he reports no previous problems with cervical spine, thoracic spine, lumbar spine, upper extremities or lower extremities." However, I note that the Claim form dated 2 July 2019 had been included in the documents sent to Dr Gehr in January 2020 as well as the clinical notes of Parkview Medical Centre. Dr Gehr only referred to entries in the clinical notes that post-dated the injury on 17 May 2019 and omitted to look at earlier entries which would have revealed the problems in January 2017 and earlier. Similarly, Dr Gehr did not properly look at the claim form in which Mr Sellathurai disclosed an earlier injury to his lumbar spine. In these circumstances, I do not consider that Mr Sellathurai was deliberately failing to disclose an earlier problem particularly when it appears from the clinical records that he had no issues with his lumbar spine between January 2017 and 17 May 2019. Further, it appears that Mr Sellathurai was accompanied by his brother-in-law, Mr Christopher Shanmugam but no official interpreter. It is difficult to know how the particular question by Dr Gehr was phrased and translated or understood and whether it was answered accurately.
134. In deciding whether Mr Sellathurai sustained an injury to his low back on 17 May 2019, the mechanism of injury and evidence concerning this must be considered. Mr Sellathurai's evidence in the main was that he sustained an injury to his back when lifting a pot of sambar. The respondents in this matter argued that Mr Sellathurai's evidence was inconsistent with the evidence of Ms Selyaraja and Mr Sriranganathan, as well as Mr Sivalingam. Mr Sivalingam did not arrive at the workplace until after Mr Sellathurai injured his back.
135. The respondents have submitted that these witnesses have stated that Mr Sellathurai said that he injured his back pushing a bin and that Mr Sellathurai was not required to lift items such as a pot of sambar in his employment. The evidence of all the witnesses needs to be considered carefully.

136. Ms Selyaraja said that she remembered that Mr Sellathurai was pushing the rubbish bin in the kitchen and then suddenly sat down. She did not remember Mr Sellathurai lifting a pot of sambar. It is not plausible that Ms Selyaraja would have observed everything that Mr Sellathurai did that morning and she merely says that she did not remember Mr Sellathurai lifting a pot of sambar. Ms Selyaraja stated that Sami usually did all the lifting and Mr Sellathurai was only involved in the cooking, however, she did not specify precisely what she meant in that statement. It may be that Sami lifted and carried items required from the cool room. However, I do not consider it probable that Mr Sriranganathan lifted all the pots that Mr Sellathurai used in his cooking duties as it is normal for cooks to lift pots off the stove.
137. Ms Selyaraja stated that Mr Sellathurai told Sami that he had had hurt his back pushing the rubbish bin. However, it is not clear whether Ms Selyaraja actually heard Mr Sellathurai say that to Sami (Mr Sriranganathan).
138. Mr Sriranganathan stated that his duties included bringing things from the cool room and that he did all the lifting work and would carry pots of sambar if required. He recalled that Mr Sellathurai was pushing one of the rubbish bins in the kitchen and Mr Sellathurai then sat down and said he had back pain. Mr Sriranganathan did not actually say that Mr Sellathurai did not lift a pot of sambar or that Mr Sellathurai hurt his back or said he had hurt his back when wheeling the bin. He merely said that Mr Sellathurai was pushing a bin when he sat down and said he had back pain. Mr Sriranganathan is actually inconsistent with Ms Selyaraja's evidence in that he never said in his statement that Mr Sellathurai said he had hurt his back wheeling the bin and she said that Mr Sellathurai told Mr Sriranganathan he had hurt his back wheeling the bin.
139. Mr Sivalingam did not arrive at the workplace until after Mr Sellathurai injured his back. He said that he asked Mr Sellathurai what had happened and stated that Mr Sellathurai said that he had hurt himself pushing a rubbish bin and did not say anything about lifting a pot.
140. Mr Sellathurai has stated that he hurt his back lifting the pot of sambar. In the SIRA Claim form dated 2 July 2019, Mr Sellathurai stated that the injury occurred when he was cooking food, tried to pick up the pot and his left leg slipped and he hurt his back.
141. The history obtained by staff at Westmead Hospital on 17 May 2019 concerning the mechanism of injury varied in the detail but all of the entries referred to lifting as opposed to pushing. These histories were obtained through the use of a "phone interpreter". The history given to Dr Jeyachandran on 20 May 2019 was "severe low back pain for 3 days after lifting a heavy weight". The history given to Dr Kam on 15 October 2019, was one of lifting a large pot and slipping on the wet floor. The history given to Dr Gehr on 12 February 2020, was one of trying to lift the pot on the stove, and the right leg slipping. The history given to Dr Powell was one of moving the pot from the stove to the floor before lifting it again to decant into a number of smaller pots when his foot slipped out. All the histories given to medical staff at Westmead Hospital and treating doctors and independent medical examiners were histories that involved lifting. Dr Kam, Dr Gehr and Dr Powell all recorded a history of lifting a pot and his leg slipping on the floor.
142. In relation to the question of whether Mr Sellathurai was lifting or required to lift a pot of sambar, I do not find it plausible that a cook, such as Mr Sellathurai, would not lift a pot of sambar off the stove and even decant it into smaller pots. Such actions are a normal part of cooking duties and it would be inefficient and extremely awkward for a cook to have to call for another worker every time the cook needed to move a pot on a stove.

143. There was also an issue about the weight of the pot of sambar that Mr Sellathurai said he had lifted. Mr Sellathurai said in his statement dated 3 July 2019 that the pot weighed 30-40 kg and, in his statement dated 6 August 2020, he said that he lifted pots weighing between 10 and 40 kg. Mr Sivalingam on 3 July 2019 stated that the sambar pot was a 10 litre pot and only ever half full. In his undated statement attached to the Reply of SPN Mr Sivalingam said that there was no requirement for Mr Sellathurai to lift any item beyond 10-15 kg. Mr Sriranganathan in his statement dated 3 July 2019 said that the heaviest that had to be lifted was 10-15 kg. Ms Selyaraja made no precise reference to the weights staff had to lift. Dr Kam noted that Mr Sellathurai lifted a large pot up to potentially 30 kg, Dr Gehr noted that Mr Sellathurai lifted a pot weighing 10-20 kg and Dr Powell noted that the pot was 30 litres and was three-quarters full. There were obviously marked differences in the estimated weight of the sambar pot. However, I do not consider that the precise weight of the pot is a matter that requires determination. I accept that the pot probably weighed 10-20 kg.
144. Another issue was raised by the first respondent, SPN, was whether Mr Sellathurai injured his back on 16 May 2019 when Mr Sivalingam said that he had moved a washing machine. There was in my view no evidence that even if Mr Sellathurai had moved a washing machine in Mr Sivalingam's home, he sustained any injury to the lumbar spine. Mr Sellathurai did not seek medical treatment on 16 May 2019 and was able to go to work on 17 May 2019 and worked for several hours before he lifted the pot of sambar.
145. However, the "washing machine" allegations by Mr Sivalingam raised some issues as to the credit of both Mr Sellathurai and Mr Sivalingam.
146. Mr Sellathurai denied moving the washing machine on 16 May 2019 and said that the new washing machine was delivered after he returned home from hospital. Mr Sivalingam, on the other hand, provided a number of inconsistent statements about the alleged movement of the washing machine. In his statement dated 3 July 2019, Mr Sivalingam said that he believed that Mr Sellathurai moved or lifted the old washing machine in order to make room for the new washing machine when it arrived. Mr Sivalingam said that he remembered seeing Mr Sellathurai at home around 8.00 pm on 16 May 2019 and Mr Sellathurai told him he had pain in his arms and his back from moving or lifting the washing machine. In his unsigned statement dated 21 September 2020, Mr Sivalingam said that washing machine was delivered on 16 May 2019 when he was not at home. He said that when he saw Mr Sellathurai at his home Mr Sellathurai told me that he had moved the old washing machine out of the way so the new washing machine could be installed and said something about having shoulder pain at the time. In the second statement dated 21 September 2020 which was signed, Mr Sivalingam said that he purchased the new washing machine and took the new washing machine to his home and placed in in my living room. He stated that he went to work and when he came home, Mr Sellathurai told him he had moved the old washing machine out of the way and put the new washing machine in its place and said something about having shoulder pain at the time. In the undated statement attached to the Reply of SPN, Mr Sivalingam said that on about 16 May Mr Sellathurai told him that he had lifted a washing machine after it was delivered to his home and he was suffering pain in the back and arms after lifting the washing machine.
147. There was no attempt by SPN to explain why Mr Sivalingam made a number of inconsistent statements about the washing machine especially in relation to the two statements dated 21 September 2020. In the first statement dated 3 July 2019 and in the unsigned statement dated 21 September 2020, Mr Sivalingam said Mr Sellathurai moved the old washing machine. In second signed statement dated 21 September 2020 Mr Sivalingam said Mr Sellathurai moved the old washing machine and put the new washing machine in place, and in the last undated statement, Mr Sivalingam said Mr Sellathurai had moved the new washing machine.

148. The invoice from Bing Lee dated 9 September 2020 but recorded as “Created 16/05/19” for a Haier 7kg top load washing machine noted it as “previously delivered”. The notation “previously delivered” suggest that the machine was delivered as opposed to picked up by the customer.
149. Mr Sriranganathan stated that he recalled Mr Sellathurai saying something many days before 17 May 2019 about moving a washing machine at Mr Sivalingam’s home. This was inconsistent with Mr Sivalingam’s statements that the machine was moved on 16 May 2019.
150. The question arises as to how this would impact upon both Mr Sellathurai’s credit and Mr Sivalingam’s credit. Mr Sellathurai consistently denied moving the washing machine. I was satisfied that other aspects of Mr Sellathurai’s evidence were truthful. There is no doubt, in my view, that he sustained an injury to the lumbar spine on 17 May 2019 and required immediate medical treatment.
151. Mr Sivalingam failed to explain the inconsistencies in his statements. Further, Mr Sivalingam did not deny that he told Mr Sellathurai that Mr Sellathurai should not report the incident to WorkCover otherwise he would get fined. I consider that Mr Sivalingam’s evidence should be treated with some caution.
152. I am not satisfied that Ms Selyaraja and Mr Sriranganathan would have constantly observed what Mr Sellathurai was doing when he worked in the kitchen on 17 May 2019. Mr Sellathurai worked for several hours until he lifted the pot of sambar and his foot slipped and he had to sit down because of pain. There was, in my view, evidence of an injury at work.
153. On balance I am satisfied that Mr Sellathurai sustained an injury to his lower back, being an aggravation, acceleration, exacerbation and deterioration of a pre-existing degenerative condition in the lumbar spine, on 17 May 2019 when he lifted a pot of sambar and his foot slipped. Mr Sellathurai bears the onus of proof on this issue and I am satisfied, on balance, that it has been discharged. In making this finding, I have preferred the evidence of Mr Sellathurai to that of Ms Selyaraja, Mr Sriranganathan and Mr Sivalingam wherever their evidence is in conflict with the evidence given by Mr Sellathurai. I found the evidence of Ms Selyaraja and Mr Sriranganathan implausible in relation to Mr Sellathurai only being required to cook and not being required to lift anything. Further, the evidence of Mr Sellathurai in terms of the mechanism of injury, that is, a lifting injury, was consistent with the histories he gave to various doctors. Any differences in Mr Sellathurai’s account of the injury can be explained by his very limited English and use of interpreters.

Section 4(b) (ii) – the main contributing factor

154. Having found that the injury on 17 May 2019 was an aggravation, acceleration, exacerbation and deterioration of a pre-existing degenerative condition of the lumbar spine, the next issue to be determined is whether Mr Sellathurai’s employment was the main contributing factor to his injury to his lumbar spine (s 4(b)(ii) of the 1987 Act).
155. Section 4 of the 1987 Act as amended by the 2012 amending Act defines injury as follows:
- “Injury-
- (a) means personal injury arising out of or in the course of employment,
 - (b) includes a disease injury, which means:
 - (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and

- (ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease, and
 - (c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the *Workers' Compensation (Dust Diseases) Act 1942*, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined."
- 156. The applicant must prove that employment was the main contributing factor to the injury to the lumbar spine, namely, the aggravation, acceleration, exacerbation and deterioration of the degenerative pathology in the lumbar spine.
- 157. Section 4(b)(ii) of the 1987 Act was amended in 2012 to provide that the employment must be "the" main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease. The use of the word "the" before "main" imports a clear intention by Parliament that the applicant must satisfy a more stringent test than that proscribed under s 9A of the 1987 Act. However, the test under s 4(b)(ii), unlike s 4(b)(i), is directed to the causes of the "aggravation, acceleration, exacerbation or deterioration" rather than the cause of the disease.
- 158. A number of Presidential Division decisions have discussed the meaning of the amended s 4(b)(ii): see *State Transit Authority v El-Achi* [2015] NSWCCPD 71 at [92], [108]; *Mannie v Bauer Media Pty Ltd* [2016] NSWCCPD 47 at [80]-[83] and *Lilyvale Hotel Pty Ltd v Bradley* [2016] NSWCCPD 62 at [33]. All of these decisions hold that, in respect of injury as defined in s 4(b)(ii), the employment must be the main contributing factor to the "aggravation, acceleration, exacerbation or deterioration of the disease".
- 159. Dr Gehr expressed the opinion that whatever pre-existing lumbar spine condition Mr Sellathurai had, the significant incident of the subject accident on 17 May 2019 caused a significant aggravation of that pre-existing condition and was the main contributing factor to any aggravation of a pre-existing or underlying spine pathology. Dr Gehr considered while Mr Sellathurai had a degenerative condition in his lumbar spine, the only evidence of any factor that caused an aggravation, acceleration, exacerbation and deterioration of the degenerative pathology in the lumbar spine on 17 May 2019 was the work duties, in particular, the lifting of the pot of sambar.
- 160. Dr Powell said that he had repeatedly clarified and confirmed the mechanism of injury with Mr Sellathurai. Dr Powell noted that the mechanism of injury as described by Mr Sellathurai was at odds with the statements provided by his two colleagues working with him in the kitchen at the time and the proprietor had provided an alternative mechanism. Dr Powell noted that there was a clear history of previous issues with the lumbar spine going back as far as 2005 and Mr Sellathurai sought medical attention in 2007 and 2017. Dr Powell concluded that there was no doubt Mr Sellathurai was suffering from a degenerative disc disease process involving the lumbar spine, though on the basis of the available information there must be doubt in relation to the mechanism of injury. Dr Powell said that he could not be certain that Mr Sellathurai sustained an injury of the lower back in the manner claimed. However, Dr Powell noted that this does not alter the fact that Mr Sellathurai had pathology in the lumbar spine and that his ongoing symptoms most likely reflected that pathology, though he did not believe there was sufficient evidence to conclude on the balance of probability that his employment represents the main contributing factor to the aggravation of the pre-existing degenerative disease process.

161. Dr Powell considered that Mr Sellathurai was suffering from a degenerative disease process involving the lumbar spine. He noted that a CT scan back in 2017 identified change of the lumbar spondylosis and L4/5 disc lesion, and subsequent investigation with CT and MRI scan in 2019 demonstrated progression of the pathology at multiple levels. Dr Powell considered this most likely represented a constitutional degenerative disease process as there was no history of any prior history or incidents and his current symptoms and associated disabilities were consistent with a natural history of the underlying degenerative condition.
162. I do not consider that the symptoms experienced by Mr Sellathurai on the morning of 17 May 2019 after he lifted the pot of sambar were consistent with the history of the natural progression of an underlying degenerative condition. Mr Sellathurai was able to work from 25 September 2018 to until the injury on 17 May 2019 performing the relatively physical and demanding duties of a cook. He performed his work duties as a cook for several hours on the morning of 17 May 2019 before the lifting incident. I accept that Mr Sellathurai was in severe pain after the lifting incident on 17 May 2019, unable to stand or work and was taken by a co-worker to his GP who then referred him to Westmead Hospital.
163. I am satisfied that employment and the work duties, namely, the lifting the pot of sambar was the only relevant factor that caused an aggravation, acceleration, exacerbation and deterioration of the degenerative pathology in the lumbar spine. There was in my view no other cause of the aggravation of the degenerative condition in the lumbar spine in the period of employment with the first respondent.
164. I am satisfied that the lifting of the pot of sambar performed by Mr Sellathurai was the only relevant cause of the aggravation, acceleration, exacerbation or deterioration of the disease at that time. This satisfies s 4(b)(ii) of the 1987 Act as work at that time was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease.
165. In my view the weight of the medical evidence supported a finding that work was a main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the degenerative condition in Mr Sellathurai's lumbar spine.
166. I am satisfied that the nature of the work that Mr Sellathurai was doing as a cook aggravated, accelerated, exacerbated or deteriorated the degenerative condition in his lumbar spine and that the employment concerned was a main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease. I do not find that the employment was a main contributing factor to the overall disease process or condition of the lumbar spine, but merely to the aggravation, acceleration, exacerbation or deterioration of the disease.
167. I find that Mr Sellathurai sustained an injury within the meaning of s 4(b)(ii) of the 1987 Act, to which his employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the degenerative condition in his lumbar spine.

Capacity

168. As I have accepted Mr Sellathurai has sustained an injury to his lumbar spine arising out of or in the course of his employment with SPN, with a deemed date of 17 May 2019, and I accepted Mr Sellathurai's employment with SPN was the main contributing factor to such injury as prescribed by s 4 (b) (ii) of the 1987 Act, it follows he may have an entitlement to weekly benefits payable under the 1987 Act.

169. Mr Sellathurai stated that he could not-do normal duties as he usually did and could not walk too far. He said that the matter had also affected him psychologically.
170. Dr Kam noted that since that 17 May 2019 Mr Sellathurai had ongoing pain that fluctuated in intensity and frequency. He noted there were some days when Mr Sellathurai could only walk 10-15 minutes before pain and numbness escalated and sitting down could be quite uncomfortable for him. He noted he had been using Panadeine Forte for pain relief and had not worked since the accident.
171. Dr Gehr considered that current restrictions in terms of capacity for work would be weight lifting restrictions of 5 kg, limited periods of kneeling, squatting, and use of ladders, but it was highly likely that he may require surgery and relevant restrictions following surgery would need to be considered. Dr Gehr considered that the subject injury was the cause of his current symptoms and diagnosis. He considered that future capacity for work depended on the outcome of surgery. Dr Gehr was of the view that Mr Sellathurai was not fit to return to work at this stage and unfit to continue in his occupation as a cook which involved strenuous physical activity. He considered it was realistic by virtue of Mr Sellathurai's age, educational background and work experiences that there were no other occupations open to him.
172. Under "fitness for work" Dr Powell stated that based on the examination he did not believe Mr Sellathurai was fit to return to his full pre-injury duties. He recommended suitable duties with a lifting restriction of 10 kg and instructions to avoid repetitive bending, lifting and twisting manoeuvres. He noted he should alternate tasks where possible with the opportunity to have regular rest breaks. He recommended that he return on reduced hours, for example 5-6 hours a week, 4-5 days a week. He did not believe Mr Sellathurai would tolerate the physical demands of his pre-existing position. Dr Powell noted that Mr Sellathurai's employment in Australia had been limited to his work as a cook and that he had a similar role in Sri Lanka.
173. In a Certificate of capacity/certificate of fitness dated 18 June 2019, Dr Jeyachandran certified Mr Sellathurai as having no work capacity from 20 June 2019 to 4 July 2019.
174. On balance I accept the opinions of Dr Gehr and Dr Jeyachandran and I am satisfied that Mr Sellathurai has had no capacity for work since 17 May 2019 and this incapacity is ongoing.

Quantification of entitlement to weekly benefits

175. Mr Sellathurai's pre-injury average weekly earnings (PIAWE) was agreed to be \$760.
176. I am satisfied that Mr Sellathurai has been totally incapacitated for work since 17 May 2019. I calculate that 95% of \$760 is \$722. Mr Sellathurai is entitled to be paid \$722 from 17 May 2019 to 24 August 2019 pursuant to s 36 of the 1987 Act. In respect of the period from 25 August 2019, I calculate that 80% of \$760 is \$608. Mr Sellathurai is entitled to be paid \$608 per week from 25 August 2019 to date and continuing pursuant to the provisions of s 37 of the 1987 Act.

SUMMARY

177. I find that on 17 May 2019 Mr Sellathurai sustained injury to his back arising out of or in the course of his employment by SPN.
178. I find that the employment with SPN was the main contributing factor to the back, namely the aggravation, acceleration, exacerbation or deterioration of the degenerative condition in the lumbar spine.

179. I find that SPN was not insured at all relevant times as required by the 1987 Act.
180. The second respondent, the Workers Compensation Nominal Insurer, is liable to make payments as if it were the insurer of SPN at all relevant times.
181. The second respondent, the Workers Compensation Nominal Insurer, to pay the applicant weekly benefits as follows:
- (a) \$722 from 17 May 2019 to 24 August 2019 pursuant to s 36 of the 1987 Act, and
 - (b) \$608 from 25 August 2019 to date and continuing pursuant to the provisions of s 37 of the 1987 Act.
182. SPN to reimburse the second respondent, the Workers Compensation Nominal Insurer for:
- (a) amounts paid out of the insurance fund in respect of compensation and costs awarded against the first respondent, and
 - (b) the costs of the second respondent, the Workers Compensation Nominal Insurer.

