WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **2966/19**
Applicant: **Hussein Bazzi**
Respondent: **Dib Group Pty Limited**
Date of Determination: **22 October 2019**
Citation: **[2019] NSWWCC 343**

The Commission determines:

1. The applicant suffered an injury to his back in the course of his employment with the respondent on 14 March 2004.

2. The applicant's earnings but for the injury in (1) above were $692.57 per week.

3. As a result of the injury referred to in (1) above, the applicant's ability to earn income on the open labour market to which he was exposed was limited to $550 per week.

4. Accordingly, as a result of the injury referred to in (1) above, the applicant suffered partial incapacity for employment on the open labour market for the period between 9 October 2006 and 31 December 2012 in the amount of $142.57 per week.

5. From time to time in the period 9 October 2006 to 31 December 2012, the applicant's partial incapacity caused him economic loss.

6. The respondent is to pay the applicant weekly compensation as follows, pursuant to section 40 of the *Workers Compensation Act 1987*:

    (a) From 1 July 2007 to 30 June 2008 at the rate of $104 per week;
    (b) From 1 July 2008 to 30 June 2009 at the rate of $142.57 per week;
    (c) From 28 October 2011 to 31 December 2012 at the rate of $142.57 per week.

7. Award for the respondent on the claim for weekly benefits for the period 9 October 2006 to 30 June 2007.

8. The parties are granted liberty to apply within 28 days to provide any further evidence and/ or submissions with regards to the applicant's loss of income (if any) for the period 1 July 2009 to 30 June 2010, failing which there will be an award for the respondent in relation to the claim for weekly payments for this period.

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

Cameron Burge
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 CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mr Hussein Bazzi (the applicant) brings proceedings for weekly benefits compensation in relation to an injury which took place in the course of his employment with Dib Group Pty Limited (the respondent) on 14 March 2004.

2. The fact of an injurious event having taken place is not in issue and there is no question the applicant suffered an injury, however, the respondent asserts he has recovered from the effects of any injury or aggravation. The respondent issued a section 74 notice in August 2006 declining further liability on the basis of the applicant having suffered an aggravation in the course of his employment, the effects of which had ceased.

3. The applicant claims weekly compensation from 9 October 2006 to 31 December 2012.

4. The applicant states he suffered an injury to his lower back at work on 14 March 2004, when he was working night shift. He states he bent over to grab a box of two litre Coca-Cola bottles which weighed approximately 16 kilos and felt a sharp burning sensation in his low back and down his left leg.

5. The workers compensation claim was originally accepted. The applicant consulted his general practitioner, Dr Missiakos, who in turn referred him to Dr McKechnie, neurosurgeon. The applicant says he stopped working a day or two after his injury owing to his back pain and was paid weekly compensation until 9 October 2006.

6. In his first statement, the applicant says that in late 2005, he obtained a job working as a telemarketer for ICT Group Australia. He says he worked for that organisation between October 2005 until July or August 2007.

7. In terms of treatment, the applicant states he had physiotherapy and facet joint injections in his back, together with attending upon rehabilitation providers arranged by the insurance company. He says his back pain has persisted over the years and caused him ongoing difficulties.

8. The applicant states that after he finished working with ICT Group, he obtained a job working for Hunter Express as an account manager/telemarketer from approximately September 2007 until April 2008. He then obtained further employment with Hollard Insurance as a telemarketer in or about September 2008 until January 2009.

9. The applicant states he was then unemployed for some time, until in August 2010 he obtained a job working for Aegis as a telemarketer, where he remained until 30 December 2010. In January 2011, the role which the applicant was performing at Aegis was transferred to Metlife Insurance.

10. Between 2006 and the end of 2012, the applicant states his back remained a source of moderate pain and he found heavy lifting very difficult. In October 2017, the applicant says he obtained a job working for Body Perfect Smash Repairers as a car detailer, which was the first non-sedentary employment he had undertaken since his back injury with the respondent. He says he injured his back while working with Body Perfect Smash Repairs on 3 May 2018 when he was trying to lift an Otto bin.

11. The applicant's former solicitors made a claim for lump sum compensation on 23 February 2009, which claim was not pursued. In response to that claim, the respondent's insurer issued a notice pursuant to section 74 of the *Workers Compensation Act 1987* (the 1987 Act) which denied liability on the basis that the applicant was fit for his pre-injury duties with no restriction and no ongoing treatment; that his ongoing complaints regarding back pain were resulting from a constitutional condition rather than the effects of the incident at issue, and there had been a temporary aggravation of the applicant's lower back at the time of the incident, however, that aggravation had ceased and any ongoing back pain is not work-related.

12. On 5 September 2008, a second section 74 notice was issued which declined liability on the basis that the applicant was not suffering any incapacity, as well as maintaining the denial on the grounds set forth in the previous notice. A review of that decision was undertaken, and on 21 April 2009, the respondent's insurer maintained its denial of liability and also relied upon section 9A of the 1987 Act.

13. On 27 December 2018, a final section 74 notice was issued by the respondent's insurer to the applicant which denied liability on the grounds that any lumbar spine strain suffered by him in the course of his employment had completely resolved, that he had not suffered a whole person impairment as a result of the injury at issue, that any condition in his lumbar spine is constitutionally determined and not related to any strain in the incident at issue; and the applicant's aggravation of his condition at a subsequent employer on 3 May 2018 was the cause of any ongoing difficulties, rather than the incident at issue.

14. On 19 June 2019, the applicant's solicitors commenced the proceedings at issue.

ISSUES FOR DETERMINATION

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

    (a) Whether the applicant suffered from the effects of the injurious event on 14 March 2004 at any time between 9 October 2006 and 31 December 2012;

    (b) Whether the applicant suffered from the effects of a work-related aggravation during the period referred to in (a) above, and

    (c) Whether either the injury or aggravation at issue caused the applicant to suffer any incapacity for employment for the period 9 October 2006 to 31 December 2012, and if so what was the extent of that incapacity.

PROCEDURE BEFORE THE COMMISSION

16. The parties attended a hearing on 22 August 2019. At the hearing, Mr B McManamey of counsel appeared for the applicant and Mr C Robertson of counsel appeared for the respondent.

17. I note for the record that at the outset of the hearing, Mr Robertson formally made an application pursuant to section 289(4) of the Workplace Injury Management and Workers Compensation Act 1998 (the 1998 Act) to raise the issue of incapacity at the hearing. Mr McManamey indicated his client was aware the question of incapacity was in issue, and had no objection to the issue being raised. Leave was accordingly granted.

EVIDENCE

Documentary evidence

18. The following documents were in evidence before the Commission and taken into account in making the determination;

    (a) The Application to Resolve a Dispute (the Application) and attached documents, and
    (b) The Reply and attached documents.

Oral evidence

19. There was no oral evidence called at the hearing.

SUBMISSIONS

The applicant's submissions

20. Mr McManamey set out the history of the matter and noted the applicant's first section 74 notice, denied liability on the basis the applicant had suffered an aggravation, the effect of which had ceased. He took the Commission to a list of payments attached to the Application, which revealed that for the period 28 September 2006 to 5 October 2006, the applicant was being paid at the rate of $347.90 per week. He submitted the respondent had accepted this was the difference in the applicant's ability to earn income and his pre-injury earnings as at that time, which was during the period of his employment as a telemarketer with the ICT Group. Mr McManamey referred to the radiological investigations and noted that a CT scan undertaken on 19 March 2004, only five days after the injury showed disc bulging at the L5/S1 level.

21. An MRI scan which was undertaken at the request of Dr Maniam, treating surgeon on 29 April 2004 reported as follows:

> "At L5/S1 there is a small central disc protrusion. This is touching, although not compressing the thecal sac. There is also no displacement of the S1 nerve roots in the lateral recesses in the supine position. There is no foraminal narrowing."

22. Mr McManamey took the Commission to the report of Dr McKechnie, treating neurosurgeon, dated 7 October 2005 and found at page 77 of the Reply. That report is a short document addressed to the respondent's insurer and records the following history:

> "He is a 31-year-old console operator at a service station who suffered a work-related injury on 14 March 2004 whilst he was lifting a box. He described sharp, burning pain in the lower back. He initially kept working but the pain worsened. Approximately one week later he developed the onset of left leg pain. He was initially treated with analgesics, anti-inflammatories, physiotherapy and hydrotherapy. He has been referred to Dr Maniam.
>
> In regard to employment, it is my opinion that the patient is currently fit for part-time light duties. I would currently recommend four hours a day, five days a week with a 5-kg lifting restriction, a restriction on repetitive bending and preferably the ability to sit and stand as tolerated."

23. Dr Missiakos, general practitioner also provided a report to the respondent's employer which contained a broadly consistent history to that set forth in Dr McKechnie's report and contained in the applicant's statement. Dr Missiakos noted the applicant stopped working after the injury at issue on 2 April 2004, and was subsequently examined by him on 13 April 2004, 16 April 2004 and 30 April 2004. Dr Missiakos said those examinations revealed some progress in his back pain and the applicant progressed to an exercise program for treatment.

24. Dr Missiakos noted that in late May 2004, the applicant was referred for hydrotherapy treatment and also commenced a TENS treatment regime for his back pain. The doctor recorded that throughout June and July 2004, the applicant attended hydrotherapy. A trial of steroid injections on two occasions was also tried to the sacro-illiac joints, however, they did not improve his back pain. Dr Missiakos noted that in July 2004, the applicant returned to work on a part-time basis, two days per week whilst he continued to attend hydrotherapy. According to Dr Missiakos, in January 2005, the applicant's job was lost when his employer was sold to a new business. Around this time, the applicant was referred for a trial of lumbar spine facet joint injections, however, these were of no assistance to him. He was also referred to Dr McKechnie, and between March 2005 and May 2005 he was treated with acupuncture to no effect.

25. Mr McManamey noted that Dr McKechnie had provided a number of reports which are contained in the Application from page 77 to 89 inclusive. Unfortunately, in the reproduction of these documents, each of them is dated 31 August 2018, however, it is possible to discern the approximate dates of those reports by reference to either the date on which the different consultations are recorded within each document, or alternatively by way of date stamp.

26. Mr McManamey took the Commission to a report of Dr McKechnie at page 87 of the Application. That report is incomplete in the Application, however, page 2 of it is found at page 14 of the Reply. With the consent of the parties, and for ease of reference, page 14 of the Reply will therefore also be referred to in these reasons as page 87A of the Application, where necessary.

27. The report of Dr McKechnie which is found at pages 87 and 87A of the Application bears a date stamp 7 November 2005, so it is safe to say the document was generated on or about that date. At the top of page 87A, Dr McKechnie records the following history:

> "At the time of the initial consultation he described persistent lower back pain radiating through the left hip and groin and occasionally into the leg. He described a burning pain in this area. He denied any previous injuries to the back. He returned to light duties following his injury. He last worked in January 2005 but the service station where he worked had been sold. He had not worked since."

28. On the same page, under the heading "Opinion", Dr McKechnie recorded the following:

> "It is my opinion that the patient's signs and symptoms are consistent with the work-related injury that he described to me. The onset of the pain was related to the injury at work on 14 March 2004. Mr Hussein Bazzi's symptoms have persisted to the current day. He did not give me any history of any pre-existing or predisposing illness or injury to the back.
>
> In regards to his prognosis, Mr Hussein Bazzi's symptoms have been present for 18 months and have not significantly responded to numerous conservative treatments. It is my opinion, therefore, that they are unlikely to improve and he has suffered permanent disability as a consequence of the accident. He will require long term pain management care. However, he does not require surgical intervention in my opinion.

> In regards to employment, it is my opinion that the patient is currently fit for part-time light duties. I would currently recommend four hours a day, five days a week with a 5kg lifting restriction, a restriction on repetitive bending [is] and preferably the ability to sit and stand as tolerated."

29. Mr McManamey next took the Commission to the report of Dr Mills, occupational physician and Independent Medical Examiner (IME) for the respondent, dated 29 September 2005. That report is found at page 1 and following of the Reply. Dr Mills sets out a number of different opinions from other practitioners, including the views of Dr Roarty, orthopaedic surgeon, Dr Ng, occupational physician, Dr Fearnside, neurosurgeon, Dr Lloyd Hughes, orthopaedic surgeon, Dr Dowda, occupational physician, and Dr Matheson, neurosurgeon. Each of Dr Roarty, Dr Ng, Dr Fearnside, Dr Dowda and Dr Matheson attributed the applicant's symptoms to the injury at issue. Dr Lloyd Hughes, however, said as at November 2004 the applicant's symptoms were due to degenerative disc disease which had suffered a temporary aggravation in the incident at issue, which aggravation had ceased at the time of his examination of the applicant.

30. Dr Mills also had the benefit of the radiological investigation reports, including the lumbar spine MRI dated 29 April 2004 which recorded a small central disc protrusion at L5/S1 which was touching, though not compressing the thecal sac. After carrying out an examination of the applicant, he concluded the radiological findings were not clinically significant and considered any injury which the applicant suffered on 14 March 2004 to have since resolved, and his then current condition was not work-related. Dr Mills ruled out the diagnosis by Dr Matheson of Scheuermann's Disease as clinically insignificant in the applicant's circumstances, given a lack of history of adolescent back pain.

31. Mr McManamey then took the Commission to the opinion of Dr Stephen, IME for the respondent dated 11 July 2006. Mr McManamey criticised Dr Stephen's opinion for not explaining the reasons as to why he reached the view the applicant's ongoing problems were constitutional, notwithstanding the radiological evidence of frank injury and the absence of any pre-existing complaint in relation to back pain. He noted that in July 2006, Dr Stephen was of the view the applicant could return to his pre-injury employment, however, when he again examined the applicant in April of 2009, Dr Stephen not only found the applicant's presentation to be consistent, but indicated there was a restriction on the applicant's capacity to work. At page 24 of the Reply under the heading "Physical Examination", Dr Stephen said:

> "Mr Bazzi was a bit hesitant but there were no gross inconsistencies. … lumbar flexion was about one-third of the normal range but was seen to be more when sitting on the couch with his knees extended. … straight leg raising on the right side was to 70 degrees and painless. On the left side, it was to 50 degrees with complaint of low back pain but he was able to sit bolt upright with his knees extended without complaint."

32. Under the heading "Diagnosis" at page 25 of the Reply, Dr Stephen said:

> "Mr Bazzi has longstanding low lumbar back pain. This renders him fit for light to moderate work but not the heaviest types of work. He is permanently unfit for work involving repeated bending, heavy lifting and work in confined spaces."

Dr Stephen then noted the applicant's condition had reached maximum medical improvement and that he fitted within the category of DRE 2, attracting a five to eight per cent whole person impairment, however, Dr Stephen was of the view that impairment was constitutional in nature.

33. Mr McManamey contrasted the views of Dr Stephen with those of Dr Evans, IME for the applicant, whose report is found at page 66 of the Application. That report is dated 1 October 2008, some 4.5 years after the injurious event. Mr McManamey noted that a CT scan of the lumbosacral spine dated 23 May 2008 showed a small central disc herniation at L5/S1 consistent with the post-injury findings on radiological investigation in 2004 and 2005. Dr Evans indicated the narrowing of the L5/S1 disc space appeared to him moderate rather than mild and was "certainly different to that in the previous CT scan, taken in 2004." Mr McManamey submitted this was consistent with the applicant's injury at L5/S1 deteriorating rather than resolving. He relied upon Dr Evans' opinion that the applicant is fit for work which does not require much bending or twisting of the back or lifting of weights heavier than 10 kilograms. He submitted Dr Evans' view was persuasive in that he directly drew his conclusions from a comparison of the radiological studies some four years apart.

34. Dr Missiakos, the applicant's general practitioner provided a further report dated 7 May 2019 to the applicant's solicitors. He has the benefit, Mr McManamey submitted, of being the applicant's longstanding treating practitioner and stated:

> "As per my previous report dated 15/06/2005, at the time, Mr Bazzi was suited for sit down administrative work at reduced hours. I am aware that Mr Bazzi did not pursue all the benefits of the workers compensation system and instead was living on Centrelink welfare benefits. Mr Bazzi was deemed fit for administrative work at reduced hours, however, this injury made it difficult for him to find employment. Certificates issued for Centrelink deemed him unfit to work up until 31/12/2012.
>
> As time went by, Mr Bazzi was able to return to an office-type role but I am unable to provide you the dates of this employment period."

35. Mr McManamey stated this report from the general practitioner is significant because the medical certificate found at page 44 of the Reply dated 26 May 2008 on its face certifies the applicant as fit for pre-injury duties from 27 May 2008. Mr McManamey submitted this certificate contains a number of internal inconsistencies in that it contains a diagnosis of lumbar spine pathology, provides for a treatment plan including physiotherapy and a review in five weeks' time, but at the same time says the applicant is fit for pre-injury duties. He said this is inconsistent and does not marry up with the other evidence.

36. Mr McManamey took the Commission to the report of Dr Stephen from April 2009, which contained a history that the applicant had suffered a major flare-up of his back pain in May of 2008. Mr McManamey submitted that evidence clearly contradicts the general practitioner's certificate, and accordingly when taken with the certificates which postdate May 2008 and provide for ongoing impairment, would lead the Commission to reject the contents of the May 2008 certificate insofar as it says the applicant is fit for pre-injury duties.

37. In summary, Mr McManamey submitted the clear preponderance of the evidence provided that the applicant had suffered an L5/S1 disc injury which had perpetuated throughout the relevant period and rendered him partially incapacitated.

38. In terms of the level of incapacity, Mr McManamey referred to the pre-injury earnings which were included in the documentation put before the Commission. He submitted the respondent's figure of $692.97 is not forwarded with any wage material and no explanation. He said that when weighing up the parties' figures, the Commission would prefer those put forward by the applicant.

39. As the applicant's alleged incapacity was suffered before the 2012 amendments, Mr McManamey took the Commission to the relevant process under the former section 40. That is, the Commission must establish what the applicant's earnings would have been but for the injury at issue, and then establish what the applicant's capacity for employment was in the labour market which was accessible to him.

40. The applicant acknowledged there was a deficiency in the material before the Commission because there was no direct wage evidence as to what the applicant was earning at the time payments ceased. Mr McManamey submitted that all which could be established is that there was a $343 per week deficiency which was being made up by the respondent and accepted by it up until the point when payments ceased. He submitted it followed from those calculations that at the time payments ceased and the relevant claim for weekly benefits commences in April 2006, the applicant would've been earning approximately $350 per week.

41. Mr McManamey took the Commission to the applicant's 2007 tax return, which demonstrated an annual taxable income of $46,126. He submitted the difficulty with that document was it did not break down the various elements which made up the income. Undoubtedly, that figure included at least 14 weeks of workers compensation payments, some Centrelink payments and also wages. He submitted that the Commission simply could not know what part was represented by the applicant's earnings.

42. Mr McManamey then took the Commission to the applicant's 2008 and 2009 tax returns, which showed taxable income of $28,878 and $13,691 respectively. He noted the Commission's task is to determine what the applicant was able to earn on average during the relevant period, and referred to the decision of *Bruce v Grocon Ltd* [1995] NSWCC10 which established the proposition that the simple fact of a period of no financial loss does not mean there was a lack of ongoing incapacity. The Commission's task, Mr McManamey submitted, was to look at the capacity of the applicant on the open labour market.

43. Mr McManamey submitted that at the time the applicant's payments ceased, he was losing approximately $350 per week and that absent any evidence to the contrary, that would be his loss. In 2008, the applicant's loss fell to $121 per week, however, thereafter the loss rose again. In accordance with the decision in *Aitken v Goodyear Tyre & Rubber Co (Aust) Ltd* (1946) SR(NSW) 20 (*Aitken*), Mr McManamey submitted the measure of the loss is the applicant's actual earnings unless the worker was deliberately underselling on the open labour market, and there is no evidence this is the case in this matter.

The respondent's submissions

44. For the respondent, Mr Robertson indicated the essential question is whether the applicant recovered from the effects of his injury. He took the Commission to the CT scan of the lumbar spine which was undertaken on 19 March 2004 and which demonstrated "mild posterior bulging from L5/S1 intervertebral disc." Mr Robertson noted this was the first radiological investigation undertaken after the injury, with the next being an MRI which was carried out on 29 April 2004. That scan also showed a small central L5/S1 disc protrusion.

45. Mr Robertson noted Dr Stephen's view of the MRI from April 2004 which is recorded at page 19 of the Reply as demonstrating dehydration of the lumbosacral disc. He said this was broadly consistent with the findings of Dr Evans found at page 68 of the Application in which Dr Evans indicated the MRI films showed a "loss of signal intensity in the L5/S1 disc, reflecting degeneration."

46. Mr Robertson submitted that having regard to the opinions of Dr Stephen and Dr Mills, by the time the respondent ceased making weekly payments in October 2006, the applicant had recovered from the effects of the injury and any issues which he had were caused by an underlying degenerative condition.

47. Mr Robertson agreed with Mr McManamey's categorisation of the relevant test for determining incapacity. He submitted that the lay and medical evidence in the matter demonstrated the work which the applicant was carrying out for the respondent was not particularly heavy. Mr Robertson submitted that given there is no statement or evidence which goes to the question of the open labour market within which the applicant found himself after the accident, factors such as what the applicant tells the doctors concerning the nature of the work he was carrying out are relevant. Mr Robertson submitted the Commission would take into account that the applicant told Mr Mendelson that the work he carried out before the injury at issue was not of a particularly heavy nature.

48. In relation to the report of Dr Missiakos in June of 2005, Mr Robertson noted the applicant was being paid at that time, so there was no issue in relation to his incapacity at that point. He referred to Dr McKechnie's report from September 2005 which indicated the applicant was fit for part-time light duties employment.

49. Mr Robertson took the Commission to the report of Dr McKechnie found at page 88 of the Application, which refers to an examination on 18 October 2005 wherein Dr McKechnie noted the applicant had "just found work today. He has been employed fulltime as a telemarketer." Dr McKechnie's report of 8 March 2006 noted the applicant was working fulltime and enjoying his work. Mr Robertson noted that was the last report of Dr McKechnie before the applicant's weekly benefits were terminated by the respondent.

50. Mr Robertson submitted the applicant's history demonstrates an ability to carry out fulltime clerical work, and that he is plainly someone who is not without some skills. His role was a telemarketer was a better paid position than that of the console operating work he was carrying out at the time of the injury. He noted the WorkCover medical certificate dated 11 October 2005 found at page 99 of the Application which certified the applicant as fit for 24 hours work per week. He contrasted this with the certificates at pages 100-104 of the Application for the periods November 2005 to October 2006 which contained no restrictions on his hours in that period. Mr Robertson noted it was in October of 2006 that the applicant's benefits were discontinued by the respondent.

51. Mr Robertson noted that the list of payments which were in evidence in the Reply demonstrates the applicant was paid at different rates for different periods before payments ceased. He noted there were no records from the respondent as employer, and that the applicant has the onus of proving his loss. Mr Robertson submitted some payments to the applicant were higher, and some were lower and it was therefore dangerous to make a finding that the applicant's capacity for employment was $350 less than what he had been earning with the respondent.

52. Mr Robertson submitted that if the Commission accepted the applicant's wages schedule, then at October 2006 he was saying that his earnings doing fulltime telemarketing were only $350 per week, and that this could not be accurate. He submitted that if the applicant did not establish what his earnings are via the documents put before the Commission, then that represents a difficulty for him.

53. Mr Robertson broadly agreed with the submissions of Mr McManamey that it was difficult to make sense of the applicant's 2006 tax return given the figures therein comprised paid employment, compensation payments and Centrelink. Nevertheless, he submitted it seems to be that the applicant's earnings as set out in the return were $6,178, which was incongruous for someone working fulltime for eight months. Mr Robertson submitted that the Commission would look to subsequent periods to obtain a more informed view of the applicant's capacity from October 2006.

54. On the histories given, Mr Robertson submitted the applicant worked for the entire 2007 financial year, which given the numbers in the tax return would lead to earnings of $838 per week. Accordingly, Mr Robertson submitted that there was no economic loss for the period when the applicant was working with ICT as a telemarketer from the date his payments ceased up to July or August of 2007. Likewise, Mr Robertson submitted that for the period when the applicant was working with Hunter Express, his earnings were $853 per week and accordingly there was no loss during that period.

55. Mr Robertson submitted there was no evidence the applicant left ICT for any reason to do with his injury. Shortly after leaving ICT, the applicant commenced at Hunter Express and Mr Robertson submitted his ability to do so is reflective of his clerical skills.

56. The applicant was employed on a fulltime basis as at 1 October 2008, according to the history he provided Dr Evans in October of 2008. At that time, the applicant said he was working as a telemarketer for Mosaique Stone. Mr Robertson submitted there was no suggestion the applicant was suffering any incapacity for employment owing to his back injury from September 2009 to August 2010. He submitted there was no reason on the evidence why the applicant could not work in telemarketing or a similar job earning more than he had at the time of the injury in issue. In relation to the periods where the applicant was without employment, Mr Robertson noted that being unemployed does not mean a person is necessarily incapacitated. He submitted that whilst the applicant was working with Aegis, his earnings amounted to $821.40 per week and with Direct Call were $1,120 per week.

57. In terms of the applicant ceasing work in October 2011, Mr Robertson submitted it had nothing to do with his back. He noted Dr Stephen took a history at page 29 of the Reply that "Anxiety really got to me". There was, Mr Robertson submitted, nothing to suggest that that anxiety related to the back injury. Moreover, at page 6 of the Reply, Dr Mills took a history of the applicant indicating his anxiety was unrelated to the injury at issue.

58. Mr Robertson noted that Dr Mendelson, IME for the applicant, saw him in September of 2018 and that when asked about the question of incapacity at page 64 of the Application said the applicant could "certainly" do telemarketing work.

59. Mr Robertson submitted very little weight should be given to the last report of the general practitioner given the vagueness of the history contained within it and the fact the doctor says the applicant was fit for administrative work on reduced hours despite the fact that he had been working on a fulltime basis. He noted that the Centrelink certificates up to 31 December 2012 were not in evidence, and that if the applicant was in fact not working we do not know why.

60. In summary, Mr Robertson submitted that at all times since October 2006 the applicant has had capacity to earn greater than $800 per week. He admitted that there were periods where the applicant had been unemployed, however, he stated there was no evidence that those periods of unemployment related to the back injury. Mr Robertson submitted that even if the Commission was satisfied there were ongoing effects of the injury, those effects do not sound an economic loss on the open labour market which was normally available to the applicant up to and including 31 December 2012.

THE APPLICANT'S SUBMISSIONS IN REPLY

61. Mr McManamey submitted that whether the applicant left various jobs due to his injury or not is irrelevant to the question which the Commission has to address. Rather, the question is what was the applicant's capacity to earn on the open labour market available to him, and was that capacity less than that which he was earning at the time of the injury. Mr McManamey submitted that the answer to that question was in the affirmative, and the best measure of the differential between pre-injury and post-injury earnings were the 2008 and 2009 tax returns.

DISCUSSION

Effect of the injury between October 2006 and December 2012

62. As already noted, there is no question of an injurious event having taken place on 14 March 2004. Rather, the applicant contends that he continued to suffer from the effects of that injury up to and including 31 December 2012, and that the effects of the injury caused a partial incapacity for employment.

63. The respondent's contention is essentially twofold. Firstly, it says the effect of any injury by way of either frank injury or aggravation of a pre-existing condition had passed by October 2006, and secondly, if this was not the case then in any event the ongoing effects of that injury did not sound in economic loss and therefore no claim for weekly benefits is maintainable.

64. As noted in *Castro v State Transit Authority (NSW)* [2000] NSWCC 12 (*Castro*), what is required to constitute "injury" as defined under section 4 of the 1987 Act is a "sudden or identifiable pathological change." In this matter, I find that the identifiable change in pathology is the disc prolapse/herniation at L5/S1 found on the lumbar CT and MRI dated 19 March 2004 and 29 April 2004 respectively.

65. There was some discussion in this matter as to whether the applicant had suffered a frank injury, or whether there had been an aggravation of a pre-existing condition. I note a worker is able to rely on a frank injury despite the existence of a disease, consistent with the High Court decision of *Zickar v MJH Plastic Industries Pty Limited* (*Zickar*) (1996) 187 CLR 310. In that case, the worker suffered brain damage due to the rupture at work of a congenital aneurism. The congenital condition could be characterised as a disease, however that would not have satisfied the requirements of clause (b) of the definition in section 4 of the 1987 Act. The worker succeeded in the High Court on the basis that the rupture itself could be described as an injury simplicitor. The court held that the presence of a disease did not preclude reliance upon that event as a personal injury.

66. In this matter, the presence of the lumbar disc pathology by way of central disc protrusion at L5/S1 against a background of disc hydration suggestive of degenerative lumbar spine changes is, in my view, analogous to the injury suffered by the worker in *Zickar*. On balance, I am satisfied that the applicant suffered an injury to his lumbar spine arising out of, or in the course of his employment with the respondent on 14 March 2004.

67. The difficulty with the respondent's contention that the effect of that injury had passed by October 2006 is the CT scan taken on 23 May 2008 which showed the continued presence of the small central disc herniation at L5/S1 and what Dr Evans described as "moderate rather than mild, and certainly different to that in the previous CT scan" narrowing of the L5/S1 disc space. Dr Evans also noted the disc protrusion appeared to be very close to the descending S1 nerve root, though not appearing to compress it.

68. In my opinion, the presence of this radiological evidence some four years after the applicant's injury is consistent with a pathological reason for the persistence of his lumbar spine symptoms.

69. On balance, I accept the view of Dr Evans, Dr Mendelson and the applicant's treating surgeon Dr McKechnie and general practitioner Dr Missiakos, all of whom are of the view that the incident on 14 March 2004 was a substantial contributing factor to the applicant's ongoing difficulties. I accept Dr Mendelson's opinion that:

> "if that incident had not occurred, then it is unlikely that a similar problem would have arisen at any time in the near future. There is a definite historical relationship between the lifting incident and the development of his symptoms and therefore I believe that his employment is the cause of that injury."

70. In my view, that opinion by Dr Mendelson is consistent with the findings of the radiological evidence from shortly after the incident through to May 2018. I note that the last MRI scan taken on 14 May 2018 demonstrated annulus tears and disc protrusions at L4/5 and the lumbosacral levels with potentially left-sided L4 nerve root impingement at the lateral aspect of the neural foramen. I do note, however, that this MRI scan was taken after a subsequent injury on 3 May 2018. Nevertheless, it is apparent that the applicant suffered lumbar disc pathology following the incident whilst working with the respondent in March 2004, and that up to at least 2008, that pathology persisted.

71. The reports of Dr McKechnie are helpful in that they provide a running narrative of the ongoing issues faced by the applicant. The reports range from reviews which took place for the first time on 8 March 2005 through to 8 March 2006, nearly two years after the incident at issue. Although by March of 2006 the applicant was making a good recovery and working fulltime, his pain continued to increase at the end of the day following long periods of sitting. In my view, the applicant's complaints of pain to Dr McKechnie across the various reviews are consistent with the symptoms experienced by him in the immediate aftermath of the incident on 14 March 2004 and accordingly, I find that the applicant continued to suffer from the effects of that injury up to and including 31 December 2012.

72. In making this finding, I reject the opinions of Dr Stephen, and Dr Mills, IMEs for the respondent. Whilst those doctors noted the presence of pre-existing changes, there is no evidence to suggest any symptoms in the lumbar region before the injurious incident at issue. Given the persistent nature of the lumbar spine pathology, and the consistent nature of the applicant's presentation to doctors from April 2004 to August 2018, I do not accept the views of Dr Mills and Dr Stephen that any ongoing symptoms during the period at issue were caused by degenerative problems.

73. I accept the submission of Mr McManamey that Dr Stephen's opinion that the applicant's ongoing problems caused by constitutional factors is provided without sufficient explanation to detract from the frank findings on radiological investigation from shortly after the injurious event through to the end of the period at issue. Rather, in my view the clinical picture is as set out in Dr McKechnie's report of November 2005, namely the applicant had suffered permanent disability in the incident at issue as a result of the disc protrusion suffered at that time.

74. I also accept the view of Dr Evans, IME for the applicant, who noted a progression in the disc protrusion affecting the applicant between the scans in 2004 and those undertaken in 2008. In light of the findings on radiological examination, I reject the views of Dr Stephen and Dr Mills, who attribute the applicant's ongoing symptoms to degenerative changes. Rather, I prefer the opinion of Dr McKechnie, treating neurosurgeon who has the benefit of treating the applicant across many years, and who is of the view the applicant's relevant ongoing problems were caused by the injury at issue.

Incapacity

75. It is difficult to precisely deal with past partial incapacity arising from an injury in 2004, absent adequate documentary evidence. As noted by the parties, the pre-2012 rights of workers with partial incapacity are governed by the provisions of section 40 of the 1987 Act which provides:

"The weekly payment of compensation to an injured worker in respect of any period of partial incapacity for work is to be an amount not exceeding the reduction in the worker's weekly earnings, but it is to bear such relation to the amount of that reduction as may appear proper in the circumstances of the case."

76. The most common approach to determining partial incapacity is set out in *Mitchell v Central West Health Service* (1997) 14 NSWCCR 526 at 529-30 (*Mitchell*), which identifies five steps to be taken in determining the award for weekly compensation pursuant to section 40:

> "... the Court is required:
>
> 1. To determine the weekly amount the worker would probably have been earning if uninjured (section 40(2)(a)) ...
>
> 2. To determine 'the average weekly amount that the worker is earning or would be able to earn in some suitable employment from time to time after the injury' (section 40(2)(b)). Section 40(3) provides that the determination of this amount is subject to the following:
>
>   (a) the determination is to be based on the worker's ability to earn in the general labour market reasonably accessible to the worker;
>   (b) the determination is to be made having regard to suitable employment for the worker within the meaning of section 43A' ...
>
> 3. to subtract the figure derived from 2 from the figure derived from 1 (section 40(2)).
>
> 4. to decide whether and to what extent the reduction calculated as above bears 'such relation to the amount of that reduction as may appear proper in the circumstances of the case (section 40(1)) ...
>
> 5. to make an award in the amount arrived at in Step 4." (at 529)

77. In order to determine the applicant's probable earnings but for injury, it must be assumed he would have continued in the same employment had he not been injured. That need not be precisely the same job, but rather refers to the same occupation. A complicating factor in this matter is the divergence between the pre-injury earnings proffered by the applicant and respondent. The applicant lists his probable earnings as $711.93, the respondent at $692.57.

78. The only evidence relating to the applicant's pre-injury earnings is contained in his tax return summaries, and in particular the year ending 30 June 2004. The summary does not set out the proportion of the applicant's income for that year which was wages, and how much, if any, was workers compensation payments, though his statement notes the applicant stopped working a few days after the incident at issue.

79. As has been noted, the applicant bears the onus of proving the level of his incapacity. Absent any evidence other than his tax return summary, I am of the view the applicant has not established his preinjury income was in the amount claimed. In the circumstances, I therefore accept the figure for comparable/probable earnings put forward by the respondent and admitted in its Reply, namely $692.57. I note that figure accords with dividing the gross income in the 2004 tax summary by 52 weeks.

80. Turning to the applicant's capacity to earn in suitable employment, I accept Mr McManamey's submission that at the date payments ceased on 9 October 2006, the respondent had been paying the applicant at the rate of $353.10 per week pursuant to section 40. That is evident from the list of payments attached to the Application. It is not, however, clear from his 2006 tax return how much income the applicant earned from employment with ICT (for whom he says he worked for the majority of the financial year) and how much of his income was derived from workers compensation payments and/or Centrelink benefits.

81. As Burke CCJ noted in *Mangion v VISY Board Pty Ltd* [1991] NSWCC1, just as "one swallow doesn't make a summer, one job doesn't determine a capacity to earn." His Honour's approach to determining incapacity under section 40 as it was before the 2012 amendments met with the approval of the Court of Appeal. In *Mangion*, Burke CCJ described the process of calculating an applicant's ability to earn as follows:

> "When one assesses an ability to earn under section 40(2), one is really arriving at a weighted average. Wage rates for jobs within capacity that are rarely available, though perhaps highly paid, rate poorly in such an assessment. Conversely, the income derivable from more readily available work rates highly.
>
> In this case, if given the premise that Mr Mangion could work full-time, I have no quibble with a finding that he is able to earn $300 per week or thereabouts. But that is not because he could do a particular job but because that sort of income is obtainable in a variety of non-physical work that doesn't place undue strain on his back."

82. In this matter, doing the best I can based upon the medical evidence and the applicant's tax documents, I consider he suffered a partial incapacity for employment on the open labour market which was previously available to him. In particular, the applicant's ability to lift, bend and carry was compromised, as was his ability to sit or stand for prolonged periods. Nevertheless, it is apparent the applicant was capable of earning income and, to his credit, he did so at various times during the period in issue. In my view, taking these factors into consideration, I believe the applicant was capable of earning not less than $550 per week during the period claimed.

83. Having made this finding, it follows that I have calculated the applicant as suffering a partial incapacity pursuant to section 40 of $142.57 per week. That, however, is not the end of the process, as on the applicant's own case there were periods where he earned more than his pre-injury earnings, and therefore suffered no loss owing to his post-injury partial incapacity.

84. Whilst the list of payments reveals the applicant was in receipt of weekly compensation immediately before payments were ceased, his evidence discloses that he was in full time employment with ICT as a telemarketer at this time. On the applicant's own history in paragraph nine of his statement, he obtained that job in late 2005 and remained in the employ of ICT until July 2007. Accordingly, on the applicant's own case, he worked for all of the 30 June 2007 financial year.

85. The applicant's 2007 taxation summary reveals taxable income of $46,126 or $887.03 per week. That being so, it is apparent for this period the applicant's partial incapacity did not result in any economic loss to him, and accordingly there will be no award in his favour for the period 9 October 2006 to 30 June 2007.

86. The applicant's taxable income for the period 1 July 2007 to 30 June 2008 was $30,605 or $588.56 per week. This represents a loss of $104 per week for this period, and an order will be made that the respondent pay the applicant weekly compensation in that sum for the period 1 July 2007 to 30 June 2008.

87. The applicant's actual earnings for the financial year ending 30 June 2009 were $13,691, which represents a weekly amount in excess of the amount of his assessed partial incapacity. Accordingly, the respondent will be ordered to pay the applicant the sum of $142.57 for the period 1 July 2008 to 30 June 2009.

88. For the period 1 July 2009 to 22 August 2010, there is no evidence before the Commission as to the applicant's actual loss, if any. Accordingly, the parties will be given liberty to apply to provide further evidence and/ or submissions relating to this period. Absent any further evidence or submission being provided within 28 days of this decision, there will be an award for the respondent with regards to this period, as in my view the applicant has not discharged the onus of proof in establishing any economic loss during this period arising from his partial incapacity.

89. Pursuant to the applicant's own wages schedule in the Application, he did not suffer any loss for the period 23 August 2010 to 27 October 2011, and there will be no award in his favour for this period.

90. For the period 28 October 2011 to 30 June 2012, I note the evidence by way of taxation documents and payment summaries discloses the applicant did not work. Accordingly, his partial incapacity sounded in economic loss for this period

91. Likewise, for the period 1 July 2012 to 31 December 2012, the applicant's relevant taxation documentation reveals he earned far less than the amount of his partial incapacity, and accordingly the respondent will be ordered to pay him $142.57 per week for this period.

SUMMARY

92. Accordingly, the Commission will make findings and orders as follows:

    (a) The applicant suffered an injury to his lumbar spine in the course of his employment with the respondent on 14 March 2004 (the applicant's injury);

    (b) At the time of the applicant's injury, he was earning $692.57 per week;

    (c) As a result of the applicant's injury, he suffered a partial incapacity for employment in the sum of $142.57 per week for the period 9 October 2006 to 31 December 2012;

    (d) From time to time in the period 9 October 2006 to 31 December 2012, the applicant's partial incapacity caused him economic loss;

    (e) The respondent is to pay the applicant weekly compensation as follows, pursuant to section 40 of the 1987 Act:

        (i) From 1 July 2007 to 30 June 2008 at the rate of $104 per week;
        (ii) From 1 July 2008 to 30 June 2009 at the rate of $142.57 per week;
        (iii) From 28 October 2011 to 31 December 2012 at the rate of $142.57 per week;

(f) Award for the respondent on the claim for weekly benefits for the period 9 October 2006 to 30 June 2007;

(g) The parties are granted liberty to apply within 28 days to provide any further evidence and/ or submissions with regards to the applicant's loss of income (if any) for the period 1 July 2009 to 30 June 2010, failing which there will be an award for the respondent in relation to the claim for weekly payments for this period.