WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **3949/19**
Applicant: **Shane Denison**
Respondent: **Weir Mineral Australia Limited**
Date of Determination: **15 April 2020**
Citation: **[2020] NSWWCC 116**

The Commission determines:

1. That the applicant suffered injury on 3 July 2015 to his lumbar spine whilst in the course of his employment with the respondent.

2. The applicant has been incapacitated thereby.

3. It is reasonably necessary that the applicant undergo spinal surgery as proposed by Dr Marc Coughlan in his reports of 30 October 2015 and 12 April 2019.

The Commission orders:

4. The respondent will pay to the applicant weekly payments as follows:

    (a) From 1 August 2015 to 31 October 2015 at $1,248.23 pursuant to s 36;
    (b) From 1 November 2015 to 29 April 2018 at $980.10 pursuant to s 37.

5. The respondent will pay the costs of and associated with the right L4/5 microdiscectomy recommended by Dr Marc Coughlan on 30 October 2015.

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

John Wynyard
Arbitrator

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

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Lucy Golic
Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Shane Denison, the applicant, brings an action against Weir Mineral Australia Limited, the respondent, for payments of weekly compensation and a declaration that proposed surgery is reasonably necessary.

2. In matter no: 1278/17 in an action between the same parties for the same relief, I found in favour of the respondent, as the applicant failed to satisfy his onus of proving that the relevant date of injury was 4 July 2014. In the present action the date of injury was alleged to be 3 July 2015, following observations I made in my determination of 17 July 2017.

3. On 15 February 2019, the respondent issued a notice denying that the applicant had suffered injury, incapacity, or had any need for medical treatment. In the body of the notice the authors also claimed that the applicant had not given notice, nor made a claim in respect of the injury of 3 July 2015.

4. An Application to Resolve a Dispute (ARD) and Reply duly issued.

ISSUES FOR DETERMINATION

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

    (a) Was the respondent duly notified of the injury according to s 254 of the *Workplace Injury Management and Workers Compensation Act* 1998 (1998 Act);

    (b) Was a Notice of Claim duly made pursuant to s 261 of the 1998 Act;

    (c) Was Mr Denison injured as alleged;

    (d) If so, did he suffer any incapacity;

    (e) If so, what is the measure of that incapacity;

    (f) Is the proposed surgery reasonably necessary.

PROCEDURE BEFORE THE COMMISSION

6. This matter was heard in Wyong on 7 February 2020. Mr Tony Baker of counsel appeared for the applicant and Ms Lyn Goodman of counsel appeared for the respondent. 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

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

(a) ARD and attached documents;

(b) Application to Admit Late Documents (ALD) from the applicant dated 3 September 2019;

(c) Reply from the respondent dated 27 August 2019.

Oral Evidence

8. No application was made for oral evidence.

FINDINGS AND REASONS

M**atter 1278/17**

9. In my decision of 17 July 2017 in matter 1278/17 I made an award in favour of the respondent because Mr Denison had not satisfied his onus that the cause of his back condition had been an injury on 4 July 2014. My determination was lodged by the applicant[1] at [59] I said[2]:

> "59. The applicant's case was based upon the fact that he had undoubtedly sustained pathology in his back, and the evidence was conclusive that from late 2015 the applicant was suffering from severe symptoms in his back and from right sided radiculopathy. The difficulty with that assertion, the respondent argued, was that the evidence also indicated that the applicant recovered from the injury he suffered on 4 July 2014, and that his symptoms recurred when he suffered another event on 3 July 2015. Whilst Mr Baker submitted that the question of radiculopathy was secondary to the fact of the applicant's back injury, the facts of this case raises the question, 'which injury?' Although during argument Mr Baker disavowed any suggestion that the event of 3 July 2015 constituted a separate injury, the respondent contended that the facts were capable of demonstrating precisely that proposition."

10. At [66] I said[3]:

> "66. The respondent submitted that the symptoms following the 4 July 2014 event had resolved, or at least subsided, and this evidence would tend to support that contention. I have not found the fact that the applicant returned to work to be significant and I do not think that I can draw an inference either that he had completely recovered, or that his back pain was severe up to 3 July 2015. What the evidence does establish is that the 3 July 2015 episode provoked continual right sided radicular pain in the applicant's leg, and that his medical practitioners regarded his condition as sufficiently serious that, after investigations and specialist intervention, surgery is now proposed. Further, the applicant stated that when he attempted to work in mid-August 2015 his back pain prevented him after one week. The entry in the note and medical certificate of Dr Treece on 24 July 2015 of additional symptomatology in the right arm and 'new pain' in the neck was indicative of the onset of significant pathology in the event of 3 July 2015. There is thus a picture of slowly escalating symptomatology that has resulted in the applicant's inability now to perform any useful work."

[1] ARD page 471
[2] ARD page 481
[3] ARD page 483

11. At [73] after considering the report of Dr Coroneos. I said:

> "73. ……The evidence established that at all times the applicant had complained of pain in his back. The evidence also established that there were two injurious events and that following the latter event, investigations revealed the presence of a disc protrusion at L4/ 5. Dr Coroneos gave no consideration to the relevant question as to which event had caused the applicant's current condition.
>
> 74. It is this aspect of the case that Dr Bodel did not address either, because he had a wrong history. The criticisms levelled against the report of Dr Bodel was [sic] upon the basis that he did not have the history of the initial left leg symptoms in 2014, and that he was unaware that the applicant had returned to pre-injury duties before his symptoms worsened, and involved the right leg, rather than the left. Dr Bode! assumed that the applicant had always suffered from bilateral leg pain, and that the applicant had been given light duties of a supervisory nature. These lapses were matters of history that prejudiced Dr Bodel's opinion that it was the 4 July 2014 injury that was the cause of the applicant's present condition. The evidence might equally well have supported a conclusion that the cause of the applicant's present condition was the event of 3 July 2015, as it was only since then that investigations were undertaken, and the applicant was referred to Dr Coughlan. The applicant was seen only four times in relation to the event of 4 July 2014, and was certified fit for pre-injury duties three days after he first sought medical attention on 23 September 2014. Such a history on its face indicated a minor, self-limiting strain to the applicant's back. Whilst Dr Bodel took a history of the sudden severe flare up on 3 July 2015 it might well be that he assumed, because he incorrectly thought that the applicant had always experienced bi-lateral leg symptoms, that the 2015 incident was simply an aggravation of the 2014 injury. That indeed might be the case, but Dr Bodel has not addressed an alternative possibility available on these facts, that it was the 2015 event that caused a vulnerable disc to rupture. The significance of the evidence regarding the involvement of the different legs after each event may have had some significance, had he known about it. Further, Dr Bodel did not explain the significance of the 2015 'sudden severe' flare up in relation to his conclusion that it was the 2014 injury that caused the disc protrusion. These difficulties with the history relied upon by Dr Bodel take his opinion beyond what could be described as a "fair climate."

12. Paragraph 76 was in the following terms:

> "76. The applicant's recollection of events in his statement of 28 February 2017 could well be mistaken due to the passage of time since he first sustained his injury on 4 July 2014, and he may have been unconsciously reconstructing the description of his symptoms. No formal notice was made of the injury until September 2014 to either his employers or to a medical practitioner, and his recollection may be affected by the onset of the more significant symptoms after 3 July 2015. There appears to have been a deterioration of his condition in July 2015 of such significance that he was referred for imaging, and to a specialist, Dr Coughlan. Moreover he has now become incapacitated, he says, whereas after the 2014 injury he was able to continue his employment, certified for his pre-injury duties. There is no doubt that his main radiating symptom was to his right leg in 2015. The history taken by Dr Treece when the applicant consulted her on 24 July 2015 was that there had been an increase in severity of back pain some three weeks earlier, which is consistent with his statement that an event happened on 3 July 2015."

13. No appeal was made against my determination and a number of issues that were decided have been revisited by the respondent. However, both Mr Denison and the respondent have relied on further evidence in the current matter.

14. As indicated, my determination was dated 17 July 2017 after a hearing on both 7 June 2017 and 19 June 2017. My statement of reasons considered the relevant evidence then before me, including the applicant's statement of 28 February 2017.

FURTHER STATEMENTS

Mr Denison

25 October 2017

15. On 25 October 2017 Mr Denison made a further statement in which he dealt more thoroughly with the events of 3 July 2015. He said he was packing a waist high box at work when he felt a sharp pain in his lower back following which he completed an incident report that was "submitted to the compliance team electronically"[4].

16. Mr Denison said that when he checked the incident reports on 6 July 2015 his incident report had been rejected. He then spoke to Mr Mark Hutchins enquiring why his report had been rejected and was told that Mr Hutchins was reopening the earlier claim of 4 July 2014.

17. In his supplementary statement of 22 August 2018, Mr Denison corrected his evidence regarding the person to whom he spoke about the incident report as being not Mr Mark Hutchins but Mr Ed Napiorkowski, who has since left the employ of the respondent. Mr Denison supplied an address, and his solicitors lodged a letter dated 23 July 2018 addressed to Mr Napiorkowski at the given address.[5] No response was received, I assume, as none was lodged.

18. Mr Denison reproduced paragraph 76 of my Determination and concluded his statement by saying that in accordance with my finding he is now seeking compensation as a result of the injury on 3 July 2015.

15 February 2018

19. On 15 February 2018 Mr Denison made a further statement, setting out his disabilities. He indicated that he was in a "holding pattern" waiting for the recommended surgery by Dr Coughlan to be approved.

22 August 2018

20. On 22 August 2018 Mr Denison then made a further supplementary statement further clarifying the event of 3 July 2015.

21. He said that on 3 July 2015, the items he was unpacking were a variety of "O" rings, pistol rings and seals which were parts for pumps and that the respondent manufactured to be used in mines.

22. Mr Denison said that in addition to making the incident report he spoke to Mr Daniel McCarthy in his office about 10 steps way from where the incident occurred. Mr McCarthy was alleged to have said:

> "Please submit an incident report…"

[4] ARD page 12
[5] ARD page 24

23. Mr Denison further said that on 6 July 2015 he participated in a supervisor's meeting, as was usual every day. He identified the people at the meeting and said that he told the group that he had injured his back, and that his incident report had been rejected because it related to the earlier 2014 injury. Mr Denison identified those present as being Daniel McCarthy, Lee Young, Andre Albert, and Tony Antiko. Mr Denison said to the group:

> "I injured my back last Friday unpacking a box of parts, I have created an incident report and recorded it. The incident report was rejected and I contacted Ed and he said that he rejected it as this injury was related to the 2014 injury."

24. Mr Denison alleged that he was then told by Mr McCarthy that he should go and see Ms Natalie Weir the site nurse, which he did. Ms Weir, Mr Denison said, now works for QBE as a Workers Compensation Claims Manager and was now married. Her surname was now Marcerola. Mr Denison saw Mrs Marcerola immediately following the meeting of 6 July 2015. He said he saw her about two weeks later and was advised to go and see his GP, which he did. Mr Denison's solicitors wrote to Mrs Marcerola on 31 July 2018, seeking confirmation specifically of seeing Mr Denison on 6 July 2015, and again about two weeks later. Mrs Marcerola responded on 8 August 2018 that all her records and clinical notes from her role would be with the respondent. Enquiries were to be directed to it.

25. Mr Denison said that Mr McCarthy said to him at the exit interview in July "do you want to stand because I know you have a sore back". Mr Denison said he did not know why Mr McCarthy would say he was not aware of the 2015 incident until the exit interview, but suggested that it may have been as a result of the deterioration in the relationship between himself and the respondent after he lodged a complaint of bullying against Mr McCarthy. He said that the reference in the GP records of 15 May 2015 to having a rough time at work related to the conduct of Mr McCarthy.

19 June 2019

26. In a further statement of 19 June 2019 Mr Denison said that he continued to suffer the same symptoms and disabilities described in his earlier statement of 15 February 2018.

27. He said that he continued to be treated by Dr Le until early April 2019 when Dr Le refused further treatment because he did not want to be involved in a workers compensation claim.

28. He said he now consults Dr Chen. Dr Chen has told him that he can only prescribe pain relief and the management of his case had to remain with the doctors at Kariong Medical Centre. His condition remains in a holding pattern. He said he "was significantly incapacitated and in pain" and relying on Lyrica medication for treatment. He said he had been unable to obtain employment since 1 August 2015 and was in receipt of Centrelink Newstart benefits, for which he was required to supply certificates and in respect of which he was required to attend an employment agency. He said[6]:

> "The jobs I have expressed an interest in are in the mining industry, specifically driving trucks. Given my symptoms above, however, I have difficulty conceiving how realistically I would be able to do this work but I do what I am required to do to be eligible to continue to receive Centrelink benefits."

[6] ARD page 20

29. Mr Denison said:[7]

> "Since 1 August 2015 to date and continuing, I have been unable to obtain any employment. I do not believe given my back condition that I will be able to obtain any employment in the foreseeable future although, hopefully, if I was to be able to undergo the surgery proposed, my medical condition would improve such that I might be able to do so in the future."

Kristel Denison

30. Mr Denison's estranged wife Kristel Denison supplied a statement dated 30 August 2018[8]. She said they separated in August 2016 and she relocated to New Zealand. She said that she remembered Mr Denison complaining about the injury in July 2014. He was able to do some work thereafter and after a period of time his symptoms improved so that he could achieve quite a high level of physical activity.

31. Mrs Denison said that after about one year Mr Denison reported that he had had a further incident trying to unpack some mining parts in 2015. She said that he was in a lot more pain following that incident and he was now experiencing pain radiating down both legs into his feet and toes. He complained daily about the pain in his lower back radiating down his leg. He could not sit or stand for any significant time without pain and he was never able to return to any work shortly after being made redundant at the end of July 2015. She said that she had to undertake two jobs because of Mr Denison's inability to work and the consequent strain significantly contributed to the breakdown of the marriage.

Lee Young

32. Mr Denison also relied on the statement of Mr Lee Young dated 10 September 2018. Mr Young said that he was employed as a pump assembly scheduler with the respondent. Mr Denison had been his supervisor when he was employed in the capacity of logistics and analysis. Mr Young disclosed that he was related as he was married to Mr Denison's niece.

33. Mr Young recalled the July 2014 incident and noted that Mr Denison continued to work thereafter although he was on restricted duties initially.

34. He said about six to eight weeks following the incident, Mr Denison returned to normal duties and appeared to be managing his lower back "OK".

35. Mr Young said he could not recall Mr Denison complaining about his back again until the further incident in July 2015. He recalled a complaint made by Mr Denison that he injured his back unpacking an order for a customer on the first Friday night in July 2015.

36. Mr Young confirmed Mr Denison's evidence that on the following Monday at the daily supervisory meeting Mr Denison told the meeting that he had hurt his back and created an incident report, and that Mr McCarthy had said that it was rejected because it was part of the 2014 injury. Mr Young also recalled Mr McCarthy telling Mr Denison that he should see "Natalie". Mr Young said that Mr Denison was made redundant at the end of the month and that he was at the time complaining of having a lot of pain in the lower back following the July 2015 incident. He said he remains in regular contact with Mr Denison, who continues to complain about the severe pain in his lower back and how restricted he was physically by it.

[7] ARD page 19
[8] ARD page 21

37. Mr Young recalled particularly that following the July 2014 incident Mr Denison moved house and that in the process Mr Denison was able to share the lifting and carrying activity thereby involved. He said that following the July 2015 incident he helped Mr Denison move his household items from his new address to storage because he had to return to live with his parents due to his inability to find work.

38. At that time Mr Denison could only instruct and supervise the removal of his items, he being unable to physically assist. Mr Young said that Mr Denison was far more restricted and in far more pain than before the July 2015 incident.

Respondent evidence

39. The respondent investigated the allegations made by Mr Denison. Three factual reports were lodged by ProCare Investigations dated 27 September 2017, 3 November 2017 and 5 December 2017.

40. Statements were obtained from Mr Daniel McCarthy of 27 September 2017, Mr Daniel Newman of 18 October 2017, Mr Benjamin Arscott dated 27 October 2017, Vincent Chaplin of 1 November 2017 and 28 November 2017. Amongst the documents produced by ProCare on 3 November 2017 were those relating to a grievance made by Mr Denison against Mr McCarthy dated 12 May 2015[9].

41. The outcome was decided by Mr Arscott on 2 June 2015 in Mr McCarthy's favour.

Daniel Scott McCarthy

42. Mr McCarthy was National Manager, Warehouse Distribution. In his statement of 27 September 2017[10] he confirmed that Mr Denison's role was supervisory, involving a mixture of administration and physical tasks. Mr McCarthy thought the balance was 70% physical and 30% administrative.

43. The physical component was said to be to demonstrate how to perform a function, walk around and inspect various areas of the shop, engage with stakeholders across the Department and outside, requiring him to walk to those locations. He was involved in parts identification but not in any aspect of the manufacturing side of the business in the two years Mr McCarthy was working there[11].

44. Mr McCarthy raised a number of performance issues with Mr Denison. He stated that he found Mr Denison being an "unhealthy" person. He was a smoker, appeared overweight and struggled when he walked. Mr McCarthy referred to the complaint made by Mr Denison against him of harassment. He said he was vindicated "but the five week process was not pleasant".

45. He said that Mr Denison applied for his role earlier in about February 2014. Mr McCarthy thought that Mr Denison was unhappy about not being successful, and Mr McCarthy said he found Mr Denison to be a "fairly cynical person"[12]. Mr Denison was "always talking about drinking beer".

46. Mr McCarthy then referred to the redundancies that were put into effect in July 2015. He said that "we" informed the staff that there were likely to be redundancies and that "we" spoke to "everyone at first and then to the affected individuals separately."

[9] Reply page 112
[10] Reply page 29
[11] Reply page 31
[12] Reply page 33

47. Mr McCarthy said at [43][13]

> "43. The Claimant knew that those discussions were taking place and saw the people leaving, and knew there were still redundancies to come, and then this injury is alleged a day or so before I have the conversation with him for his redundancy. …."

48. Mr McCarthy acknowledged that Mr Denison was given the letter on 30 July 2015 stating his employment was to cease the following day. He said[14]:

> "45. However, the redundancy and his last date would have discussed with him many times prior to that date, and even at toolbox meetings as many people had discussions. ..."

49. Mr McCarthy said that Mr Denison "would have been given" information about other roles available that he could apply for.

50. Mr McCarthy then referred to the exit interview and said[15]:

> "49. I remember [Mr Denison] saying at the exit interview, 'what about my back', which was reported a day earlier to the nurse, and then reported to me. He had mentioned he had hurt his back lifting a wire basket from a shelf to a bench."

51. Mr McCarthy said further[16]:

> "I don't recall the Claimant returning to any form of 'light duties' as he alleges in his statement. His role was not overly strenuous. I recall he would experience discomfort when he would go to sit down, but not him being on light duties as he had a mainly sedentary role."

52. Mr McCarthy appeared to contradict what he had stated on paragraph 49, saying at paragraph 56:

> "With the injury the claimant alleges having sustained on 3 July 2015, I didn't know of this injury until the day of his exit interview as noted above, when he said: 'what about my back'. I didn't say anything at the time."

53. Performance appraisals for 2013 and 2014 were lodged by the respondent. The first was by manager Rod Stinson, and the second by Mr McCarthy. The 2013 appraisal was positive, showing "good results", "great effort so far", "very encouraging result", "good roll out and uptake", "good effort", "good actions"[17].

54. In contrast the appraisal carried out by Mr McCarthy for 2014 was critical, noting that Mr Denison had not achieved five out of nine goals, although Mr Denison's work was also praised in some respects.

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[13] Reply page 35
[14] Reply page 35
[15] Reply page 36
[16] At [52]
[17] Reply pages 41-42

Daniel David Newman

55. Mr Daniel Newman's statement was included in the second ProCare report of 3 November 2017. Mr Newman was Human Resources Manager who had been working for the respondent since 2012. He said that he did not get involved with workers compensation claims, which were managed by the Health & Safety Manager. He noted that Mr Denison had raised an issue that he was being bullied and harassed by Mr McCarthy at one stage, but there were no issues in relation to his actual tasks to be performed or that he required any extra training or assistance with anything[18].

56. Mr Newman was unable to assist with any relevant evidence. He spoke about the redundancy policies within the company and confirmed that Mr Denison received notice of his redundancy on 30 July 2017. He said that the mood in the work environment was not positive as a number of redundancies were occurring in 2015.

Benjamin John Arscott

57. Mr Benjamin Arscott's statement was dated 18 October 2017 and was contained in the second ProCare report. He was HR Business Partner at the relevant time.

58. At the exit interview on 30 July 2015 Mr Arscott was unable to recall Mr McCarthy saying anything at the meeting and he thought that he, Mr Arscott, had done most of the talking. He said[19]:

> "The Claimant was good at his role and I think when Mr McCarthy commenced he may have wanted the Claimant to perform at a higher level but the Claimant may not have met that expectation; they had some differences between them."

59. He said that Mr Denison may have been "unpacking boxes to assist with work or seen something to assist with. He was a very hands-on person and would jump in to help out if required."[20].

Vince Conrad Chaplin

60. Mr Vince Chaplin gave two statements; one dated 27 October 2017 and the other dated 29 November 2017.[21] Mr Chaplin was National Safety and Environment Manager. He said that the system for reporting injuries at the time of the injury was "Integrum". The reporting system at the time of his statement changed to one called "Shield" but as I understood Mr Chaplin the basic process was the same. The injured person was required to make contact with his/her supervisor and the supervisor or manager would enter the details of the injury onto the computer programme.

61. He said that only the supervisor or somebody in a higher position was able to lodge the incidents on the Shield system, as they must be trained and be approved to have their own system login access. Mr Chaplin supplied a printout of contemporaneous entries from 1 July to 31 July 2015 noting that Mr Denison's name did not appear on the list. (I interpolate to note that it has not been suggested by Mr Denison that it did appear on the list for the reasons explained in his statements).

62. In his second statement Mr Chaplin repeated his earlier statement

[18] Reply page 97[16]
[19] Reply page 107
[20] Reply page 107[30]
[21] Reply page 103 and 127 respectively

The grievance 12 May 2015 - 2 June 2015

63. The second Procare report also contained the particulars of the grievance made by Mr Denison against Mr McCarthy. The initiating document consisted of 13 dot points regarding criticism of Mr McCarthy, and it was dated 12 May 2015[22].

64. A document dated 19 May 2015 containing 49 dot points was also part of the grievance process. It had been lodged by Mr Lee Young, whose statement I have referred to above. The outcome in Mr McCarthy's favour dated 2 June 2015 was also lodged[23].

Email chain 24 July 2015

65. The third ProCare report of 5 December 2017 contained an email chain following Mr Denison's visit to Dr Treece on 24 July 2015. The first email from Mr Denison to Natalie Marcerola was dated 27 July 2015 at 9.39am. It said:[24]

> "On Friday the 24/07/2015 I had the day off to see the doctor about my back. Am I to put a personal day in for this or will it go through as work cover?"

66. Ms Marcerola replied at 11.05am, noting that the doctor had not indicated that Mr Denison was unfit, and also querying whether the certificate issued by Dr Treece was a "final" certificate, as the certificate had also indicated that approval for scans and physiotherapy had been requested.

67. Mr Denison responded to that email at 11.16am, notifying that his next appointment was on 21 August 2015.

Dr James Bodel

68. Dr James Bodel, Orthopaedic Surgeon, supplied a supplementary report following a letter of instructions being received from Mr Denison's solicitors on 5 April 2018. That letter set out the history as I found in my decision of 1278/17. Dr Bodel was asked to assume that Mr Denison returned to his pre-injury duties before the event on 3 July 2015, after which he suffered bilateral lower limb symptoms for the first time. Dr Bodel was asked to revisit his earlier opinion that 4 July 2014 was the causative incident in view of that history.

69. In his report of 10 April 2018 Dr Bodel confirmed that the history taken did show that Mr Denison was more severely affected after 3 July 2015. Dr Bodel said[25]:

> "It would therefore be my view that this gentleman had an initial insult to the lumbosacral disc in the episode on 4 July 2014 but a major external rupture of that damaged disc in the episode of injury that occurred on 3 July 2015. It is my view therefore that both the events are contributing to the overall level of impairment but the need for surgery primarily arose as a consequence of the event on 3 July 2015".

70. In his report of 28 August 2018 Dr Bodel said:[26]

> "[Mr Denison] is not currently fit for his pre-injury work. In the supervisory role only he could manage part time work but the type of supervisory work which requires hands on lifting activities is not really possible at the moment. He will need to be retrained in alternative duties."

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[22] Reply 112
[23] Reply page 118
[24] Reply page 132
[25] ALD 3 September 2019 page 5
[26] ARD page 328

Submissions

71. At the hearing on 7 February 2020 some time was lost due to the inclement weather, which cause transport difficulties to Wyong. Accordingly I directed Ms Goodman to lodge written submissions, which were duly provided.

Ms Goodman: oral submissions

72. Ms Goodman also made brief oral submissions which she expanded on in her written submissions. In her oral submissions Ms Goodman referred to the section 74 notice and the grounds therein set out for the denial of Mr Denison's fresh claim of injury on 3 July 2015. She submitted that at the time of his redundancy, Mr Denison had been certified by Dr Treece to be fit for pre-injury duties at pre-injury hours. Accordingly she submitted Mr Denison had not shown that the alleged injury had caused any incapacity in any event. Ms Goodman reserved her position thereafter pending the written submissions.

Mr Baker

73. Mr Baker submitted that the argument advanced as to capacity by Ms Goodman was "tortured". He conceded that the certificates from Dr Treece did certify that Mr Denison was fully fit for his pre-injury duties. However, he submitted that the pre-injury duties were, as I had already found in my earlier decision, mainly of a supervisory nature which required some strenuous physical work.

74. Mr Baker referred Mr Denison's attempt to work with Northline Pty Ltd, which was of a more physical nature. He submitted that the evidence established that the sequellae to the 3 July 2015 injury was instrumental in causing significant restrictions that caused incapacity.

75. Mr Baker referred to the contents of the WorkCover certificates issued by Dr Treece after 24 July 2015. Whilst Dr Treece certified that Mr Denison was fit for working five days a week eight hours a day, but with restrictions, she did so within the description of Mr Denison's duties whilst he was working as a supervisor for the respondent. Mr Baker submitted that the certification was unreliable when it was made in ignorance of the fact that Mr Denison had not worked in that capacity since 31 July 2015. These certificates were issued periodically until January 2016.

76. Mr Baker submitted that Dr Treece did not appear to be too concerned about history or causation in the entries she made to her WorkCover certificates and within her clinical notes.

Ms Goodman: written submissions

77. In Ms Goodman's written submissions she referred to the respondent's witnesses statements, stating that none of them were aware that Mr Denison had suffered an injury on 3 July 2015. Ms Goodman acknowledged that there was some support from Mr Young, but that I should approach Mr Young's statement with some caution.

78. Ms Goodman then referred me to a number of clinical notes entered by Dr Treece in furtherance of a submission that the contemporaneous medical evidence did not support the concept that there had been a fresh injury on 3 July 2015. I interpolate to observe that this was hardly surprising, as it was the basis of my determination in 1278/17. The clinical notes included the entry of 24 July 2015. Ms Goodman submitted that Dr Treece found no loss of power in the arm or legs and no radiation into the legs or paraesthesia. Ms Goodman submitted further that the letter "n" appearing in that note indicated "normal" in relation to straight leg raising, upper and lower reflexes and sensation to light touch.

79. I was referred to various entries in which Dr Treece ascribed the symptoms complained of to the event in July 2014. Ms Goodman submitted that Dr Treece never took any history of an incident on 3 July 2015. I was referred to the WorkCover certificate of 24 July 2015 which spoke of "reopen case" and that it certified Mr Denison as being fit for full duties. Ms Goodman made reference to any entry in which Dr Treece ascribed the applicant's current condition as being caused by the 4 July 2014 injury.

80. Ms Goodman referred to an opinion by Dr Marc Coughlan dated 30 October 2015 that was based on a history of an injury in 2014 and which recommended the surgery the subject of these proceedings, a right L4/5 microdiscectomy. I was referred to Dr Treece's clinical notes of 30 July 2015, 17 August 2015, 21 August 2015 and 21 September 2015. These, it was said, did not record any complaint of leg pain. It followed, Ms Goodman argued, that any leg pain must have come on after the applicant had left the employ of the respondent and before he saw Dr Coughlan in October 2015. It was suggested that Mr Denison might have further injured himself whilst working for Northline Pty Ltd, or indeed whilst moving his house.

81. Submissions were made as to the various impressions of medical practitioners who saw the MRI scan of 17 August 2015. Reference was made to Dr Bodel's report of 27 May 2016 when Dr Bodel, although taking a history of injury on 3 July 2015, ascribed the cause of the pathology revealed on the MRI to the 2014 incident. Ms Goodman referred to Dr Bodel's later report of 28 August 2018, which she submitted should be given no weight as he took an incorrect history regarding the onset of the radiating leg pain.

82. Ms Goodman also made reference to the reports of Dr Coroneos. However no further reports were lodged in that regard, and I considered his reports in my earlier decision.

83. Ms Goodman submitted that it was necessary to exercise a great deal of caution in considering the statements made by Mr Denison at various times during the currency of these actions. They were made many years after the event. Mr Denison may have been unconsciously reconstructing events, making his recollection unreliable.

84. Ms Goodman then considered the question of capacity for work. The starting point was that Mr Denison had been certified at all times since his redundancy as having a capacity to return to full-time work. Ms Goodman noted that between the date of injury 3 July 2015 and 31 July 2015 Mr Denison had taken only one day off work, 24 July 2015. Dr Treece in the certificate issued on that date certified Mr Denison to be fully fit, which certification was not altered before his redundancy. Ms Goodman submitted that had it not been for redundancy Mr Denison would likely have continued to work for the respondent.

85. I was referred to the statement of Mr Newman regarding the processes used to make the respondent's workers redundant. I would accept as a result, it was submitted, that Mr Denison "would have been" aware that others were to be made redundant, although Ms Goodman conceded that Mr Denison might not have appreciated that he was in that category.

86. Ms Goodman referred to Mr Denison's subsequent employment with Northline Pty Ltd. Ms Goodman submitted that although Mr Denison said he only worked for about a week because it was too heavy, there was no evidence to substantiate that he actually did that work. There were no payslips no PAYG summary, and no details as to the hours worked for payment received. Mr Denison's statement of 28 February 2017 could not be relied on, she submitted. I again interpolate to observe that the absence of further evidence regarding Mr Denison's short employment with Northline Pty Ltd is also hardly surprising, as I had already found in matter 1278/17 that such work occurred.

87. I was referred to *Hume Nursing Home v Dewar* in the context of assessing Mr Denison's capacity, post -employment. I was referred to Dr Bodel's opinion of 19 December 2016 that Mr Denison could manage part-time work in a supervisory role, but not doing any lifting.

88. Finally, Ms Goodman submitted that the request for surgery the subject of the current application was now four years old, although she conceded that Dr Marc Coughlan had provided a further report of 12 April 2019 confirming that the surgery was still indicated. This report, it was submitted, should be given no weight as it was not based on an examination of Mr Denison nor had any recent investigations being carried out.

89. As for the alleged failure by Mr Denison to give a notice of claim, it was submitted that there was no evidence as to why no claim had been made until 16 August 2017. I would observe in passing that it was no coincidence that a claim was made in August 2017, given that my determination had been handed down on 17 July 2017, which decision rejected the applicant's original allegation of injury on 4 July 2014. I infer that Notice was given as soon as possible following my decision, which was strongly in favour of a finding that 3 July 2015 was the date of injury.

DISCUSSION

90. The emphasis by the respondent witnesses focused to a significant extent on the redundancy process, and it can be seen that underlying some of the statements was a focus on the temporal relationship between the occurrence of the injury and the redundancy. This appeared to the respondent to be suspicious. This mistrust must also be seen in the context of the history of the personal relationship between Mr McCarthy and Mr Denison.

91. It is not in dispute that in 2014 Mr McCarthy had been chosen for the position he now holds in preference to Mr Denison's application, or that Mr Denison had made a grievance against Mr McCarthy on 19 May 2015, which was dismissed on 2 June 2015.

92. Ms Goodman urged that I must approach the evidence of Mr Denison's supporting witness, Mr Young, with some degree of caution as Mr Young is married to Mr Denison's niece, and Mr Young's statement was dated 10 September 2018, well after the events he described. I also think it prudent to bear in mind that Mr Young was also a supporter of Mr Denison in the grievance dispute with Mr McCarthy. It is clear that Mr Denison and Mr Young were well acquainted – indeed they carpooled together.

93. Ms Goodman did not refer to the evidence contained in the statement of Mr Denison's estranged wife, Kristel, who now lives in New Zealand. I would accept however that I should also be aware of the danger that her evidence might not be objective because of their shared history, notwithstanding that the marriage appears to be over.

Jones v Dunkel[27]

94. The first observation to make is that the respondent has failed to respond to the allegations contained in the statements lodged by the applicant, his estranged wife, and Mr Young.

95. I note that the ARD was lodged with the Commission on 7 August 2019, and the reply on 27 August 2019. The Procare reports upon which the respondent relied were obtained in September, November and December 2017. No attempt has been made to traverse the subsequent evidence lodged by and on behalf of the applicant. The initial attempt to paint Mr Denison's claim as being a concoction as a result of his being retrenched have been answered by specific and detailed allegations that:

    (a) Mr Dennison notified Mr McCarthy of his injury on 3 July 2015 at the time it occurred.

    (b) Mr McCarthy was "ten steps" away from where the injury happened.

    (c) Mr McCarthy asked Mr Denison to submit an injury report.

[27] (1959) 101 CLR 298

(d) Mr Denison discussed his injury the following Monday 6 July 2015 at a regular daily supervisor's meeting, at which four named employees were present;
Mr McCarthy, Mr Albert, Mr Antiko and Mr Young.

(e) At that meeting Mr Denison advised the group that his injury report had been rejected.

(f) At that meeting Mr McCarthy advised Mr Denison to see the site nurse, which he did.

96. These assertions could have been investigated by the respondent. There has been no answer from Mr McCarthy, neither did the respondent call any evidence in reply from either Mr Albert or Mr Antiko, notwithstanding that Mr McCarthy concluded his statement by indicating that he had spoken to Mr Albert.[28] No explanation has been given as to why this evidence was not obtained.

97. Mr Young has supplied a statement which confirmed the narrative given by the applicant, and it is the only corroborative evidence as to the events of 6 July 2015, when Mr Denison alleged he discussed his injury with Mr McCarthy and other supervisors.

98. In the face of this evidentiary lacuna I infer that no further evidence was lodged by the respondent because it would not have assisted the respondent, pursuant to the rule in *Jones v Dunkel*. It follows that I may place some weight on the evidence of Mr Denison, Mrs Denison and Mr Young, notwithstanding the dangers I adverted to above.

Unchallenged evidence

99. This evidence establishes that on 3 July 2015 Mr Denison suffered an injury to his back when he was unpacking a variety of "O" rings, piston rings and seals in the course of his employment. This injury was reported to Mr McCarthy, whose instruction to submit an incident report was frustrated by Mr Napiorkowski, who reopened the earlier 2014 claim instead.

100. I am satisfied that on 6 July 2015 Mr Denison advised those present, Messrs McCarthy, Albert, Antiko and Young, at their daily supervisor's meeting of his injury and the rejection of his injury report. I further find that Mr Denison then visited the site nurse, Ms Weir, as she then was, and reported his injury.

101. I accept further the evidence of Mrs Kristel Denison as to the effect of the 3 July 2015 injury. I have already found in my determination of 1278/17 that Mr Denison's back symptoms had resolved, or at least subsided following the 2014 event. Mrs Denison's evidence confirmed that finding.

102. She said that following the 2014 event her husband's condition improved to the point that he could achieve quite a high level of activity. Mr Arscott's evidence tended to confirm that Mr Denison was quite active, being a "hands on" person who would jump in to help if required. Mrs Denison's evidence of the restrictions that were caused following the 3 July 2015 injury described a different personality who was always in pain and was unable to sit or stand for long. She also corroborated Mr Denison's evidence that he was unable to work because of his injury. I accept that she had to work two jobs to make ends meet, and that the strain contributed to the breakdown of the marriage.

[28] Reply page 38

103. Mr Denison's restrictions following the injury of 3 July 2015 were also the subject of Mr Young's evidence. His relationship with Mr Denison was frankly admitted and I infer that there was a friendship between the two. However, whilst it is appropriate to approach such evidence with some caution, it does not mean that it is to be disregarded. Nothing apart from the relationship and the temporal gap between event and statement has been raised by the respondent to suggest that Mr Young's evidence cannot be relied on.

104. I find Mr Young's description of Mr Denison's contrasting physical condition between when he moved house after the 2014 injury and when he moved house after the 2015 injury to be cogent and plausible. I accept that Mr Denison appeared far more restricted following the 2015 injury. Such evidence is referrable to specific events, and the lapse of time between Mr Young's statement on 10 September 2018 and the events of 2014/ 2015 is not so remote as to make his evidence unreliable.

Credit

105. Secondly, I have some reservations about Mr McCarthy's evidence. The emails of 27 July 2015 are contemporaneous documentary material establishing that the respondent, through Ms Marcerola, was advised that Mr Denison had issues with his back. It is not unlikely that this complaint would be passed on to Mr McCarthy, and indeed on one version of his statement this had happened the day before the exit interview on 30 July 2015.

106. As I noted at the time I was considering the evidence, it does seem that Mr McCarthy had not turned his mind to that admission when, a few paragraphs later, he contradicted himself by saying that the first time he heard about a back injury sustained by Mr Denison was when he was told by Mr Denison during that exit interview. Whether he mentioned Mr Denison's back problem first as alleged by Mr Denison or whether Mr Denison mentioned it is immaterial in the light of that admission.

107. Further, I note Mr McCarthy's evidence that it would be difficult to pinpoint the people present at the exact location of the injury. Mr Denison said he reported the injury immediately to Mr McCarthy himself, and that it was 10 steps from Mr McCarthy's office. Moreover the people who witnessed the interchange about the occurrence of the injury and the explanation as to the rejection of the injury notice were identified by Mr Denison and Mr Young in their statements of 22 August 2018 and 10 September 2018. This evidence was not contradicted.

108. I also noted the gratuitous observations volunteered by Mr McCarthy as to Mr Denison's hobbies and appearance. They were as unnecessary as they were pejorative, and demonstrated a personal animus that may have affected the objectivity of his recall. I have already described the personality clashes that were evident, and I note that Mr Arscott observed that the two "had some differences between them."

Missing respondent witnesses

109. Mrs Marcerola was asked specific questions as to her involvement in the enquiry made of her by Mr Denison's solicitors. Her curt response did not assist either party, and it did not assist the Commission. Mr Napiorkowski did not respond to the solicitor's letter. Both letters are proof that Mr Denison did what he could to obtain evidence from these named witnesses, and accordingly constitute an acceptable explanation for their absence. I do not draw any *Jones v Dunkel* inference accordingly.

Notice and claim

110. As to the denial of liability because notice of injury and notice of claim had not complied with ss 260 and 261 or s 254 of the 1998 Act, I reject both allegations for the following reasons.

111. Section 254 of the 1998 Act provides relevantly:

> "(1) Neither compensation nor work injury damages are recoverable by an injured worker unless notice of the injury is given to the employer as soon as possible after the injury happened and before the worker has voluntarily left the employment in which the worker was at the time of the injury.
>
> (2) The failure to give notice of injury as required by this section (or any defect or inaccuracy in a notice of injury) is not a bar to the recovery of compensation or work injury damages if in proceedings to recover the compensation or damages it is found that there are special circumstances as provided by this section.
>
> (3) Each of the following constitutes special circumstances-
>
> > (a) the person against whom the proceedings are taken has not been prejudiced in respect of the proceedings by the failure to give notice of injury or by the defect or inaccuracy in the notice,
> > (b) the failure to give notice of injury, or the defect or inaccuracy in the notice, was occasioned by ignorance, mistake, absence from the State or other reasonable cause,
> > (c) the person against whom the proceedings are taken had knowledge of the injury from any source at or about the time when the injury happened,
> > (d) …
> > (e) …
> > (f) …
> > (g) …"

112. In the first place, these grounds were not raised in matter 1278/17. The issues canvassed in that case concerned whether the injury had occurred on 4 July 2014, and the denial notice, issued pursuant to s 74, relied on the fact that no radiological investigations were carried out until after Mr Denison complained on 24 July 2015 to Dr Treece, who then "re-opened" the claim. The notice spoke of a "flare-up" of symptoms, which involved the right leg, whereas the complaints about the 2014 injury (which were not made until September 2014) recorded complaints about the left leg. Notice of injury and claim were not relevant, as they had been duly made.

113. Secondly, the authors of both the s 74 notice and the reply in matter 1278/17 were aware that there had been a further incident on 3 July 2015, as Dr Bodel specifically mentioned it in his report of 19 December 2016. The applicant also mentioned the 3 July 2015 incident in his statement of 28 February 2017. No prejudice to the respondent has been shown as a result, and indeed matter 1278/17 was defended upon the precise issue that is now before me: it was the 3 July 2015 date that was the cause of Mr Denison's present condition.

114. I am accordingly satisfied that "special circumstances" existed in that no prejudice has been occasioned to the respondent. The result of my determination in matter 1278/17 was that the applicant failed not because he did not have an injury, but because it occurred on another date. Dr Bodel (originally) and Dr Treece thought the event that caused the "flare up" was the injury of 4 July 2014, but as a matter of law, I determined the "flare up" event, which I found occurred on 3 July 2015, was a fresh injury.

115. In that the failure to specify the date 3 July 2015 was a defect or inaccuracy in the notice I find that Mr Denison had reasonable cause. It was my decision in 1278/17 that alerted both applicant and respondent of the inaccuracy of the accepted notice of injury.

116. I am also satisfied that the persons against whom the proceedings were taken had knowledge of the injury at or about the time when the injury happened. The source was Mrs Marcerola, the site nurse. It is common ground that the email chain dated 27 July 2015 demonstrated that she had received a WorkCover certificate, and on enquiry as to its contents, learnt that further investigations were planned for August. As indicated, I am satisfied that Mr McCarthy was also told at the supervisors' meeting of 6 July 2015 of Mr Denison's back injury, and that Mr Napiorkowski had rejected the incident report. I am satisfied that Mr McCarthy was also made aware by Mrs Marcerola on 29 July 2015 of Mr Denison's recent back complaints.

117. Section 260 of the 1998 Act provides relevantly:

> "(1) A claim must be made in accordance with the applicable requirements of the Workers Compensation Guidelines.
> (2) …..
> (3) ……
> (4) …….
>
> (5) The failure to make a claim as required by this section is not a bar to the recovery of compensation or work injury damages if it is found that the failure was occasioned by ignorance, mistake or other reasonable cause or because of a minor defect in form or style.
>
> (6) ….
>
> (7) …"

118. For the same reasons I have just discussed regarding the provisions of s 254, I am satisfied that the failure to make a claim in accordance with the guidelines was occasioned by the reasonable cause of the determination in matter no: 1278/17. The issue raised for consideration was that the applicant had not met his onus, and I upheld that argument on the basis that the evidence demonstrated that event of 3 July 2015 was more probably the injury responsible for Mr Denison's present condition.

119. Accordingly, the denial of liability based on ss 254 and 260 of the 1998 Act is rejected.

Contemporaneous clinical material

120. Ms Goodman relied upon the evidence contained in the clinical notes and WorkCover certificates issued by Mr Denison's GP, Dr Treece, and other material from the physiotherapist. Ironically, having argued that such evidence should not be accepted in matter no: 1278/17, Ms Goodman has taken the opposite tack in the present proceedings.

121. In matter no: 1278/17 I referred to *Mason v Demasi*[29] and *Qannadian v Barter Enterprises Pty Ltd*[30] and the necessity to approach apparent inconsistencies appearing within clinical records with caution. Leaving aside the question of issue estoppel in the present case, I expressed my reasons for not accepting the content of Dr Treece's notes and certificates in matter 1278/17.

122. Dr Treece was not a practitioner who concerned herself with issues of causation or history. Her focus was to treat her patient for the symptoms he presented with. As to matters of history and causation, she made assumptions as to Mr Denison's situation which were not correct. She was unaware that Mr Denison had worked at Northline Pty Ltd, and although she noted in some entries that Mr Denison had been retrenched on 31 July 2015, she nonetheless expressed surprise in her entry of 21 January 2016 that Mr Denison had lost his

[29] [2009] NSWCA 227
[30] [2016] NSW WCC PD 50

job in August 2015. I infer that she thought he had continued to work with the respondent until that time, doing the duties he had previously been doing.

123. The entries in both the WorkCover medical certificates and the clinical notes made by Dr Treece demonstrate a belief held by her that the July 2014 injury was the cause of the complaints made to her on 24 July 2015. I discussed this note in my earlier decision, noting that notwithstanding the contents of the clinical note of that date, the WorkCover medical certificate issued on the same day was headed "reopen case" and reported new pain in the neck radiating to the right upper arm with paraesthesia. I also noted at [76] that the entry demonstrated that there had been an increase in severity of back pain some three weeks earlier, which was consistent with Mr Denison's statement that an event happened on 3 July 2015.

124. Putting Ms Goodman's submissions at their highest in this respect, the inferences she seeks to draw from Dr Treece's often expressed view that the 2014 injury was the cause of Mr Denison's condition, are again rejected, as they were in matter no: 1278/17. Although, because of the interrupted nature of the hearing itself, Mr Baker did not make submissions in reply, the submissions regarding the contemporaneous material from medical practitioners had already been ruled on, and Ms Goodman's submissions on this subject are estopped in any event. If I am wrong in that finding, they are rejected for the reasons I have just considered.

Capacity

125. With regard to capacity, Ms Goodman also relied on the series of certificates issued by Dr Treece. On 24 July 2015 Dr Treece certified Mr Denison to be fully fit for work. The next certificate was dated 21 August 2015, and certificates within issued through to 21 January 2016 which found Mr Denison fit to work for eight hours per day, five days a week with a restriction on lifting of 10 kg, with no bending twisting or squatting. Sitting and standing tolerances were limited by a requirement to alternate, and no pushing or pulling over a 10 kg weight was advised.

126. These restrictions were appropriate to Mr Denison's job description as a supervisor with the respondent. The clinical note entered by Dr Treece in January 2016 expressed ignorance that Mr Denison had lost his job in August 2015.[31] She did not make any note of Mr Denison's employment at Northline Pty Ltd which I found in my determination of 1278/17 to have occurred for a week in August 2015. The continual certification that he was fit for eight hours a day five days a week from 24 July 2015 to 21 January 2016 does not reflect the extent of the difficulties experienced by Mr Denison following the subject injury. In his statement of 28 February 2017 Mr Denison said that he was totally incapacitated and unable to do any work. The situation has not altered down the years since that statement was made has been evidenced by Mr Young and Mrs Denison.

127. Dr Bodel found that Mr Denison was not fit for his pre-injury work as a supervisor, as he could not undertake hands on lifting activity. That Mr Denison's pre-injury duties involved physical labour was confirmed by Mr Mcarthy, who said that Mr Denison's role was "70% physical and 30% administrative." Although not described by Mr McCarhy as "overly strenuous," he did note that Mr Denison would have to sit down when he experienced discomfort, from which statement I infer that Mr Denison was suffering from spinal symptoms from time to time, as there is no suggestion of any other cause whilst employed by the respondent. I note further Mr Arscott's evidence that Mr Denison was a "hands-on person and would jump in to help out if required."

[31] ARD page 51.

128. Section 32A of the *Workers Compensation Act* 1987 (the 1987 Act) provides relevantly:

> **"'suitable employment'** , in relation to a worker, means employment in work for which the worker is currently suited -
>
> (a) having regard to -
> (i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and
> (ii) the worker's age, education, skills and work experience, and
> (iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and
> (iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and
> (v) such other matters as the Workers Compensation Guidelines may specify, and
>
> (b) regardless of-
> (i) whether the work or the employment is available, and
> (ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and
> (iii) the nature of the worker's pre-injury employment, and
> (iv) the worker's place of residence."

129. I was referred to *Wollongong Nursing Home Pty Ltd v Dewar* [32] regarding Mr Denison's capacity for employment post redundancy. The terms of s 32A must be strictly applied, DP Roche said in that case. Particularly, the availability of suitable work on the open labour market was no longer a relevant consideration.

130. I regard the opinions given by Dr Treece as to Mr Denison's capacity to work with some askance. I do not accept her opinion as to Mr Denison's capacity for the reasons I have adverted to above.

131. Mr Denison listed his symptoms in his statement of 15 February 2018:[33]

> "I presently suffer the following ongoing symptoms with respect to my lower back:
> (a) Constant pain and stiffness;
> (b) Aggravation of pain when sitting for extended periods;
> (c) Aggravation of pain when walking for extended periods;
> (d) Aggravation of pain when standing for extended periods;
> (e) Inability to carry out activities involving repetitive lifting, bending or twisting;
> (f) Inability to sit for prolonged periods due to the aggravation referred to above which interferes with my ability to do any sedentary type work or work involving extended driving;
> (g) Difficulty ascending and descending stairs;
> (h) Aggravation of pain when walking on uneven ground;
> (i) Shooting pain from my lower back down both legs into my feet and big toes;
> (j) Pins and needles and numbness sensation radiating from my lower back down both my legs into my feet and into my toes;

[32] [2014] NSWWCCPD 55 (incorrectly cited as *Hume Nursing Home v Dewar*).
[33] ARD pages 14/15

(k) Inability to run;
(l) Development of a limp if required to walk for long periods;
(m) Significantly reduced physical conditioning and endurance;
(n) Inability to carry out normal household chores such as lawn mowing, cleaning gutters and the heavier household maintenance;
(o) Aggravation of symptoms when attempting !to carry out less strenuous activities of household chores such as washing up;
(p) Insomnia due to pain;
(q) Reliance on pain relief medication specifically, Lyrica, which I am required to take one tablet in the morning and two tablets at night;
(r) Depression due to significant impact my injuries have had on my ability to lead a normal life;
(s) Frustration and anxiety;
(t) Inability to concentration due to constantly being in pain and sleep deprivation due to pain."

132. In his further statement of 19 June 2019 Mr Denison said:[34]

> "I continue to suffer the same symptoms and disabilities referred to in paragraph 2 of my statement dated 15 February 2018 in relation to my lower back with the exception that I take Lyrica 1 tablet in the morning and 1 tablet at night now."

133. I put aside Mr Denison's reference to the psychological issues he described of depression and anxiety, as no evidence has been lodged in that regard.

134. However, I have accepted Mr Denison's evidence as to the circumstances of the injury, and the investigations have demonstrated a condition within his lumbosacral spine of some significance.

135. The fact that Mr Denison remained on his full duties as a supervisor following his appointment with Dr Treece on 24 July 2015 does not in my view equate to an inference that he was not suffering symptoms. Indeed the medical certificate issued on that date ("reopen case..same pain T12-L5 … new pain reported in neck") and the fact that Dr Treece ordered radiological investigations for the following month indicated that she was concerned that Mr Denison had sustained a more serious injury than that of July 2014. Dr Treece did not regard the 2014 injury as being serious enough to order such investigations, but her consultation on 24 July 2015 revealed complaints that were sufficiently serious to warrant such a step.

136. The investigations were carried out on 17 August 2017. In his report of 16 December 2016, Dr Bodel reproduced the investigation results:[35]

> "17.08.2015: MRI scan of the lumbosacral spine: There is a right-sided disc prolapse at the L4/5 level
>
> 17.08.2015: MRI of the cervical spine: There is some minor central bulging at C6/7 but no spinal cord or nerve root compromise."

[34] ARD page 19
[35] ARD page 327

137. When asked to make assumptions on the basis of my decision in matter 1278/17, Dr Bodel accepted that the event of 3 July 2015 had caused a "major" rupture of the lumbosacral disc, originally injured on the 2014 event, which in turn has necessitated the surgery recommended by Dr Coughlan. I accept that opinion. As I noted in my earlier decision, had that opinion been before me then, the missing causative link might well have been established, as material contribution would have become relevant. In any event Dr Bodel's revised opinion makes it clear that the episode of 3 July 2015 caused a major rupture of Mr Denison's lumbosacral spine.

138. I accept that his opinion also supports Dr Coughlan's opinion. I found in my determination of 1278/17 that Dr Coughlan had found a diminished right ankle jerk when he first examined Mr Denison in September 2015. It is nothing to the point to refer to the fact that the first request for approval was made in October 2015, as Dr Coughlan revisited his opinion on 12 April 2019, and Dr Bodel, who saw the applicant in May 2016 revisited his opinion on 28 August 2018. Both continued to recommend surgery. Neither expressed any need for a further consultation with Mr Denison. Dr Coughlan's diagnosis was clear, and Mr Denison, as Mr Denison said himself, was "on hold" until he came to the recommended surgery.

139. The nature of Mr Denison's incapacity from a medical perspective as required by s 32A(a)(i) I find to establish a limited ability to earn. I was not assisted by the certificates of incapacity, as I have indicated above.

140. Mr Denison is now 47 years of age. His education has been limited. He left school after year 12, and his tertiary education consists of the completion of a Diploma in Management. He had been fully employed all his working life, and that employment has consisted of physical work in the form of labouring and machine operating, until, after joining the respondent in 1999 he progressed to become a supervisor where his manager described his duties as being 70% physical. Whilst some of that physical work was light, he was required to do physical work, as indeed both back injuries of 4 July 2014 and 3 July 2015 demonstrate.

141. I accept Dr Bodel's opinion that Mr Denison is fit for part time work in a supervisory position that did not require any physical hands-on lifting activity. His lack of treatment and deconditioning by being out of work now for almost five years make it difficult to see how he could manage more than three days per week for five hours a day. I agree with Dr Bodel that Mr Denison will need to be retrained. However, before that can be contemplated, his proposed surgical treatment has to be undertaken.

142. In all the circumstances I find that Mr Denison is capable of earning $30 per hour for 15 hours per week. The pre-injury average weekly earnings (PIAWE) of Mr Denison was claimed at $1,787.62, which claim was not challenged. I note that the claim for weekly compensation purported to include a period of entitlement pursuant to s 38 of the 1987 Act, however no such entitlement has been established.

Proposed surgery

143. I am satisfied that the recommended surgery is reasonably necessary. Indeed no submissions have suggested that it is not, apart from Ms Goodman's objection that Dr Coughlan has not seen Mr Denison since 2015, which I have rejected above. There is no evidence before me that the surgery is not reasonably necessary.

144. I find that the applicant suffered injury on 3 July 2015 to his lumbar spine whilst in the course of his employment with the respondent. I find that he has been incapacitated thereby, and that it is reasonably necessary that he undergo spinal surgery as proposed by Dr Marc Coughlan in his reports of 30 October 2015 and 12 April 2019.

SUMMARY

145. The respondent will pay to the applicant weekly payments as follows:

    (a) From 1 August 2015 to 31 October 2015 at $1,248.23 pursuant to s 36;
    (b) From 1 November 2015 to 29 April 2018 at $980.10 pursuant to s 37.

146. The respondent will pay the costs of and associated with the right L4/5 microdiscectomy recommended by Dr Marc Coughlan on 30 October 2015.