

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 986/20
Applicant: Hassan Haddad
Respondent: Ali Baba Lebanese Cuisine Pty Ltd
Date of Determination: 16 June 2020
Citation: [2020] NSWCC 200

The Commission determines:

1. The applicant sustained injury to his cervical spine and lumbar spine as a result of the nature and conditions of his employment with the respondent between October 2013 and 28 February 2014 pursuant to s 4(b) of the *Workers Compensation Act 1987*.
2. The applicant has not discharged the onus of establishing "injury" to his right shoulder as a result of the nature and conditions of his employment with the respondent between October 2013 and 28 February 2014.

The Commissions orders:

1. The matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for assessment as follows:
 - Date of injury: 28 February 2014 (deemed)
 - Body parts: Cervical spine
Lumbar spine
 - Method: Whole Person Impairment
2. The materials to be referred to the AMS are to include the Application to Resolve a Dispute and all attachments and the Reply and all attachments, together with this certificate of determination and statement of reasons.
3. The matter requires a face to face examination and should be placed on the Medical Assessment Pending List.
4. The matter to be listed for further teleconference upon receipt of the Medical Assessment Certificate to deal with the applicant's entitlement to weekly benefits.

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

Rachel Homan
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 RACHEL HOMAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Mr Hassan Haddad (the applicant) was employed by Ali Baba Lebanese Cuisine Pty Ltd (the respondent) between October 2013 and 28 February 2014. The applicant claims that as a result of the nature and conditions of his employment with the respondent he sustained an injury to his lumbar spine, cervical spine and right shoulder.
2. The applicant made a claim for compensation on 17 June 2014. The respondent declined liability for the injury by a notice issued pursuant to former s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) dated 23 December 2014. That decision was maintained in further dispute notices issued on 17 November 2016 and 20 May 2019.
3. The present proceedings were commenced by an Application to Resolve a Dispute (ARD) filed in the Commission on 24 February 2020. The applicant seeks weekly compensation for 130 weeks from 28 February 2014 and lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act).

ISSUES FOR DETERMINATION

4. The parties agree that the following issues remain in dispute:
 - (a) whether the applicant sustained an injury to his lumbar spine, cervical spine and right shoulder as a result of the nature and conditions of his employment with the respondent pursuant to s 4 of the 1987 Act;
 - (b) the extent and quantification of any incapacity resulting from the injury, including the applicable Pre-Injury Average Weekly Earnings (PIAWE) figure, and
 - (c) the degree of permanent impairment resulting from injury and quantum of any entitlement to lump sum compensation pursuant to s 66 of the 1987 Act.

PROCEDURE BEFORE THE COMMISSION

5. The parties appeared for conciliation conference and arbitration hearing on 18 May 2020. The applicant was represented by Mr William Carney or counsel, instructed by Ms Anna Tavianatos. The respondent was represented by Mr Paul Stockley of counsel, instructed by Mr Christopher Michael. A representative from the insurer, Mr Nick Rafferty, was also present during the conciliation conference.
6. 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, and
 - (b) Reply and attached documents.
8. Neither party applied to adduce oral evidence or cross-examine any witness.

Applicant's evidence

9. The applicant's evidence is set out in written statements made by him on 10 October 2014 and 12 November 2019.
10. In the first statement, the applicant gave evidence that he completed Year 12 of high school in Campbelltown then attended the Australian Careers Business College at Liverpool. He also commenced studies towards a Bachelor of Policing at university. The applicant had held a number of jobs prior to commencing employment with the respondent as a Picker/Packer.
11. The applicant's duties as a Picker/Packer included processing, packaging, labouring and general duties as required around the warehouse. The applicant was mainly working in the meat section but would sometimes move to other sections during the day. The applicant's duties included lifting tubs of meat, some of which weighed 80-100 kg. The applicant had to load and lift the tubs by himself.
12. The applicant was employed to work between 8.00 am and 4.00 pm but sometimes completed 12 to 13 hour shifts. The applicant was earning approximately \$20 per hour.
13. The applicant stated that work began to get busy towards the end of November and start of December 2013. More orders were placed and the volume of meats became three to four times greater. When the applicant first started employment with the respondent, he was processing about 500 to 600 kg of meat but that increased to about 1.8 tonnes in November and December. On a Thursday and Friday, the applicant put about four tonnes of chicken into a machine. The applicant had to lift each bag of chicken up to about shoulder height to pour into the machine. Each bag would weigh about 20 kg. During this period, the applicant began to feel issues in his lower back, shoulders and neck at night time.
14. The applicant worked over the Christmas 2013 period. The applicant complained to his supervisor about needing another person to give him a hand as the work was getting too hard and his back was getting sore. The supervisor would just say that he had a sore back too.
15. The applicant said he recalled reporting his sore back to another supervisor named Robert after the Christmas period. On one occasion when the applicant complained to Robert about his sore back, he sent a new worker to help the applicant. The applicant was able to work for about 15 minutes more before going home because of the pain in his lower back and shoulders. When the applicant went home, he rested and the following day went back to work as normal. The applicant had a little bit of pain but worked through it. The applicant did not complain because he thought he would get the sack and needed the job.

16. The applicant took a period of about one and a half weeks off work in January 2014 for family reasons. When the applicant returned to work, an electronic pallet jack had broken down. Everything had to be pushed with a manual pallet jack. The applicant had to move meat manually with the pallet jack. The meat weighed in excess of 800 kg. While pushing meat with the manual pallet jack, the applicant felt pain in his back and neck. The applicant asked when the electronic jack was getting fixed but the respondent did not want to pay for it.
17. The applicant was getting a sore back and neck pushing and lifting. Sometimes the floor was a bit frozen and the jack would hit the floor and jar the applicant, causing pain in his back and shoulders.
18. When meat got stuck in a machine, the applicant was told to go up a ladder to pull the meat out. In order to empty the rubbish, the applicant had to push the manual pallet jack all around the outside of the warehouse.
19. About a week prior to the applicant's last day of work, he went to see Robert and told him what was going on. Robert told the applicant to take time off. The applicant returned to work on a Monday. The applicant had a bit of back pain and told his supervisor that he did not want to continue with this type of work. The applicant thought he might have been moved to another task in the warehouse. The applicant was sent to the cool room to make boxes. After a while, Robert came in and was angry because the work that day was not getting done. He said the applicant was letting him down. By this time the applicant had had enough and left. This was the applicant's last day of work.
20. After ceasing work for the respondent, the applicant looked for work in other fields. Over time, his back started to get worse. The applicant's pain was in his lower back and the middle of his neck and shoulders and would prevent him from doing his normal day-to-day tasks. The applicant tried to manage the pain through rest. The pain then became much worse. On some days, the applicant was not able to get out of bed. The applicant was managing the pain with prescribed medication.
21. The applicant said that because of his pain, he had trouble doing simple things like going to the toilet, standing too long, driving a motor vehicle and walking. The applicant was not able to run, mow the lawn or pick up his sister's children.
22. The applicant stated that he had previously injured his right knee at work but was not sure whether it was reported under workers compensation.
23. In his supplementary statement, the applicant said he remained off work due to his injuries and was in receipt of Centrelink payments.
24. The applicant said he was under the care of Dr Abraszko. Dr Abraszko had advised the applicant not to proceed with surgery but had suggested a stimulator may assist.
25. The applicant said he continued to have constant pain in his back and experienced difficulty walking long distances. The applicant said he was not able to return to any form of work and was reliant on medication for pain relief. The applicant's symptoms included radiating pain into his legs, intermittent paraesthesia, restricted ability to stand, walk, lift, bend, twist, reach and drive and no ability to lift or carry heavy objects or carry out heavy manual or repetitive tasks.
26. The applicant said that on many days he was not even able to get out of bed due to his significant pain. The applicant said he would be totally unreliable to any employer.

Ms Hadayat (Heidi) Haddad

27. The applicant's sister, Ms Hadayat (Heidi) Haddad, prepared a written statement on 22 February 2017.
28. Ms Haddad said that the applicant was previously a very fit, energetic and healthy man. The applicant played sport and participated in recreational activities including swimming and attending a gym to train on cardio machines. The applicant helped their parents around the house including, the gardening, vacuuming and mopping tiles. Ms Haddad said she did not recall the applicant having any issues with his lower back, neck or shoulders prior to starting work with the respondent.
29. Ms Haddad said the applicant would often complain to her about the work conditions at the respondent's premises. The applicant said he was lifting up to 20 kg of chicken into a meat processor and putting about three to four tonne of chicken into a marinater. For the most, he had no assistance.
30. Ms Haddad said she recalled the applicant complaining about the amount of work he had to do in around November and December 2013. The applicant said there was more work on and deadlines to be met. The applicant also mentioned that an electronic pallet jack had broken down and he had to lift and carry everything manually on his own.
31. Ms Haddad began to notice the applicant hunching over and being slow to get up when seated. Ms Haddad was taken aback by the physical changes she observed. The applicant would often complain that he was in pain in his back, neck and shoulders. Ms Haddad thought the applicant was simply suffering from general muscular ache which would improve with rest.
32. Ms Haddad said she often drove the applicant to and from work. On one occasion, Ms Haddad saw the applicant walk out of the warehouse dragging a huge industrial tub of blood soaked cardboard and plastic packaging. The applicant dragged and lifted the tub into a skip bin. The applicant said he had to do this because the electronic pallet jack was no longer operational.
33. In February 2014, the applicant had physically deteriorated to the point that he could not continue working. Ms Haddad said she recalled seeing one of the applicant's supervisors at a festival in Liverpool sometime later. Ms Haddad recalled the supervisor asking the applicant how his back was.
34. Ms Haddad said the applicant was not able to get through his day without having to take painkillers and needed assistance from his family for the most simple day-to-day tasks like getting out of bed or going to the bathroom. The applicant was bedridden most of the day. Ms Haddad said she often saw her brother cry in agony from the pain in his lower back. The applicant was often disconsolate and had developed insomnia. The applicant had gained weight and become socially withdrawn. The injuries had a significant impact on the applicant's self-care.

Evidence from the applicant's treating practitioners

35. Clinical notes from Allcare Carnes Hill Medical Centre as at 5 March 2015 are in evidence.
36. On 17 July 2013, the notes refer to a work injury to the applicant's left knee. On 18 July 2013, the applicant was noted to have requested that the knee injury be put under WorkCover so he would be paid for the period 17 to 19 July 2013.

37. On 13 September 2013, there was a consultation recorded as follows:

“back pain- from yesterday
started on the gym recently
no radiation down the legs

work in lifting heavy boxes
O/E
musculoskeletal system- not restricted.

did not go to work because he felt sore in the back muscles and thought that it will aggravate when lifting things at work.”

38. On 7 January 2014, there was a consultation for the purpose of a “drug screen” as the applicant said his family was “suspicious he is on drugs”.

39. On 25 March 2014, the notes record:

“rusted nail went to his r face
from fence
happed at work
adt not know...”

40. On 14 April 2014, the applicant reported:

“back pain --lower -- 5 months -almost every day when lifting weights or after- days work.

--nurofen-- partial; relief.

radiates to neck---says restricted lateral flexion to left.

onset : no trauma, gradual worsening

at worst -5/10. at best --1/10.

works as a casual --lifts at work--repetitive - 20-30 kg meat- mostly on his own.

no sleep disturbances.

finds back freezes when getting up from sitting even on a chair. denies systemic symptoms of fever/ involuntary weight loss/night sweats/lumps.

Examination:

LS:

flexion severely restricted to finger tips level mid thighs

extension -severe restriction.

lateral flexion both sides ~ finger tips level mid thighs.

no spinal tenderness.

SLR- 70 BOTH SIDES.

C-Spine: all movements moderate restriction.

Actions:

Diagnostic Imaging requested: X-ray - Spine - Cervical, X-ray - Spine - Lumbo-sacral - chronic pain and stiffness---repetitive lifting at work place.”

41. The report of an x-ray of the cervical and lumbar spine dated 17 April 2014 indicates that the applicant was referred with a history of chronic pain and stiffness and repetitive lifting at workplace.

42. The report indicated there were degenerative changes noted at the right C3/4 uncovertebral joint with neural exit foraminal narrowing. At the lumbar spine there was minimal narrowing of the L5/S1 disc space but the investigation was otherwise normal.

43. On 23 April 2014, the applicant’s general practitioner noted that the applicant reported back pain for five months. It was noted that the applicant thought working had caused him to have permanent damage to his back. The x-ray results were discussed.

44. A detailed clinical note was prepared by general practitioner, Dr Tuan Bui on 10 May 2014, when it was noted:

“heavy lifting in all jobs. beyond safety limit reported to boss but was pressured to carry on when could not, quitted”

45. Dr Bui referred the applicant for a CT scan of the cervical and lumbar spine, which was performed on 14 May 2014, and was reported to show:

“There is cervical spondylosis as described with mild degenerative foraminal narrowing bilaterally and ossification of the posterior longitudinal ligament behind the C3 vertebra.

...

There are transitional vertebra at the lumbosacral junction. There is moderate to severe spinal stenosis at L5/S1 with degenerative right foraminal narrowing. There are features suggestive of sacroiliitis”

46. The applicant consulted Dr Bui again on 17 May 2014 to discuss his symptoms and pain management.

47. On 31 May 2014, Dr Bui noted a consultation regarding “WC L5/S1 disc prolapse R mass effect on nerve root 28/2/2014”. The applicant was referred for an ultrasound of the right shoulder. A WorkCover certificate of capacity was issued on this date diagnosed:

“neck pain 2 soft tissue injury, back pain 2 discs bulge, right shoulder pain 2 soft tissue injury.”

48. The injury was said to be related to work due to repetitive heavy lifting over 20 kg, alleged poor work safety procedures and demands that the applicant continue to work after the injury sustained. The certificate recorded that the applicant had been referred for neurosurgical review and had no current work capacity between 28 February 2014 and 20 June 2014.

49. On 6 June 2014, the clinical notes record the applicant was complaining of left shoulder pain in the context of working for five months in a meat company. The doctor’s examination noted “Shoulder: left, not red, not swollen, not hot, tender. pain on abduction”. A referral was given for ultrasound of the right and left shoulders.

50. An ultrasound of both shoulders was performed on 11 June 2014, the report of which commented:

“Fluid around both biceps tendons, which may indicate biceps tenosynovitis, that may just indicate shoulder joint effusions. In addition, there is evidence of supraspinatus tendonopathy on the right side.”

51. A letter of referral from physiotherapist, Mr Vuko Tomasevic, to Dr Renata Abraszko, dated 1 July 2014, indicates that the applicant had been seen three times at his clinic. A history was given as follows:

“Hassan is 23 years old, he has been experiencing high levels of constant lower back and right leg pain over the past few months. Hassan reports that his symptoms commenced while working at Alibaba, a meat production company. His job was to lift and carry meat and other products repetitively during the day, he reports that the products weighed up to 35kg. There was an incident in November 2013 where he experienced back and leg pain while lifting meat. He felt as though it was a muscle strain and did not think much, of it at the time.

His symptoms gradually got worse over the following few months, he has not been able to exercise and is not socialising with his friends due to his pain and restrictions. A CT performed on the 14th May 2014 showed moderate to severe spinal stenosis at L5-S1 with degenerative right foramina narrowing.”

52. On 22 July 2014, the applicant reported “long-standing back pain” at a general practitioner consultation. The applicant requested more Tramadol.
53. Dr Bui prepared a letter of referral to Dr Abraszko on 2 October 2014 in relation to back and neck pain, numbness and sciatica.
54. A discharge referral from Liverpool Hospital dated 19 October 2014 indicates that the applicant presented to Liverpool Hospital emergency department with an acute exacerbation of chronic lower back pain:

“gradual onset of lower back pain yesterday during the day, took prescribed analgesia denies any acute injury, pain increased in severity during the evening, couldn't sleep pain similar to previous episode, exacerbated by movement, not relieved with usual Targin, Lyrica and Endone. also reports mild lower limb weakness or paraesthesia.”

55. The applicant’s medical history was said to include:

“Chronic lower back pain for 12 months
previous work place repetitive injury (heavy lifting)”

56. Neurosurgeon and spinal surgeon, Dr Renata Abraszko prepared a report to Dr Bui on 5 November 2014. Dr Abraszko took a history as follows:

“Thank you very much for referring Hassan, a pleasant gentleman, who had a work related injury in November/December last year. He reported the injury to his supervisor, but there was never any action taken. He was doing a lot of lifting and bending. He kept working and then in February, he resigned from work because he could not do any bending or lifting. Despite that he stopped working, his pain did not get better and became more severe. The pain radiates to his both sides from the lower back. He also has a neck pain. He feels very weak.”

57. Dr Abraszko indicated that she recommended the applicant undergo MRI of the cervical and lumbar spine to clarify his diagnosis.
58. Dr Abraszko prepared a report for the applicant’s solicitors on 16 April 2015. Dr Abraszko recorded that she had seen the applicant on 21 October 2014, when she took a history as follows:

“He stopped working after February 2014, He used to work for meat producer Ali Baba Lebanese Cuisine and his work required him to perform a lot of lifting of meat trays, pulling and pushing and bending forward.

Past Medical History

He denies any previous injuries to his lumbar and cervical spine.

Medical History

Mr Haddad told me that he had a work related injury in November/December last year. Mr Haddad lifted 30 kg of meat tray and started to experience neck and low back pain. The back pain started to radiate to his right leg. He reported

the injury to his supervisors but there was never any action taken. He kept working and then in February 2014, he resigned from work because he could not do any bending or lifting. Despite that he stopped working, his neck and back pain did not get better and became more severe. He started also to experience right shoulder pain.”

59. Dr Abraszko said she had recommended the applicant undergo MRI of the cervical and lumbar spine and may benefit from conduction studies and EMG of the lower limbs. Dr Abraszko said she had not seen the applicant since 21 October 2014.
60. Dr Abraszko said her examination revealed restricted movements of the cervical and lumbar spine due to muscle spasms. Dr Abraszko considered the radiological investigations referred to above and diagnosed:

“Mr Haddad provided consistent history with radiological investigations and neurological findings. He suffered from injury to his lumbar spine - to L5/S1 disc, causing spinal stenosis and right foraminal stenosis.

He suffered from musculoskeletal injuries to his cervical spine.

He sustained injuries to his right shoulder.

The injuries are consistent with described work related incident. The employment with Ali Baba Lebanese Cuisine is a substantial contributing factor to the injuries sustained by Mr Haddad.

The injuries sustained are significant contributing factor to his ongoing complaints.”

61. With regard to the applicant’s fitness for work, Dr Abraszko said:

“Fur to his L5/S 1 disc injury he is not fit for any work which require lifting from floor to waist level, lifting more than 5 kg, repetitive bending and twisting movements of his lumbar spine. He is not fit for work which requires him to stand or sit for more than 60 minutes in one position.

The loss of capacity for such a work remains for life.”

Dr Habib

62. The applicant relies on medicolegal reports prepared by orthopaedic consultant, Dr Sheikh M Habib, dated 26 September 2016 and 7 February 2019.
63. In his first report, Dr Habib took a history of the applicant’s employment duties as involving heavy and repetitive work including moving/pushing/pulling tubs of various quality meats and fats weighing up to 80 to 100 kg. The applicant had to move the tubs by himself and pour small tub contents into large tubs. Towards Christmas 2013, the applicant’s workload increased resulting in him developing neck, back and shoulder pain. The applicant continued to work but by 28 February 2014 he was not able to persevere.
64. Dr Habib reported that on return from a short break in January 2014, the applicant had to move a very heavy tub weighing 800 kg with the help of a pallet jack. This resulted in the development of very severe low back pain radiating into his right lower limb. The applicant had some investigations at the advice of his family doctor and was later referred to see Dr Renata Abraszko.

65. Dr Abraszko recommended MRI scans of the cervical lumbar spines and noted restricted movements of the neck and back on examination. Neurological examination was apparently essentially normal. Dr Abraszko diagnosed L5/S1 discopathy, musculoligamentous injuries to the cervical spine and injuries to the right shoulder.
66. Dr Abraszko referred the applicant to see pain management specialist, Dr Manohar. The applicant did not consult Dr Manohar due to financial constraints.
67. Dr Habib noted the applicant was using analgesics and narcotics physiotherapy and antidepressants.
68. Dr Habib's examination revealed muscle guarding at the neck and tenderness at the C5/6 to C7 interspinous areas. Neck movements were restricted.
69. The applicant's right shoulder was tender anteriorly under the acromion. Movements were moderately restricted and anterior subacromial crepitation was palpable.
70. Moderate muscle guarding was noted in the lower back and there was flattening of the lumbar lordosis. The lumbar spine was tender on deep palpation at L4/5 to S1. Back movements were moderately/severely restricted. Sensory alteration was reported in the right L5 distribution, mild in the S1 dermatome.
71. Dr Habib concluded:

"Mr Haddad's employment with Ali Baba Lebanese Cuisine P/L was according to the description extremely heavy physical and labour intense in nature. He was, according to him, required to push / pull and tilt loaded bins weighing 80-100kg. He also had to pull or push the heavier tubs with wheels, at times faulty wheels, much heavier than the smaller 80-100 tubs. The repetitive bending, pulling and pushing at times lifting at work resulted in the development of neck and back pain, also the right shoulder which has since continued.

His management has been less than adequate because of the lack of funds. His treatment should have been funded by the insurer of his employer. As to why this was not the case was not quite clear."

72. Dr Habib made a diagnosis as follows:

1. Chronic severe musculo ligamentous strain injury of the neck and aggravation of the mild asymptomatic cervical spine changes.
2. Traumatic rotator cuff tendonopathy with stiffness.
3. Lumbar discopathy with right radiculopathy."

73. With regard to causation, Dr Habib stated:

"Mr Haddad had been in good health and physically fit prior to commencing the labouring / process work with Ali Baba Lebanese Cuisine in October 2013. His current condition is substantially caused by the nature and conditions of his employment from October 2013 and the deemed date of injury (the date of his resignation on 28/02/14)."

74. Dr Habib considered that the applicant was currently unfit for work. Dr Habib assess the applicant as having 22% whole person impairment (WPI) comprising 12% WPI at the lumbar spine, 7% WPI at the right shoulder and 5% WPI at the cervical spine.

75. In his supplementary report, Dr Habib reiterated his view that the applicant had suffered severe strain injuries of the neck and lower back or performing heavy duties at work. The applicant's injuries had been managed with pills and sporadic physical therapies. The applicant was using moderate quantities of narcotics and the clinical picture was one of chronic pain syndrome.

76. On this occasion, Dr Habib diagnosed:

- “1. Chronic musculo ligame consistentntous strain of the neck, ongoing aggravation injury of the asymptomatic cervical spinal changes
2. Traumatic rotator cuff tendonopathy with secondary capsulitis and resultant stiffness
3. Lumbar discopathy with right radiculopathy”

77. Dr Habib expressed the view that in his current state of both physical and mental health, the applicant was unfit for work. In addition, Dr Habib said:

“Because of the chronic nature of his conditions, the restrictions required for employment, Mr Haddad has past impairment of his earning capacity (since 28/02/14).”

Dr Wallace

78. The respondent relies on a medicolegal report prepared by orthopaedic surgeon, Dr Raymond Wallace on 14 December 2014.

79. Dr Wallace took as history as follows:

“His work duties included lifting tubs of meat weighing between 80 and 100kg from a trolley onto scales and then onto a bench. He was also required to lift bags of chicken weighing 25kg and empty them into a machine. He was also required to use a pallet jack and lift spice bags weighing up to 25kg each.

At the end of November 2013, he noted the onset of lumbar spinal pain with lifting activities at work. He reported these symptoms to his work supervisor. He did not seek medical review at that time as he ‘didn't think that it was anything.’ He remained off work for a week at that time.

On Friday, 28 February 2014, he ceased work in order to apply to join the Police Force.”

80. Further:

“He claims that he suffered an injury at his cervical spine in the course of his duties at work with Ali Baba Lebanese Cuisine Pty Ltd on an unknown date when he was pushing a pallet jack down a ramp and his hands were jarred forward and he noted the onset of neck pain. He did not require medical review nor treatment at that time.”

81. Dr Wallace noted that the applicant had submitted a workers compensation claim four months after ceasing work. The applicant was reviewed in early November 2014 by Dr Abraszko who ordered MRI investigations which were not performed. The applicant was continuing a self-supervised hydrotherapy and using medication. The applicant had no further therapeutic intervention.

82. The applicant complained of persisting pain at the C6/7 spinous process with no radiation to his upper limbs. The applicant had no paraesthesia and numbness in his upper limbs but complained of weakness. The applicant noted ongoing stiffness in his cervical spine. The applicant complained of persisting pain at the L4/5 spinous process radiating to the right buttock and right groin. The applicant's pain was worse with prolonged walking, standing or sitting.
83. The applicant complained of difficulty dressing himself, disturbed sleep, difficulty driving a motor vehicle and an inability to help with housework and home maintenance.
84. Dr Wallace performed an examination of the applicant's cervical spine and lumbar spine and neurological examination of the upper and lower limbs.
85. Dr Wallace diagnosed, "Pre-existing degenerative cervical and lumbar spondylosis - not work related."
86. With regard to causation, Dr Wallace stated:

"There is no objective medical evidence that Mr Haddad suffered any work-related injury at his cervical and lumbar spine whilst in the employ of Ali Baba Lebanese Cuisine Pty Ltd. He worked for this company over a period of four months in the period October 2013 to February 2014. He suffered no documented work-related injury during that time.

He did not submit a worker's compensation claim until June 2014, some four months after voluntarily leaving their employ.

He underwent CT examinations of the cervical and lumbar spine on 14 May 2014 which showed evidence of multilevel degenerative cervical and lumbar spondylosis which is constitutional in origin and not work-related.

His current cervical and lumbar spinal disability is due to pre-existing degenerative cervical and lumbar spondylosis which is not related to his employment with Ali Baba Lebanese Cuisine Pty Ltd.

His employment with Ali Baba Lebanese Cuisine Pty Ltd is not the main contributing factor to any current cervical and lumbar spinal condition."

87. Dr Wallace said there were inconsistencies at the clinical examination. The applicant resisted range of movement testing at his lumbar spine and said the applicant's complaints of ongoing significant cervical and lumbar spinal pain could not be explained on the basis of any work-related injury.
88. Dr Wallace said the applicant had no ongoing work incapacity as a result of any work-related conditions at his cervical or lumbar spine.

Other evidence

89. A payslip issued by the respondent to the applicant, dated 29 December 2013, indicates the applicant's annual salary was \$39,520. The applicant was paid an hourly rate of \$20. For the period 23 December 2013 to 29 December 2013, the applicant was paid for 20.75 hours plus 12 hours of overtime.

90. A letter from the respondent's company accountant to the applicant's solicitors dated 15 September 2014 provides a series of responses to questions regarding the applicant's claim. The letter indicates that the applicant was employed on a casual basis from 21 October 2013 as a Picker/Packer. The respondent was not aware of any accident until it received a letter on 19 June 2014 from the applicant's solicitors. The weekly working hours varied from 6 to 44 hours. The weekly gross wage paid was \$880.
91. A Centrelink employment separation certificate dated 8 April 2014 indicated that the applicant commenced employment with the respondent on 21 October 2013 and ceased employment on 28 February 2014. The applicant's average gross weekly wage was said to be \$750 per week. The applicant ceased work voluntarily. In response to a question, "Has a claim been made, or is a claim likely to be made, for workers compensation?" the "no" box is ticked.

Respondent's submissions

92. Mr Stockley said there was a medical dispute between Dr Habib, who put forward a credulous opinion and Dr Wallace who put forward a sceptical opinion in relation to the applicant's claim. There was no obvious way to undertake an analysis of the competing opinions other than to look at the contemporaneous accounts of complaint an injury to see whether one or other opinion was supported by credible underlying data.
93. Mr Stockley referred me to the clinical notes of Allcare Carnes Hill Medical Centre and observed that these recorded an injury to the applicant's knee in July 2013 which the applicant wished to have dealt with under workers compensation. Mr Stockley submitted that this record demonstrated that the applicant had familiarity with the workers compensation process.
94. Mr Stockley referred me to the entry for 13 September 2013 at which the applicant was recorded to have reported back pain from the previous day in the context of having started at a gym recently. The applicant had not gone to work because he felt sore in the back muscles.
95. Mr Stockley noted that the applicant had not explained this record in his written statement. Reading the note in isolation lead to the conclusion that the applicant had back pain due to attending a gym and was reluctant to attend work because his gymnasium injury would be made worse. This was said to be inconsistent with the applicant's statement which referred to a gradual onset of pain in the workplace. Mr Stockley said this inconsistency created doubt about the reliability of the applicant's reporting.
96. Mr Stockley noted that there was an attendance on the Medical Centre in January 2014 at which the applicant requested drug screening. The next entry was on 25 March 2014, which post-dated the cessation of employment with the respondent. Mr Stockley noted that on this occasion the applicant made a complaint about injuring his face on a rusted nail at work. Mr Stockley submitted that given that this event happened sometime after the cessation of duties with the respondent, it indicated that the applicant had been involved in work other than for the respondent. This generated further doubt about the reliability of what the applicant was telling the Commission.
97. Mr Stockley noted that in April 2014, the applicant reported a five month history of back pain. Mr Stockley noted that this history was given a couple of months after the applicant ceased work for the respondent. The applicant did not give an account of neck pain associated with work on this occasion. The applicant referred only to symptoms in the back.

98. Mr Stockley noted that the first allegation of a work injury caused by heavy lifting appeared on 10 May 2014. On that occasion, once again, the applicant referred only to back pain without reference to neck or shoulder symptoms. Although the applicant was referred for a CT scan of the cervical spine, it was unclear why.
99. On 17 May 2014, Dr Bui recorded a complaint of back pain without reference to neck or shoulder symptoms. On 31 May 2014, Dr Bui noted psychological symptoms and back injury.
100. Mr Stockley said the first reference to shoulder pain appeared on 6 June 2014 but the clinical notes referred to left shoulder pain only despite the applicant claiming a right shoulder injury. It was unclear from the records why an ultrasound was requested of both shoulders. At the consultation on 22 July 2014, the applicant was noted to have complained of back pain without reference to the shoulder.
101. Mr Stockley submitted that a review of the contemporaneous evidence suggested the onset of pain in the context of gymnasium attendance and continuing complaints of back pain to some extent associated with work. The applicant was not recorded to have complained of right shoulder pain and there was no record of sustained complaint of any unique symptoms in that body part. Mr Stockley conceded, however, that the applicant had been referred for radiological investigations of his back, neck and shoulder in 2014.
102. Mr Stockley noted the correspondence from Mr Tomasevic did not mention complaints of neck and right shoulder pain. The applicant appeared to have told the physiotherapist about a specific incident in November 2013. Mr Stockley said that history did not accord with what had been recorded by the general practitioners at the time or in the applicant's statement, which alleged a gradual onset through the nature and conditions of the applicant's employment.
103. Mr Stockley said Dr Abraszko's report contained no relevant analysis of causation or attribution. Dr Abraszko took a history that was different to the current claim of a specific event in November/December the previous year when the applicant lifted a 30 kg meat tray and started to experience neck and lower back pain. Dr Abraszko's report suggested the onset of shoulder pain after the applicant ceased work. Mr Stockley said it was difficult to understand how the right shoulder could be ascribed to work given the chronology.
104. Mr Stockley submitted that the reliability of the applicant's evidence was already in doubt. Dr Wallace had recorded inconsistencies exhibited at his examination. Dr Wallace considered the applicant's ongoing symptoms could not be explained on the basis of a work-related injury. Mr Stockley said Dr Wallace's observed inconsistencies underscored the lack of credibility in the applicant's evidence.
105. Mr Stockley noted the statement from the applicant's sister and submitted that her evidence should be given limited weight. Ms Haddad described a florid set of symptoms, including the applicant crying in agony and crawling because he could not stand, which did not appear to be supported by the pathology or the contemporaneous evidence of those treating the applicant. Mr Stockley noted that Ms Haddad's evidence referred to psychological symptoms which did not form part of the present claim before the Commission.
106. With regard to the applicant's capacity for work, Mr Stockley noted that the applicant was relatively young and possessed transferable skills. The applicant was literate and numerate, having completed Year 12 and commenced study at university. The applicant had provided no detail as to his previous employment. Mr Stockley said there was no support in the contemporaneous evidence for an injury to the neck or right shoulder. If the Commission were to accept a lower back injury, Mr Stockley said there must be a range of suitable employment available to the applicant. Mr Stockley submitted that the applicant had not placed before the Commission sufficient evidence to allow a detailed analysis of the applicant's work capacity.

107. With regard to the applicable PIAWE rate Mr Stockley noted that the payslip showed the applicant was paid a base rate of pay plus overtime. The applicant's employer said the average weekly earnings were \$880. Mr Stockley submitted that after 52 weeks, the overtime of \$415 was to be excluded.

Applicant's submissions

108. Mr Carney noted that the applicant's statement appeared to have been prepared by an investigator. It was unclear what questions were asked of the applicant and this circumstance would account for the lack of reference to specific dates in the applicant's evidence.

109. Mr Carney noted that the applicant's evidence was that his work with the respondent began to get busy towards the end of November and December 2013. There was a massive increase in the amount of work the applicant was doing consistent with the holiday period. The applicant started to feel issues in his neck and back at night and made complaints of pain to his co-workers. The applicant described an electronic pallet jack breaking down. The applicant took about a week off work but things did not improve. The applicant was assigned light duties but eventually ceased work. The applicant's evidence was that he was not initially taking medication but trying to manage his pain through rest.

110. Mr Carney noted that the first record of a complaint of back pain in September 2013 made reference to the applicant going to a gym. Mr Carney submitted that general practitioner's notes should be approached with caution and are not prepared for the benefit of lawyers who may view them down the track. Mr Carney submitted that some inaccuracies were evident in the clinical notes including the reference to a rusty nail in the face at work in March 2014.

111. Mr Carney additionally noted that the first certificate of capacity issued on 31 May 2014 referred to the back, neck and right shoulder as well as psychological symptoms. The entry in the clinical records of that date referred only to lower back pain. Mr Carney submitted that this showed the clinical records were an unreliable record of the complaints the applicant made at the time.

112. Mr Carney noted that the applicant had given evidence that he had complained of pain to his co-workers. The respondent had not obtained statements from those co-workers and there was no evidence to contradict the applicant's claims. The applicant's sister had provided a statement. Mr Carney noted that Ms Haddad's description of the applicant's symptoms was consistent with the evidence of the applicant's presentation to the Liverpool Hospital emergency department.

113. Mr Carney observed that the history given to the applicant's treating neurosurgeon, Dr Abraszko related the applicant's symptoms to work in November and December 2013. The history taken by Dr Abraszko was said to be on all fours with the applicant's evidence. The applicant was treated with medication and physiotherapy. The applicant was asked to obtain an MRI but did not. Dr Abraszko concluded that the applicant's symptoms were consistent with the work history and concluded that work had caused the applicant's problems.

114. Mr Carney noted that Dr Habib had taken a history of the nature and conditions of the applicant's work and gave a clear opinion that the heavy lifting caused the applicant's injuries. The history given to Dr Habib was consistent with the applicant's evidence.

115. Mr Carney conceded that Dr Wallace had taken a reasonable history and performed an examination. Although Dr Wallace did not comment on range of motion, his notes indicated there was restriction of movement. Mr Carney submitted that Dr Wallace disregarded the nature and conditions of the applicant's employment. Every other doctor had commented on those duties and accepted that they were consistent with having caused injury. Mr Carney submitted that it appeared Dr Wallace was looking for a frank injury as opposed to an injury

of gradual onset. Mr Carney noted that Dr Wallace observed that the applicant did not claim an injury until June 2014, however, by April 2014 there had been a detailed complaint to Dr Bui and the applicant had been referred for radiological investigation of his lumbar and cervical spines.

116. Mr Carney submitted that Dr Wallace was incorrect in saying there was no objective evidence of a work injury. Dr Wallace did not comment on the nature or origin of the disc protrusion revealed on the radiological evidence. Dr Wallace did not consider the possibility of an aggravation of a pre-existing condition. The applicant's claim was that heavy work with the respondent caused an increase in pain.
117. Mr Carney submitted that the Commission should make an award for the applicant for the lumbar spine, cervical spine and right shoulder.
118. With regard to the PIAWE figure, Mr Carney submitted that the only material difference in approach was the position after 52 weeks. Mr Carney submitted that if the applicant were found to have some capacity it should be noted that the applicant did not complete his university qualifications and his work experience was in work of a physical nature. Mr Carney submitted that the Commission would find very little residual capacity.

Respondent's submissions in reply

119. Mr Stockley referred to Mr Carney's submissions regarding the reliability of the general practitioner's notes but said the applicant had failed to explain the September 2013 clinical notes or identify any other inaccuracies in his evidence. Mr Stockley submitted that the applicant had a number of opportunities to qualify witnesses and his failure to do so gave rise to a *Jones v Dunkel*¹ inference.
120. Mr Stockley said that if Dr Wallace was looking for a frank injury and not considering the nature and conditions of the applicant's employment it was due to the history given by the applicant. The applicant's history also explained why there was no assessment of the shoulder.

FINDINGS AND REASONS

121. Section 9 of the 1987 Act provides that a worker who has received an "injury" shall receive compensation from the worker's employer. The term "injury" is defined in s 4 of the 1987 Act as follows:

"4 Definition of 'injury'

In this Act:

injury:

- (a) means personal injury arising out of or in the course of employment,
- (b) includes a disease injury, which means:
 - (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and
 - (ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease, and

¹ (1959) 101 CLR 298 at 320.

- (c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the *Workers' Compensation (Dust Diseases) Act 1942*, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined.”

122. The Court of Appeal in *Nguyen v Cosmopolitan Homes*² has found that a tribunal of fact must be actually persuaded of the occurrence or existence of the fact before it can be found, summarising the position as follows:

- “(1) A finding that a fact exists (or existed) requires that the evidence induce, in the mind of the fact-finder, an actual persuasion that the fact does (or at the relevant time did) exist;
- (2) Where on the whole of the evidence such a feeling of actual persuasion is induced, so that the fact-finder finds that the probabilities of the fact's existence are greater than the possibilities of its non-existence, the burden of proof on the balance of probabilities may be satisfied;
- (3) Where circumstantial evidence is relied upon, it is not in general necessary that all reasonable hypotheses consistent with the non-existence of a fact, or inconsistent with its existence, be excluded before the fact can be found, and
- (4) A rational choice between competing hypotheses, informed by a sense of actual persuasion in favour of the choice made, will support a finding, on the balance of probabilities, as to the existence of the fact in issue.”

123. There is agreement between the medicolegal experts involved in this case that the applicant has medical conditions at his cervical and lumbar spines. As Mr Stockley observed, however, there is a difference of opinion between Dr Habib and Dr Wallace as to the nature and aetiology of those conditions.

124. Dr Wallace took the view that the applicant had pre-existing degenerative cervical and lumbar spondylosis which was not related to work. Dr Habib on the other hand found there was a chronic musculoligamentous strain and ongoing aggravation of cervical spinal changes as well as lumbar discopathy with right radiculopathy, which he considered were “substantially caused” by the nature and conditions of the applicant's employment. Dr Habib additionally diagnosed a traumatic rotator cuff tendinopathy with stiffness and later capsulitis at the right shoulder caused by the applicant's employment.

125. It is the applicant who bears the onus of establishing on the balance of probabilities that he sustained an injury in accordance with s 4 of the 1987 Act. In order to determine whether that onus has been discharged, it is necessary to consider the evidence as a whole.

126. It is plain that there are some evidentiary challenges for the applicant. The reliability of the applicant's evidence has been directly challenged by the respondent. The history provided by the applicant to Dr Abraszko and Dr Habib was that he was in good health and physically fit and had no previous conditions at his cervical spine and lumbar spine prior to commencing employment with the respondent.

127. This history is not supported by the clinical notes from Allcare Carnes Hill Medical Centre. Those notes indicate a complaint of back pain on 13 September 2013 that is, approximately one month prior to the commencement of employment with the respondent. The clinical note on that date indicates that the applicant had started at a gym recently and was performing work lifting heavy boxes. The applicant had not gone to work because he felt sore in the back

² [2008] NSWCA 246.

muscles and thought this would be aggravated by lifting things at work. Although the applicant was given a medical certificate it does not appear that the applicant was referred for any radiological investigation nor prescribed any other form of treatment on this occasion.

128. The applicant's written statement provides no explanation or elucidation of what is recorded in this consultation.

129. It is well-established that consideration of clinical notes must be approached with caution, consistently with the observations of Basten JA in *Mason v Demas*³:

"First, the trial judge was invited to discount the appellant's oral testimony on the basis of accounts given to various health professionals, which appeared inconsistent either with each other, or with her oral testimony, or both. The difficulties attending this kind of exercise should be well-understood; as explained in the *Container Terminals Australia Ltd v Huseyin* [2008] NSWCA 320 at [8], such apparent inconsistencies may, and often should, be approached with caution for the following reasons, amongst others:

- (a) the health professional who took the history has not been cross-examined about:
 - (i) the circumstances of the consultation;
 - (ii) the manner in which the history was obtained;
 - (iii) the period of time devoted to that exercise, and
 - (iv) the accuracy of the recording;
- (b) the fact that the history was probably taken in furtherance of a purpose which differed from the forensic exercise in the course of which it was being deployed in the proceedings;
- (c) the record did not identify any questions which may have elucidated replies;
- (d) the record is likely to be a summary prepared by the health professional, rather than a verbatim recording, and
- (e) a range of factors, including fluency in English, the professional's knowledge of the background circumstances of the incident and the patient's understanding of the purpose of the questioning, which will each affect the content of the history."

130. The clinical note of 13 September 2013 is, however, relatively detailed. Reading the note together with the radiological investigations and subsequent expert opinions indicating the presence of degenerative changes in the lumbar spine, I find that the applicant had experienced symptoms of pain in his back in the context of attendance at a gym and previous employment prior to the commencement of his employment with the respondent in October 2013.

131. As a consequence, I am not satisfied that the history provided by the applicant to Dr Abraszko and Dr Habib was reliable in this regard. I do note, however, that there is no evidence of any reported symptoms at the applicant's cervical spine or right shoulder prior to the commencement of employment with the respondent.

³ [2009] NSWCCA 227 at [2].

132. Another evidentiary difficulty for the applicant arises from the delay in reporting symptoms associated with his employment with the respondent for a period of time following the cessation of work.
133. Although the clinical notes show attendances on the applicant's general practitioner during the period of employment and approximately one month after the applicant ceased work, there is no evidence that the applicant complained of any relevant symptoms in his back or neck until 14 April 2014.
134. The applicant has given evidence that he complained of pain to his supervisors over the Christmas period and about a week prior to the applicant's last day of work. There is, however, no evidence from the applicant's colleagues to confirm this and the Centrelink separation certificate in evidence suggests that no claim for workers compensation had been made or was anticipated.
135. I am satisfied that the applicant was aware of the workers compensation scheme having requested that his doctor put a knee injury under workers compensation as recently as July 2013. The applicant's failure to notify an injury or make a workers compensation claim during or more immediately after the cessation of employment with the respondent cannot, therefore, be explained by ignorance. I do note, however, that the applicant's sister has given evidence consistent with the applicant's supervisor being aware of the applicant's back symptoms.
136. The first report of right shoulder symptoms appears on 31 May 2014 in the WorkCover certificate of capacity, which refers to right shoulder pain secondary to soft tissue injury. At the consultation on the same date, Dr Bui referred the applicant for ultrasound of the right shoulder. A further referral for ultrasound of both shoulders was made on 6 June 2014.
137. There is some suggestion in the clinical notes that, contrary to the applicant's other evidence, he engaged in employment after ceasing work with the respondent. On 25 March 2014, approximately one month after the cessation of employment with the respondent, the clinical notes indicate the applicant sustained an injury to his face from a rusted nail in a fence at work. Although Mr Carney submitted that this was an error, once again, the applicant's evidence is silent as to this entry in the clinical notes. The effect of the clinical note in the circumstances is to cast further doubt over the reliability of the applicant's evidence.
138. There is also an unexplained reference in Dr Wallace's history to the applicant ceasing work with the respondent in order to pursue a policing career. If indeed, the applicant did engage in other employment after ceasing work with the respondent, that circumstance, taken together with the delay in the reporting of symptoms, would raise serious questions as to the causal relationship between the employment with the respondent and those symptoms.
139. There is a degree of inconsistency in the applicant's explanations of how his symptoms arose. In particular, the histories provided to the practitioners involved in the applicant's case have identified a number of events, differently described, which the applicant appeared to associate with an acute onset of symptoms.
140. Mr Tomasevic took a history of an incident in November 2013 where the applicant experienced back and leg pain while lifting meat. Dr Abraszko took a history of a work-related injury in November/December 2013 when lifting a 30 kg meat tray which caused the applicant to experience neck and low back pain. Dr Wallace took a history that included a particular injury causing the onset of cervical pain when the applicant was pushing a pallet jack down a ramp and his hands were jarred forward. Dr Habib refers to a particular incident in early 2014 where the applicant had to move a very heavy tub weighing 800 kg causing the development of very severe low back pain.

141. The present claim relates not to any particular frank incident but rather a gradual onset of symptoms over the course of the applicant's employment with the respondent. Whilst the identification of these different events casts a shadow of doubt over the overall credibility of the applicant's claim, I accept that the events broadly describe the normal incidents and conditions of the applicant's employment with the respondent. I am not satisfied that these inconsistencies in the histories materially undermines the applicant's claim.
142. Weighing against the problematic aspects of the applicant's evidence, is a body of consistent evidence dating from 14 April 2014 onwards attributing lumbar and cervical symptoms to the applicant's repetitive heavy lifting in the course of his employment with the respondent.
143. I am satisfied that the applicant's work for the respondent did involve heavy manual labour including the lifting of weights of around 20 to 35 kg, although there appears to be a degree of hyperbole in the applicant's description of his duties. I have some concerns, for example, about the reliability of the applicant's claim to have been lifting weights of up to 100 kg unassisted or manually moving tubs weighing 800 kg by himself. No evidence has, however, been provided from the respondent to contradict the applicant's allegations as to the nature of his duties.
144. From 14 April 2014 onwards, the applicant reported pain in his lumbar spine and neck to his practitioners, which he associated with repetitive lifting at work of 20 to 35 kg weights of meat, mostly on his own. The timing of the reported onset of symptoms, being five months earlier, is consistent with the applicant's evidence of increasing symptoms as his workload increased during November and December 2013. The radiological investigations of the cervical and lumbar spine ordered in April 2014 and May 2014 identified pathology which the treating practitioners and Dr Habib accepted as consistent with the history of injury provided to them. The evidence from the applicant's general practitioners, physiotherapist, Dr Abraszko and Liverpool Hospital during the period from April to October 2014 broadly supports the applicant's claims.
145. Dr Wallace saw the applicant in December 2014. Dr Wallace did take a history of heavy manual work for the respondent and, despite some inconsistencies in his examination of the applicant, diagnosed cervical and lumbar spondylosis. Dr Wallace considered, however, that this condition was purely pre-existing degenerative change on the basis that he found no objective medical evidence of a work-related injury.
146. Dr Wallace's reasoning is not explained other than by reference to the absence of a documented work-related injury during the period of employment and the delay in submitting a workers compensation claim. Dr Wallace did not actively engage with the applicant's history of an onset of pain in the context of heavy lifting at work. Dr Wallace also did not give express consideration to the possibility that such work could have aggravated or exacerbated the degenerative changes revealed in the radiological investigations.
147. Dr Habib, who saw the applicant almost two years later, did, however, consider this possibility and accepted that the applicant's current condition was substantially caused by the nature and conditions of his employment, consistently with the view that had been expressed by Dr Abraszko after examining the applicant in October 2014.
148. Considering the evidence as a whole and notwithstanding some misgivings as to the reliability of aspects of the applicant's evidence, I feel a sense of actual persuasion, that the applicant did sustain injury in the nature of a musculoligamentous strain of the neck and aggravation of previously asymptomatic cervical spinal changes, to which employment with the respondent was the main contributing factor.

149. I am not satisfied that the applicant's lumbar spine was asymptomatic prior to the commencement of his employment with the respondent having regard to the clinical records in evidence. I do accept, however, that there was an aggravation or exacerbation of the lumbar discopathy found by Dr Abraszko and Dr Habib, to which employment with the respondent was the main contributing factor.
150. The evidence in relation to the applicant's right shoulder is less compelling. Symptoms in the right shoulder were first reported to the applicant's general practitioners more than six weeks after the initial report of work-related back and neck symptoms, and more than three months after the cessation of employment with the respondent. Despite a clinical note describing symptoms and an examination of the left shoulder, there is no record of what particular symptoms the applicant was experiencing or what any examination revealed at the right shoulder. An ultrasound investigation of the right shoulder was, however, ordered which revealed the presence of pathology. An injury to the right shoulder was identified in the WorkCover certificate issued by Dr Bui on 31 May 2014.
151. The applicant does not indicate that he reported pain in his shoulders to his colleagues whilst employed by the respondent, although he does describe experiencing shoulder symptoms whilst employed and Ms Haddad says she was aware of this. There is no evidence that shoulder symptoms were reported to the applicant's physiotherapist, Mr Tomasevic. No history of right shoulder symptoms was given to Dr Wallace. Dr Abraszko's first report to Dr Bui made no mention of right shoulder symptoms or injury.
152. Dr Abraszko appears to have only seen the applicant on one occasion on 21 October 2014, however, in her subsequent report for the applicant's solicitors, Dr Abraszko said the applicant had started also to experience right shoulder pain. It is not clear when this history was given to Dr Abraszko and it is not made expressly clear in her report how or why she considered the right shoulder pain was related to work. I accept Mr Stockley's submission that Dr Abraszko's report can be read as suggesting the onset of right shoulder pain after the cessation of work, which is inconsistent with the applicant's evidence of an onset during employment.
153. Dr Abraszko did note that the ultrasound of the applicant's shoulders revealed fluid in both tendons of biceps muscles or tendinosis. There is, however, no description of Dr Abraszko's findings on any examination of the right shoulder other than an indication that power, tone, reflexes and sensation were normal in the applicant's upper limbs. Dr Abraszko diagnosed injury to the right shoulder but did not elaborate on the nature of the injury or how it related to work. Dr Abraszko did not identify any incapacity relating to the right shoulder.
154. The first detailed description of a shoulder injury appeared in late 2016, when Dr Habib took a history consistent with the evidence set out in the applicant's written statement of the onset of symptoms during the course of employment in the right shoulder. Dr Habib noted the diagnosis of right shoulder injury by Dr Abraszko. Dr Habib found tenderness and moderate restriction of movement together with crepitation on his examination of the right shoulder and formed the opinion that the applicant's repetitive bending, pulling and pushing and, at times, lifting resulted in the development of traumatic rotator cuff tendonopathy with stiffness and later secondary capsulitis.
155. I have carefully considered the lay and medical evidence relating to the applicant's right shoulder but do not feel a sense of actual persuasion that there was an injury in the course of employment to that body part in the manner claimed. The delay in the reporting of symptoms for three months after the cessation of work and six weeks after the work injury to the neck and lumbar spine were reported; the lack of explanation in the contemporaneous medical evidence as to what symptoms the applicant experienced and when the symptoms first appeared; the absence of complaint to Mr Tomasevic and Dr Wallace; the omission of reference to the shoulder in Dr Abraszko's first report; and the general concerns I have as to the reliability of the applicant's recollections, leave me unsatisfied on the balance of probabilities that the applicant injured his right shoulder as claimed.

156. Having found that the applicant sustained an injury consistent with s 4(b) of the 1987 Act to his cervical spine and lumbar spine I consider it appropriate that the matter be remitted to the Registrar for referral to an Approved Medical Specialist (AMS) to assess the degree of permanent impairment resulting from injury to those body parts. The Medical Assessment Certificate issued by the AMS will determine the quantum of the applicant's entitlement to lump sum compensation pursuant to s 66 of the 1987 Act. I note that the AMS assessment will require physical examination of the applicant and so the matter should be placed on the Medical Assessment Pending List.

Extent and quantification of incapacity resulting from injury

157. Section 33 of the 1987 Act provides that if total or partial incapacity for work results from an injury, the compensation payable by the employer to the injured worker shall include a weekly payment during the incapacity.

158. The applicant in this case seeks weekly compensation from 28 February 2014 to 28 August 2016.

159. In order to determine the applicant's entitlement to weekly payments, it is necessary to determine whether he had "no current work capacity" or "current work capacity" as defined in s 32A of the 1987 Act during the period of weekly benefits being claimed.

160. Section 32A of the 1987 Act defines the relevant terms as follows:

"current work capacity, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment.

no current work capacity, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to work, either in the worker's pre-injury employment or in suitable employment.

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 WorkCover 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."

161. A difficulty arises in assessing the applicant's capacity for work during the period of weekly benefits claimed due to the lack of contemporaneous medical evidence as to the applicant's condition.
162. There is a single WorkCover certificate of capacity in evidence covering the period 28 February 2014 to 20 June 2014, which certified the applicant as having no current work capacity.
163. After examining the applicant on 21 October 2014, Dr Abraszko identified a number of work restrictions relating to the lumbar spine but did not suggest the applicant had any incapacity for suitable employment.
164. Dr Wallace expressed the view in December 2014 that there was no work-related incapacity.
165. There are no relevant clinical notes or any other evidence from any treating practitioners in evidence after 6 January 2015 although it is apparent that the applicant has continued to access prescription medication.
166. Dr Habib first saw the applicant after the period of weekly benefits claimed had ceased. In his report of 26 September 2016, Dr Habib said the applicant was presently unfit for work, although his opinion must be read as including consideration of the right shoulder condition which I have not accepted. In his supplementary report, Dr Habib indicated that a significant component of the applicant's incapacity for work derived from his psychological condition which is not part of the claim pursued in these proceedings.
167. The evidence of Ms Haddad in 2017 was of the applicant being bedridden for most of the day and requiring assistance with self-care, which suggests a much greater degree of incapacity than is reflected, for example, in Dr Abraszko's reports.
168. Given the unsatisfactory nature of the evidence and, noting that the matter is to be referred to an AMS for assessment of the degree of permanent impairment, I consider I may be assisted by the AMS's opinion on permanent impairment. This approach is also consistent with the comments of Roche DP in *Jaffarie v Quality Castings Pty Ltd*⁴ and will avoid any potential inconsistency between my findings on incapacity and the AMS's findings on permanent impairment.
169. The matter will be listed for further teleconference upon receipt of the Medical Assessment Certificate to deal with the entitlement to weekly benefits. The parties will be entitled to supplement their submissions with any comment or response to Medical Assessment Certificate at that time.

SUMMARY

170. The applicant sustained injury to his cervical spine and lumbar spine as a result of the nature and conditions of his employment with the respondent between October 2013 and 28 February 2014 pursuant to s 4(b) of the 1987 Act.
171. The applicant has not discharged the onus of establishing injury to his right shoulder as a result of the nature and conditions of his employment with the respondent between October 2013 and 28 February 2014.

⁴ [2014] NSWCCPD 79 at [269].

172. The matter is remitted to the Registrar for referral to an AMS for assessment as follows:

Date of injury: 28 February 2014 (deemed)

Body parts: Cervical spine
Lumbar spine

Method: Whole Person Impairment

173. The materials to be referred to the AMS are to include the ARD and all attachments and the Reply and all attachments, together with my certificate of determination and statement of reasons.

174. The matter requires a face to face examination and should be placed on the Medical Assessment Pending List.

175. The matter to be listed for further teleconference upon receipt of the Medical Assessment Certificate to deal with the applicant's entitlement to weekly benefits.

