WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **6776/19**
Applicant: **Michael Piontek**
Respondent: **Walter Findlay Pty Ltd**
Date of Determination: **30 June 2020**
Citation: **[2020] NSWWCC 215**

The Commission determines:

1. The applicant sustained injury to his back arising out of or in the course of his employment with the respondent on 2 February 2017 (deemed).

2. The applicant's employment was the main contributing factor to his injury.

3. The applicant had no current work capacity from 22 February 2017 to 20 August 2019.

4. The applicant requires medical treatment as a consequence of his injury and the respondent is liable to pay reasonably necessary medical expenses in respect of his back injury.

5. The proposed L3-S1 anterior lumbar interbody fusion and L2-pelvis decompression and fusion, and associated incidental expenses, is reasonably necessary treatment as a result of the injury arising out of or in the course of the applicant's employment with the respondent on 2 February 2017 (deemed).

6. The applicant failed to give notice of injury with section 254(1) of the *Workplace Injury Management and Workers Compensation Act 1998*.

7. The applicant's failure to give notice of injury was occasioned by the special circumstances identified in section 254(3)(b) of the *Workplace Injury Management and Workers Compensation Act 1998*.

8. The applicant became aware of his injury on 25 March 2019 and gave notice of a claim for compensation on 28 March 2019.

9. The applicant complied with section 261(1) by reason of s 261(6) of the *Workplace Injury Management and Workers Compensation Act 1998.*

The Commission orders:

10. The respondent to pay the applicant weekly compensation in accordance with the *Workers Compensation Act 1987* as follows:

    (a) $1,439.92 per week from 22 February 2017 to 31 March 2017 pursuant to section 36(1)(a);

    (b) $1,460.95 per week from 1 April 2017 to 23 May 2017 pursuant to section 36(1)(a);

(c) $1,230.27 per week 24 May 2017 to 30 September 2017 pursuant to section 37(1)(a);

(d) $1,239.13 per week from 1 October 2017 to 20 February 2018 pursuant to section 37(1)(a);

(e) $639.32 per week from 21 February 2018 to 31 March 2018 pursuant to section 37(1)(a);

(f) $648.46 per week from 1 April 2018 to 30 September 2018 pursuant to section 37(1)(a);

(g) $652.48 per week from 1 October 2018 to 31 March 2019 pursuant to section 37(1)(a), and

(h) $659.34 per week from 1 April 2019 to 20 August 2019 pursuant to section 37(1)(a).

11. Liberty to the parties to apply in respect of these calculations within 14 days of this determination.

12. The respondent is to pay the applicant's reasonably necessary medical expenses, including the cost of the proposed L3-S1 anterior lumbar interbody fusion and L2-pelvis decompression and fusion, and associated incidental expenses, pursuant to section 60 of the *Workers Compensation Act 1987*.

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

Glenn Capel
Senior 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 GLENN CAPEL, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Michael Piontek (the applicant) is 57 years old and commenced employment with Walter Findlay Pty Ltd (the respondent) as a baker on 7 November 2011. He ceased work on 2 February 2017 and he resigned on 22 February 2017.

2. The applicant allegedly suffered an injury to his back over a period of months prior to 2 February 2017. A claim form was submitted to iCare Workers Insurance (the insurer) on 28 March 2019.

3. On 5 July 2019, the insurer issued a notice pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), disputing that the applicant was entitled to bring a claim because he had not given notice of injury as soon as possible and before he had voluntarily left the employ of the respondent, and because he had not made a claim within six months of his injury. The insurer also disputed that the applicant was entitled to the payment of medical expenses because they were not reasonably necessary. It cited ss 59 and 60 of the *Workers Compensation Act 1987* (the 1987 Act) and ss 254 and 261 of the 1998 Act.

4. On 13 November 2019, the applicant's solicitor requested the insurer review its decision and he served a claim for weekly compensation and medical expenses, including the cost of surgery proposed by Dr Singh.

5. On 28 November 2019, the insurer reviewed its position and issued a notice pursuant to s 78 of the 1998 Act. It confirmed that it disputed that the applicant had injured his back and that his employment was the main contributing factor to the contraction or aggravation, acceleration, exacerbation or deterioration of the disease in his lumbar spine.

6. The insurer disputed that the applicant was entitled to weekly compensation and the payment of medical expenses. Finally, it disputed that the applicant was entitled to bring a claim because he had not given notice of injury as soon as possible and before he had voluntarily left the employ of the respondent, and because he had not made a claim within six months of his injury. It cited ss 4, 4(b), 33, 59 and 60 of the 1987 Act and ss 254 and 261 of the 1998 Act.

7. An Application to Resolve a Dispute (the Application) registered in Workers Compensation Commission (the Commission) on 20 December 2019. There were conciliation conferences and arbitration hearings on 3 March 2020, 2 April 2020 and 27 May 2020 during which time the nature of the claim and the issues in dispute were clarified.

8. As a result of those discussions, it was confirmed that the applicant claims weekly compensation from 22 February 2017 to 20 August 2019 pursuant to ss 36 and 37 of the 1987 Act and medical expenses, including the cost of proposed surgery, pursuant to s 60 of the 1987 Act, due to an injury sustained to his lower back on 22 February 2017 (deemed) , in the form of an aggravation, acceleration, exacerbation or deterioration of a disease in terms of s 4(b)(ii) of the 1987 Act.

PROCEDURE BEFORE THE COMMISSION

9. 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.

10. Due to time restrictions, only oral submissions were made by the applicant's counsel, Ms Grotte at the hearing on 27 May 2020. Accordingly, I directed that written submissions be filed.

11. Written submissions were filed by the respondent on 1 June 2020, and written submissions in reply were filed by the applicant on 9 June 2020.

ISSUES FOR DETERMINATION

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

    (a) whether the applicant sustained a back injury – s 4(b)(ii) of the 1987 Act;

    (b) whether a valid notice of injury was given to the respondent – s 254 of the 1998 Act;

    (c) whether a valid claim for compensation made on the respondent – s 261 of the 1998 Act;

    (d) extent and quantification of the applicant's entitlement to weekly compensation – ss 33, 36 and 37 of the 1987 Act;

    (e) the respondent's liability to pay medical expenses – ss 59A and 60 of the 1987 Act, and

    (f) whether the treatment proposed by Dr Singh was reasonably necessary as a result of the work injury- ss 59A, 60 and 60(5) of the 1987 Act.

Documentary evidence

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

    (a) The Application with attached documents;
    (b) Reply with attached documents;
    (c) Application to Admit Late Documents received on 12 May 2020;
    (d) Application to Admit Late Documents received on 26 May 2020, and
    (e) Quotes for two stage spinal surgery proposed by Dr Singh dated 4 June 2019.

Oral evidence

14. Neither party sought leave to adduce oral evidence or cross examine any witnesses.

REVIEW OF EVIDENCE

Applicant's statements

15. The applicant provided a statement on 20 May 2019. The dates are confused and the statement contains many errors. He advised that he commenced employment with the respondent as a baker on 7 November 2011 [sic]. He worked from Monday to Thursday between 6 am to 6 pm or 6 pm to 6 am. He averaged 20 to 32 hours overtime each week.

16. The applicant stated that his duties comprised picking up plastic crates containing loaves of bread, which were stacked on top of each other, and tipping them onto a conveyer belt to be crumbed by a grinder. He removed bread on rakes from the drying room and placed them next to the conveyer belt for crumbing. He would remove trays, each weighing about 8 kg one at a time. He also assisted with cleaning.

17. The applicant stated that about six months before February 2017, as he was straightening up towards the end of a shift, he felt a sharp pain in the middle of his lower back. He kept working but he continued to feel sharp pain. He mentioned that he had a sore back to his supervisor, Graeme Smoothy, who asked him what he had done. The applicant responded that he was doing his job. Mr Smoothy changed his job to standing under a crumbing shoot, so he did not have to lift bags off the ground or bend over. He finished his shift and walked home. He stated that he had not experienced back pain before this episode.

18. The applicant stated that he did not go to work the next day and he consulted Dr Tran. He told him about his injury. The doctor gave him a certificate and prescribed Panadeine Forte. He gave the certificate to Ben Ronan and told him what had happened. He did not complete an Incident Report or claim form.

19. The applicant stated that he continued to do his normal duties and he experienced low back pain towards the end of each shift. When he told Mr Smoothy, he was allocated 'bread throwing' duties. This happened at least three times a week. No incident reports were completed. He did not seek treatment and pushed on despite his pain.

20. The applicant stated that on 5 February 2017, when he was picking up crates of bread and tipping them onto a conveyer belt, he felt a sharp pain in his back as he was straightening up. He did not report the injury and there were no witnesses. As he walked home in pain, he twisted his left ankle.

21. The applicant stated that he consulted Dr Tran on 6 February 2017, and he told him about his back injury. The doctor prescribed medication and gave him a certificate, which he presented to the respondent. When he returned to work on 17 February 2017, he advised Mr Ronan and Mr Weal that he had injured his back, but he did not complete any injury forms. He resumed his normal duties, but his pain was getting worse. Whenever he felt pain, he informed Mr Smoothy and he was allocated crumb bagging duties, or he continued on the conveyor belt.

22. The applicant stated that he worked until March 2017. Dr Tran did not give him certificates for any time that he took off work during this period, but he prescribed Panadeine Forte. In March 2017, he had to finish work early because he was taking excessive doses of his medication and this was making him groggy. He told Mr Smoothy before he left work and Mr Weal the next morning. Mr Weal told him that he could not work if he was taking medication, so he decided to resign.

23. The applicant stated that he consulted Dr Mon, who took over Dr Tran's practice, and she referred him to Dr Wanigasekera. He had a CT scan and was prescribed physiotherapy. In March 2018, he consulted Dr Kumarasiri. He was prescribed Targin and he was referred to Dr Soo. Dr Soo suggested that he see Dr Calvache-Rubis. He also received treatment from Dr Lim. He was taking Gabapentin, Panadeine Forte and Targin for his low back pain which had remained the same. He stated that he had not previously claimed workers compensation for a similar condition or for any other conditions.

24. In his statement dated 30 August 2019, the applicant acknowledged that he had made previous workers compensation claims, but not in respect of his back. He had not suffered any back injuries in the past or since he had ceased work with the respondent.

25. The applicant explained that as he notified his manager and supervisor when he had back pain, but because he had experienced pain over an extended period without suffering a specific incident, he was unaware whether he could make a claim. It was only when he consulted Dr Soo that he became aware of his entitlement to make a claim. He had been relying on income protection payments from his superannuation fund and Centrelink payments.

26. The applicant stated that when he ceased work at the respondent, he was relying on heavy doses of Tramadol, Endone, Nurofen and Panadol. This impacted on his ability to work and function.

27. The applicant stated that Dr Singh had recommended surgery, and he was keen to have the operation to alleviate his pain and to enable him to resume work and improve his life. He could no longer tolerate the pain and he had been advised about the risks associated with the surgery.

28. In his statement dated 22 May 2020, the applicant advised that when he provided his initial statement to the investigators in May 2019, he had no recollection of any previous back pain, but he had since recalled that he had suffered from back pain prior to his present claim, as disclosed in the clinical notes of Dr Tran. He stated that he had difficulty retaining information due to the strong medication that he was taking.

29. The applicant stated that he consulted Dr Tran on 21 October 2015 for back pain after a day of heavy and frequent lifting at work. He also told the doctor that he had experienced minor back pain in the past. The doctor gave him a certificate and prescribed strong analgesic medication such as Brufen, Codalgin, Nurofen Plus and Tramadol.

30. The applicant stated that he experienced back pain in the past whilst carrying out his work duties, but the pain was bearable, and he did not take time off work. He continued to perform his normal duties which involved repeated heavy lifting. His pain became severe and he was unable to work. He had experienced chronic severe back pain since he ceased work and he continued to see receive treatment.

31. The applicant stated that as his pain worsened, he became concerned about his job security. He was working 12 hour shifts to support his wife and five children because he was the sole breadwinner. He had to support his family and he continued to work despite his pain. He was taking significant quantities of analgesic medication.

32. The applicant stated that according to the clinical notes, on or around 26 September 2016, he told his doctor that his boss had provided him with suitable duties. The applicant recalled that he had spoken to Mr Smoothy and Mr Ronan, and they had given him suitable duties.

33. The applicant stated that in early 2017, he could not complete his duties. Mr Weal asked him to obtain a letter from Dr Tran with details of his medication and his capacity for work. On 14 February 2017, he was told that he would not be allowed to return to work until he was cleared of having Codeine and Benzo in his system.

34. The applicant indicated that his back pain was worsening, and he was not allowed to take his pain medication. He was struggling financially, so on or around 23 February 2017 he resigned and applied for Centrelink benefits. He was still taking strong medication.

Clinical notes, reports and certificates of Busby Medical Practice

35. The clinical notes of the Busby Medical Practice commence on 27 January 2009 and the last consultation was on 15 February 2018.

36. The first reference to any back symptoms was at the consultation on 21 October 2015, when Dr Medbury recorded that the applicant had been troubled by back pain the previous night after doing a lot of lifting at work. His back was aching prior to the end of the shift, but there was no specific injury. The applicant also admitted to having back twinges in the past, but not like his present symptoms.

37. Dr Medbury observed muscle spasm, a limited range of motion and an antalgic gait. He diagnosed a low back strain and prescribed Brufen, Codalgin Forte and Diazepam. He gave the applicant a certificate fort three days off work.

38. The applicant attended Bathurst Base Hospital on 14 December 2015 with low back pain. It was reported that the applicant had experienced the sudden onset of low back pain when he moved in bed. He was not taking medication and he was "normally a fit and well man who works vigorously as a baker"[1].

39. At the consultation on 22 January 2016, Dr Tran recorded that the applicant still had low back pain radiating to buttock with an antalgic gait. He noted that the applicant was employed in a physical job that included heavy lifting. The applicant was taking up to 12 tablets of Nurofen Plus each day. The doctor prescribed Tramadol and referred the applicant for a CT scan on 22 January 2016. This showed stenosis in the lumbar spine, degenerative changes at L2/3, L4/5 and L5/S1, narrowing and impingement.

40. On 2 February 2016, Dr Tran devised a chronic illness care plan and he advised the applicant to avoid heavy lifting at work. He prescribed Tramadol, Panadeine Forte and Lyrica, and referred the applicant for physiotherapy. The doctor gave him a certificate for one day off work on 2 February 2016 and on 9 March 2016 because he was "unwell".

41. The applicant saw the doctor every week or so for his back symptoms, and on 22 March 2016, he referred him for a steroid injection. The doctor gave him a certificate for one day off work because he was "unwell".

42. On 19 April 2016, the applicant told the doctor that he had to keep his job because he had five children and his wife was not working. They discussed his job situation and a potential change of career because his job was quite physical.

43. On 7 June 2016, Dr Tran noted that the applicant was only taking Panadeine Forte. He was still working for the respondent because he was the main income earner. The doctor gave him a certificate for one day off work because he was "unwell".

44. On 9 August 2016, Dr Tran recorded that the applicant had requested a certificate for his employer, He told the doctor that he could not afford to lose his job and he was caring for his sick wife. Dr Tran prescribed Panadeine Forte. According to the certificate dated 9 August 2016, the applicant had discovertebral degenerative changes at L2/3, L4/5 and LS/51 and he needed to follow safe lifting techniques at work.

45. On 26 September 2016, Dr Tran recorded that the applicant had been given suitable duties and he was receiving physiotherapy from his brother's friend. The doctor prescribed Panadeine Forte and he told the applicant to stop taking Lyrica which made him nauseous.

46. On 28 November 2016, the applicant complained of chronic back pain. He was still doing physical work and he was supporting his wife and children. Dr Tran prescribed Panadeine Forte and Diazepam.

47. On 2 December 2016, Dr Tran recorded that the applicant's back pain was so bad that he had been unable to attend work the previous day. The doctor provided him with a non-WorkCover certificate on 2 December 2016 that certified him unfit for 1 December 2016 because he was "unwell".

48. On 28 December 2016, Dr Tran recorded that the applicant was on holidays and his back pain was not too bad. On 31 January 2017, the doctor recorded that there had not been much change in his back pain. He prescribed Panadeine Forte and Diazepam.

[1] Application, page 208.

49. On 6 February 2017, Dr Tran reported that the applicant had lost control of his foot and had sprained his ankle on the date before (Sunday). The applicant said that his low back pain was getting worse, and he was thinking of quitting his job and go on Centrelink payments. He provided the applicant with a certificate, prescribed Diazepam and referred him to Dr Gunawardena.

50. In the letter of referral, Dr Tran advised that the applicant had been seeing him for 12 months with chronic low back pain and left sided radiculopathy due to advanced degenerative changes at L2/3, L4/5 and L5/S1.

51. On 10 February 2017, the doctor recorded that the applicant required a letter for his boss with details of his medication. On 14 February 2017, the applicant advised that he was not allowed to go to work unless he was cleared of Codeine and Benzo in his urine test as per company policy. The doctor changed the applicant's medication to Naproxen.

52. On 20 February 2017, the applicant told the doctor that his pain had worsened since he stopped taking Panadeine Forte and Valium. He was struggling financially because he could not return to work until his urine was clear. The doctor noted that, "He wants to claim WorkCover, but I can see that his case will be very challenging. Advise to seek legal advice first from compensation lawyer before he decides to go that way."[2]

53. On 23 February 2017, Dr Tran recorded that the applicant had quit his job and was going to apply for Centrelink payments until he found another position. He provided the applicant with a Centrelink certificate. On 8 March 2017, the doctor reported that the applicant had resigned because he could not cope anymore, and he needed to take painkillers for his pain. He prescribed Panadeine Forte and Diazepam.

54. The applicant came under the care of Dr Mon in May 2017. He continued to attend the surgery for prescriptions and Centrelink certificates throughout 2017. The doctor reported that the applicant was trying to reduce his intake of Panadeine Forte and Diazepam. In December 2017, the applicant advised that he was looking to volunteer for community work for two hours per day. He last attended the surgery for a certificate on 16 February 2018.

55. In a referral letter to Dr Bell dated 31 August 2017, Dr Mon advised that the applicant had been troubled by ongoing low back pain for about six to eight months, but curiously the doctor indicated that this was not related to his work. No reasons were provided.

56. The first certificate in evidence was issued by Dr Corbett Jones of the Loxley House Family Practice on 2 February 2017. He certified that the applicant was unfit for work due to a "medical condition" from 2 February 2017 to 10 February 2017.

57. Dr Tran issued non-WorkCover certificates that certified that the applicant was unfit for work due to chronic low back pain and an acute left ankle sprain from 5 February 2017 to 17 February 2017. The doctor then certified that the applicant was "unwell" and that he was unfit for work from 14 February 2017 to 28 February 2017 until the levels of Codeine and Benzo in his system were negative.

58. Dr Tran issued Centrelink certificates for total unfitness from 23 February 2017 to 8 April 2017 due to persistent low back pain. Dr Dousip issued Centrelink certificates for total unfitness from 16 February 2018 to 16 April 2018 due to chronic low back pain.

[2] Application, page 109.

Reports of Dr Gunawardena

59. Dr Gunawardena initially reported on 13 April 2017. She noted that the applicant had experienced low back pain for many months, and it had increased in the past 12 months. He was employed as a baker and he had to cease work because he could not cope with lifting the weights and standing for prolonged hours.

60. Dr Gunawardena reported that the applicant had pain mainly in his low back, which at times radiated into his legs. A CT scan showed advanced degenerative changes at L2/L3, L4/L5 and L5/S1, together with some nerve compression. He was not working, and he was taking Panadeine Forte.

61. Dr Gunawardena referred the applicant for an MRI scan on 26 April 2017. This showed a loss of disc height and irregularity at L2/3 consistent with discitis, and multilevel degenerative changes in the lower lumbar spine with foraminal stenosis at L5/S1 and possible impingement at L5 and S1. A bone scan and gallium scan taken in June 2017 showed degeneration but there was no evidence of infective discitis.

62. In his report dated 4 October 2017, the doctor noted that the applicant had been referred to an orthopaedic specialist, Dr Bell. Dr Gunawardena prescribed Diazepam, Baclofen and Panadeine Forte. She indicated that it was unlikely that the applicant would ever return to his pre-injury duties as a baker.

Clinical notes from Northwest Health Medical Centre

63. The clinical notes from Northwest Health Medical Centre commence on 12 February 2018 and conclude on 18 August 2019.

64. On 12 February 2018, Dr Kumarasiri recorded that the applicant had suffered from chronic back pain since February 2017. The doctor prescribed Panadeine Forte and Diazepam. The applicant also had hydrotherapy.

65. The applicant attended the surgery on a regular basis for prescriptions for medication, including Targin and Panadeine Forte, for his on-going back pain. On 3 October 2018, Dr Kumarasiri reported that the applicant had experienced sharp low back pain of varying intensity since 2017. He had not suffered any workplace injury, but he was working as a baker. The doctor referred the applicant to Dr Soo and in May 2019, it was noted that the applicant had been referred to Dr Lim and Dr Singh, who had recommended surgery.

Reports of Dr Soo

66. Dr Soo reported on 25 March 2019. He recorded that the applicant had worked as a baker for 40 years, averaging 60 to 70 hours per week, in duties that involved repetitive lifting of boxes weighing 15 to 20 kg. He had experienced back pain over the years, but this would go away quickly. Two years ago, his pain worsened, and he was unable to continue working. He had sought treatment and had been prescribed physiotherapy and medication, including Panadeine Forte, Diazepam, Lyrica, Amitriptyline and Targin.

67. Dr Soo noted that the applicant's pain had worsened. He experienced pain in his back, and pins and needles radiated into his left leg. He was attending hydrotherapy, but he was not gaining any benefit.

68. Dr Soo diagnosed severe debilitating back pain due to advanced degenerative changes which he attributed to the nature of the applicant's employment as a baker over a period of 40 years. He considered that the applicant would benefit from a spinal fusion, although he would prefer to see the scans before making any decision. He was surprised that the applicant had not made a claim for workers compensation for his injury.

Clinical notes, reports and medical certificates of Wyong Doctors

69. The clinical notes of Wyong Doctors commence on 28 March 2019 and conclude on 26 August 2019.

70. On 28 March 2019, Dr Calvache-Rubio recorded that on 2 February 2017, the applicant suffered a low back injury due to repetitive heavy lifting, bending and twisting over years at work. He had continued working with pain and this had aggravated his condition. He had to resign in February 2017 or March 2017 due to severe pain.

71. The doctor diagnosed lumbar spine radiculopathy, an L3/4 bulging disc with an annular tear, L4/5 and L5/S1 foraminal stenosis with S1 nerve root compression, and chronic pain with psychosocial barriers. He indicated that it would be reasonable to conclude that the mechanism of injury was the direct result of performing those specified tasks/ Further, the history was consistent with his employment being the main contributing factor to the injury. He stated that the applicant was unfit for work. He recommended physiotherapy and psychological counselling.

72. Dr Calvache-Rubio referred the applicant for an MRI scan on 26 April 2019. This showed multilevel canal and foraminal stenosis at L4/5 and L5/S1 with contact on the L5 nerve roots and foraminal stenoses. There was also a disc osteophyte at L3/4 contacting on the L4 nerve root.

73. Dr Lim provided a report on 2 September 2019 in almost identical terms to that of Dr Calvache-Rubio. He concluded that the applicant had suffered chronic back pain from years of work as a baker. He recommended physiotherapy, psychological counselling and spinal surgery, which was reasonably necessary.

74. Dr Lim stated that the applicant had pre-existing back pain at the time that he commenced employment with the respondent. He continued to work with back pain, and he left his job because of his symptoms. The doctor considered that the applicant's work as a baker had aggravated the previous back pathology.

75. Dr Lim stated that the applicant had been unfit for work due to his injury on 2 February 2017, and he was simply not aware of his entitlements. He felt that the need for the spinal surgery was causally related to the applicant's work injury.

76. Dr Calvache-Rubio certified that the applicant had no current work capacity from 28 March 2019 to 6 June 2019 due to lumbar spine radiculopathy, an L3/4 bulging disc with an annular tear, L4/5 and L5/S1 foraminal stenosis with S1 nerve root compression, and chronic pain with psychosocial barriers that resulted from repetitive lifting, bending and twisting over the years. Dr Lee certified that the applicant had no current work capacity from 6 June 2019 to 26 July 2019.

77. Dr Lim certified that the applicant had no current work capacity from 19 July 2019 to 16 August 2019, and he provided Centrelink certificates of unfitness from 19 July 2019 to 1 November 2019.

Reports of Dr Singh

78. Dr Singh reported on 22 May 2019 and 26 June 2019. He recorded that the applicant had significant lumbar disease with central and foraminal stenosis, and loss of disc height at multiple levels with significant central and lateral recess stenosis, more severe at L2-3 and L3-4. The applicant was unable to work, and he had difficulty performing his activities of daily living.

79. Dr Singh stated that the history of repetitive bending, heavy lifting, twisting and turning during his job as a baker was responsible for the applicant's condition, and that his employment was the main substantial contributing factor to his injury. He considered that there was no evidence of any pre-existing condition.

80. Dr Singh indicated that, given the applicant's symptoms and the MRI scan findings, conservative treatment was not appropriate, and he recommended that the applicant have a staged L2 to S1 decompression and fusion with pelvic fixation.

81. In his report dated 12 September 2019, Dr Singh advised that the applicant's job as a baker involved heavy lifting and repetitive bending which over the course of several years, in the absence of any specific injury, had resulted in his back condition and was the substantial contributing factor to his injury. He considered that the applicant had no capacity for work for the foreseeable future, and as conservative treatment had failed, the proposed surgery was reasonably necessary. The treatment arose from as a consequence of his work related injuries. He agreed that the applicant has had no capacity for work since 2017.

Reports of Dr Gehr

82. Dr Gehr reported on 5 November 2019. He noted that the applicant had experienced low back pain for weeks or months prior to February 2017, together with pins and needles in the left leg to his knee. He had intermittent low back pain related to his work duties for many months prior to his injury, but his symptoms had always settled, and he had not seen a doctor until the time of his injury.

83. Dr Gehr recorded that on 2 February 2017, the applicant's pain was quite intense, and he was not able to complete his shift. The following day he saw his doctor who arranged scans and prescribed painkillers and physiotherapy. He had seen Dr Wanigasekera and Dr Singh, who recommended surgery.

84. The doctor reported that the applicant had constant pain in his back radiating down his left leg with walking, at varying degrees of intensity. His pain impacted on his ability to walk, stand and sit. The applicant claimed that his symptoms were getting worse.

85. Dr Gehr diagnosed a lumbar spine soft tissue injury with left radiculopathy on a background of lumbar disc disease with collapse of disc height from L3 to S1 with significant central and lateral recess stenosis, particularly at L2/3 and L3/4. He stated that the applicant's employment was a significant contributing factor to his injury, and he believed that the applicant was unfit for his pre-injury duties. As he had failed non-operative management, he considered that the surgery proposed by Dr. B. Singh was reasonable and necessary. The need for the treatment was casually related to the applicant's work. He agreed that the applicant had been incapacitated since 2 February 2017.

86. In his report dated 25 May 2020, the doctor responded to a series of questions from the applicant's solicitor. The doctor was asked to assume that the applicant's employment involved repetitive bending, twisting, turning, and repetitive heavy lifting.

87. Dr Gehr advised that the degeneration in the applicant's lumbar spine was caused by the nature and conditions of his employment from 2011 to 2017 [sic] in the absence of any other history or cause. He considered that the pain that the applicant had on 2 February 2017 had been building up over the previous weeks or months, so his injury represented an aggravation of the back pain that had been developing from 2011.

88. Dr Gehr noted the views of Dr Powell, and observed that he was of the view that the cause of the applicant's pain was likely to be multifactorial, including a constitutional component as well as the nature and conditions of his employment. Dr Gehr disagreed that Dr Powell's opinion that the applicant's back pathology was not caused by his employment with the respondent, although Dr Powell conceded that the employment resulted in an aggravation of pre-existing degenerative disease. Dr Gehr questioned how the applicant would have been able to carry out such a physically demanding job in the presence of significant previous degenerative disease.

Report of Dr Powell

89. Dr Powell reported on 11 May 2020. He recorded details of the applicant's duties that included work on a dough-making machine, and placing bread in trays that weighed 8 kg and then tracking the trays onto dollies. Each tray would contain four 2 kg loaves for a total weight of 8 kg. Whilst performing these duties, the applicant was aware of the gradual lower back pain over a period of several years.

90. Dr Powell recorded that for the last four to five months of his employment, he was required to unload bread from the crates and turn the loaves out onto a conveyor belt of a crumbing machine. During this period, he noticed increasing lower back pain. He took medication for his pain. The doctor noted that in February 2017, he was asked to leave work due to erratic behaviour and his employment was terminated shortly afterwards.

91. Dr Powell noted that the applicant had seen a number of doctors for his chronic back pain, and Dr Singh had recommended an L2 to S1 posterior decompression and fusion. The applicant had intermittent pain in his lumbar spine and pelvis, together with muscle spasm and pins and needles in his right thigh. He experienced pain on a daily basis, and it was worse at night. It was aggravated by periods of prolonged sitting and standing, and he had reduced mobility. He had injured his back when lifting on two occasions in the 1980s, but his injuries settled over a period of several months with conservative treatment.

92. Dr Powell diagnosed advanced multilevel degenerative disc disease from L2/3 to L5/S1. He did not believe that there had been any specific precipitating incident resulting in the development of the applicant's back pain, which developed in a more gradual fashion.

93. Dr Powell indicated that the cause of the longstanding degenerative condition was likely to be multifactorial, with a constitutional component as well as contribution from the nature and conditions of his employment over a period of 40 years with multiple employers. He stated that the pathology identified on the CT scan in 2016 took many years to develop, and it was not the result of his employment with the respondent.

94. Dr Powell thought that it was reasonable to conclude that the applicant's employment with the respondent aggravated the pre-existing degenerative disease in the applicant's lumbar spine, but he did not consider that his employment was the main contributing factor to the aggravation of the underlying degenerative disease process, because of the extent of the disease shown in the scans in 2016, the history of previous injury to the lumbar spine, the nature of his previous employment, and the natural history of the very advanced multilevel degenerative pathology.

Respondent's statements

95. Bruce Weal, the site manager, provided a statement on 28 May 2019. He stated that he first became aware about the applicant's claim on 8 April 2019, when he was contacted by a claims officer from EML. He indicated that the applicant was sent home by his work colleagues to protect himself and them from his erratic behaviour on 2 February 2017. The applicant did not return to work and he resigned on 22 February 2017 because he was unable to continue to work without his medication.

96. Mr Weal stated that the applicant made no complaints to him regarding any back injury sustained at work, but the applicant told him that he was using pain relief for a back injury after he ceased work. At no time did the applicant indicate that he had injured his back at work, and he could not recall seeing the applicant in discomfort.

97. Mr Weal confirmed that he accompanied the applicant to the appointment with Dr Corbett Jones on 2 February 2017, and during the discussions, the applicant admitted that he had back pain, but he did not suggest that it was due to a back injury.

98. Mr Weal stated that he did not know whether Mr Smoothy had taken the applicant off the bread throwing job, but he confirmed that job rotation was encouraged. The applicant was stood down due to his erratic behaviour and the concerns that he was self-medicating with drugs. When he ceased work on 2 February 2017, he went on sick leave and he did not return to work before his resignation. He provided certificates from Dr Tran, but they did not refer to any work injury.

99. Ben Ronan, the production supervisor, provided a statement on 28 May 2019. He stated that he only became aware of the applicant's claim when he was told by Mr Weal in April 2019. He advised that the applicant was the subject of a discipline or performance issue after the night shift on 1 February 2017, when fellow workers raised concerns about his erratic behaviour. He contacted the applicant and told him **to** take the night off work on 2 February 2017. The applicant submitted a certificate of unfitness from 2 February 2017 to 10 February 2017.

100. Mr Ronan stated that the applicant did not report that he had injured his back during his employment, and he did not see any sign of the applicant suffering from a back injury. He had no recollection of the applicant giving him a certificate from Dr Tran, but if that had been the case, he would have asked the applicant to complete an incident report. He was not aware of the applicant being taken off the bread throwing duties due to back issues. He confirmed that the applicant ceased work on 2 February 2017 after being sent home on the night of 1 February 2017, and he did not return to work before his resignation. Mr Ronan completed a memorandum regarding the applicant's erratic behaviour on 1 February 2017, which included lifting two trays containing eight loaves and taking them through the bakery to the ingredient store[3].

101. Nathanial Mason, an operator, provided a statement on 28 May 2019. He stated that when he was driving the applicant home one morning, he told him that he was taking medication for a previous back injury. At no stage did the applicant tell him that he hurt his back at the respondent, although in around November 2016 or December 2016, the applicant told him that he aggravated his back when lifting bread crates. He had never seen the applicant with back pain.

102. Mr Mason stated that when he was working with the applicant on 2 February 2017, he appeared to be affected by something. He could not remember what he was doing, and he was sweating. He later said that his mother had passed away that day and he was upset. The applicant was sent home after this.

103. Graeme Smoothy, a line operator, provided a statement on 28 May 2019. He advised that the applicant had told him that he had injured his back at a prior employer. He said that he was taking strong pain medication for years.

[3] Reply, page 119.

104. Mr Smoothy stated that he first became aware of the applicant's claim when he was told by Mr Weal. During the nightshift on 1 February 2017, he was concerned about the applicant because he appeared to be out of it. He was looking into space and he was slurring his words. The applicant told him that his mother had passed away. At one stage, the applicant locked himself in the makeup room. He later found him in the makeup room with crates of bread that should have been put on the line in the drying room.
105. Mr Smoothy advised that he decided to send the applicant home for his own safety and the safety of the other workers. At no stage did the applicant say that he had injured his back and he did not appear to be in any pain.

106. Mr Smoothy stated that the applicant had never reported that he injured his back at work, and he was never moved to another area because of his back. All jobs were rotated in accordance with the respondent's policy. He confirmed that the applicant was sent home from work on 2 February 2017 between 12.30 am and 1.30 am, and he had not returned to work since that time.

107. According to the Job Physical Requirements Form dated 14 February 2017, the applicant's duties involved continuous standing, bending and lifting, together with intermittent walking and twisting over the course of 10.5 hours per shift. The applicant had breaks totalling 1.5 hours per shift. He lifted weights up to 10 kg.

APPLICANT'S SUBMISSIONS

108. Ms Grotte concedes that the applicant di not lift weights in excess of 8 kg, but according the job description, his job involved continuous sitting, bending and lifting, and intermittent walking and twisting over 10.5 hours per shift. The weights are not an issue, rather the repetitive nature of his duties.

109. Ms Grotte submits that in March 2019, Dr Soo noted that the applicant had been troubled by worsening back pain for the last two years and he had been forced to cease work 18 months earlier. The doctor noted that the tests showed advanced degenerative changes in the applicant's lower back, which he attributed to the nature of his employment as a baker over a period of 40 years. He stated that the applicant would benefit from a spinal fusion.

110. Ms Grotte submits that Dr Soo was surprised that the applicant had not considered making a clam for workers compensation and he spoke to him about this. This was the first time that the applicant became aware that he had suffered a work related injury, and it is fairly clear that the applicant had not thought about making a claim before seeing Dr Soo.

111. Ms Grotte submits that in May 2019, Dr Singh noted that the applicant had multilevel lumbar disc disease. He recommended a two staged decompression and fusion, but he did not comment on causation. However, in his report dated 26 June 2019, the doctor indicated that the history of repetitive bending, heavy lifting, twisting and turning during his job as a baker was responsible and consistent with the degenerative disease in his back. He considered that the applicant's employment was the main substantial contributing factor due to the repetitive demands of the job.

112. Ms Grotte submits that in his statement, the applicant described the nature of his duties, which included lifting crates of bread weighting around 8 kg. He explained that he felt sharp pain in his back after a day's shift about six months before February 2017. He told Mr Smoothy that he had a sore back, and he was allocated duties that did not involve lifting and bending.

113. Ms Grotte submits that Dr Tran on 9 August 2018 reported that the applicant had degenerative changes in his back, and he needed to follow strict safe lifting techniques. There were complaints of low back pain recorded in Dr Tran's notes on 5 August 2016, " 9 August 2016, and 29 September 2016, when it was noted that the applicant had been given suitable duties by his boss. These notes corroborate the applicant's evidence that he told his boss. There was nothing to gain by saying this to his doctor. He was not intending to claim compensation and he was trying to hold on to his job. Dr Tran recorded that the applicant could not afford to lose his job, because he had children and was looking after his ill wife.

114. Ms Grotte submits that in his statement, the applicant confirmed that he saw his doctor about his back injury, and he was given a certificate for two days off. He gave the certificate to Mr Ronan and he did not complete an incident report. He continued to experience pain and when he told Mr Smoothy, he was given the bread throwing job.

115. Ms Grotte submits that in his supplementary statement, the applicant conformed that he had experienced low back pain over a significant period of time, and this is corroborated by the clinical notes of Dr Tran. It was noted that the applicant had resigned because he could no longer cope with his duties without taking his medication. The statement was provided two years after the fact, and there are inaccuracies in dates and times. These errors are immaterial, and do not detract from his evidence.

116. Ms Grotte submits that the applicant indicated that he had no prior problems with his back, and this is consistent with the clinical notes from 2009 to 2015. On 21 October 2015, the applicant complained of low back pain after a lot of heavy lifting at work on the previous day. The applicant clarified this in his statement and confirmed that he sustained no specific injury.

117. Ms Grotte submits that on 22 January 2016, Dr Tran recorded that the applicant was still troubled by recurrent low back pain since October 2015. He arranged tests and prescribed medication. The applicant was provided with certificates of unfitness before and after he saw Dr Soo.

118. Ms Grotte submits that in his last statement, the applicant indicated that he left work because he could not manage his pain without taking high doses of painkillers. After he sought medical advice, he became aware that he had suffered a work injury that might be compensable.

119. Ms Grotte submits that Dr Powell recorded a history of prior intermittent pain, treatment in October 2015 and increasing low back pain prior to his cessation of work in 2017. He accepted that the applicant's employment aggravated the pre-existing degenerative disease in the applicant's back, but he considered that the employment was not the main contributing factor. Counsel submits that the doctor did not describe the other factors and he did not clearly address the question as to whether the employment was the main contributing factor to the aggravation. Not much weight can be given to his opinion, and there is no evidence of any other contributing factor.

120. Ms Grotte submits that Dr Gehr did not properly refer to "main contributing factor", but he indicated in his second report that he found no other causes to account for the degeneration in the applicant's spine. The doctor disagreed with Dr Powell and stated that the nature of the applicant's employment between 2011 and 2017 was enough to accelerate and cause the changes in the applicant's lumbar spine.

121. Ms Grotte submits that there is no evidence of any previous problems and no evidence of the applicant experiencing high pain levels. The nature of the applicant's work involved repetitive bending lifting and twisting, and this represents an aggravation of the degenerative disease in terms of s 4(b)(ii) of the 1987 Act.

122. Ms Grotte submits that the evidence confirms that conservative treatment has been undertaken and Dr Singh has recommended surgery in light of the MRI scan findings. Dr Soo also agreed that surgery was required. Therefore, one can be satisfied that the need for surgery resulted from the work aggravation.

123. Ms Grotte submits that it was clear from the clinical notes that the applicant notified his employer that he had a sore back, but he did not mention that he had a work injury. The applicant explained why he did not report his injury.

124. Ms Grotte submits that the failure by a worker to comply with s 254 of the 1998 Act is not a bar to receiving compensation if there are special circumstances or there is some other reasonable cause. The applicant tried to maintain his job and manage his pain for 1.5 years before he could no longer cope. He did not see a specialist until March 2019. Dr Soo thought that he had a good claim, as did Dr Lim, although Dr Tran stated on 20 February 2017 that he thought that any claim would be challenging.

125. Ms Grotte submits that the applicant has provided a reasonable explanation as to why he did not make a claim, such that he can rely upon s 261(6) of the 1998 Act. He made a claim within a few weeks of becoming aware that he had suffered a work injury when he was informed by Dr Soo. This is consistent with *Unilever Australia Ltd v Petrevska*[4].

RESPONDENT'S SUBMISSIONS

126. The respondent's counsel, Mr Doak, submits that the applicant indicated that he reported his injury to Mr Ronan on 17 February 2017, but he did not complete any injury or incident forms. The suggestion that the applicant did not claim workers compensation for fear of losing his job does not ring true, as the applicant said that he reported the injury.

127. Mr Doak submits that the applicant's evidence is contradicted by several pieces of evidence. According to Messrs Smoothy and Mason, the applicant was stood down on 2 February 2017 due to his erratic behaviour during the night shift. The applicant said that he had taken pain killers for lower back pain. He also claimed that he was affected by the recent death of his mother. The applicant did not report any work injury, and this was confirmed by Messrs Weal and Ronan.

128. Mr Doak submits that the respondent maintains that the applicant did not return to work after 2 February 2017, and he later resigned. Mr Smoothy denied that the applicant reported any injury and he denied that he moved him to different jobs to accommodate work limitations due to his back injury. Mr Smoothy's evidence about the applicant having prior back problems contradicts the applicant's evidence.

129. Mr Doak submits that there is no record in the clinical notes of Dr Tran that the applicant injured his lower back in February 2017. The applicant reported back pain on 31 January 2017, but he did not refer to any work-related cause. The entry on 6 February 2017 only referred to an ankle sprain, and Dr Tran did not record any relationship between work and reported symptoms. It was noted that the applicant was thinking of quitting his job so he could go on Centrelink payments. He failed to give any plausible explanation why he did not report a work-related injury to Dr Tran in February 2017.

130. Mr Doak submits that the contents of the clinical notes contradict the applicant's evidence regarding past back pain. Dr Powell also recorded a history of a back injury when the applicant was working at the Achilles Bakery between 1980 and 1994.

[4] [2013] NSWWCCPD 3, (*Petrevska*).

131. Mr Doak submits that in his last statement, the applicant indicated that he had experienced back pain for many years, but he did not particularise the period or the circumstances in which he experienced the back pain. This is inconsistent with his earlier statements. There is no evidence in either the treating clinical records or reports, or of the applicant reporting a significant effect on his ability to recall matters. The applicant has not provided any explanation why it had taken until 22 May 2020 to address this.

132. Mr Doak submits that either the applicant was not truthful in his statement regarding the existence of lower back pain before August 2016, or his ability to accurately recollect events is such that no weight can be given to his version of events. The applicant's evidence must be found to be unreliable and cannot be preferred to the evidence of the respondent's witnesses.

133. Mr Doak submits that Mr Smoothy indicated that the applicant told him that he had prior back pain and had taken painkillers, meaning that the symptoms were in existence prior to 2011, when he commenced work with the respondent. There is no reason why Mr Smoothy's unchallenged evidence should not be accepted, and the applicant has not provided any explanation.

134. Mr Doak submits that if the applicant was concerned about job security or his financial future, he would not have reported his work injury, or he would have made sure that the injury was documented. The uncontradicted evidence of Messrs Weal and Ronan was that all employees were aware of the procedure for reporting injuries.

135. Mr Doak submits that little weight can be given to the accuracy of the history given by the applicant to Dr Medbury in October 2015. He submits that the applicant has consistently shown that he is untruthful or completely unreliable. The history in his most recent statement that he had bearable pain differs from that recorded by Dr Medbury of *"minor back twinges in the past".* It cannot be assumed that the applicant chose to tell Dr Medbury the truth.

136. Mr Doak submits that Dr Medbury diagnosed a low back strain, and although the doctor reported in January 2016 that the applicant had recurrent back pain since October 2015, the doctor relied on an inaccurate history. The applicant cannot say that he has either given an untruthful or unreliable history about his past back symptoms because of his pain.

137. Mr Doak submits that the absence of any history of a work injury is reflected in the medical certificates issued by Dr Tran after August 2016.There is no report from Dr Tran explaining his concerns about any claim. It is possible that based on the discussions between the applicant and Dr Tran that the doctor had formed the view that the applicant's back condition was not work related.

138. Mr Doak submits that Dr Powell stated that it would be reasonable to conclude that the applicant's employment caused an aggravation of the pre-existing degenerative disease, but he considered that based on the applicant's history, the heavy nature of his previous employment, and the natural history of the advanced degenerative disease, the applicant's employment with the respondent was not the main contributing factor to the aggravation, exacerbation or deterioration of the degenerative condition.

139. Mr Doak submits that no weight or reliance can be placed on the truthfulness or accuracy of the applicant's evidence. It does not support a finding that his employment was the main contributing factor to the aggravation etc of a disease.

140. Mr Doak submits that in his first report, Dr Gehr recorded a history that the applicant developed low back pain over a period of weeks or months prior to 2 February 2017. He felt that the applicant's pain was due to the work that he had been performing. Dr Gehr did not record any description of the applicant's work duties.

141. Mr Doak submits that Dr Lim recorded that the applicant's work involved repetitive heavy lifting, bending and twisting over years at work, and that it was reasonable to conclude that the mechanism of injury was resulted from performing those duties. Such a description and conclusion is meaningless in the context of establishing on the balance of probabilities that the applicant's employment was the main contributing factor to the aggravation. His evidence fails to meet the requirements discussed in *Makita (Australia) Pty Ltd v Sprowles*[5]*, Dasreef Pty Ltd v Hawchar*[6]**,** and *Hancock v East Coast Timber Products Pty Limited*[7]. There is a need to demonstrate that the opinion is that of a person with specialised knowledge based on that person's training, study or experience and the opinion is wholly or substantially based on that specialised knowledge[8].

142. Mr Doak submits that the report of Dr Calvache-Rubio dated 28 March 2019 suffers the same deficiency. The description of the circumstances of injury is in almost identical terms to that recorded in the report of Dr Lim, raising questions of objectivity, but it is not necessary to make a finding about the weight to be given to the report for the same reasons discussed above.

143. Mr Doak submits that Dr Singh did not properly identify the nature of the work the applicant was performing in coming to his opinion on causation. Dr Soo's opinion was based on an inaccurate history that the applicant was working for 60 to 70 hours per week in duties that involved repetitive lifting of boxes weighing 15 kg to 20 kg, and that the severe degeneration was the direct result of the nature of his job over the past 40 years. Neither opinion can be accepted as supporting the applicant's claim under s 4(b)(ii) of the 1987 Act.

144. Mr Doak submits that Dr Gehr was asked to assume a generalised version of the applicant's work duties, namely repetitive heavy lifting, bending and twisting over years at work. He did not identify with precision the nature of the work the applicant that the was in performing in terms of the weight and movement involved, and the degree of repetition.

145. Mr Doak submits that Dr Gehr stated that the degenerative disease was caused by the applicant's work, but such an opinion does not support the applicant's claim under s 4(b)(ii) of the 1987 Act. Further, the doctor did not have a history of the prior work injury as recorded by Dr Powell. Given there is no evidence from the applicant to suggest that history is incorrect, the failure by Dr Gehr to consider this prior injury means his opinion cannot be relied upon. Accordingly, the applicant's claim fails.

146. Mr Doak submits that the evidence confirms that the applicant failed to give any notice of an injury before he resigned from his employment on 22 February 2017. In his statement, he explained that he was unaware whether a claim could be made because he had previously reported back pain which was not caused by a specific incident. The question of the applicant's belief about his entitlement to make a compensation claim is not the issue.

147. Mr Doak submits that the applicant conceded that he was aware of the injury and he claimed that he did not formally report it prior to resigning because he had already told his supervisor that he had back pain. This has been denied by the respondent's witnesses and their evidence should be preferred. It could not be said that the applicant failed to give notice due to ignorance or mistake in accordance with s 254(3) of the 1998 Act.

148. Mr Doak submits that the applicant failed to make a claim for compensation within six months of the date of injury contrary to s 261 of the 1998 Act. The relevant date of injury is 2 February 2017, when the applicant first ceased work, allegedly due to the effects of medication he was taking as a result of the pain in his lower back.

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[5] [2001] NSWCA 305; 52 NSWLR 705; 25 NSWCCR 218, (*Makita*).
[6] [2011] HCA 21, (*Hawchar*).
[7] [2011] NSWCA 11 (*Hancock*).
[8] *Rolleston v Insurance Australia Ltd* [2017] NSWCA 168, [32], (per Emmett JA).

149. Mr Doak submits that principles discussed in *Petrevska* do not apply to the present matter, as according to applicant's evidence, he was aware of the injury prior to his resignation and he had informed his employer of same.

150. Mr Doak submits that the applicant must show that he was ignorant of his right to claim compensation for his injury, consistent with *Irwin v LA Logistics Pty Limited*[9]. The applicant claimed that he was unaware that he could make a claim for compensation until he consulted Dr Soo in March 2019, but Dr Soo stated that he had spoken to the applicant regarding the possibility of making a claim, but this was known to the applicant when he saw Dr Tran on 20 February 2017. The applicant failed to address the reason why the discussion with Dr Soo in March 2019 was different to the knowledge he had in February 2017.

151. Mr Doak submits that the applicant has not established that his failure to make the claim for compensation within six months was due to ignorance, mistake or other reasonable cause.

APPLICANT'S SUBMISSIONS IN REPLY

152. Ms Grotte submits that the fact that the applicant has a poor recollection of the chronology of events does not mean that he is a liar, especially in the presence of corroborative contemporaneous clinical notes. The notes support the applicant's allegation that Mr Smoothy accommodated his back problem, so his evidence should be preferred to that of the respondent's witnesses.

153. Ms Grotte submits that the clinical notes show that the applicant was afraid of losing his job and that he was trying to continue working despite the increasing pain from October 2015.

154. Ms Grotte submits that the applicant told Mr Smoothy that he experienced back pain during the course of his employment, but he did not formally make a notification of injury. This is supported by the fact that he gave to his employer medical certificates, not WorkCover certificates. This is consistent with the clinical notes.

155. Ms Grotte submits the applicant's treating general practitioners did not appreciate that he had an injury within the terms of s 4(b)(ii) of the 1987 Act, and they did not support him in his wish to make a claim. The applicant then made a claim for income protection from his superannuation fund. It was not until he saw Dr Soo in 2019 that he was told that he could have a viable claim.

156. Ms Grotte submits that the applicant provided an explanation that satisfied the "special circumstances" requirement. The applicant did not want to lose his job, and his treating doctor indicated that it would be challenging for him to claim workers compensation. This explanation is reasonable.

157. Ms Grotte submits that the applicant relies upon s 261(3)(b) or s 261(6) of the 1998 Act in the alternative. The applicant provided a reasonable explanation why he failed to make a claim within the time specified by the legislation. He made his claim within three years of the injury by March 2019. There is no cogent reason not to accept him as a witness of truth.

158. Ms Grotte submits that the applicant relies upon an injury in the form of an aggravation, acceleration, exacerbation or deterioration of a disease where the employment was the main contributing factor in terms of s 4(b)(ii) of the 1987 Act. She submits that the job description confirmed that the applicant's involved job continuous standing, bending and lifting over 10.5 hours, together with intermittent twisting and walking since November 2011.

[9] [2011] NSWWCCPD 23.

159. Ms Grotte submits that the clinical notes from the Busby Medical Centre show that the applicant first complained of low back pain on 21 October 2015, Dr Medbury recorded that the applicant had done a lot of lifting at work. Dr Medbury also recorded that the applicant had "minor back twinges in past but not like this". The applicant was prescribed medication, and there is no evidence that he required medication beforehand. This history is consistent with the Australian Super Application form dated 12 May 2017.
160. Ms Grotte submits that it can be reasonably inferred from the notes that the work that the applicant performed caused a worsening of the effects of any underlying pre-existing condition, which did not abate. On 22 January 2016, there was a history of a physical job which included heavy lifting and recurrent low back pain since October 2015.

161. Ms Grotte submits that after October 2015, the applicant frequently consulted Dr Tran. The doctor recommended that he avoid heavy lifting at work. This is an acknowledgement by Dr Tran that the applicant's duties were causing an increase in his symptoms and that he required medication. On 19 April 2016, the doctor recorded that the applicant had to keep his job, as he had five children and his wife was not working. On 28 December 2016, the applicant told the doctor that he was on holidays and his back was not too bad. This shows that the work he was carrying out was adversely impacting on the pre-existing condition.

162. Ms Grotte submits that the opinions of Drs Soo and Singh support the applicant's claim that his employment caused an aggravation of the underlying condition. Dr Singh stated that the applicant's employment as a baker was the "main substantial contributing factor to his injury due to the repetitive functional demands of the job". Dr Lim also indicated that it would be reasonable to conclude that the mechanism of injury was the direct result of repetitive heavy lifting, bending and twisting at work.

163. Ms Grotte submits that Dr Gehr accepted that the nature of the applicant's work was sufficient to accelerate and cause the changes in his lumbar spine. He based his opinion on all of the material facts which included a comprehensive analysis of the clinical notes and the nature of the duties.

164. Ms Grotte submits that Dr Powell conceded that it was reasonable to conclude that the applicant's employment aggravated the pre-existing degenerative disease process in the applicant's back. He disputed that the applicant's employment was the main contributing factor in the aggravation, but he did not identify what was the main contributing factor to the aggravation or what the other factors were. His comment represents a mere ipse dixit, and his opinion should not be preferred to that of the applicant's doctors. Further, Dr Mon's opinion on 31 August 2017 that the applicant's ongoing back pain was unrelated to work demonstrates a lack of understanding by Dr Mon of what constitutes an "injury" under s 4(b)(ii) of the 1987 Act. Dr Tran also appears to be under the same misapprehension.

165. Ms Grotte submits that the applicant is entitled to an award of weekly compensation at the relevant rates from 22 February 2017 to 21 August 2019, based on the Pre-Injury Average Weekly Earnings (PIAWE) of $1,515.71 per week, together with medical expenses, including the cost of the surgery proposed by Dr Singh.

REASONS

Did the applicant sustain injury to his lower back? – s 4(b)(ii) of the 1987 Act

166. Section 4 of the 1987 Act defines injury as follows:

> "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

(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".

167. In order to be satisfied that an injury has occurred, there must be evidence of a sudden or identifiable pathological change: *Castro v State Transit Authority (NSW)*[10], or as stated by Neilson CCJ in *Lyons v Master Builders Association of NSW Pty Ltd* [11], "the word 'injury' refers to both the event and the pathology arising from it".

168. The issue of causation must be determined based on the facts in each case. The accepted view regarding causation was set out in *Kooragang Cement Pty Ltd v Bates*[12] where Kirby J stated:

> "The result of the cases is that each case where causation is in issue in a workers compensation claim must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase 'results from' is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is a common sense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation."

169. The applicant alleges an injury in the form an aggravation, acceleration, exacerbation or deterioration of an underlying disease process in his lumbar spine in terms of s 4(b)(ii) of the 1987 Act. He bears the onus of establishing that he suffered such an injury.

170. In *Department of Education & Training v Ireland*[13], President Keating considered the principles regarding the discharge of the onus of proof. He stated:

> "The principles relevant to the discharge of the onus of proof were discussed in *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246 (16 October 2008) ('*Nguyen*') where McDougall J (McColl and Bell JJA agreeing) said at [44]–[48]:

[10] [2000] NSWCC 12; 19 NSWCCR 496.
[11] (2003) 25 NSWCCR 422, [429].
[12] (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*), [463].
[13] [2008] NSWWCCPD 134 (*Ireland*).

> ‘44. A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336. His Honour’s statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in *Helton v Allen* (1940) 63 CLR 691 at 712.
>
> 45. Dixon CJ put the matter in different words, although to similar effect, in *Jones v Dunkel* (1959) 101 CLR 298 at 305 where his Honour said that ‘[t]he facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied’. Although his Honour dissented in the outcome of that case, the words that I have quoted were cited with approval by the majority (Stephen, Mason, Aickin and Wilson JJ) in *West v Government Insurance Office of NSW* (1981) 148 CLR 62 at 66. See also Stephen J in *Girlock (Sales) Pty Limited v Hurrell* (1982) 149 CLR 155 at 161–162, and Mason J (with whom Brennan J agreed) in the same case at 168.
>
> 46. It is clear, in particular from *West* and *Girlock*, that the requirement for actual satisfaction as to the occurrence or existence of a fact is one of general application, and not limited to cases where the fact in question, if found, might reflect adversely on the character of a party or witness.
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> 47. In *Malec v JC Hutton Pty Limited* (1990) 169 CLR 638 Deane, Gaudron and McHugh JJ said at 642-643:
>
> > “A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain; if the probability of it having occurred is less than it not having occurred, it is treated as not having occurred.”
>
> 48. On analysis, I think, what their Honours said is not inconsistent with the requirement that the tribunal of fact be actually persuaded of the occurrence or existence of the fact before it can be found. On their Honours’ approach, what is required is a determination of the respective probabilities of the event’s having occurred or not occurred. There is nothing in that analysis to suggest that the determination in favour of probability of occurrence should not require some sense of actual persuasion.’”[14]

171. Therefore, in order for the applicant to discharge the onus, I “must feel an actual persuasion of the existence of that fact”.

172. There is no doubt that the applicant is an unreliable historian, but I do not accept the respondent’s submission that he has been untruthful. He is obviously confused about dates, who he consulted and when he sought treatment. In his last statement, he indicated that he had difficulty retaining information due to the strong medication that he was taking. This is a plausible explanation, given that the respondent had concerns about his ingestion of medication at the time that he ceased work on 2 February 2017. Therefore, this places in issue what weight can be given to the contents of the applicant’s statements.

[14] *Ireland*, [89].

173. The statement that the applicant provided to the investigator in May 2019 and to his solicitor in August 2019 contain a number of inconsistencies, but this may reflect the fact that they were taken more than two years after he ceased work. Further, the solicitor's ability to take a detailed and accurate statement, coupled with the objectivity of the investigator and his statement taking skills, might well have contributed to these apparent inconsistencies.

174. Attempts have been made to rectify some of these inconsistencies in the applicant's last statement after the clinical notes were reviewed. It would certainly have been prudent for the applicant's solicitor to have examined the clinical notes before obtaining a statement from the account, so a more accurate account could have been recorded.

175. In decisions such as *Davis v Council of the City of Wagga Wagga*[15]*, Nominal Defendant v Clancy*[16]*, King v Collins*[17]*and Mastronardi v State of New South Wales*[18], the Court of Appeal cautioned against placing too much weight on the clinical notes of treating doctors, given their primary concern was treatment. In the Court's view, the notes rarely, if ever, represent a complete record of the exchange between a busy doctor and the patient.

176. This also was confirmed in *Winter v NSW Police Force*[19], where Deputy President Roche stated:

> "It is important to remember that clinical notes are rarely (if ever) a complete record of the exchange between a patient and a busy general practitioner. For this reason, they must be treated with some care (*Nominal Defendant v Clancy* [2007] NSWCA 349 at [54]; *Davis v Council of the City of Wagga Wagga* [2004] NSWCA 34 at [35]; *King v Collins* [2007] NSWCA 122 at [34] – [36])."[20]

177. Despite such reservations, I consider that the clinical notes have an important part to play in the evidentiary matrix. There are some aspects where the histories in the applicant's statements are ad idem, but in my view, it is important to cross reference the applicant's statements with the contents of the contemporaneous clinical notes, which in my view, is the most accurate, reliable and persuasive evidence.

178. According to the applicant, his duties involved picking up plastic crates of bread weighing about 8 kg, tipping them onto a conveyer belt and then removing the crates. This is consistent with the duties identified in the job description document, and has not been challenged by the respondent.

179. In the initial statement, the applicant stated that he experienced sharp back pain about six months before February 2017. He indicated that he had not felt back pain before this episode. This may well have been a reference to the episode of back pain in October 2015. The applicant clarified his evidence in his second statement, where he conceded that he had made previous workers compensation claims, but not in respect of his back.

180. According to the Bushby Medical Practice notes, the applicant consulted Dr Medway on 21 October 2015, not Dr Tran as suggested in his last statement. Dr Medway noted a history that the applicant had experienced back pain after doing a lot of lifting at work, and he admitted to having experienced twinges in the past. There was clinical evidence of back pathology and the doctor diagnosed a back strain. The applicant's symptoms were sufficient to justify the prescription of pain killers. Whilst Dr Medbury did not specifically comment on causation, he did not suggest that this was caused by non-work factors.

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[15] [2004] NSWCA 34.
[16] [2007] NSWCA 349.
[17] [2007] NSWCA 122.
[18] [2009] NSWCA 270.
[19] [2010] NSWWCCPD 12 (*Winter*).
[20] *Winter*, [183].

181. I do not accept Mr Doak's submission that the history recorded by Dr Medbury should be disregarded because the applicant is untruthful or unreliable. This entry represents a contemporaneous history and there is no reason why one should consider that this is inaccurate. The applicant was not taking strong medication before 21 October 2015 and there is no evidence to suggest that he was an unreliable historian until 2019 when he gave inconsistent accounts to the investigator and his solicitor.

182. The notes disclose that Dr Medbury gave the applicant a certificate for three days off work. This certificate is not in evidence. Whether this was a WorkCover certificate or otherwise is unknown. This might well be the certificate that the applicant gave to Mr Ronan.
183. The applicant was troubled by back pain after October 2015, as evidenced by the Bathurst Hospital notes dated 14 December 2015, the Chronic Illness Care Plan completed by Dr Tran on 2 February 2016, the histories recorded in the notes throughout 2016 and the regular reference to a diagnosis of chronic back pain.

184. On 2 December 2016, Dr Tran noted that the applicant required a certificate because his back pain was so bad that he could not go to work the day before. He was prescribed various forms of medication and was referred for diagnostic tests in 2016. This confirms that the applicant was troubled by on-going symptoms. It is not clear why Dr Tran was reluctant to provide WorkCover certificates, when the histories that he recorded seemed to suggest that work related factors were in play.

185. The applicant claimed that he told Mr Smoothy that he had a sore back when he was doing his job. He did not suggest that he told Mr Smoothy that he had a work injury. He stated that Mr Smoothy gave him other duties, which did not involve bending or lifting. This history seems to have been corroborated by the entries in the notes of Dr Tran dated 9 August 2016 and 26 September 2016.

186. The applicant indicated in his statement that he did not seek treatment and continued to work despite his pain, although the clinical notes appear to suggest otherwise. This evidence seems to relate to the period between October 2015 and February 2017.

187. Therefore, having regard to the contemporaneous entries in the clinical notes, there seems little doubt that the applicant was undertaking his normal duties under difficulty and this work was contributing to his on-going back pain. There is no history of any other causative factors. He required pain killing medication. At times he complained to his supervisor and he was allocated lighter work. There is no suggestion in the notes that the applicant's duties were merely rotated.

188. The evidence concerning the events in early February 2017 is reasonably consistent. In his initial statement, he claimed that he felt sharp pain when picking up crates of bread on 5 February 2017. This date is obviously incorrect, given that according to Messrs Smoothy and Mason, the applicant was stood down by the respondent on 2 February 2017 due to his erratic behaviour caused by the ingestion of pain killers. The applicant indicated that he told Dr Tran about his back pain when he saw him the next day, but that history is also incorrect, because he did not see Dr Tran until 6 February 2017.

189. According to the entry in Dr Tran's notes dated 6 February 2017, the applicant had sprained his ankle and his low back pain was getting worse. The doctor gave him a certificate that certified that he was unfit for work due to chronic low back pain and an acute left ankle sprain from 5 February 2017 to 17 February 2017.

190. The suggestion in the applicant's initial statement that he continued to work beyond 5 February 2017 and into March 2017 is clearly incorrect, when one has regard to the above certificate and the evidence of the respondent's witnesses. It seems that the applicant confused the months of February 2017 and March 2017, because there are similarities regarding the circumstances surrounding his cessation of work when one compares the applicant's statement and those of the respondent's witnesses.

191. In his statements, the applicant indicated that he had to finish work early because he was taking excessive doses of his medication and this impacted on his ability to work and function. This is consistent with the evidence of the respondent's witnesses. The applicant stated that Mr Weal told him that he could not work until his system was free of the medication, and because he needed the medication, he decided to resign. This evidence is corroborated in Dr Tran's notes.

192. According to Dr Tran, the applicant was asked to provide details of his medication, and on 14 February 2017, the applicant told the doctor that he was not allowed to go to work until his urine was clear. When the applicant ceased taking this medication in late February 2017, he told Dr Tran that his pain had worsened. Significantly, on 8 March 2017, the doctor reported that the applicant had resigned because he could not cope anymore, and he needed to take painkillers.

193. It is true that the history recorded by Dr Soo that the applicant lifted boxes weighing 15 kg to 20 kg is incorrect, and he attributed the applicant's advanced degenerative changes to his employment as a baker. This is not the case that the applicant brings, and this is against the weight of evidence, so his opinion can be given little weight.

194. Drs Lim and Calvache-Rubio did not see the applicant until 2019, so they are reliant on the history provided to them by the applicant. Their histories are consistent with that recorded by Dr Tran, apart from the reference to heavy lifting.

195. Dr Calvache-Rubio stated that it would be reasonable to conclude that the applicant's injury was the direct result of performing his work duties, and the history was consistent with his employment being the main contributing factor to the injury. Dr Lim was of a similar view, and he felt that the applicant's work as a baker had aggravated the previous back pathology. These conclusions are reasonable when one has regard to the contents of Dr Tran's notes.

196. Mr Doak's suggestion that the doctors' descriptions and conclusions are meaningless is without merit, as both doctors were aware that the applicant's job included repetitive bending and twisting. It is true that both reports are almost identical, but on the last page of his report, Dr Lim addressed a number of questions regarding causation and the need for surgery, so it could not be said that he has not applied his mind to the applicant's medical condition.

197. Dr Singh is also supportive of the applicant's claim. He was satisfied that the applicant's employment as a baker over several years, in the absence of any frank injury, was responsible for his condition, and that his employment was a substantial contributing factor to his injury. It is unclear whether he meant that the work contributed to an aggravation.

198. Dr Singh considered that there was no evidence of any pre-existing condition, which is confusing, given that the CT scan January 2016 indicated that the pathology was advanced. Perhaps he meant that there was no previous injury per se. He seems to suggest that the employment caused the pathology, rather than aggravated it, so his views carry less weight.

199. It is true, as submitted by Mr Doak, that Dr Gehr did not record details of the nature of the applicant's duties, or the injury allegedly sustained in the 1980s. The significance of this prior injury is unknown.

200. Nevertheless, Dr Gehr was provided with a copy of the applicant's initial statement, and a comprehensive medical file, so it could not be said that he was not aware of the physical demands on the applicant's job and the past medical history. Indeed, one might consider that the applicant's initial statement contains the most accurate description of his duties.

201. Dr Gehr accepted that the degeneration in the applicant's lumbar spine was caused by the nature and conditions of his employment and his injury represented an aggravation of the back pain that had been developing from 2011. Therefore, he seems to accept an aggravation of a longstanding spinal disease.

202. In summary, the applicant has given a history that he developed back pain as a result of performing his normal duties. Such a history is consistent with the contemporaneous clinical notes. Drs Lim, Calvache-Rubio and Gehr accept that the applicant's employment duties aggravated pre-existing back pathology. Drs Soo and Singh seem to suggest that the pathology was caused by the applicant's work at the respondent. Such opinions are against the weight of evidence and should not be preferred.

203. The applicant's claim of on-going low back pain caused by his work duties gains some support from Dr Gunawardena, who recorded a history of low back pain that had increased in the past 12 months, although she did not comment on causation. The applicant told the doctor that he could not cope with lifting and standing for prolonged hours, so he had ceased work.

204. There is no explanation why the first doctor that the applicant saw, Dr Corbett Jones, or Dr Tran, did not provide WorkCover certificates, or why Dr Mon in August 2017 indicated that the applicant's on-going low back pain was not related to his work, given the history of worsening back pain when undertaking his normal work duties.

205. The notes from Northwest Health Medical Centre record that the applicant had suffered from chronic back pain since February 2017, although Dr Kumarasiri thought that he had not suffered any workplace injury. Perhaps that was a reference to a specific frank injury.

206. The absence of any detailed reports from these four doctors explaining why the applicant had not suffered a work injury by way of an aggravation, acceleration, exacerbation or deterioration of the pre-existing degenerative disease leads to the conclusion that no weight can be given to their opinions on causation on the basis of the principles discussed in the authorities such as *Makita*, *Hawchar* and *Hancock.*

207. This leaves the opinion of Dr Powell. He recorded a consistent description of the applicant's duties. He noted that the applicant had experienced the onset of gradual lower back pain over a period of several years. This history is similar to that recorded elsewhere. He noted that the applicant took medication for his increasing pain, and that he was asked to leave work due to erratic behaviour.

208. According to Dr Powell, it was reasonable to conclude that the applicant's employment with the respondent aggravated the pre-existing degenerative disease in his lumbar spine. In other words, he accepted the possibility of a work injury in the form of an aggravation of the pre-existing degenerative disease, but he disputed that the employment was the main contributing factor in the aggravation.

209. Dr Powell explained that the scans taken in 2016 showed the pre-existing disease. This is not controversial. He recorded a history of a back injury when the applicant was working at the Achilles Bakery in the 1980s. Such a history is not recorded elsewhere. Unfortunately, the doctor provided no insight as to the significance or severity of this injury, other than noting that the applicant's symptoms settled over a number of months with conservative treatment. The applicant could not recall seeking further treatment. which seems consistent with the clinical notes in evidence. Given that the applicant continued to work after the 1980s, one would have to question what, if any, contribution this injury made to the applicant's current back pathology.

210. Dr Powell stated that the applicant's longstanding degenerative condition was likely to be multifactorial with contributions from a constitutional component, the natural history of the pathology, and the nature and conditions of his employment with multiple employers. He confirmed that the degenerative changes were not the result of his employment with the respondent, and I accept that this is the case. So, there were both work and non-work related factors. He is the only doctor to express this view, and it is against the weight of evidence.

211. However, the applicant does not seek to allege that his five year period of employment with the respondent caused the degenerative pathology in his back. He relies on an aggravation of the pre-existing degenerative changes caused by repetitive lifting, bending and twisting at the respondent.

212. What constitutes an aggravation of a disease process was discussed by Windeyer J in *Federal Broom Co Pty Ltd v Semlitch*[21]. His Honour stated:

> "The question that each poses is, it seems to me, whether the disease has been made worse in the sense of more grave, more grievous or more serious in its effects upon the patient".

213. Prior to the 2012 amendments, s 4(b)(ii) of the 1987 Act provided that the employment had to be a contributing factor to the aggravation of a disease, and that being the case, in accordance with s 9A of the 1987 Act, it had to be a substantial contributing factor to the aggravation as opposed to the disease itself. This was confirmed by Burke CCJ in *Harpur v State Rail Authority (NSW)*[22] and in *Cant v Catholic Schools* Office[23]where he stated:

> … the employment is required to substantially contribute to the aggravation and not the pre-existing condition other than by way of such aggravation. The frame of reference is the contribution to the aggravation not to the overall disease."

214. However, s 4(b)(ii) of the 1987 Act provides that the employment must be the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease. Therefore, as in *Cant*, the employment needs to be the main contributing factor to the aggravation of the disease rather than the main contributing factor to the disease itself.

215. In *AV v AW* [24], Deputy President Snell provided an analysis of the authorities and considered the meaning of "main contributing factor". He concluded:

> "The following may be taken from the above:
>
> (a) The test of 'main contributing factor' in s 4(b)(ii) is more stringent than that in s 4(b)(ii) in its previous form, which applied in conjunction with the test in s 9A. There will be one 'main contributing factor' to an alleged aggravation injury.
>
> (b) The test of 'main contributing factor' is one of causation. It involves consideration of the evidence overall, it is not purely a medical question. It involves an evaluative process, considering the causal factors to the aggravation, both work and non-work related. Medical evidence to address the ultimate question of whether the test of 'main contributing factor' is satisfied is both relevant and desirable. Its absence is not necessarily fatal, as satisfaction of the test is to be considered on the whole of the evidence.

[21] [1964] HCA 34; 110 CLR 626 (*Semlitch*), [369].
[22] [2000] NSWCC 3; (2000) 19 NSWCCR 256, [79].
[23] [2000] NSWCC 37 (*Cant*), [23].
[24] [2020] NSWWCCPD 9 (*AV v AW*).

(c) In a matter involving s 4(b)(ii) it is necessary that the employment be the main contributing factor to the aggravation, not to the underlying disease process as a whole."

216. The evidence suggests that the applicant had pre-existing degenerative changes in his back that caused twinges from time to time. However, after 21 October 2015, he was troubled by significant pain when he was working, and he required strong pain killing medication.

217. The applicant claims that he experienced back pain when undertaking his normal work duties. He required significant doses of medication to cope, and this eventually led to his suspension from work, and ultimately his resignation.
218. The applicant's evidence regarding the onset of his back has been corroborated by Dr Tran, whilst Drs Lim, Calvache-Rubio and Gehr diagnosed an aggravation of pre-existing pathology. Drs Lim and Calvache-Rubio indicated that the applicant's employment was the main contributing factor to his injury, whilst Dr Gehr used the incorrect term "significant contributing factor".

219. The clinical notes confirm that the applicant was experiencing difficulties performing his normal work duties after October 2015. Therefore, there was causal connection between the work that he was performing and his pain. He was forced into a corner by the respondent when it insisted on him being drug free, but his medication was the only thing that was providing him with some relief from his symptoms and it allowed him to continue at work. His increasing pain was described as chronic by Dr Tran, and I am satisfied that the level of his symptoms reached a stage when he could no longer perform the repetitive lifting, bending and twisting that were a crucial part of his usual duties.

220. In the circumstances, having regard to the common-sense test in *Kooragang* and the principles discussed in *Ireland*, *Semlitch*, *Cant* and *AW v AV*, I accept that the pre-existing degenerative disease was made "more grave, more grievous or more serious", such that the applicant suffered an injury in the form of an aggravation of a pre-existing degenerative disease. Further, I am satisfied that the applicant's employment was the main contributing factor to that aggravation, acceleration, exacerbation or deterioration of the degenerative back condition in accordance with s 4(b)(ii) of the 1987 Act.

Was a valid notice of injury and notice of claim given to the applicant? – ss 254 and 261 of the 1998 Act

221. Section 254 of the 1998 Act provides:

"**254 Notice of injury must be given to employer**

(1) Neither compensation nor work injury damages are recoverable by an injured worker unless notice of the injury is given to the employer as soon as possible after the injury happened and before the worker has voluntarily left the employment in which the worker was at the time of the injury.

(2) The failure to give notice of injury as required by this section (or any defect or inaccuracy in a notice of injury) is not a bar to the recovery of compensation or work injury damages if in proceedings to recover the compensation or damages it is found that there are special circumstances as provided by this section.

(3) Each of the following constitutes special circumstances:

(a) the person against whom the proceedings are taken has not been prejudiced in respect of the proceedings by the failure to give notice of injury or by the defect or inaccuracy in the notice,

(b) the failure to give notice of injury, or the defect or inaccuracy in the notice, was occasioned by ignorance, mistake, absence from the State or other reasonable cause,
(c) the person against whom the proceedings are taken had knowledge of the injury from any source at or about the time when the injury happened,
(d) the injury has been reported by the employer to the Nominal Insurer in accordance with this Act…."

222. Section 261 of the 1998 Act provides:

"**261 Time within which claim for compensation must be made**

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

(2) If a claim for compensation was made by an injured worker within the period required by this section, this section does not apply to a claim for compensation in respect of the death of the worker resulting from the injury to which the worker's claim related.

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

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

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

(5) The failure to make a claim within the period required by this section is not a bar to the recovery of compensation if the insurer concerned determines to accept the claim outside that period. An insurer cannot determine to accept a claim made more than 3 years after the injury or accident happened or after the date of death (as appropriate) except with the approval of the Authority.

(6) If an injured worker first becomes aware that he or she has received an injury after the injury was received, the injury is for the purposes of this section taken to have been received when the worker first became so aware."

223. In his initial statement, the applicant indicated that about six months before February 2017, he mentioned to Mr Smoothy that he had a sore back. He did not suggest that he told Mr Smoothy that he had suffered an injury. He also claimed that Mr Smoothy gave him alternative duties. This history is consistent with the entry dated 26 September 2016 in the clinical notes of Dr Tran.

224. Mr Smoothy denied that the applicant had ever reported an injury or that he had allocated him alternative duties. He advised that there was job rotation, so perhaps this is what the applicant meant. One cannot draw any finite conclusion in the absence of testing the evidence of the applicant and the respondent's witnesses under cross examination.

225. According to the applicant, he presented a certificate to Mr Ronan, presumably after the episode of back pain in October 2015, but there is no suggestion that he reported a back injury. Mr Ronan could not recall this.

226. The applicant confirmed that he had to leave work in February [sic] 2017 because he was taking excessive doses of his medication and this was making him groggy. He did not suggest that he was told to go home, but he confirmed that Mr Weal told him that he could not work if he was taking medication. This was confirmed by Mr Weal and Mr Smoothy in their statements. Mr Weal also confirmed that he accompanied the applicant to see Dr Corbett Jones on 2 February 2017, when the applicant complained of back pain without any suggestion of a work injury.

227. The applicant claimed that he reported his injury to Mr Weal and Mr Ronan on 17 February 2017, but he did not complete any injury forms. This seems odd, as one would expect that a claim form and notification of injury would have been completed.

228. Mr Weal denied that the applicant had reported an injury and suggested that the applicant told him he had hurt his back after leaving work. There is no medical evidence to support any subsequent injury. Mr Ronan also denied that the applicant had reported any injury. Therefore, I think it more likely than not that the applicant did not report any injury before he resigned.

229. Mr Mason denied any report of injury, and this is consistent with the applicant's evidence. However, Mr Mason indicated that in around November or December 2016, the applicant told him that he aggravated his back when lifting bread crates. Therefore, there are internal inconsistencies in Mr Mason's statement.

230. In his second statement, the applicant advised that he notified his manager and supervisor when he had back pain, but he was unaware whether he could make a claim because he had not suffered a frank injury. His evidence is unchallenged regarding his awareness to make a claim in respect of an injury of gradual onset. Again, there was no suggestion that he had informed the respondent that he injured his back. He stated that was only when he consulted Dr Soo that he became aware of his entitlement to make a claim.

231. In his last statement, the applicant explained that he was concerned about his job security and the need to support his wife and children, so he continued to work in pain with the assistance of strong doses of medication.

232. Mr Doak submits that if the applicant was concerned about job security, he would not have reported an injury as alleged on 17 February 2017, but this submission ignores the fact that the applicant had already ceased work and he had decided to resign because he could not work without taking his medication.

233. In summary, the applicant alleges that he told Mr Smoothy that he had a sore back, rather than reporting a work injury. He also claims that on 17 February 2017, he reported his injury to Mr Weal and Mr Ronan. His evidence has been disputed by the respondent's witnesses, apart from Mr Mason, who was aware that the applicant had complained of aggravating his back pain at work. It is difficult to determine whose evidence should be preferred in the absence of cross examination.

234. The clinical notes show that Dr Medway gave the applicant a certificate for three days off work in October 2015 as a consequence of back pain after doing a lot of lifting at work. The applicant claimed that he gave this certificate to Mr Ronan. Given that Mr Ronan has not denied this and has no recollection, I accept that the applicant submitted a certificate to the respondent.

235. It is true that Dr Tran did not support the applicant regarding a work injury. His reasoning is unknown. In April 2016, June 2016 and August 2016, the applicant told the doctor that he had to keep his job to support his family, and it is apparent that the doctor was concerned about the physical nature of the applicant's duties. The doctor reported in November 2016 and December 2016 that the applicant was experiencing difficulties at work due to back pain. It is therefore remarkable that he did not issue WorkCover certificates.

236. Significantly, on 20 February 2017, Dr Tran recorded that the applicant wanted to make a claim, but he expressed the view that "his case will be very challenging". Dr Mon also expressed some reservations in August 2017. This could explain why the applicant did not make a formal claim in 2017, and it was not until he saw Dr Soo in March 2019 that he became aware that he could bring a claim. Dr Lim also reported that the applicant was unaware of his entitlement to bring a claim.

237. The evidence suggests that either the applicant reported his injury on 17 February 2017, which has been denied by the respondent, or alternatively he did not do so until he submitted the claim form on 28 March 2019. I have already indicated that I am satisfied that he did not report any injury. Therefore, he failed to comply with s 254 (1) of the 1998 Act.

238. In the claim form dated 28 March 2019, the applicant indicated that he "did not know which employer or employers was responsible for the outcome. Don't know too much about compensation claims".

239. Ms Grotte submits that the first time that the applicant became aware that he had suffered a work related injury when he was informed of his potential rights by Dr Soo in March 2019. The applicant was concerned about job security and did not report any injury whilst he was working.

240. Section 254(2) of the 1998 Act provides that the failure to give notice of an injury is not a bar to the recovery of compensation in special circumstances where the failure to give notice of injury was occasioned by ignorance, mistake, absence from the State or other reasonable cause.

241. In *Albury Real Estate Pty Ltd v Rouse*[25], Deputy President Roche discussed the meaning of "other reasonable cause" in former s 65 (13) of the 1998 Act, which was similar to s 261(4) of the 1998 Act. He stated:

> "The phrase 'reasonable cause' was considered in *Garratt v Tooheys Ltd* [1949] WCR 80 ('*Garratt*') at 86-7. In that case Judge Rainbow said at 86:
>
> > 'The next question is whether the applicant's failure was occasioned by some reasonable cause. In its context, cause means the grounds which led the workmen to omit to claim. And the mixture of facts, circumstances and motive which constitute the explanation of the failure must be reasonable. It is sometimes argued that the reasonableness of the cause is only to be measured and considered from the viewpoint of the worker and reference is made for example to *King v Port of London Authority* [1920] AC 1 where Lord Atkinson

[25] [2006] NSWWCCPD 139 (*Rouse*).

> at page 24 said: 'Of course it is reasonable cause having reference to the workman himself'. If this argument means that the inquiry is to be limited to discovering whether the worker believed himself to be acting or thinking reasonably that is not the law: cf *Brown v Aveling and Porter,* (22 BWCC 165 at 169). It is not the worker who is to be reasonable, it is the cause. As Lord Birkenhead said in *King v Port of London Authority*, 'the general atmosphere must always be considered'. The reasonableness is to be measured objectively in the light of every circumstance in the case relevant to showing why the failure to claim occurred: cf *Atherton v Chorley Colliery Co Ltd* (19 BWCC 314)."

Commenting on *Garratt* C P Mills said at page 468:

> 'The mixture of facts, circumstances and motive which constitute the explanation of the omission must be reasonable, considered from the view point of the worker not in the sense that he considered his omission reasonable, but rather in the sense that the cause of the omission is reasonable in the light of all the circumstances in which the worker found himself'."[26]

242. The Deputy President continued:

> "I reject the Appellant Employer's submission that the words 'other reasonable cause' must be read ejusdem generis with the words 'mistake' and 'ignorance' in the subsection. I know of no authority where such a construction has been applied to this section or its predecessor (section 53) in the 1926 Act or to any similar legislation in Australia or England. The words should be given their ordinary meaning. The word 'other' means 'existing besides or distinct from that or those already specified or implied; further or additional' (The New Shorter Oxford Dictionary). In my view 'other reasonable cause' can be any other event, situation or circumstance that resulted in a claim not being made within six months of the date of injury. I agree with the comment by C P Mills that it is the 'mixture of facts, circumstances and motive which constitute the explanation of the omission' that must be reasonable. If the explanation is 'reasonable' and if the failure to claim within six months was occasioned by that 'cause', then the subsection has been satisfied."[27]

243. In the present matter, I am satisfied that the applicant was under the mistaken impression that he had suffered a work injury caused by the nature of his duties, as opposed to a frank injury, and it was not until he was informed of this fact by Dr Soo in March 2019 that he became aware of his injury and his rights. He also was concerned about keeping his job.

244. The evidence confirms that whilst he may have contemplated reporting an injury and making a claim in February 2017, Dr Tran was pessimistic about his prospects of success and I accept that this would have influenced the applicant's mindset at that stage.

245. Ms Grotte submits that there were special and a reasonable explanation why the applicant did not report his injury. He wanted to keep his job and Dr Tran indicated in February 2017 that any claim would be challenging. She submits that the applicant can rely upon s 261(3) of the 1998 Act and/or s 261(6) of the 1998 Act, because he made a claim within a few weeks of becoming aware that he had suffered a work injury in March 2019. He provided a reasonable explanation that satisfied the "special circumstances" requirement.

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[26] *Rouse*, [30] – [31].
[27] *Rouse*, [35].

246. Therefore, there seems to be a valid reason for the delay in the giving of notice of the applicant's injury and claim for compensation due to ignorance of his rights and his concern about the security of his job. In my view, this seems a reasonable explanation for the failure to comply with the time frames in the 1998 Act.

247. Accordingly, I am satisfied that the applicant's failure to give notice of injury in accordance with s 254(1) was occasioned by special circumstances, namely ignorance or other reasonable cause, in accordance with ss 254(3)(b) of the 1998 Act.

248. Further, given that the claim was made on 28 March 2019, three days after the applicant was told about his rights by Dr Soo, the applicant complied with ss 261(1) and 261(6) of the 1998 Act, because he did not become aware of his injury until 25 March 2019.

Extent of capacity

249. An assessment of the applicant's capacity involves a consideration of whether the applicant has no current work capacity or a current work capacity as defined in s 32A of the 1987 Act.

250. 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."

251. “No current work capacity” requires a consideration of a worker’s capacity to undertake not only his pre-injury duties, but also suitable employment, irrespective of its availability. This was confirmed by Deputy President Roche in *Mid North Coast Local Health District v De* Boer[28] and in *Wollongong Nursing Home Pty Ltd v Dewar.*[29]

252. Therefore, if the applicant has “no current work capacity”, I need to assess whether the applicant is unable to return to both his pre-injury duties and some suitable employment.

253. Mr Doak made no submissions regarding extent and quantification of the applicant’s capacity. Ms Grotte merely submitted that the applicant was entitled to an award of compensation.

254. The determination of the extent of the applicant’s capacity requires a consideration of the evidence that primarily relates to the period from 22 February 2017 to 20 August 2019, being the ambit of the claim.

255. The applicant’s statements are largely unhelpful regarding the extent of his capacity. In his initial statement, he advised that he was attending a physiotherapist and he was taking Gabapentin, Panadeine Forte and Targin for his pain. His pain level was the same as when he was working, and he had not participated in any rehabilitation.

256. In his second statement, the applicant indicated that he had undergone conservative treatment, and Dr Singh had now recommended surgery. He stated that he was keen to have the procedure because he could no longer tolerate his pain. In his last statement, he confirmed that the was still taking strong medication.

257. Prior to March 2019, the applicant was only provided with non-WorkCover certificates and Centrelink certificates which only certified that he was unfit for work, not that he had no current work capacity.

258. According to the medical certificates issued by Dr Corbett Jones, Dr Tran and Dr Dousip, the applicant was unfit for work from 2 February 2017 to 8 April 2017 and from 16 February 2018 to 16 April 2018 due to low back pain.

259. In October 2017, Dr Gunawardena indicated that it was unlikely that the applicant would ever return to his pre-injury duties as a baker. She did not express a view regarding his capacity for other work.

260. In February 2018 and October 2018, Dr Kumarasiri recorded that the applicant had suffered from chronic back pain since February 2017. The doctor continued to prescribe medication for his pain.

261. In March 2019, Dr Soo noted that the applicant had worsening pain and pins and needles in his left leg. He did not comment on the applicant’s capacity, but he confirmed that the applicant’s pain was debilitating and that he would benefit from a fusion, although he wanted to see the scans before expressing a final opinion.

262. In March 2019, Dr Calvache-Rubio indicated that the applicant was unfit for work. He issued certificates that certified that the applicant had no current work capacity from 8 March 2019 to 6 June 2019, and Dr Lee certified that the applicant had no current work capacity from 6 June 2019 to 26 July 2019.

[28] [2013] NSWWCCPD 41.
[29] [2014] NSWWCCPD 55.

263. Dr Lim certified that the applicant had no current work capacity from 19 July 2019 to 16 August 2019, and he provided Centrelink certificates of unfitness from 19 July 2019 to 1 November 2019. He did not say that the proposed surgery was reasonably necessary, only that the need for surgery resulted from the applicant's work injury.

264. According to Dr Singh, the applicant had no capacity for work since February 2017, and he required spinal surgery to alleviate his symptoms.

265. In November 2019, Dr Gehr reported that the applicant had constant and worsening pain in his back and left leg of varying intensity. He confirmed that the applicant had been incapacitated since 2 February 2017. He agreed that the surgery was reasonable and necessary as a result of his work injury.

266. Finally, Dr Powell recorded that the applicant had intermittent pain in his lumbar spine and pelvis, muscle spasm and pins and needles in his right thigh. He did not comment on the applicant's capacity or the need for surgery.

267. Although there is no continuity of medical certificates, it is apparent from the clinical notes that the applicant continued to seek treatment and was prescribed pain killing medication for chronic back pain. The applicant's pre-injury duties were physical and involved prolonged periods of repetitive bending, lifting and twisting. There is no evidence to suggest that the applicant's condition improved between February 2017 and March 2019 when he came under the treatment of Drs Calvache-Rubio, Lee and Lim, who certified that the applicant had no current work capacity. Accordingly, I am satisfied that the applicant has been unfit for his pre-injury duties since 2 February 2017.

268. The next question to consider is whether the applicant was fit for suitable employment as defined in s 32A of the 1987 Act. This requires a consideration of the nature of the incapacity and the details provided in medical information, the applicant's age, education, skills and work experience, any return to work plan, and any occupational rehabilitation services that have been provided to him, irrespective of whether the work was available to him or of a type or nature that is generally available in the employment market. The focus will be in the period 22 February 2017 to 20 August 2019.

269. The applicant is 57 years old. According to his statement, he left school after obtaining his school certificate and he has worked as a sales assistant, pastry cook, process worker, plastic extrusion operator and baker. All of these jobs involve manual work and he has not worked in a sedentary or administrative capacity in the past. He has not participated in any return to work or rehabilitation plan. He has persistent low back and leg pain, and surgery has been recommended. The evidence does not suggest that he has the capacity to do any work.

270. Therefore, having regard to the definition of suitable employment in s 32A of the 1987 Act, the applicant's medical evidence as a whole, his age, education, skills, work experience and the other matters referred to in the definition, I am satisfied that the applicant has had no current work capacity at all times from 2 February 2017 to 20 August 2019.

Quantification

271. The parties agree that the applicant's PIAWE were $1,515.71. The applicant was not in receipt of any pecuniary benefits. This figure would be adjusted on 1 April 2017 to $1,537.84 per week and to $1,548.91 on 1 October 2017. The 52 week period for the purposes of s 44C (5) of the 1987 Act concludes on 20 February 2018.

272. The PIAWE for the purposes of s 44C (5) of the Act 1987 was agreed at $782.80. This figure would be adjusted on 1 April 2017 to $794.23 per week, $799.15 on 1 October 2017, $810.58 on 1 April 2018, $815.60 on 1 October 2018 and $824.17 on 1 April 2019.

273. In accordance with s 36(1)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the first entitlement period from 22 February 2017 to 31 March 2017 is:

    (AWE x 95%) - D =
    $1,515.71 x 95% - 0 = $1,439.92 per week.

274. In accordance with s 36(1)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the first entitlement period from 1 April 2017 to 23 May 2017 is:

    (AWE x 95%) - D =
    $1,537.84 x 95% - 0 = $1,460.95 per week.

275. In accordance with s 37(1)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the second entitlement period from 24 May 2017 to 30 September 2017 is:

    (AWE x 80%) - D =
    $1,537.84 x 80% - 0 = $1,230.27 per week.

276. In accordance with s 37(1)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the second entitlement period from 1 October 2017 to 20 February 2018 is:

    (AWE x 80%) - D =
    $1,548.91 x 80% - 0 = $1,239.13 per week.

277. In accordance with s 37(1)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the second entitlement period from 21 February 2018 to 31 March 2018 is:

    (AWE x 80%) - D =
    $799.15 x 80% - 0 = $639.32 per week.

278. In accordance with s 37(1)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the second entitlement period from 1 April 2018 to 30 September 2018 is:

    (AWE x 80%) - D =
    $810.58 x 80% - 0 = $648.46 per week.

279. In accordance with s 37(1)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the second entitlement period from 1 October 2018 to 31 March 2019 is:

    (AWE x 80%) - D =
    $815.60 x 80% - 0 = $652.48 per week.

280. In accordance with s 37(1)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the second entitlement period from 1 April 2019 to 20 August 2019 is:

    (AWE x 80%) - D =
    $824.17 x 80% - 0 = $659.34 per week.

281. The applicant will be entitled to an award as calculated above. I will grant the parties liberty to apply with respect to my calculations within 14 days of this determination.

Medical expenses – s 60 of the 1987 Act

282. As the applicant has succeeded in his claim, I accept the medical evidence that supports the need for payment of reasonable medical, hospital and related expenses. Accordingly, there will be a general order under s 60 of the 1987 Act, but this will be subject to s 59A of the 1987 Act.

Is the proposed treatment reasonably necessary as a result of the injury sustained during the course of the applicant's employment?

283. Section 60 of the 1987 Act provides:

> "60 (1) If, as a result of an injury received by a worker, it is reasonably necessary that:
>
> (a) any medical or related treatment (other than domestic assistance) be given, or
> (b) any hospital treatment be given, or
> (c) any ambulance service be provided, or
> (d) any workplace rehabilitation service be provided,
>
> the worker's employer is liable to pay, in addition to any other compensation under this Act, the cost of that treatment or service and the related travel expenses specified in subsection (2)".

284. What constitutes reasonably necessary treatment was considered in the context of s 10 of the *Workers Compensation Act 1926* in *Rose v Health Commission (NSW)*[30], Burke CCJ stated:

> "Treatment, in the medical or therapeutic context, relates to the management of disease, illness or injury by the provision of medication, surgery or other medical service designed to arrest or abate the progress of the condition or to alleviate, cure or remedy the condition. It is the provision of such services for the purpose of limiting the deleterious effects of a condition and restoring health. If the particular 'treatment' cannot, in reason, be found to have that purpose or be competent to achieve that purpose, then it is certainly not reasonable treatment of the condition and is really not treatment at all. In that sense, an employer can only be liable for the cost of reasonable treatment."[31]

285. Further, His Honour added:

> "1. *Prima facie*, if the treatment falls within the definition of medical treatment in section 10(2), it is relevant medical treatment for the purposes of this Act. Broadly then, treatment that is given by, or at the direction of, a medical practitioner or consists of the supply of medicines or medical supplies is such treatment.
>
> 2. However, although falling within that ambit and thereby presumed reasonable, that presumption is rebuttable (and there would be an evidentiary onus on the parties seeking to do so). If it be shown that the particular treatment afforded is not appropriate, is not competent to alleviate the effects of injury, then it is not relevant treatment for the purposes of the Act.

[30] (1986) 2 NSWCCR 32 (*Rose*).
[31] *Rose*, [42].

3. Any necessity for relevant treatment results from the injury where its purpose and potential effect is to alleviate the consequences of injury.

4. It is reasonably necessary that such treatment be afforded a worker if this Court concludes, exercising prudence, sound judgment and good sense, that it is so. That involves the Court in deciding, on the facts as it finds them, that the particular treatment is essential to, should be afforded to, and should not be forborne by, the worker.

5. In so deciding, the Court will have regard to medical opinion as to the relevance and appropriateness of the particular treatment, any available alternative treatment, the cost factor, the actual or potential effectiveness of the treatment and its place in the usual medical armoury of treatments for the particular condition."[32]

286. His Honour considered the relevant factors relating to reasonably necessary treatment under s 60 of the 1987 Act in *Bartolo v Western Sydney Area Health Service*[33] and stated:

> "The question is should the patient have this treatment or not. If it is better that he have it, then it is necessary and should not be forborne. If in reason it should be said that the patient should not do without this treatment, then it satisfies the test of being reasonably necessary."[34]

287. In *Diab v NRMA Ltd*[35], Deputy President Roche questioned this approach and cited *Rose* with approval. He provided a summary of the principles as follows:

> "In the context of s 60, the relevant matters, according to the criteria of reasonableness, include, but are not necessarily limited to, the matters noted by Burke CCJ at point (5) in *Rose* (see [76] above), namely:
>
> (a) the appropriateness of the particular treatment;
> (b) the availability of alternative treatment, and its potential effectiveness;
> (c) the cost of the treatment;
> (d) the actual or potential effectiveness of the treatment, and
> (e) the acceptance by medical experts of the treatment as being appropriate and likely to be effective.
>
> With respect to point (d), it should be noted that while the effectiveness of the treatment is relevant to whether the treatment was reasonably necessary, it is certainly not determinative. The evidence may show that the same outcome could be achieved by a different treatment, but at a much lower cost. Similarly, bearing in mind that all treatment, especially surgery, carries a risk of a less than ideal result, a poor outcome does not necessarily mean that the treatment was not reasonably necessary. As always, each case will depend on its facts.

[32] *Rose*, [47].
[33](1997) 14 NSWCCR 233 (*Bartolo*).
[34] *Bartolo*, [238].
[35] [2014] NSWWCCPD 72 (*Diab*).

> While the above matters are 'useful heads for consideration', the 'essential question remains whether the treatment was reasonably necessary' (*Margaroff v Cordon Bleu Cookware Pty Ltd* [1997] NSWCC 13; (1997) 15 NSWCCR 204 at 208C). Thus, it is not simply a matter of asking, as was suggested in *Bartolo*, is it better that the worker have the treatment or not. As noted by French CJ and Gummow J at [58] in *Spencer v Commonwealth of Australia* [2010] HCA 28, when dealing with how the expression 'no reasonable prospect' should be understood, '[n]o paraphrase of the expression can be adopted as a sufficient explanation of its operation, let alone definition of its content'".[36]

288. Whether the need for reasonably necessary treatment arises from an injury is a question of causation and must be determined based on the facts in each case in accordance with the common sense test discussed in *Kooragang.*

289. It is accepted that a condition can have multiple causes, but the applicant must establish that the injury materially contributed to the need for surgery. This was confirmed by Deputy President Roche in *Murphy v Allity Management Services Pty Ltd*[37], where he stated:

> "Moreover, even if the fall at Coles contributed to the need for surgery, that would not necessarily defeat Ms Murphy's claim. That is because a condition can have multiple causes (*Migge v Wormald Bros Industries Ltd* (1973) 47 ALJR 236; *Pyrmont Publishing Co Pty Ltd v Peters* (1972) 46 WCR 27; *Cluff v Dorahy Bros (Wholesale) Pty Ltd* (1979) 53 WCR 167; *ACQ Pty Ltd v Cook* [2009] HCA 28 at [25] and [27]; [2009] HCA 28; 237 CLR 656). The work injury does not have to be the only, or even a substantial, cause of the need for the relevant treatment before the cost of that treatment is recoverable under s 60 of the 1987 Act.
>
> Ms Murphy only has to establish, applying the commonsense test of causation (*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796), that the treatment is reasonably necessary 'as a result of' the injury (see *Taxis Combined Services (Victoria) Pty Ltd v Schokman* [2014] NSWWCCPD 18 at [40] – [55]). That is, she has to establish that the injury materially contributed to the need for the surgery (see the discussion on the test of causation in *Sutherland Shire Council v Baltica General Insurance Co Ltd* (1996) 12 NSWCCR 716)."[38]

290. I have determined that the applicant injured his back arising out of or in the course of his employment on 2 February 2017 (deemed). According to the applicant, he has continued to experience pain in his back and leg pain. He has been treated with physiotherapy and he continues to take medication.

291. In 2019, the applicant was referred to Dr Singh, and he recommended a two stage decompression and fusion which he expects will assist to alleviate the applicant's symptoms. The applicant is keen to have the surgery.

292. Drs Lim and Gehr, and to a lesser degree, Dr Soo, agree that the surgery is appropriate, although they have not used the correct terminology of "reasonably necessary" referred to in s 60 of the 1987 Act. In my view this is immaterial, as they attribute the need for surgery to the work injury, rather than any other factor.

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[36] *Diab*, [88] to [90].
[37] [2015] NSWWCCPD 49 (*Murphy*).
[38] *Murphy*, [57] to [58].

293. Further, there is no evidence that says that the condition in the applicant's back is such that the proposed surgery is not reasonably necessary. The only doctor who might have challenged the need for surgery is Dr Powell, and he did not express an opinion one way or the other.

294. The medical evidence does not suggest that the effects of the applicant's work injury have subsided. I am satisfied that the surgery has the potential to alleviate the applicant's symptoms, is an appropriate treatment and is likely to be effective. There seems to be no alternative forms of treatment and the cost is not unreasonable. This satisfies the relevant factors discussed in *Rose* and *Diab*.

295. Accordingly, I am satisfied that the treatment proposed by Dr Singh, namely an L3-S1 anterior lumbar interbody fusion and L2-pelvis decompression and fusion, and associated incidental expenses, is reasonably necessary treatment as a result of the injury arising out of or in the course of the applicant's employment with the respondent on 2 February 2017 (deemed).

Other Matters

296. The 1998 Act imposes certain obligations on arbitrators to use their best endeavours to bring parties to a resolution of the dispute. Section 355 of the 1998 Act provides:

> "**355 Arbitrator to attempt conciliation**
>
> (1) The Commission constituted by an Arbitrator is not to make an award or otherwise determine a dispute referred to the Commission for determination without first using the Arbitrator's best endeavours to bring the parties to the dispute to a settlement acceptable to all of them.
>
> (2) No objection may be taken to the making of an award or the determination of a dispute by an Arbitrator on the ground that the Arbitrator had previously used the Arbitrator's best endeavours to bring the parties to the dispute to a settlement."

297. Unfortunately, in the present matter, my attempts to assist the parties to resolve the dispute were to no avail.

298. The matter was initially listed for a conciliation conference and arbitration hearing on 3 March 2020. An offer was made by the applicant, and I was informed that there were issues obtaining an offer in response. By the time that the matter was in a position to proceed, there was insufficient time to complete submissions. Accordingly, the matter was adjourned to a further conciliation conference and arbitration hearing.

299. On 2 April 2020, there were no settlement discussions. At the commencement of the arbitration hearing, the applicant sought and was granted leave to rely on an injury in the form of an aggravation, acceleration, exacerbation or deterioration of a disease in terms of s 4(b)(ii) of the Act 1987. The respondent was unable to meet this amendment, so its application for an adjournment was granted. The matter was adjourned to a further conciliation conference and arbitration hearing.

300. On 27 May 2020, the applicant made a settlement offer to the respondent. There was no response, which I found surprising, given that the respondent had qualified Dr Powel, who conceded that the applicant might have suffered an aggravation of his pre-existing back condition.

301. Upon further enquiry, I was informed by Mr Doak at approximately 11.45 am, that instructions could not be obtained to respond to the applicant's offer because the case manager at the scheme agent, Employers Mutual Ltd, could not be contacted, and it was not possible to respond to any offer without first discussing the proposal with the employer. I was informed that only the scheme agent could contact the respondent.

302. A representative of icare was in attendance at the telephone conference and at all three hearings, and the dispute notice was issued by icare. However, I was advised that she could not provide instructions. Given those facts, one would have to question why she was in attendance.

303. I was informed that no attempt had been made by the respondent's solicitor or the representative of icare to alert both the scheme agent and the respondent about the hearing and the possibility that instructions might be required. I found this astounding and totally unacceptable.

304. The parties are reminded of e-bulletins No 98 and No 102 issued by President Phillips in March 2020 and May 2020. These e-bulletins attached a protocol for the conduct of conferences and hearings during covid-19. Paragraph 2 of the protocol provides:

> "**2. Legal representatives (including counsel) must consult with their clients prior to the telephone con/arb or mediation**, preferably before the day of the listing and, in any event, well before the con/arb or mediation commences, to ensure that the matter is ready to proceed. The Commission **strongly discourages legal practitioners** from obtaining instructions immediately before a scheduled con/arb or mediation - the consequences of such practices are delay, the poor use of Commission resources and fewer settlements.
>
> **Note**:
>
> - It is extremely important that the insurer representative attends each telephone event. This will ensure minimum delays for their legal representatives to obtain instructions and will enhance opportunities for resolution.
> - The insurer representative may be released if the arbitrator or mediator is satisfied the conference can proceed without them and the insurer representative can be contacted if required further."

305. The failure by the scheme agent and the employer to participate in this matter unnecessarily pronged the matter and prevented me from fulfilling my statutory obligations under the 1998 Act to bring the parties to a resolution of the dispute. It would have been appropriate to adjourn the matter so that the scheme agent and employer could participate, but I formed the view that a further delay would be unfair to the applicant and would be inconsistent with the objective of the Commission to provide a timely and effective resolution of the dispute.

306. The respondent, scheme agent and the legal representatives should take note of the protocol and ensure that this situation does not arise again in the future.

FINDINGS

307. The applicant sustained injury to his back arising out of or in the course of his employment with the respondent on 2 February 2017 (deemed).

308. The applicant's employment was the main contributing factor to his injury.

309. The applicant had no current work capacity from 22 February 2017 to 20 August 2019.

310. The applicant requires medical treatment as a consequence of his injury and the respondent is liable to pay reasonably necessary medical expenses in respect of his back injury.

311. The proposed L3-S1 anterior lumbar interbody fusion and L2-pelvis decompression and fusion, and associated incidental expenses, is reasonably necessary treatment as a result of the injury arising out of or in the course of the applicant's employment with the respondent on 2 February 2017 (deemed).

312. The applicant failed to give notice of injury with s 254(1) of the 1998 Act.

313. The applicant's failure to give notice of injury was occasioned by the special circumstances identified in s 254(3)(b) of the 1998 Act.

314. The applicant became aware of his injury on 25 March 2019 and gave notice of a claim for compensation on 28 March 2019.

315. The applicant complied with s 261(1) by reason of s 261(6) of the 1998 Act.

ORDERS

316. The respondent to pay the applicant weekly compensation in accordance with the 1987 Act as follows:

    (a) $1,439.92 per week from 22 February 2017 to 31 March 2017 pursuant to s 36(1)(a);

    (b) $1,460.95 per week from 1 April 2017 to 23 May 2017 pursuant to s 36(1)(a);

    (c) $1,230.27 per week 24 May 2017 to 30 September 2017 pursuant to s 37(1)(a);

    (d) $1,239.13 per week from 1 October 2017 to 20 February 2018 pursuant to s 37(1)(a);

    (e) $639.32 per week from 21 February 2018 to 31 March 2018 pursuant to s 37(1)(a);

    (f) $648.46 per week from 1 April 2018 to 30 September 2018 pursuant to s 37(1)(a);

    (g) $652.48 per week from 1 October 2018 to 31 March 2019 pursuant to s 37(1)(a), and

    (h) $659.34 per week from 1 April 2019 to 20 August 2019 pursuant to s 37(1)(a).

317. Liberty to the parties to apply in respect of these calculations within 14 days of this determination.

318. The respondent is to pay the applicant's reasonably necessary medical expenses, including the cost of the proposed L3-S1 anterior lumbar interbody fusion and L2-pelvis decompression and fusion, and associated incidental expenses, pursuant to s 60 of the 1987 Act.