

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 4974/19
Applicant: ALAN MONAHAN
Respondent: TAYLOR CARPENTRY HOLDINGS PTY LTD
Date of Determination: 18 DECEMBER 2019
Citation: [2019] NSWCC 408

The Commission determines:

1. The applicant sustained an injury to his lumbar spine on 17 November 2018 in the course of his employment with the respondent.
2. The incapacity for work resulting from the injury is likely to be of a permanent nature.
3. That subject to the requirements of section 53 of the *Workers Compensation Act 1987*, the respondent is to pay the applicant weekly compensation at the rate of \$345.96 per week from 4 July 2019 to date and continuing, pursuant to section 37(1) of the *Workers Compensation Act 1987*.

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

Carolyn Rimmer
Arbitrator

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

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. The applicant, Alan Monahan (Mr Monahan), was employed by the respondent, Taylor Carpentry Holdings Pty Ltd (the respondent) as a carpenter. The respondent's workers compensation insurer at the relevant time was Employers Mutual Limited (the insurer).
2. In the course of his employment duties on 17 November 2018 Mr Monahan injured his lumbar spine when he was lifting a large steel door with some colleagues on a worksite.
3. In the Application to Resolve a Dispute (the Application) lodged in the Workers Compensation Commission (the Commission) on 23 September 2019, Mr Monahan claimed weekly benefits from 27 November 2018 to date and continuing. The insurer had paid Mr Monahan weekly benefits for the period 27 November 2018 to 26 February 2019, pursuant to s 36 of the *Workers Compensation Act 1987* (the 1987 Act), and then weekly benefits from 27 February 2019 to 3 July 2019 pursuant to s 37 of the 1987 Act. The insurer ceased paying weekly benefits when Mr Monahan returned to Ireland in July 2019.
4. In an email dated 22 August 2019, Ms Kristen Bennett of the insurer advised the applicant's solicitor that Mr Monahan had been paid his weekly entitlements until the expiry of his certificate of capacity on 5 July 2019. She noted that prior to his return home, Mr Monahan was fit for full time suitable duties (30 hours a week) and there was also a clearance for pre-injury duties on 23 April 2019 for a brief period. Ms Bennett noted that Dr Chris Walls had examined Mr Monahan on 21 June 2019 and his report indicated that while Mr Monahan was not fit for pre-injury duties at the time of the assessment, the option remained variable for the long term future (six months), which indicated that the current condition was not permanent and ongoing. Ms Bennett maintained that Mr Monahan did not satisfy the criteria stipulated under s 53 of the 1987 Act as he was not subject to an award and had not been assessed by an Approved Medical Specialist (AMS). Ms Bennett considered that the medical evidence suggested that Mr Monahan would be able to return to his pre-injury employment and therefore his entitlements to compensation had ceased.

PROCEDURE BEFORE THE COMMISSION

5. I am satisfied that the parties to the dispute understood the nature of the application and the legal implications of any assertions 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.
6. The parties attended a conciliation/arbitration hearing before me on 1 December 2019. Mr Monahan was represented by Mr Goodridge who was instructed by Firths, The Compensation Lawyers. The respondent was represented by Mr Parker who was instructed by Ms Markely of Bartier Perry. Ms Sadri from iCare was also present at the hearing. Mr Monahan attended by telephone conference.

EVIDENCE

Documentary evidence

7. The following documents were in evidence before the Commission and have been taken into account in making this determination:
 - (a) The Application and attached documents;
 - (b) The Reply and attached documents, and
 - (c) Application to Admit Late Documents dated 25 November 2019 filed by the applicant.

Oral evidence

8. There was no oral evidence.

ISSUES FOR DETERMINATION

Matters previously notified as disputed

9. The parties agreed that the following issues remained in dispute:
 - (a) Whether the incapacity for work resulting from the injury is likely to be of a permanent nature.
 - (b) Entitlement to weekly benefits.

FINDINGS AND REASONS

Evidence of the applicant

10. In a statement dated 1 July 2019, Mr Monahan said that he had been born in Ireland in 1998 and on leaving school he went into his trade to become a carpenter. He stated that following the completion of his four year apprenticeship he went to Canada where he worked as a carpenter for two years and then returned to Ireland in about 2013. He said that he came to Australia in September 2017 on a working holiday visa which allowed him to work for one year doing farm work and other work of that nature.
11. Mr Monahan stated that after six months of doing farm work he managed to get a sponsorship with the respondent to work as a carpenter and his visa was changed to a 457 visa which allowed him to work for one employer for four years undertaking carpentry work. He stated that after three years if he wished he could apply for permanent residency under that visa. He said that after the three year period, he and his partner planned to apply for permanent residency and stay in Australia where work was more readily available than in Ireland.
12. Mr Monahan said he started work with the respondent as a carpenter in October 2017. He said that on 17 November 2018 he was injured in the course of his employment when he was assisting in lifting (a large steel door on a worksite. Mr Monahan said that following the injury he continued to try and work for about two weeks but the pain increased and he was unable to continue. He said that during the two week period he had been going to the chiropractor and had hoped that the injury would resolve, but when it did not, he lodged a claim for workers compensation.
13. Mr Monahan wrote:
 - “18. Since that time, I have largely been certified as unfit for my duties, although there were a couple of occasions where I attempted to return to work on suitable duties for short periods, all of which were unsuccessful.
 19. In my duties as a carpenter I was required to perform lots of lifting, often awkwardly, of beams of wood and other building materials, bending, carrying objects, having to work in awkward positions and spaces, using power tools, working from ladders at awkward angles, carrying around tools which could often weigh in excess of ten kilograms including a tool belt, climbing scaffolding, moving things around site and doing all sorts of ordinary construction.
 20. From the time of my injury to date there has been no way that I can return to that work.

21. I have made three attempts to return to work on suitable duties.
 22. On the first attempt I lasted only a day or two when I had to cease when asked to assist in carrying a small fridge which aggravated my back pain and sent me back off work.
 23. On the second occasion I attempted a return to work in the workshop where I worked for half a day alternately standing and sitting at a bench drilling various pieces of timber.
 24. After that we would then have to load the timber on a truck and deliver it to the worksite. I found that this was simply too much for me as well.
 25. The third attempt of returning to work was simply on a worksite but unfortunately there was lots of kneeling, bending and laying down which aggravated my symptoms in a short period of time and I was unable to cope for more than about a week.”
14. Mr Monahan stated that even in a workshop environment he could not stand for too long, could not sit for too long, and could not lift, bend or twist and at best he could work maybe part-time and would need an employer who would tolerate all of his restrictions. He stated that his experience as a carpenter was that such positions did not exist.
 15. Mr Monahan described the pain worsening in cold weather and having difficulties sleeping. He stated that this could cause some concentration difficulties during the day as he was more tired.
 16. In a statement dated 9 July 2019, Mr Monahan said that as a result of his injury he had been unable to return to work which was in breach of the conditions of his section 457 visa which prohibited ceasing work for more than 60 days. He stated this had left him with no option but to leave Australia and return to Ireland where he now resided.
 17. In a statement dated 1 November 2019, Mr Monahan said that since his return to Ireland he had seen a physiotherapist on a couple of occasions, a sports physician and an osteopath. He said he had been unable to get any better relief from them than he had from any of his treatment in Australia. He stated they confirmed the advice he received from his medical practitioners in Australia that he would be left with an incapacity and would just need to learn to live with it as best he could and alter his day to day activities to accommodate his pain and discomfort.
 18. Mr Monahan confirmed that his inability to return to his pre-accident activities remained the same as it was when he made his earlier statements in July 2019. He stated that his disabilities and day to day restrictions had remained unchanged since July 2019 and there had been no significant change in his physical condition for a substantial period of time.
 19. Mr Monahan wrote:

“Since returning to Ireland I have been unable to return to my previous occupation and I have resigned myself to the fact that I will never be able to do so.

Given the time since my original injury and based on the medical evidence I now believe I have a permanent incapacity.”

Medical evidence from treating doctors and health professionals

20. Dr Christopher Han, treating general practitioner, in a referral to Dr Fred Orr, clinical psychologist, dated 29 March 2019, noted that Mr Monahan required an opinion and management of pain related psychological issues. Dr Han reported that Mr Monahan had chronic pain from a work injury.
21. In a referral dated 2 May 2019 to Dr Dupree, Dr Han noted that Mr Monahan had not tolerated pre-injury duty recently and had started getting pain after two hours of a shift.
22. In a report dated 17 August 2019, Dr Han noted that Mr Monahan first presented to his colleague, Dr Kiang, with lower back pain on 4 December 2018. Dr Han saw Mr Monahan for the first time on 10 December 2018 and noted that Mr Monahan had sustained an injury at work on 17 November 2018 when he was lifting a heavy door with colleagues. Dr Han reported that Mr Monahan had been making very slow progress with some fluctuations in his symptoms over the period. He noted on 24 January 2019 that Mr Monahan complained of significantly worsening symptoms and organised an MRI scan, which showed disc protrusions at L4/5 and L5/S1 that could be contacting the right L5 and S1 nerve roots in the subarticular recesses. Dr Han noted Mr Monahan then made steady progress but his employer could not accommodate him for short hours per shift as recommended.
23. Dr Han noted that Mr Monahan mentioned feeling depressed on 29 March 2019 and numerous attempts to put him back at work for his level of tolerance with the respondent had failed. Mr Monahan was also under enormous pressure with the visa issue. Dr Han wrote:

“Although Mr Monahan was not fully ready to work, we have discussed the situation and agreed to give a trial of pre-injury duty on 18/4/19. He could not tolerate the full hours at work. He was there for 2 hours and pain flared up significantly due to awkward posture and tasks that he needed to do. He was keen to give a trial for shorter hours and again this was not offered.”

24. Dr Han wrote:

“His capacity to work as a carpenter is not good as he would need to have some form of restriction for a while at this stage. At this stage, he does not have the physical endurance in his lumbar spine to cope with the physical nature of work as a carpenter. If he were not to do certain postures and exertion that would aggravate the lumbar spine pain, he may be able to continue in his profession, but I am afraid that this will be a disadvantage for him when he is seeking new work. Disc protrusion will cause lumbar spine pain in a relapsing and remitting pattern in the future. He would be able to live with minimal to some impairment in his quality of life.

I do agree with Dr Dias on his incapacity to work pre-injury duties as a carpenter. If he were to continue as a carpenter, he would need to negotiate some arrangement in order to avoid the aggravation of his symptoms and minimise recurrences of episodes of lumbar spine pain. However, I believe he will be able to work reasonably adequately if he were to choose a career which is not highly physically demanding of him.”

25. In a report dated 9 April 2019, Dr Fred Orr, noted that Mr Monahan reported that he had a work related L4/L5 disc protrusion which caused him pain when he lifted or bent at the waist. Mr Monahan told Dr Orr that if he sat for long periods in excess of 30 minutes the pain increased. Dr Orr noted Mr Monahan wanted to continue his carpentry work but doubted whether it would be possible for the long term and that his work sponsorship visa would soon be in jeopardy.
26. Dr Orr noted that Mr Monahan's scores in the DASS 21 showed he was in the extremely severe range for depression and stress and at the moderate range for anxiety. He reported that he had started Mr Monahan on a CBT relaxation training program.

27. In a report dated 21 May 2019, Dr Dupree, sports physician, noted he had reviewed Mr Monahan regarding his chronic mechanical non-specific back pain as a consequence of lumbar disc protrusion sustained in November 2018. Dr Dupree wrote:

“Unfortunately, Alan has been unable to gradually re-introduce work as his current employer unfortunately cannot accommodate this. It seems that he is likely to have to return home to Ireland as a consequence of his visa running out over the next few months. He did attempt to return to full-time work including full days of heavy labour, but after four days the pain became unbearable and he had to cease this.”

28. On examination, Dr Dupree noted that forward flexion and extension demonstrated a reasonable range with some fear avoiding qualities. He noted there was tenderness in the lower lumbar spine in the midline. Dr Dupree wrote:

“It seems unlikely that Alan will be able to return to full duties before his visa runs out, and as such it is likely that he will have to return to Ireland. We have spent some time today discussing the nature of chronic pain and the interventions that are likely to give him benefit in the long run.”

29. Mr Rafferty, exercise physiologist, in a report dated 30 May 2019, noted that Mr Monahan trialled pre-injury duties and hours but was downgraded as a result of his failure to complete an eight hour working day, arising from reported increased pain symptomatology in sustained crouching/bending over positions. Mr Rafferty noted that despite the increase in reported pain symptomatology and regression in function, he believed Mr Monahan had the capacity to be upgraded to trial modified duties and hours. However, Mr Rafferty noted this was not an option with the respondent. He noted that Mr Monahan was currently unfit for duties.

Medico-legal reports

30. In a report dated 21 June 2019, Dr Dias, occupational physician, noted that Mr Monahan completed his high school studies in Ireland and then an apprenticeship as a carpenter. He stated he worked for about three and a half years in Ireland before moving to Canada for two years between 2011 and 2013. Dr Dias noted that Mr Monahan returned to Ireland in 2013 and worked in Ireland for the next four years in a variety of different job roles, primarily in the retail industry, as a retail assistant and sales assistant, as the carpentry and building industry in Ireland was quite slow during that period. Dr Dias reported that Mr Monahan migrated to Sydney, Australia in September 2017 on a working holiday visa and then commenced employment with the respondent in October 2017 as a carpenter on a full-time basis.
31. Dr Dias reported that Mr Monahan said that his pre-injury job role as a carpenter was a full time job and he would usually work 40 hours per week with a variable amount of overtime. He noted that Mr Monahan said his pre-injury duties were repetitive, heavy and manual in nature and would involve repetitive heavy lifting of timber framework components and building components, repetitive bending and twisting of the lower back, frequent heavy pulling and pushing, repetitive tool use, frequent kneeling and crouching and frequent overhead work. Mr Monahan said that he would carry a tool pouch around his waist which would weigh between 5 kg and 10 kg on a day to day basis.
32. Dr Dias noted that Mr Monahan was injured on 17 November 2018 when he was attempting to lift a large steel door with two other work colleagues. Dr Dias reported that as Mr Monahan and his co-workers attempted to lift the door off the floor, Mr Monahan felt a sharp jarring sensation of pain in his lumbar spine. He noted that Mr Monahan tried to continue working for the rest of the day but his symptoms of pain persisted.

33. Dr Dias noted that Mr Monahan had continued to experience ongoing symptoms of pain, stiffness and discomfort affecting his lower back on a daily basis over the course of the past seven months since the workplace injury. He noted Mr Monahan has had extensive conservative rehabilitation treatment measures including chiropractic treatment sessions, physiotherapy treatment sessions and a gym based exercise program co-ordinated by an exercise physiologist. Treatment had also included home exercises, anti-inflammatory tablets, analgesia, use of a topical ointment and two cortisone injections in the lumbar spine in February 2019. Dr Dias noted that the injections did not yield any systematic benefit. Dr Dias noted that Mr Monahan had been seeing Dr Dupree in relation to the work related lower back injury and also a psychologist, Dr Fred Orr, for pain management counselling.
34. Dr Dias noted that Mr Monahan recalled taking about two weeks off work in early December 2018 and then he trialed a return to work on light duties in late December 2018. Mr Monahan said he only lasted one week due to worsening lower back pain. Dr Dias said that Mr Monahan was subsequently off work again for about three months and then trialed a return to light duties for the respondent in mid-March 2019 but could not cope due to worsening lower back pain and had remained off work since about 19 March 2019. Mr Monahan told Dr Dias that he remained certified as fit for light duties at work with a lifting restriction of 5 kg and sitting and standing restrictions of 30 minutes, but there were no light duties available from the respondent. Dr Dias noted that due to visa issues Mr Monahan had decided to return to Ireland permanently in early July 2019.
35. Dr Dias reported that current symptoms included pain, stiffness and discomfort affecting the lower back, predominantly right-sided, with radiation of pain into the right hip region. He noted that symptoms of pain tended to be worse in cold weather and Mr Monahan would wake up two to three times a night due to worsening symptoms of lower back pain and suffered consistently broken sleep due to lower back pain. He noted Mr Monahan could tolerate walking for up to one hour before having to stop due to worsening lower back pain and that standing became increasingly difficult after 30 minutes. Dr Dias noted Mr Monahan struggled to sit for more than 20 minutes at a time due to worsening back pain and driving became increasingly difficult after 20 minutes due to worsening lower back pain.
36. On examination, Dr Dias noted that Mr Monahan was tender to palpation in the midline and in the right and left lumbar paraspinal musculature from the level of L3 to S1 with tenderness to palpation extending inferolaterally into the right gluteal musculature. Dr Dias reported that there was moderate muscular guarding noted on palpation of these regions, but no evidence of muscular spasm. He noted that Mr Monahan was able to perform forward flexion of his lumbar spine to approximately two-thirds of the normal range before being limited by pain and discomfort. Extension of the lumbar spine was limited to one-half of the normal range and lateral flexion of the lumbar spine was limited on the right side to one-third of normal range and on the left side to two-thirds of normal range. He noted lateral rotation of the torso was limited to approximately three-quarters of the normal range bilaterally by pain and discomfort. Dr Dias made a diagnosis of chronic non-specific lumbar spine pain with associated L4/L5 and L5/S1 disc protrusions, secondary to an acute musculoligamentous strain.
37. Dr Dias assessed Mr Monahan as qualifying for DRE lumbar category 2 and made an assessment of 7% Whole Person Impairment. Dr Dias wrote:

“Given that Mr Monahan has suffered with chronic symptomatology in his lumbar spine region for the past seven months, and given that his lumbar spine condition is unlikely to alter significantly from a clinical perspective over the course of the next 12 months, I can objectively conclude that Mr Monahan’s compensable lumbar spine injury has effectively stabilised and he has reached maximum medical improvement from an impairment assessment perspective. Therefore, the above impairment rating should be considered permanent.”

38. Dr Dias considered that Mr Monahan remained partially incapacitated for employment as a result of the lumbar spine injury. He wrote:

“In my opinion, Mr Monahan would be fit for work with the following restrictions pertaining to his lumbar spine condition:

- Mr Monahan is fit to work on a full-time basis i.e. full-time hours and full-time days.
- Mr Monahan should avoid lifting any items weighing greater than 5kg on a repetitive basis.
- Mr Monahan should avoid performing any heavy pulling or pushing duties using force greater than 5kg.
- Mr Monahan should avoid performing any tasks that involve prolonged walking or prolonged standing for greater than 30 minutes at a time.
- Mr Monahan should take a break from seated duties every 25-30 minutes, to rest and stretch his lower back for 5 minutes.
- Mr Monahan should avoid performing any tasks that involve repetitive bending and twisting of the lower back or prolonged kneeling and crouching.
- Mr Monahan should avoid performing any tasks that involve working in confined spaces.
- Mr Monahan should avoid performing any tasks that involve ladder climbing.”

39. Dr Dias stated that within the abovementioned restrictions, Mr Monahan might be able to return to the workforce, albeit on a heavily restricted basis. He considered that the restrictions would have a significant negative impact on Mr Monahan’s vocational options and earning capacity if he were to return to the workforce within the scope of his previous education, training and experience. Dr Dias expressed the opinion that Mr Monahan was not fit to return to his pre-injury job role as a carpenter in an unrestricted capacity as a result of the chronic lower back condition. He considered that Mr Monahan’s restrictions would preclude return to the workforce in the carpentry industry at the present time.

40. Dr Dias wrote:

“Taking into account the chronicity of Mr Monahan’s symptomatology thus far, despite extensive conservative rehabilitation treatment measures and also taking into account the underlying pathology involved (L4/L5 and L5/S1 disc protrusions), in my opinion Mr Monahan’s partial incapacity for work resulting from his lumbar spine injury is likely to endure on a permanent basis into the foreseeable future. In my opinion, the prognosis of Mr Monahan being able to return to his pre-injury employment as a carpenter would have to be judged as poor, given the nature of the pathology involved, the chronicity of his symptomatology thus far, his relatively poor prognosis for significant improvement and taking into account the inherent physical requirements of working as a carpenter on the open labour market.”

41. Dr Dias expressed the opinion that the restrictions he referred to were likely to be of a permanent nature and were likely to continue to have an ongoing negative impact on Mr Monahan’s vocational options and earning capacity on the open labour market for the foreseeable future.”

42. Dr Dias wrote:

“In my opinion, Mr Monahan is likely to remain permanently partially incapacitated for employment for the foreseeable future as a result of his chronic lumbar spine condition. In my opinion, Mr Monahan is unlikely ever to be able to return to his pre-injury job role as a carpenter in an unrestricted capacity and is unlikely to even ever be able to return to his pre-injury vocation as a carpenter in any capacity, given the restrictions I have listed above ...and taking into account the inherent core physical requirements of working as a carpenter in the building and construction industry. In my opinion, Mr Monahan does have some capacity for employment but is likely to require vocational retraining and vocational rehabilitation to source alternative employment within the scope of his previous education, training and experience, and within the abovementioned restrictions I have listed above ...when he returns to Ireland in July 2019. Mr Monahan suffers from chronic symptoms of lower back pain, stiffness and discomfort, and is likely to continue to suffer with symptomatology associated with his lower back condition for the foreseeable future. He is likely to be at risk of aggravation and exacerbation if he were to return to his pre-injury vocation of carpentry at the present time or in the foreseeable future, given the inherent physical requirements of working as a carpenter (prolonged standing, prolonged walking, repetitive bending and twisting of the lower back, prolonged kneeling and crouching, repetitive heavy manual handling, repetitive heavy pulling and pushing and repetitive tool use).”

43. Dr Dias considered that Mr Monahan’s prognosis for significant improvement in his lumbar spine condition would have to be judged as relatively poor at the present time. He expressed the opinion that it was doubtful that Mr Monahan’s lumbar spine condition would improve to the point where he was pain free or free from functional compromise on a day to day basis in the foreseeable future.
44. In a report dated 21 June 2019, Dr Chris Walls, occupational physician, noted that Mr Monahan was only making a slow improvement in his pain levels and with his exercise and physiotherapy programs. Dr Walls reported that persistent lower back pain was interfering with activities of daily living and the ability to return to work as a carpenter, and the outcome of Mr Monahan’s recovery was complicated by the fact that he had to return to Ireland as his working visa had expired.
45. Dr Walls noted he had discussed the case with Dr Han and they agreed that although Mr Monahan was fit for suitable duties (even if the employer did not make them available), in view of his imminent departure the current certification was appropriate given the failure to re-engage in work to date.
46. Dr Walls stated that Mr Monahan should avoid heavy work, work-related lifting and forceful movements, awkward postures (bending and stooping) and whole body vibration.
47. Dr Walls noted Mr Monahan said that he would seek lighter work when he returned to Dublin. On examination, Dr Walls noted restrictions of movement. Dr Walls expressed the view that Mr Monahan suffered from a low back disorder in all probability due to the disc injuries identified in the MRI scan at L4/5 and L5/S1. He noted that discomfort had not been relieved by transforaminal and perineural injections so ongoing conservative therapies were recommended.

48. Dr Walls considered Mr Monahan would take some time to recover (months) and was fit for work that avoided heavy work, work related lifting, forceful movements, the adoption of awkward postures, whole body vibration and static postures.
49. Dr Walls concluded that Mr Monahan had suffered an injury by accident undertaking an unsafe lift and developed lower back pain. He noted investigations had shown bi-level lumbar disc disease and that these were the probable pain generators. Dr Walls wrote:
- “He is fit for restricted work at this time, but I would look for him to slowly recover his ability to return to carpentry (if he wished) over a period of time.”
50. Dr Walls noted Dr Han would continue the current certification until Mr Monahan returned to Ireland.
51. Dr Walls noted Mr Monahan reported symptoms that meant he could not return to pre-injury duties at this time, although pre-injury duties (with care) remained a viable option in the long term (six months). He noted that suitable duties had been available but Mr Monahan had not found himself able to sustain them. Dr Wall expressed the opinion that Mr Monahan did have work ability for light work with postural variety or clerical and administrative work. Noting various complications, Dr Walls expressed the view that Mr Monahan could work 20 hours of work a week with the restrictions noted and extend that to full hours over a four week period. Dr Wall wrote:
- “I would expect some inefficiency: that is, highly paced demanding work, even of a light nature, would probably exceed his capabilities (provoke unacceptable levels of pain).”
52. Dr Walls then noted the time frame for upgrading his hours from 20 hours a week to 40 hours would be approximately four to six weeks. He estimated it would take some four to six months before Mr Monahan would be able to physically sustain pre-injury duties.

WorkCover Certificates of capacity

53. In an undated WorkCover NSW certificate of capacity Dr Han certified the applicant as fit for pre-injury duties from 23 April 2019 as a trial.
54. In a WorkCover NSW certificate of capacity Dr Han certified the applicant as having capacity for some type of employment from 3 May 2019 to 17 May 2019 with a 15 kg lifting/carrying capacity and a standing tolerance of up to an hour with stretch and rest after that. Dr Han also certified the applicant as having no current work capacity for any employment from 30 April 2019 to 1 May 2019.
55. In a WorkCover NSW certificate of capacity Dr Han certified the applicant as having capacity for some type of employment from 18 May 2019 to 31 May 2019 with a lifting/carrying capacity of up to 15 kg at once but not repetitively and a standing tolerance of up to one hour and to stretch and rest after that.
56. In a WorkCover NSW certificate of capacity Dr Han certified the applicant as having capacity for some type of employment from 1 June 2019 to 28 June 2019 with a 15 kg lifting/carrying capacity but not repetitively and a standing tolerance of up to an hour and to stretch and rest after that.

Findings and Reasons

57. Section 53 of the 1987 Act provides:

- “1. If a worker receiving, or entitled to receive, a weekly payment of compensation under an Award ceases to reside in Australia, the worker shall thereupon cease to be entitled to receive any weekly payment, unless an Approved Medical Specialist certifies, or the Commission determines, that the incapacity for work resulting from the injury is likely to be of a permanent nature.
2. If the incapacity is so certified or determined to be of a permanent nature, the worker is entitled to receive quarterly the amount of the weekly payments accruing during the preceding quarter, so long as the worker establishes, in such manner and at such intervals as the insurer may require, the worker’s identity and the continuance of the incapacity in respect of which the weekly payment is payable.”

58. The parties agreed that Mr Monahan was not in receipt of an award of weekly compensation. Mr Monahan now seeks an award to remedy that problem. Counsel for Mr Monahan submitted that the medical evidence before the Commission supported a finding that Mr Monahan’s incapacity for work resulting from the injury was likely to be of a permanent nature. Counsel submitted that Mr Monahan was entitled to weekly payments and the Commission should make an award pursuant to s 53.

59. The respondent submitted that Mr Monahan must first establish an entitlement under s 37 of the 1987 Act and that the extent of capacity has been and is likely to remain unchanged.

60. The respondent submitted that Mr Monahan, but for his return to Ireland, could have obtained suitable employment. The respondent submitted that Mr Monahan would be able to earn as much as he did pre-injury or that any loss was nominal.

61. The parties agreed that the pre-injury average weekly earnings (PIAWE) was \$1,358.22 and payments after 4 July 2019 would be 80% of PIAWE. The parties agreed that 80% of PIAWE was \$1,086.58.

62. I noted at the beginning of the arbitration that the respondent accepted that Mr Monahan had not been employed since his return to Ireland in early July 2019.

Permanent nature

63. Dr Dias, in his report dated 21 June 2019, expressed the opinion that Mr Monahan was not fit to return to his pre-injury job role as a carpenter in an unrestricted capacity as a result of the chronic lower back condition. Dr Dias was of the view that Mr Monahan’s partial incapacity for work resulting from his lumbar spine injury was likely to endure on a permanent basis into the foreseeable future. He wrote: “In my opinion, Mr Monahan is likely to remain permanently partially incapacitated for employment for the foreseeable future as a result of his chronic lumbar spine condition.” Dr Dias considered that Mr Monahan was unlikely ever to be able to return to his pre-injury job role as a carpenter in an unrestricted capacity and was unlikely to even ever be able to return to his pre-injury vocation as a carpenter in any capacity, given the restrictions he had and taking into account the inherent core physical requirements of working as a carpenter in the building and construction industry.

64. In a report dated 17 August 2019, Dr Han agreed with Dr Dias in relation to Mr Monahan’s incapacity to work pre-injury duties as a carpenter. I would place considerable weight on Dr Han’s opinions as he treated Mr Monahan since 10 December 2018 and until Mr Monahan returned to Ireland in July 2019 and had the opportunity to review Mr Monahan regularly and monitor his condition.

65. In a WorkCover NSW certificate of capacity, Dr Han certified the applicant as having capacity for some type of employment working normal hours from 1 June 2019 to 28 June 2019 with a 15 kg lifting/carrying capacity but not repetitively and a standing tolerance of up to an hour and to stretch and rest after that.
66. Dr Walls, in a report dated 21 June 2019, considered Mr Monahan would take some time to recover (months) and was fit for work that avoided heavy work, work related lifting, forceful movements, the adoption of awkward postures, whole body vibration and static postures. Dr Walls was of the opinion that Mr Monahan was fit for restricted work, but “I would look for him to slowly recover his ability to return to carpentry (if he wished) over a period of time.”
67. Dr Walls noted Mr Monahan reported symptoms that meant he could not return to pre-injury duties but considered that pre-injury duties performed with care remained a viable option in the long term. Dr Walls estimated it would take some four to six months before Mr Monahan would be able to physically sustain pre-injury duties.
68. The lifting and carrying restrictions placed on Mr Monahan in 2019 were such that a return to his pre-injury work as a carpenter was not possible. I note that Mr Monahan did attempt a return to work on three occasions. On one of those returns he was certified as fit for a trial of his pre-injury duties, despite Dr Han commenting that Mr Monahan was not fully ready to work pre-injury duties. It appears that the trial of pre-injury duty on 18 April 2019 was attempted because Mr Monahan was worried that his visa would expire. In any event, the work Mr Monahan performed during that trial of pre-injury duties increased his symptomatology and he had to cease work.
69. Mr Monahan gave evidence that since his return to Ireland in July 2019 his inability to return to his pre-accident activities remained the same as it was in July 2019. He stated that his disabilities and day to day restrictions had remained unchanged since July 2019 and there had been no significant change in his physical condition for a substantial period of time. I accept the evidence given by Mr Monahan.
70. I am satisfied that the medical evidence supports a finding that Mr Monahan has an incapacity for work. I find that he can no longer perform work involving lifting or carrying over 15 kg and such lifting or carrying cannot be repetitive, and he has a standing tolerance of up to an hour and needs to stretch and rest after that.
71. Dr Dias’ assessment supports a finding that incapacity for work is of a permanent nature, and I accept this assessment. Dr Walls expected some improvement in the four to six month period after his examination of Mr Monahan on 21 June 2019. Accepting Mr Monahan’s evidence, which was not really challenged, it is clear that his condition had not really changed and there had been no improvement in his symptoms in the last five months. More than a year has passed since he sustained the injury to his lumbar spine on 17 November 2018. I am satisfied that in Mr Monahan’s case it is clear for the reasons discussed above that his back will not recover and he does have an incapacity for work that is likely to be of a permanent nature. Accordingly, I find this aspect of section 53 has been established by Mr Monahan.

Section 37

72. Both parties agreed that any entitlement to weekly compensation falls within the second entitlement period, which is governed by s 37 of the 1987 Act.
73. As noted above, I am satisfied that the medical evidence supports a finding that Mr Monahan has an incapacity for work. An entitlement to compensation under s 37 of the 1987 Act calls for an assessment firstly as to whether Mr Monahan has “no current work capacity” for the period claimed or “current work capacity”.

74. "Current work capacity" is defined in s 32A of the 1987 Act as 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".
75. "No current work capacity" is defined in s 32A as "a present inability arising from injury such that the worker is not able to return to work, either in the worker's pre-injury employment or in suitable employment".
76. It follows from the findings I have made above that Mr Monahan has from 3 July 2019 to date and continuing a present inability arising from his lumbar spine injury such that he is not able to return to his pre-injury employment. The question to be addressed is whether he is able to return to work in suitable employment.
77. The respondent argued that Mr Monahan could do work and had a significant capacity for full time work with restrictions. Counsel relies on the decision of Roche DP in *Wollongong Nursing Home Pty Ltd v Dewar* (2014) NSW WCC PD 55 (*Dewar*), in which the concept of suitable employment was discussed. In that case, Roche DP said at [51]:

"If the Arbitrator meant that the suitable employment must be employment that is real and is (potentially) available in the labour market at large, though not available to Mrs Dewar and not 'generally available in the employment market', I agree."

78. Roche DP said at [58]:

"However, while the new definition for suitable employment has eliminated the geographical labour market from consideration, it has not eliminated the fact that 'suitable employment' must be determined by reference to what the worker is physically (and psychologically) capable of doing, having regard to the worker's 'inability arising from injury'. Suitable employment means 'employment in work for which the worker is currently suited'."

79. I noted that there was agreement between the parties that the applicant had not obtained any employment since his return to Ireland.
80. In section 32A suitable employment means employment in work for which the worker is currently suited, and various matters are listed to be taken into account and matters are listed that cannot be taken into account, such as that Mr Monahan from 3 July 2019 has resided in Ireland.
81. The determination of what is suitable employment is a practical exercise that is conducted having regard to the following factors:
- (a) the nature of the incapacity and the details provided in medical information;
 - (b) the worker's age, education, skills and work experience;
 - (c) any return to work plan, and
 - (d) any occupational rehabilitation services that have been provided to the worker.

But, without regard to:

- (a) whether the work or employment is available, that is, obtainable;
- (b) whether the work or the employment is of a type or nature that is generally available in the employment market;

- (c) the nature of the worker's pre-injury employment, and
- (d) the worker's place of employment.

82. On 21 June 2019, Dr Walls stated that Mr Monahan should avoid heavy work, work-related lifting and forceful movements, awkward postures (bending and stooping) and whole body vibration. Dr Walls expressed the opinion that Mr Monahan had work ability for light work with postural variety or clerical and administrative work. Noting various complications, Dr Walls expressed the view that Mr Monahan could work 20 hours of work a week with the restrictions noted and extend that to full hours over a four to six week period. Dr Walls wrote:

“I would expect some inefficiency: that is, highly paced demanding work, even of a light nature, would probably exceed his capabilities (provoke unacceptable levels of pain).”

83. Dr Han, in his report dated 17 August 2019, noted that Mr Monahan did not have the physical endurance in his lumbar spine to cope with the physical nature of work as a carpenter. Dr Han commented that if Mr Monahan were not to do certain postures and exertion that would aggravate the lumbar spine pain, he might be able to continue in his profession, but this would be a disadvantage for him when he is seeking new work. Dr Han stated that the disc protrusion would cause lumbar spine pain in a relapsing and remitting pattern in the future.

84. Dr Han did agree with Dr Dias in relation to Mr Monahan's incapacity to work pre-injury duties as a carpenter. Dr Han believed he would be able to work reasonably adequately if he were to choose a career which is not highly physically demanding.

85. Dr Han certified Mr Monahan as fit for suitable duties work normal hours with a 15 kg lifting/carrying capacity but not repetitively and a standing tolerance of up to an hour and to stretch and rest after that.

86. Dr Dias considered that Mr Monahan remained partially incapacitated for employment as a result of the lumbar spine injury. Dr Dias considered Mr Monahan was fit to work on a full-time basis, that is, full-time hours and full-time days. He set out a number of restrictions relating to the lumbar spine condition including avoiding lifting any items weighing greater than 5 kg on a repetitive basis, avoiding performing any heavy pulling or pushing duties using force greater than 5 kg, avoiding performing any tasks that involve prolonged walking or prolonged standing for greater than 30 minutes at a time, avoiding performing any tasks that involve repetitive bending and twisting of the lower back or prolonged kneeling and crouching, avoiding performing any tasks that involve working in confined spaces, avoiding performing any tasks that involve ladder climbing, Dr Dias noted that Mr Monahan should take a break from seated duties every 25-30 minutes, to rest and stretch his lower back for five minutes.

87. Dr Dias stated that within the abovementioned restrictions, Mr Monahan might be able to return to the workforce, albeit on a heavily restricted basis. He considered that the restrictions would have a significant negative impact on Mr Monahan's vocational options and earning capacity if he were to return to the workforce within the scope of his previous education, training and experience. Dr Dias expressed the opinion that Mr Monahan was not fit to return to his pre-injury job role as a carpenter in an unrestricted capacity as a result of the chronic lower back condition.

88. Mr Monahan is aged 31 years. He completed school in Ireland and then a carpentry apprenticeship. He has worked as a carpenter since he finished his apprenticeship apart from a period when he did some work in retail in Ireland because work as a carpenter was not available.

89. Mr Monahan attended an exercise rehabilitation program in March 2019. The programme was focused on ensuring a sustainable return to work to his pre-injury duties. Mr Monahan attempted to return to work on suitable duties on to occasions and on pre-injury duties on another occasion. All attempts to return to work failed and resulted in an increase in symptoms. It appears that no occupational rehabilitation services were provided to Mr Monahan.
90. The restrictions described by Dr Walls, Dr Dias and Dr Han would, in my view, limit the employment opportunities available to a worker who has worked as a carpenter since he left school, apart from some work in retail when carpentry work was not available. However, it is apparent that the medical evidence supports a finding that Mr Monahan is able to return to work in suitable employment.
91. Doing the best I can with the medical evidence and giving due weight to Mr Monahan's evidence on the issue, I am satisfied that Mr Monahan had a current earning capacity during the period claimed. It follows that Mr Monahan is able to perform some work perhaps such as retail or sales work, provided he was able to avoid prolonged standing and any heavy lifting. While there is no evidence about the availability of such work in the Sydney region, I have no doubt that such employment exists and that it constitutes a "real" job. I have concluded from the medical certificates that Mr Monahan could work a 38 hour week performing such work. I have also concluded that it is unlikely that such work would attract more than the minimum wage. The parties agreed that the applicable minimum wage is \$19.49 per hour or \$740.62 per week. Accordingly, I find that the applicant was capable of earning in suitable employment from 11 October 2018 the sum of \$740.62 per week.
92. The parties have agreed that 80% of the applicant's PIAWE is the sum of \$1,086.58 per week. I make an award for the applicant pursuant to s 37 (3) of the 1987 act in the sum of \$345.96 per week from 4 July 2019 to date and continuing.

