

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 6404/19
Applicant: Anthony Micallef
Respondent: IVE Employment Australia Pty Limited
Date of Determination: 3 March 2020
Citation: [2020] NSWCC 58

The Commission determines:

1. The applicant sustained an injury to his lumbar spine in the course of his employment with the respondent by way of a disease injury as provided by section 4 (b)(ii) of the *Workers Compensation Act 1987* (1987 Act), with a deemed date of injury of 6 May 2019.
2. The applicant had no current work capacity from 6 May 2019 to 12 June 2019 as a result of that injury.
3. The applicant has had a partial incapacity for work from 13 June 2019 as a result of that injury.

The Commission orders that:

1. The respondent is to pay the applicant weekly payments of compensation as follows:
 - (a) \$1,140 per week from 6 May 2019 to 12 June 2019 pursuant to section 36 of the 1987 Act;
 - (b) \$505 per week from 13 June 2019 to 20 June 2019 pursuant to section 36 of the 1098 Act;
 - (c) \$449 per week from 21 June 2019 to 5 August 2019 pursuant to section 36 of the 1987 Act, and
 - (d) \$219 per week from 6 August 2019 to date and continuing pursuant to section 37 of the 1987 Act.

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

John Isaksen
Arbitrator

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

G Bhasin

Gurmeet Bhasin
Acting/Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. The applicant, Anthony Micallef, commenced employment with the respondent, IVE Employment Australia Pty Limited, as a machine operator in 2001.
2. The applicant claims that on Sunday 4 May 2019 he was at his home in Mount Druitt and was involved, along with his wife, in putting out rubbish for a council pick up. The applicant claims that he bent over and felt immediate pain in his lower back.
3. The applicant attempted to return to work on 13 May 2019 but had to stop work on that day due to his pain and he has not worked at all since. The applicant claims that he has sustained injury due to the nature and conditions of his employment or by way of aggravation, acceleration, exacerbation or deterioration of a disease process.
4. The applicant claims weekly payments of compensation since 13 May 2019 as a result of injury sustained in the course of his employment with the respondent.
5. The respondent has issued dispute notices dated 24 July 2019 and 24 October 2019 wherein the respondent disputes that the applicant has sustained an injury in the course of his employment with the respondent and disputes that the applicant has any total or partial incapacity for work that results from any such injury.

ISSUES FOR DETERMINATION

6. The parties agree that the following issues remain in dispute:
 - (a) whether the applicant has sustained an injury in the course of his employment with the respondent pursuant to section 4 of the *Workers Compensation Act 1987* (the 1987 Act);
 - (b) whether the applicant has sustained an injury as a result of a disease injury pursuant to section 4(b) of the 1987 Act, and
 - (c) whether the applicant has any total or partial incapacity for work that results from an injury sustained in the course of his employment with the respondent (sections 32A, 33, 36 and 37 of the 1987 Act).

PROCEDURE BEFORE THE COMMISSION

7. The parties attended a conference and hearing at Penrith on 20 February 2020. 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.
8. Mr Horan appeared for the applicant, instructed by Ms Survery. Mr Baker appeared for the respondent.
9. Pre-injury average weekly earnings (PIAWE) were agreed by the parties at \$1,200 per week.

EVIDENCE

Documentary evidence

10. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute and attached documents;
 - (b) Reply and attached documents, and
 - (c) Application to Admit Late Documents filed by the applicant on 12 February 2020.

Oral evidence

11. There was no application to cross examine the applicant or adduce oral evidence.

FINDINGS AND REASONS

The applicant's evidence

12. The applicant has provided a statement dated 21 November 2019.
13. The applicant states that he commenced employment as a machine operator with the respondent 18 years ago. He states that the respondent undertakes mass printing and that it is a very physical job and involves heavy work. He states that he is required to operate large heavy machines throughout his shift.
14. The applicant states that he is required to move multiple pallets of paper that can weigh anywhere between 100 kilograms and one tonne. He states that the electric pallet jacks that are used are often taken or broken, so that he has to push or pull these pallets to get them to the machine, and that can be a fair distance within the factory. He states that once the pallets are moved to the machine then he has to operate the machine which includes bending, twisting and lifting to get the machine running.
15. The applicant states that during the course of his employment with the respondent he had a number of back injuries and flare-ups ranging on various dates since 2004, 2005, 2006, 2007, 2013, 2014 and most recently on 5 May 2019. He states that he lodged complaints regarding all of these incidents but never previously made a worker's compensation claim. The applicant states: "I've always tried to do the right thing by my employer and push on with work where possible."
16. The applicant states that on Sunday 5 May 2019 he had booked a council pick up to remove rubbish from his house. He states that the items that he was getting rid of were light stuff such as a vacuum cleaner and steam mop. The applicant states:

"In the course of organising this I bent over and felt immediate pain. My wife completed the clean-up herself, I was in immense pain and could hardly move."
17. The applicant states that on the next day he attended his general practitioner, Dr Selim. He states that he was unable to work due to his pain and that Dr Selim advised him to take a week off work. Dr Selim also referred the applicant for a CT scan on his lower back.
18. The applicant states that he attempted to return to work on 13 May 2019 but could not cope due to significant pain in his lower back. He states that he was provided with a Certificate of Capacity from his doctor. He states that in July 2019 his employment with the respondent was terminated on the basis that he had made a dishonest workers compensation claim, in that the injury had occurred at home and not at work.

19. The applicant states that his pain continues every day with a burning sensation down from his back and into his legs.

The evidence of Donna Micallef

20. Donna Micallef has provided a statement dated 21 November 2019.
21. Mrs Micallef is the applicant's wife and states that they were married in 2013. She states that he is a hardworking man and is loyal, dedicated and honest.
22. Mrs Micallef states that over the years the applicant mentioned about a back injury which occurred with the respondent, that his back was never the same thereafter, and that he had flare ups which would require pain relief.
23. Mrs Micallef states that on 5 May 2019 the applicant and herself were involved in disposing of items for a council pick up, although none of the items were heavy. She states that the applicant was about to assist her when he bent over slightly and felt immediate pain in his lower back. She states that he was not lifting anything at the time or anything prior to the pain which suddenly appeared.

Other non-medical evidence

24. In the Reply there is a document dated 18 June 2019 and signed by Simon Bailey, General Manager PRINT NSW, Fiona Cotter, IVE Group National HSEQ Advisor, and Len Adams, Bindery Manager, which refers to a meeting conducted on 13 May 2019 in the presence of Joshua Cooney of IPAR and the applicant which includes the following:

“...Anthony confirmed that the injury was due to him bending over at home on the afternoon Saturday 4th May preparing for a council clean up. His back basically popped and he felt immediate pain.”
25. In the Reply there is a Workplace Assessment Report from Joshua Cooney from IPAR dated 20 June 2019. Mr Cooney records a history of the applicant feeling immediate pain in his lower back when he bent over when helping his wife complete a council clean up. He also records that the applicant was unable to identify any specific workplace incident which may have contributed to the onset of his lower back pain but the applicant considered that his lower back pain was the result of an accumulative period of eight years of work.
26. Mr Cooney also records that the applicant said he sustained an injury to his lower back in approximately 2007 when lifting a table, took three weeks off work, but felt that the injury had never fully resolved.
27. Mr Cooney records that the applicant was keen to engage in a return to work and felt that his pain symptoms and general pathology had mostly resolved. However, the respondent had elected not to provide the applicant with suitable duties because his claim had yet to be accepted.
28. Mr Cooney refers to a Certificate of Capacity from Dr Selim dated 13 June 2019 which certifies the applicant as having restrictions on his capacity of no lifting over 10 kilograms and to avoid repetitive bending. Mr Cooney reviews and summarises the work duties on the K8 machine which the applicant worked on and opined that the applicant could undertake that work as there was no lifting above 8 kilograms and rarely required stooping.

The medical evidence

29. The applicant's general practitioner, Dr Selim, has provided two reports and three separate handwritten responses to questions asked by Employers Mutual Limited (EML), the insurer of the respondent. There are also Certificates of Capacity issued by Dr Selim between 16 May 2019 and 6 September 2019.
30. There are also clinical notes in evidence from Dr Selim commencing from 7 August 2006, although the period from 7 August 2006 to 7 October 2009 only contains details of prescription medicine and more detailed notes only appear from 7 October 2009 onwards. In a report dated 2 August 2019, Dr Selim states that he only has records for the applicant from 2009 onwards.
31. In the report dated 2 August 2019, Dr Selim states that the applicant had a work related injury in 2007 and issued a WorkCover certificate but that he no longer had records of that injury in his possession. He states that his records show that the applicant "had numerous consultations over the years for low back pain arising from this work related injury." He states that the applicant has not had a new back injury but that on 5 May 2019 he suffered another exacerbation of his chronic low back pain.
32. In a report dated 12 September 2019, Dr Selim states that the applicant presented in 2007 for a work related low back injury. He states that since then he has had numerous exacerbations of low back pain including on 7 and 15 October 2009, 20 May 2013, 28 November 2013, 3 June 2016, 29 June 2018 and 6 May 2019.
33. Dr Selim writes that on 6 May 2019 the applicant reported sudden severe low back pain after bending forward and that this pain radiated down the left leg, which was similar to a presentation on 29 June 2018. He also writes:

"Mr Micallef's current incapacity is a result of a work related injury in 2007. He has numerous exacerbations of this injury since that date and therefore his employment is a substantial contributing factor to this injury. His current incapacity is not the result of any new injury or pathophysiological process."
34. Dr Selim writes that the applicant was initially totally unfit for work but became fit for work for 30 hours per week with a 10 kilogram lifting limit and a restriction on repetitive bending. He then writes that the applicant's condition deteriorated and at the time of that report the applicant was fit for 12 hours per week with a 5 kilogram limit on lifting and no repetitive bending.
35. The Certificates of Capacity issued by Dr Selim confirm what was written in his report dated 12 September 2019 regarding the applicant's capacity for work, although Dr Selim issued four Certificates of Capacity between 21 June 2019 and 12 July 2019 which certified the applicant as being able to work 35 hours per week, with a 10 kilogram limit on lifting and no repetitive bending.
36. The first handwritten response by Dr Selim to questions asked by EML is provided on 22 May 2019. Dr Selim makes a diagnosis of the applicant having left L3/4 and left L4/5 disc prolapse with left L4 nerve root compression. In answer to the date of injury reported by the applicant, Dr Selim writes: "low back pain experienced at work on numerous occasions and reported to employer however pain became intolerable on 5th May."
37. Dr Selim opines that the mechanism of injury as reported by the applicant is: "recurrent lifting, bending and twisting using folding machine at work."

38. In answer to a question as to why Dr Selim initially wrote three medical certificates and then wrote a Certificate of Capacity on 16 May 2019, back-dated to apply from 6 May 2019, Dr Selim writes:
- “Initially patient was going to utilise his own sick leave due to reluctance to go on workers compensation – hence the medical certificate issued. He then decided to utilise WorkCover insurance when realising work is a substantial contributing factor to his injury.”
39. Dr Selim certifies the applicant as being able to work for four hours per day for five days per week from 27 May 2019 with a 5 kilogram limit on lifting, standing for no more than 30 minutes and no bending or squatting.
40. In his second handwritten response dated 19 June 2019, Dr Selim is asked whether there was a frank incident reported to him by the applicant and replies: “No. It is a ‘wear and tear’ type injury due to repetitive activities.” He also identifies the repetitive activities as occurring on an aging printing machine.
41. In his third handwritten response dated 1 July 2019, Dr Selim is provided with a copy of the workplace assessment report of Mr Cooney dated 20 June 2019 and is asked whether the mechanism of injury described by the applicant to him is the same as that described in the report of Mr Cooney. Dr Selim replies:
- “No. Anthony first experienced this pain at work many years ago and many times since. It first occurred at work.”
42. In answer to a question as to the record made in the report of Mr Cooney of an injury in 2007 which never fully resolved, Dr Selim replies: “I am not aware of such an incident.”
43. Dr Selim concludes his third handwritten response by stating:
- “The absence of a specific workplace incident does not exclude work being a substantial contributing factor as the injury could be due to a repetitive strain type mechanism.”
44. The applicant attended Dr New, orthopaedic surgeon, at the request of his solicitors and Dr New has provided a report dated 24 September 2019.
45. Dr New records that the nature and conditions of the applicant’s employment involved twisting and bending over machinery, lifting in awkward positions and pushing heavy pallets up ramps. He records that the applicant had flare-ups of pain in his lumbar spine in 2003, 2004, 2005, 2007, 2013, 2014 and 2019.
46. Dr New records that on 5 May 2019, the applicant bent over and felt severe pain and could not move.
47. Dr New refers to an MRI scan which revealed lumbar spondylosis as well as some lateral canal stenosis, although the report is not in evidence and no specific details of the report, such as the date when the MRI scan was taken, are recorded by Dr New.
48. Dr New opines that the applicant’s employment was a substantial contributing to his injury and states:
- “There is a well-documented history which is supported by GP attendance during this period.”

I would indicate that the last issue in 2019 was both trivial and on the back of the substantial history of back problems, with lifting weights that appear to be well in excess of the normal Occupational Health & Safety Guidelines recommended.”

49. Dr New also writes that the “quite trivial” injury in 2019 produced the same symptoms as the applicant’s previous issues.
50. Dr New also opines that the applicant’s capacity for work has been substantially altered as a result of the applicant’s multiple injuries at work. He opines that “the medical restrictions that he has are currently appropriate that he is not working.”
51. In a supplementary report dated 17 December 2019, Dr New opines that the applicant’s employment with the respondent “is the major contributing factor to his presentation and diagnosed lower back injury.”
52. Various entries in the clinical notes from Dr Selim, which date from 7 October 2009 onwards, were referred to by counsel by both parties, with each counsel endeavouring to emphasise how certain entries assisted their position.
53. The last time that there is an entry for low back pain in those notes, prior to the event on 5 May 2019, is an entry on 29 June 2018, which includes:

“L buttock pain radiating to groin and L knee
L groin pain
L spine – full ROM on all planes
? Left sciatic pain.”
54. Mr Horan for the applicant submits that this is consistent with the applicant having ongoing problems with his lower back and the conclusion made by Dr New that the incident on 5 May 2019 produced the same symptoms as previous issues.
55. Mr Baker for the respondent points out that there is no reference to actual low back pain in those notes and there is a record of the applicant having a full range of motion of the lumbar spine. He also notes there is no reference to the symptoms complained of being caused by the applicant’s work duties.
56. Working backwards in time, the next relevant entry is on 7 March 2017 where it is recorded that the applicant had left knee pain for one day and the pain was now in the lower back, but there is a full range of motion in the lumbar spine.
57. The next relevant entry is on 3 June 2016 where there is a record of the applicant having persistent lower chest wall pain from the previous month but also a record of: “Low back pain, recurrent problem.” Mr Horan relies on that entry as evidence of an ongoing, chronic problem that the applicant is having with his low back. Mr Baker emphasises that there is no reference to the applicant’s work being the cause of these recorded symptoms.
58. Mr Baker also points out that there are over 20 consultations between 3 June 2016 and 29 June 2018 with no mention of lower back pain, except for the entry on 7 March 2017. There is also no reference to lower back pain in two and a half years between 28 November 2013 and 3 June 2016. On 28 November 2013 there is a record of one day of neck and low back pain but also: “Recurrent problem.”
59. There are further entries that record low back pain in 2013. On 19 June 2013, the entry includes: “Exacerbation chronic low back pain” and “Mechanical low back pain.” On 20 May 2013, the entry includes: “Recurrent low back pain since work injury 4 yrs ago.” Although Mr Baker points out the entry for that date also records the applicant having a full range of motion of the lumbar spine.

60. There are no entries for low back pain or symptoms between October 2009 and May 2013. Entries made by Dr Selim in October 2009 are for treatment for polyarthralgia, which included low back pain, but Dr Selim records: "Mechanical low back pain."

Determination

Whether the applicant sustained an injury in the course of his employment with the respondent

61. Mr Horan for the applicant submits that the applicant's evidence of the heavy work that he was doing with the respondent, the consistent record of low back pain made by Dr Selim, and the opinion expressed by Dr Selim that the injury the applicant has sustained to his lower back is a 'wear and tear' type injury from repetitive activities at work, supports a finding that the applicant has sustained a disease injury as provided by section 4(b) of the 1987 Act.
62. Mr Baker refers to only occasional complaints of lower back pain in the clinical notes of Dr Selim over a period of 10 years, with no reference to those complaints being work-related. Mr Baker submits that what occurred on 5 May 2019 was a new event, which bears no relation to the occasional complaint of low back pain in the past, in that the applicant was in immediate and intense pain and Dr Selim immediately ordered a CT scan, which had never been ordered before.
63. I consider that the applicant's description of the work which he undertook for a period of 18 years is certainly capable of causing an injury to the lower back. I accept that the activities of pushing pallets up to one tonne and twisting and bending over a large printing machine over a period of some years could cause injury to the lower back.
64. The respondent has not challenged the description of the applicant's duties. The respondent has not disputed that there were occasions when the applicant had to push heavily laden pallets because the electric pallet was broken or taken away. The report from Mr Cooney refers to the applicant working on a K8 machine, which involved no lifting over 8 kilograms and minimal bending and stooping, but there is no evidence as to when the applicant commenced to work on this machine. The applicant's evidence is otherwise unchallenged as to his contention that his work with the respondent was heavy and strenuous.
65. Section 4(b) of the 1987 Act provides as follows:

"In this Act:

Injury:

.....

- (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 is 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."

66. In *Perry v Tanine Pty Ltd t/as Ermington Hotel* (1998) 16 NSWCCR 253; [1998] NSWCC 14 (*Perry v Tanine*), Burke CCJ was dealing with a carpal tunnel injury, but what he said has been applied more generally to a disease injury:

“In general it seems to me that carpal tunnel syndrome is a failure of an area of the body to cope with repeated stress imposed upon it and reacts to that stress by developing swelling, pain and loss of function as a consequence. That seems to me to be classically a disease process. Where work is the source of the relevant stress it connotes to me that the worker has received injury either by the contraction or aggravation of a disease.”

67. There is a consistent history identified in the clinical notes of Dr Selim of the applicant having low back pain. There are several references to the low back symptoms complained of by the applicant as being a recurrent problem.
68. The notes do not refer to that low back pain being experienced at work or at the end of a day's work. There are also extended periods of time, such as between 2013 and 2016, when there is no reference to lower back pain at all. The applicant does not provide evidence which one might expect from a person who has ongoing chronic problems in the lower back, such as getting home at the end of each day and taking a hot bath or using a heat pack or taking some over the counter analgesics to ease his pain.
69. However, I also accept from the applicant's own work record and his wife's evidence that the applicant is a man who did his best to keep turning up for work for some 18 years to undertake work of a heavy nature. That he did not choose to claim workers compensation for a lower back injury at any time before May 2019 is consistent with a man who was endeavouring to ensure that he could stay at work and earn a living for himself and his family.
70. I therefore accept that the applicant had developed lower back symptoms for at least 10 years prior to the incident on 5 May 2019 from the heavy work that he was required to undertake in his employment with the respondent.
71. Dr Selim is in an ideal position to provide an opinion as to whether the circumstances which brought on the symptoms which the applicant presented with on 6 May 2019 can be regarded as work-related.
72. Mr Baker submits that a review of the reports and correspondence from Dr Selim show him simply to be an advocate for the applicant's claim. In his report dated 12 September 2019, Dr Selim opines that the applicant's incapacity is a result of a work injury in 2007 and that he has had numerous exacerbations since. Yet in his third handwritten response dated 1 July 2019, Dr Selim answers that he is not aware of any injury sustained by the applicant in 2007 and Dr Selim states in his report dated 2 August 2019 that he no longer has his notes from 2007.
73. Those inconsistencies in the details and opinions expressed by Dr Selim do cause me to question the reliability of Dr Selim's evidence. However, there remains the consistent history in his clinical notes of the applicant having a recurrent low back problem and the benefit that Dr Selim has had of observing and treating the applicant over many years. It is on that background that Dr Selim is able to opine that the injury to the applicant's lower back “is a ‘wear and tear’ type injury due to repetitive activities” and the “absence of a specific workplace incident does not exclude work being a substantial contributing factor as the injury could be due to a repetitive strain type mechanism.”

74. I accept the conclusion drawn by Dr Selim that the applicant has developed lower back symptoms due to the repetitive activities at work, which on the applicant's unchallenged evidence were of a heavy and strenuous nature, because of the position that Dr Selim has as the applicant's long-standing general practitioner. What is recorded by Dr Selim and then made the subject of his opinions, particularly in the handwritten responses he has made, fits the definition of a disease process set out in *Perry v Tanine*, being "a failure of an area of the body to cope with repeated stress imposed upon it and reacts to that stress by developing swelling, pain and loss of function as a consequence." In my view, the uncertainty as to whether or not the applicant sustained an injury to his lower back in 2007 does not alter my conclusion because of the consistent history recorded by Dr Selim of the applicant's lower back symptoms.
75. While the evidence of Dr Selim has laid the basis for a finding that the applicant's lower back symptoms have been due to wear and tear upon his lower back in undertaking work for the respondent, it is the orthopaedic surgeon, Dr New, who draws the link between the dramatic onset of symptoms at the applicant's home on 5 May 2019 and the applicant's underlying condition, the latter of which has been aggravated by his employment.
76. Dr New confirms the history of multiple attendances by the applicant over the years with Dr Selim for recurrent lower back problems, considers the incident on 5 May 2019 to be trivial, and opines that the applicant's symptoms were the same as previous episodes of lower back pain.
77. Mr Baker disputes that the symptoms complained of by the applicant following the incident on 5 May 2019 were the same as in the past. I have already referred to his submission that in the last reference to lower back pain in the clinical notes of Dr Selim before the 5 May 2019 incident, being on 29 June 2018, there is no reference to actual low back pain and a record of the applicant having a full range of motion of the lumbar spine.
78. However, there is also a record of pain extending down the left leg and a concern of left sciatic pain. In my view that record made by Dr Selim allows Dr New to draw the link between the ongoing lower back problems that the applicant had experienced and the onset of more significant pain some 10 months later on 5 May 2019, even though that later incident occurred on a weekend at the applicant's home.
79. There is also no medical evidence provided by the respondent to present a contrary view to the opinions expressed by Dr Selim and Dr New.
80. When asked, Mr Horan was non-committal as to whether the injury sustained by the applicant should fit the definition in section 4(b)(i) or (ii) of the 1987 Act. The CT scan of the lumbar spine dated 6 May 2019 identifies disc bulging at various levels and degenerative changes. Dr New, an experienced treating orthopaedic surgeon, diagnoses that the applicant has lumbar spondylosis. That evidence supports a finding that the injury to the applicant's lower back is an aggravation of a disease of the lower back.
81. Dr New opines that the applicant's employment with the respondent "is the major contributing factor to his presentation and diagnosed lower back injury." Although Dr New has been retained to provide an independent medical opinion and should be familiar with the terminology for defining injury within the workers compensation legislation, I consider his opinion when read as a whole does satisfy the definition of disease injury in section 4(b)(ii) in that the applicant's employment has been the main contributing factor to the aggravation of a disease of the applicant's lower back.

82. In this regard, I am mindful of what was said by DP Roche in *State Transit Authority v El-Achi* [2015] NSWCCPD 71 (*El-Achi*) at [72]:

“That a doctor does not address the ultimate legal question to be decided is not fatal. In the Commission, an Arbitrator must determine, having regard to the whole of the evidence, the issue of injury, and whether employment is the main contributing factor to the injury. That involves an evaluative process.”

83. I am therefore satisfied that the applicant did sustain an injury to his lower back in the course of his employment with the respondent by way of a disease injury.

84. The first Certificate of Capacity was not issued by Dr Selim until 13 May 2019, but he had previously issued medical certificates certifying the applicant as being unfit for work from 6 May 2019. As I have made a finding of injury pursuant to section 4(b)(ii), I consider the deemed date of injury should be 6 May 2019, being the applicant’s first day of incapacity as provided by section 16 of the 1987 Act.

The applicant’s entitlement to weekly payments of compensation

85. Dr Selim certified the applicant as having no current work capacity from 6 May 2019 to 26 May 2019. That would entitle the applicant to a payment of \$1,140 per week for this period pursuant to section 36 of the 1987 Act.

86. Dr Selim certified the applicant as fit for four hours of work per day for five days per week from 27 May 2019 with a 5 kilogram limit on lifting, standing for no more than 30 minutes, and no bending or squatting. However, in my view those remained significant limitations on a man who had been doing labouring work for his adult working life and I do not consider it realistic for the applicant to have been able to undertake work within those restrictions given that it was still less than a month since he ceased work because of his lower back injury. I consider the applicant to have no current work capacity from 27 May 2019 until there is an upgrade in his hours and duties in a Certificate of Capacity issued by Dr Selim on 13 June 2019. There will be an award of \$1,140 per week from 27 May 2019 to 12 June 2019 as well.

87. The Certificate of Capacity issued by Dr Selim on 13 June 2019 certified the applicant as being fit for six hours of work per day for five days per week with a lifting limit of 10 kilograms and no repetitive bending. That was increased to 35 hours of work per week on 21 June 2019, and a further three Certificates were issued with that limitation until 19 July 2019.

88. On 14 June 2019 and 21 June 2019 Dr Selim records the applicant having low back pain at “1/10.”

89. In his report dated 20 June 2019, Mr Cooney records that the applicant was keen to engage in a return to work and felt that his pain symptoms and general pathology had mostly resolved.

90. Dr Selim reduced the applicant’s ability to work to 20 hours per week on 19 July 2019 and to 12 hours per week on 12 August 2019, but provides no explanation for this, other than to state in his report dated 12 September 2019 that the applicant’s condition had deteriorated.

91. Dr New opines in September 2019 that “the medical restrictions that he has are currently appropriate that he is not working” but also provides no explanation for this.

92. There is an entry in Dr Selim's notes on 19 June 2019 of the applicant having increased low back pain after commencing a gym program but Dr Selim has provided nothing further to explain this.
93. In the absence of any adequate explanation as to why there was a reduction in the applicant's capacity to work in July 2019, I consider that the certification made by Dr Selim of the applicant being able to undertake 35 hours of work per week, with the restrictions he has imposed, remains the basis of the applicant's capacity for work.
94. The wage rate that the applicant was earning while employed with the respondent should not apply to the calculation of what the applicant could earn in suitable employment as the applicant had the responsibility for operating a large machine with considerable output and understandably was remunerated at a higher rate than what would have provided under the relevant award. The applicant could not expect to earn more than an award rate when starting a new job, given that he had worked in the one job with the respondent for some 18 years.
95. An appropriate job that the applicant is suited to is that of a courier driver who is required to deliver light parcels, because Dr Selim does not place any restrictions on how long the applicant can sit for and has imposed a 10 kilogram limit on lifting. A review of Dr Selim's clinical notes since 5 May 2019 does not record the applicant being prescribed any strong analgesic medication which might impair his capacity to drive and concentrate.
96. The award rate for a courier driver under the Road Transport and Distribution Award 2010 (being a Transport Worker grade 2) is \$21.17 per hour, which amounts to \$741 for a 35 hour week.
97. A determination of "suitable employment" as required by section 32A is to be made:
"regardless of-
- (i) Whether the work or employment is available, and
 - (ii) Whether the work or 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."
98. The available evidence supports a finding that the applicant is currently suited to work as a courier driver, regardless of whether that work or employment is available.
99. For the purposes of section 37 of the 1987 Act, 80% of PIawe is \$960.
100. The award of weekly payments from 13 June 2019 will be as follows:
- (a) \$505 per week from 13 June 2019 to 20 June 2019 pursuant to section 36 of the 1987 Act;
 - (b) \$449 per week from 21 June 2019 to 5 August 2019 pursuant to section 36 of the 1987 Act;
 - (c) \$219 per week from 6 August 2019 to date and continuing pursuant to section 37 of the 1987 Act.

