WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **2582/19**
Applicant: **Mohammad Hussaini**
Respondent: **Safeguard Home Improvements Pty Limited**
Date of Determination: **1 October 2019**
Citation: **[2019] NSWWCC 317**

The Commission determines:

1. The applicant suffered an injury to his lower back in the course of his employment with the respondent on 26 June 2017.

2. The applicant's employment with the respondent was a substantial contributing factor to the injury referred to in (1) above.

3. The applicant's pre-injury average weekly earnings at the date of injury were $1,170.15.

4. As a result of the injury referred to in (1) above, the applicant has suffered partial incapacity for employment from 28 December 2017 to date and continuing, and has capacity to work up to nine hours per week on restricted duties.

5. The respondent is to pay the applicant weekly compensation pursuant to section 37 of the *Workers Compensation Act 1987* (the 1987 Act) at the rate of $702.09 per week from 28 December 2017 to date and continuing.

6. The respondent is to pay the applicant's reasonably necessary medical and treatment expenses pursuant to section 60 of the 1987 Act, upon production of accounts, receipts and/or Medicare Australia Notice of Charge.

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

Cameron Burge
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 CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mohammad Hussaini (the applicant) brings these proceedings against his former employer, Safeguard Home Improvements Pty Limited (the respondent) seeking weekly benefits and payment of reasonably incurred medical expenses as a result of an injury to his lower back which he alleges took place in the course of his employment on 26 June 2017.

2. The applicant says on that date in the course of his duties with the respondent, he was instructed to move approximately 57 trays which held around 100 kilograms of cloth. As the applicant was carrying out these duties, he is alleged to have felt pain in his back and experienced an acute onset of low back pain.

3. It is not in issue that at the date of his alleged injury, the applicant was earning $1,170.15 per week, and for the purposes of this matter that figure represents his pre-injury average weekly earnings (PIAWE).

4. There is also no issue the applicant commenced employment with the respondent on 7 June 2017. The circumstances surrounding the alleged incident and injury are in issue, and the respondent also takes issue with the applicant's credibility.

5. According to the applicant, on 26 June 2017, he along with four co-workers, was required to move trays of fabric which weighed around 100 kilograms each. The applicant describes the circumstances of that day as follows:

> "11. At the beginning of the task I was working with four co-workers. Towards the end of the task, after we had moved 20 to 30 trays, it was only me and one other co-worker moving the trays.
>
> 12. I began to feel the onset of pain and discomfort in my lower back as I performed this task. This pain and discomfort gradually increased over time as I was required to continue lifting these heavy trays with less support. The co-worker that I was working with had significant difficulties holding up his side of the tray, and so I was forced to carry most of the load. This caused me to place more strain on my back, and I felt increasing pain and discomfort as this continued."

6. The applicant states he completed his day's work and went home thinking that there was nothing seriously wrong. He says when he awoke the following day, the pain was much worse. The applicant states that that day was one for Eid celebration, so he rested during the day in the hope that his back would feel better and he could return to work.

7. According to the applicant, the pain was worse again on 28 June 2017, so he reported it to his supervisor and asked if he could perform light duties. He says he was very slow at performing his normal tasks due to the pain which he was experiencing. He says he left work on 28 June 2017, and received a phone call after he had left from Human Resources and was told that he had been terminated from his employment.

8. According to the applicant, he reported the injury to his general practitioner, Dr Mohammed Islam who in turn referred him for an x-ray and suggested chiropractic treatment. The applicant did not obtain any benefit from that treatment, nor from a physiotherapy program.

9. The applicant states he was referred to Dr Geoffrey Rosenberg, orthopaedic surgeon, whom he first consulted on 29 August 2017. Dr Rosenberg referred the applicant for an MRI, which he states disclosed he was suffering a left-sided annular tear at L4/5. Dr Rosenberg recommended an L5 nerve root block and continuation of physiotherapy.
10. The nerve block was carried out on 5 September 2017 and the applicant underwent physiotherapy, however, he states it provided him with little relief.

11. Dr Rosenberg saw the applicant again on 19 September 2017, and referred him for further x-rays together with advising the applicant he should try to keep active and engage in physiotherapy. A further review took place on 12 December 2017, when the applicant was referred for a further MRI. The annular tear was again demonstrated and Dr Rosenberg recommended facet joint injection at L4/5.

12. The applicant states that on 18 April 2018, he attended Dr Rosenberg's rooms to report he obtained no relief from the injection. Dr Rosenberg recommended a lumbar discogram in anticipation of surgical intervention, however, according to the applicant he decided not to proceed as he felt it too risky and would not provide him with relief.

13. The applicant complained of ongoing pain, discomfort and restriction of movement to his lower back together with referred pain into his left leg as far as his toes. He says he feels numbness and pain on both right and left sides.

14. The applicant alleges he reported his injury verbally on 28 June 2017, and via email on 8 July 2017. He submitted a claim form on 11 August 2017.

15. Dr Islam provided the applicant with a medical certificate alleging he had no work capacity from 27 June 2017 to 20 July 2017.

16. On 3 October 2017, the applicant having signed a return to work plan recommenced duties with suitable restrictions and for 20 hours per week. Following the first shift of suitable duties, the applicant revisited Dr Islam, who downgraded his capacity to totally unfit for 4 and 5 October 2017, citing pain from using the sewing machine with his left foot. The applicant then recommenced suitable duties on 6 October 2017 for a further reduced period of 12 hours per week, however, the following day he fell to the floor in a severe bout of pain saying he had aggravated his lumbar spine while executing a sharp twisting motion. The applicant had a further MRI of his lumbar spine on 19 October 2017, which did not reveal any new pathology. Dr Islam certified the applicant as fit to resume suitable duties on 23 October 2017 for a further reduced period of nine hours per week on alternating days.

17. On 1 November 2017, the respondent had the applicant examined by Dr Paul Carney, neurosurgeon and Independent Medical Examiner (IME). Dr Carney stated the applicant exhibited non-organic characteristics and inconsistencies in his presentation. Dr Carney said there was no evidence to support the applicant's complaint of leg pain, or any ongoing lumbar symptoms.

18. On 14 December 2017, the respondent's insurer issued a section 74 notice in which it denied the applicant had suffered an injury pursuant to section 4 of the *Workers Compensation Act 1987* (the 1987 Act) and that his employment had been a substantial contributing factor to the injury (section 9A of the 1987 Act). In the same notice, the respondent indicated there were concerns surrounding the applicant's version of injury, as it alleged the applicant could not have loaded 56 trays of fabric onto the relevant machine at the respondent's premises, as that machinery only has capacity for 24 such rolls.

19. The applicant's solicitors then filed a request for a review by the respondent's insurer and enclosed the report of Dr Pillemer, IME, dated 11 October 2018.

20. Dr Pillemer diagnosed the applicant as suffering from evidence of nerve root irritation on the left side by way of radiculopathy as evidenced by distinct sensory loss in the S1 distribution. Dr Pillemer described the applicant as presenting in a very straightforward and open manner, and it was his view there was no attempt on the applicant's part to exaggerate his physical signs. Dr Pillemer said the applicant was unfit for pre-injury duties and said he would only be fit for very restricted duties which did not place excessive stress on his back and left leg.

21. On 21 November 2018, and in response to the request for review, the respondent's insurer issued a further section 74 notice alleging the back injury did not arise out of, or in the course of the applicant's employment as required by section 4 of the 1987 Act; that the applicant's employment was neither a substantial nor the main contributing factor to any injury or disease suffered by him; that any incapacity which he may be found to suffer is not related to any workplace injury, and that the applicant has no entitlement to medical expenses.

22. The applicant's attorneys then filed these proceedings on 28 May 2019.

ISSUES FOR DETERMINATION

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

    (a) Whether the applicant suffered an injury in the course of his employment;

    (b) Whether the applicant's employment was either the main contributing factor (in the event of a disease injury) or a substantial contributing factor to the injury, and

    (c) The applicant's alleged incapacity.

PROCEDURE BEFORE THE COMMISSION

24. 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.

25. The parties attended a hearing on 20 August 2019. On that occasion, Mr R Hanrahan of counsel appeared for the applicant and Mr D Saul of counsel appeared for the respondent.

EVIDENCE

Documentary evidence

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

    (a) Application to Resolve a Dispute (the Application) and attached documents;

    (b) The Reply and attached documents, and

    (c) The respondent's Application to Admit Late Documents (AALD) dated 9 August 2019 and attached documents.

27. I note at the hearing the respondent elected to rely upon the opinion or Dr Carney, and agreed to the exclusion of the report of IME Dr Keller, save for the history provided to him only.

Oral evidence

28. There was no oral evidence called at the hearing.

SUBMISSIONS

The applicant's submissions

29. Mr Hanrahan noted the applicant had a consistent work history since he had arrived in Australia, notwithstanding the relatively short period of time during which he had worked for the respondent.

30. He noted that at the time of the alleged injury, the applicant and his co-workers were engaged in the major task of moving premises for the respondent.

31. Mr Hanrahan submitted that the task undertaken by the applicant was undoubtedly heavy and he had been lifting over 50 kilograms on multiple occasions throughout the day on 26 June 2017. He noted the respondent had paid weekly benefits up to December 2017, and that the applicant had attempted to return to work between September and November 2017 to no avail.

32. Mr Hanrahan took the Commission to the Liverpool Hospital records at page 27 of the Application. He noted those documents related to an attendance at the emergency department on 13 October 2017, at which time the applicant gave a history of an L4/5-disc bulge after lifting heavy objects at work approximately three months earlier. Mr Hanrahan noted the applicant was referred for repeat neurological examination to assess lower limb strength upon the initial examination revealing left-sided sciatica and L4/5 sensory radiculopathy. The hospital recommended the applicant continue to wear a supportive lumbar brace, take analgesics and continue with physiotherapy and mobility exercises.

33. Mr Hanrahan referred the Commission to the report of Dr Islam addressed to Dr Rosenberg dated 7 September 2017. He noted that in September 2017, Dr Islam certified the applicant as fit for work for no more than 20 hours per week and then in November 2017 to July 2018 for nine hours per week only.

34. Mr Hanrahan submitted there can be no issue as to the pathology found in the applicant's lumbar spine given the radiological findings and the thorough treatment by way of injections and nerve blocks together with physical therapy carried out upon him. He submitted the Commission would accept that none of the treatment has made a significant difference to the applicant's wellbeing.

35. The applicant submitted the opinion of Dr Pillemer would be preferred, noting as it does on physical examination asymmetry and hypoesthesia together with radiculopathy consistent with an S1 distribution. Mr Hanrahan submitted this was consistent with the radiological investigations which showed an annular tear on the left side under MRI scan. Mr Hanrahan submitted that the Commission would not likely disregard or discount Dr Pillemer's opinion, coming as it does from a leading Approved Medical Specialist.

36. Mr Hanrahan contrasted Dr Pillemer's view with that of Dr Carney, whom he noted described the applicant's symptoms as non-organic, notwithstanding the radiological findings which would support the presence of radiculopathy and hypoesthesia. Mr Hanrahan submitted that Dr Carney's opinion contained an inherent contradiction in that he agreed with the presence of an annular tear, yet somehow did not accept it was causing any symptoms in the applicant.

37. In summary, Mr Hanrahan submitted the applicant had complained of pain at the time of his injury, and that pain has persisted as one would expect with the presence of an annular tear, which constitutes the pathological change sufficient to ground a finding of injury pursuant to section 4 of the 1987 Act. He submitted he was unsure of the basis for Dr Carney suggesting that the applicant should have recovered by now, when it is clear that he has not and the annular tear persists. He submitted the general practitioner and Dr Pillemer agree that the applicant has lost approximately two-thirds of his capacity for work and submitted the Commission would make an order for the payment of weekly compensation at the rate of 80 per cent of the applicant's PIAWE (being agreed at $936.12) less any component for his ability to earn.

38. Mr Hanrahan submitted the Commission should take into account relevant factors under section 32A such as the applicant's lack of relative education and experience in anything other than manual work together with limited language skills. He submitted this means the applicant has limited employment prospects and the Commission would find that he remains incapacitated.

39. Mr Hanrahan also sought a general order for payment of reasonably necessary medical and treatment expenses.

The respondent's submissions

40. Mr Saul noted the applicant's credit was in issue, and said he had only been employed for a period of several weeks with the respondent. He noted the applicant's termination was due to a shortage of work on 28 June 2017, and that the applicant's position was casual.

41. The respondent relies on the evidence of Mr Khalil, the applicant's supervisor. Mr Khalil noted at paragraph 4 of his statement that he began to have concerns with the applicant's performance in that he was not completing his workload in accordance with timeframes, and he needed to have his day continually managed.

42. Mr Khalil noted the applicant was helping load trays into the respondent's silo on 25 June 2017. He said that at the completion of the day, the applicant had loaded 14 trays. He said on 26 June 2017, the applicant made a comment to Mr Khalil that he was feeling sore from lifting trays into the silo the day before. Mr Khalil continued:

> "At no time did Mohammad request not to continue doing the work he was allocated."

43. Mr Khalil then indicated that he asked whether the applicant was okay and when the applicant replied in the affirmative, he was allocated light duties so as to not aggravate any soreness. Mr Khalil confirmed the applicant missed work on 27 June 2017 to attend Eid celebrations. The applicant, according to Mr Khalil, returned to work on 28 June 2017 and "completed work as normal. There were no further complaints or comments regarding any soreness or request for alternate duties."

44. Mr Khalil then confirmed that at the end of that day, a decision was made to tell the applicant there was not enough work to sustain his employment. He said at no time did the applicant lodge an injury claim or incident form or make reference to having hurt his back while employed by the respondent.

45. The respondent also relies upon the statement of Mr Hewston-Richardson, Human Resource Manager which is found at page 8 of the Reply. Mr Richardson likewise indicates that at no time did the applicant mention to him any concerns relating to having a sore back "or even that he raised it internally."

46. Mr Saul noted that no claim was made until 11 August 2017, nearly two months post-injury. He criticised the applicant for failing to produce any contemporaneous records of when he first attended a doctor. Mr Saul noted that the history given to Dr Rosenberg does not, as opposed to the applicant's statement, mention having to take all the weight of the fabric whilst lifting it. He impressed upon the Commission the opinion of Dr Carney, who has grave concerns about the applicant's credibility.

47. Mr Saul noted that the payment of compensation up to the end of 2017 does not represent an admission, consistent with the decision in *Department of Education and Training v Sinclair* [2004] NSWWCCPD 90. He submitted that, if anything, the applicant suffered a small annular tear which the respondent submits did not occur on 26 June 2017, or if it did is no longer the cause of the applicant's problems.

48. Mr Saul submitted that whilst there is no doubt the applicant had seen a number of doctors, there is a full history of a lack of any serious injury taking place on the date alleged. He submitted that if the annular tear had occurred on 26 June 2017 as alleged, one would have expected problems to be mentioned on that day.

49. Mr Saul urged a finding on the balance of probabilities that there was no injury on 26 June 2017 to the back and accordingly there would be an award for the respondent.

50. Mr Saul submitted that if the Commission did not accept that submission, then there ought to be a finding that the applicant's presentation, bizarre as it allegedly is, is not explained by that injury, which ought to have resolved. He submitted either the applicant was not working because he was exhibiting pain behaviour and was so focused on it that he was unable to do any work. Mr Saul submitted that it is odd the applicant's condition would be worse in March 2019 than it was in June 2017.

51. In relation to capacity, Mr Saul submitted that all of the evidence on the applicant's case is old. He said the last opinion was that provided by Dr Rosenberg in 2018, and other than that there are only medical certificates from 2017. He submitted the applicant is capable of a wide variety of duties of a sedentary nature. Whilst Mr Saul admitted the Commission should take into account section 32A, it should do so only in looking at the applicant's capacity. Mr Saul quite appropriately admitted that questions of language limitations are something which ought to be taken into account when assessing a worker's capacity, however, he submitted there can be no question that this applicant has capacity in the labour market.

52. Mr Saul also took the Commission to the respondent's AALD, which contained the applicant's bank statements and referred to a number of cash deposits, He submitted these deposits were somewhat suspicious and perhaps are indicative of income for carrying out work.

The applicant's submissions in reply

53. Mr Hanrahan submitted that the injury clearly took place during a period of work lifting heavy items, between 14 and 30 of them rather than a single movement. He noted that the Festival of Eid simply marks the end of the holy month of Ramadan, and the fact the applicant attended the festival is not indicative of his undertaking any physical exertion. Rather, the festival really consists of essentially a festive feast.

54. Mr Hanrahan submitted that the statement of Mr Khalil should be taken with "a grain of salt". He noted that whilst the applicant sought a day off for Eid celebrations and was approved, the fact is the applicant could simply not attend at work without notice because he was a casual employee. The request made by the applicant for a day off was, Mr Hanrahan submitted, a sign-off courtesy and the seriousness with which he took his appointment. In relation to the statement of Mr Richardson, Mr Hanrahan rhetorically questioned why the applicant would ever mention the fact that he had a sore back to the Human Resources Manager of a company in circumstances where his employment is terminated only one working day after he suffered soreness for the first time.

55. Mr Hanrahan submitted the Commission would reject the report of Dr Carney, which simply reiterates his previous views and does not take into account that the activities in the workplace on 26 June 2017 may well have caused an aggravation of an underlying condition. He submitted there is no evidence of any previous injury, there are no records of any complaint to the general practitioner of such symptoms despite records being produced. Mr Hanrahan submitted that Dr Carney does not set out what inconsistencies there were on the part of the applicant, whereas by contrast Dr Pillemer gives clear, detailed reasons for his findings and should be preferred.

DISCUSSION

Injury and contributing factor

56. It is appropriate to deal with these matters together, as they are often factually and legally entwined. This is such a case.

57. "Injury" is defined in section 4 of the 1987 Act as follows:

> "In this Act: injury means
>
> (a) 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."

58. There is a useful review of the authorities concerning the issue of injury in *Castro v State Transit Authority* (NSW) [2000] NSWCC 12; (2000) 19 NSWCCR 496 (*Castro*). That case makes clear that what is required to constitute "injury" is a "sudden or identifiable pathological change". In *Castro* a temporary physiological change in the body's functioning (atrial fibrillation: irregular rhythm of the heart), without pathological change, did not constitute injury.

59. Consistent with *Castro*, the decision in *Trustees of the Society of St Vincent de Paul (NSW) v Maxwell James Kear as administrator of the estate of Anthony John Kear* [2014] NSWWCCPD 47 (*Kear*) added:

> "In any event, the authorities do not support the proposition that, on its own, an elevation in blood pressure is a personal injury. That is because, without more, it is not a sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state. It is no more than a temporary physiological change in the body's functioning, similar to the atrial fibrillation that occurred in *Castro*, without any accompanying lesion or pathological change (*Castro* at [138])." (at [60])

60. A worker is able to rely on injury simpliciter despite the existence of a disease. This is highlighted in *Zickar v MGH Plastic Industries Pty Ltd* (Zickar) [1996] HCA 31; 187 CLR 310. In that case, the worker suffered brain damage due to the rupture, at work, of a congenital aneurism. The congenital condition could be characterised as a disease, however that would not have satisfied the requirements of clause (b) of the definition in section 4. The worker succeeded in the High Court on the basis that the rupture itself could be described as an injury simpliciter. The Court held that the presence of a disease did not preclude reliance upon that event as a personal injury. Toohey, McHugh & Gummow JJ agreed with a passage in *Accident Compensation Commission v McIntosh* [1991] 2 VR 253 that, "it is nonetheless a rupture – something quite distinct from the defect, disorder or morbid condition, which enables it to occur" (at [262]). The terms "personal injury" and "disease" are not mutually exclusive categories. A sudden identifiable physiological (pathological) change to the body brought about by an internal or external event can be a personal injury and the fact that the change is connected to an underlying disease process does not prevent the injury being a personal injury.

61. Liability for an employer to pay compensation pursuant to section 9 is limited by the requirement under section 9A that employment is a substantial contributing factor to the injury. Section 9A was introduced shortly after the High Court's decision in *Zickar v MGH Plastic Industries Pty Ltd* (*Zickar*) [1996] HCA 31; 187 CLR 310, and relevantly provides:

> "No compensation is payable under this Act in respect of an injury (other than a disease injury) unless the employment concerned was a substantial contributing factor to the injury.
>
> Note: In the case of a disease injury, the worker's employment must be the main contributing factor. See section 4."

62. Subsection (2) of section 9A provides examples of matters to be taken into account in determining whether employment was a substantial contributing factor. The list, which is not exhaustive, has six examples:

    (a) the time and place of the injury,

    (b) the nature of the work performed and the particular tasks of that work,

    (c) the duration of the employment,

    (d) the probability that the injury or a similar injury would have happened anyway, at about the same time or at the same stage of the worker's life, if he or she had not been at work or had not worked in that employment,

    (e) the worker's state of health before the injury and the existence of any hereditary risks,

    (f) the worker's lifestyle and his or her activities outside the workplace.

63. Whether employment is a substantial contributing factor to an injury is a question of fact and is a matter of impression and degree (*Dayton v Coles Supermarkets Pty Ltd* [2001] NSWCA 153 at [29] (*Dayton*); *McMahon v Lagana* [2004] NSWCA 164 (*McMahon*) at [32]) to be decided after a consideration of all the evidence. See also *Workcover Authority of NSW v Walsh* [2004] NSWCA 186.

64. It is important to recognise in section 9A that the employment must be a substantial contributing factor to the injury, not to the incapacity, need for treatment or loss. In *Rootsey v Tiger Nominees Pty Ltd* [2002] NSWCC 48; (2002) 23 NSWCCR 725 Neilson CCJ stated "employment must be a substantial contributing factor to the event causing the injury; that is, to the receipt of the injury, rather than to be a substantial contributing factor to the ongoing incapacity" (at [19]).

65. It is also important to note that the employment must be "a" substantial contributing factor to the injury, not "the" substantial contributing factor. The Court held in *Mercer v ANZ Banking Corporation* [2000] NSWCA 138 that there may be more than one substantial contributing factor to a single injury, of which employment only need be one (at [16]). The Court also excluded the relevance of a predisposition or susceptibility to injury, Mason P saying:

> "Section 9A does not require that the employment must be 'the' substantial contributing cause, nor does it attempt to exclude predisposition or susceptibility to a particular condition (cf *University of Tasmania v Cane* (1994) 4 Tas R 156)." (at [27])

66. The injury in this matter is not said to be a disease process, or the aggravation of such a process. Rather, it is pleaded as a frank injury.

67. Taking into account all of the lay and expert evidence presented in this matter, I am satisfied on the balance of probabilities that the applicant suffered an injury to his back in the course of his employment with the respondent, to which his employment is a substantial contributing factor.

68. In making this finding, I accept Mr Hanrahan's submission to the effect there is little doubt the applicant was carrying out heavy lifting and carrying on the date in question. I have had regard to the lay statements of the respondent's witnesses, and note the statement of Mr Richardson's statement that the worker made no complaint of injury to his back contradicts that of Mr Khalil, who does recall the applicant complaining of general soreness after carrying out the task at issue.

69. Whilst I appreciate that both Mr Richardson and Mr Khalil have done their best to recollect the matters in issue, the fact the applicant did not tell the Human Resources Manager of his employer that he had hurt his back is not a matter which reflects poorly on the applicant's credit at all. Indeed, one might wonder why he would do so, unless it was part of a process within the workplace. Similarly, I reject Mr Saul's submission that the short period of employment is a relevant factor when examining the applicant's credit, in circumstances where his having engaged in heavy lifting is not in issue.

70. Likewise, Mr Khalil's statement contains an important contradiction – at one point he says the applicant told him he was sore after carrying out the lifting task and was therefore placed on lighter duties, yet at another point in his statement, Mr Khalil said the applicant had not made a complaint about hurting his back while in the respondent's employ.

71. In my view, the applicant's version of his reporting his injury to the respondent has a ring of truth to it. Mr Khalil records a general complaint of soreness; however, the applicant says at paragraph 15 of his statement that he told his supervisor (whom we now know is Mr Khalil) about injuring himself while performing the heavy manual lifting. I accept that version of events, though I note it is not in itself determinative of a finding of injury.

72. The balance of the medical evidence in this matter supports a finding of injury to the applicant's back on the date in question. There is no issue the applicant's job involved heavy work. Likewise, when the applicant underwent radiological investigation a short time after the incident, those scans revealed the presence of an annular tear in his lumbar spine. If that pathology was pre-existing, I find it difficult to accept the applicant would have been able to engage in the at times arduous duties required of him by the respondent.

73. I note the x-ray report at page 20 of the Application, which was requested by Dr Islam on 2 July 2017, only a matter of days after the applicant's employment was terminated. The existence of that report is consistent with and corroborates the applicant's statement to the effect he consulted Dr Islam a short time after the incident at issue. Moreover, the respondent's own section 74 Notice makes mention of the applicant having attended on his general practitioner on 29 June 2017, the day following his termination and only three days after the injurious event at issue.

74. The further radiological investigation by way of MRI which is referred to by Dr Rosenberg in his report to Dr Islam dated 3 September 2017, confirms the presence of a left sided annular tear. I accept the presence of that pathology, and the submission that it was caused by the heavy lifting on 26 June 2017. The applicant's history in relation to the onset of symptoms is broadly consistent to all of the practitioners, and his complaints are contemporaneous to the allegedly injurious events. I accept Dr Rosenberg's opinion as treating specialist that:

> "On the MRI, the lowest level which is labelled lumbosacral is transitional. Above this which is labelled L4-5 there is a left sided annular tear. It obviously is far worse than the supine film as he has significant findings.
>
> I have reassured him it is early days and in all likelihood, he can expect to improve. Initially I would recommend a left 15 nerve root block which as a 70% chance of improving the symptoms particularly in his leg."

75. I also accept the findings of Dr Pillemer, whose diagnosis in my opinion broadly correlates with the objective and contemporaneous treating evidence, and is explained by the findings on the various radiological investigations. In so finding, I reject the opinion of Dr Carney, who expresses reservations concerning the applicant's presentation. Whilst Dr Carney is, of course, entitled to his view arising from his observations of the applicant, they are inconsistent with the findings of the other practitioners, both treating and medicolegal. Dr Carney does not, in my view, sufficiently explain why the effect of the annular tear in the applicant's lumbar spine would have resolved by the time of his examination, notwithstanding the applicant having made complaints for over two years which are consistent with the longstanding presence of that pathology. For those reasons, I reject Dr Carney's opinion and prefer the views of Dr Islam, general practitioner, Dr Rosenberg treating surgeon and Dr Pillemer, the applicant's IME.

Incapacity

76. It is necessary to determine the degree of incapacity, if any, arising from the injury suffered by the applicant. I note the applicant's PIAWE was agreed at the telephone conference at $1,170.15. As the entirety of the period at issue falls within the section 37 entitlement period, the relevant baseline sum on which to base any calculations is an agreed sum of $936.12 per week (being 80% of the PIAWE). The relevant period claimed at Part 5 of the Application is from 28 December 2017 to date and continuing.

77. I accept Mr Saul's submission that the fact of the respondent having paid weekly compensation up to December 2017 does not constitute an admission of liability to continue making payments. I also accept the applicant has some capacity to work. In my view, there can be no finding of total incapacity on the available medical evidence in this matter.

78. Given the date of injury, the applicant is subject to the post-2012 regime for weekly benefits. Noting his PIAWE is agreed and given a period of past payments having been made, the period in issue is subject to section 37 of the 1987 Act which relevantly provides:

> "(3) The weekly payment of compensation to which an injured worker who has current work capacity and has returned to work for less than 15 hours per week (or who has not returned to work) is entitled during the second entitlement period is to be at the rate of:
>
> (a) (AWE × 80%) − (E + D), or
> (b) MAX − (E + D),
>
> whichever is the lesser."

Relevantly in this matter, "E" refers to the amount which the applicant can earn in suitable employment.

79. As was accepted by both counsel during the hearing, the Commission is to take into account the applicant's capacity for work, allowing for any relevant matters under section 32A, such as the applicant's skills, education, age and work experience.

80. Taking into account each of these factors and also the nature and extent of the injury in question, I find the applicant has suffered and continues to suffer an incapacity for employment. Having earlier rejected Dr Carney's opinion with regards to the nature and extent of the injury at issue, I do not accept his views in relation to its impact on the applicant's capacity for employment. The two matters are intrinsically linked, in that if Dr Carney is not accepted as to the nature of the applicant's problems and the manner in which he has been affected by them, it follows his views on capacity will also not be accepted, as those views must inevitably be grounded in his findings in relation to the injury at issue and its consequences (or lack of, in Dr Carney's view).

81. In attempting to determine the degree of incapacity, I have weighed up the fact the applicant has limited English skills and education, and that he has engaged in mostly physical work during his time in Australia.

82. I have also taken into account the entries in the applicant's bank records. Whilst there are some deposits made to the applicant in various sums, without further evidence, I am not satisfied they represent payment of income to the applicant. The payments are not, in my opinion, regular nor is there any indication they have been paid to him for work carried out.

83. I accept the applicant's evidence in relation to his ongoing problems, and having regard to the nature and extent of the pathology on radiological examination and the findings of Dr Pillemer and Dr Rosenberg on examination, I find the applicant is fit to work nine hours per week, or roughly one-third of his pre-injury working hours on restricted duties. I note that figure was submitted to the Commission by Mr Hanrahan, and is in accordance with the level of capacity recorded by Dr Islam from November 2017 to mid-2018. In my view, the evidence does not disclose any improvement in the applicant's symptoms since that time, and accordingly, I find the applicant has capacity to work for up to nine hours per week on restricted duties, involving a lifting restriction of up to 5 kg.

84. Eighty per cent of the applicant's PIAWE being $936.12, and his capacity in suitable employment as submitted by his counsel being approximately one third of that amount, I consider the following rate of compensation pursuant to section 37 as appropriate:

> $936.12 - $234.03 = $702.09 per week.

85. The Commission will therefore order the respondent to pay the applicant weekly compensation from 28 December 2017 to date and continuing at the rate of $702.09 per week.

Medical and treatment expenses

86. In light of the findings concerning injury, and given the respondent (appropriately in my view) made no submissions suggesting the treatment being provided to the applicant is not reasonably necessary, I accept Mr Hanrahan's submission that the applicant be granted a general order under section 60 of the 1987 Act.

SUMMARY

87. The Commission will therefore make the following findings and orders:

    (a) The applicant suffered an injury to his lower back in the course of his employment with the respondent on 26 June 2017;

    (b) The applicant's employment with the respondent was a substantial contributing factor to the injury referred to in (a) above;

    (c) The applicant's PIAWE at the date of injury were $1,170.15;

    (d) As a result of the injury referred to in (a) above, the applicant has suffered partial incapacity for employment from 28 December 2017 to date and continuing, and has capacity to work up to nine hours per week on restricted duties;

    (e) The respondent is to pay the applicant weekly compensation pursuant to section 37 of the 1987 Act at the rate of $702.09 per week from 28 December 2017 to date and continuing, and

    (f) The respondent is to pay the applicant's reasonably necessary medical and treatment expenses pursuant to section 60 of the 1987 Act, upon production of accounts, receipts and/or Medicare Australia Notice of Charge.