

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2238/20
Applicant: John Sarkis
Respondent: Brickworks Limited
Date of Determination: 8 July 2020
Citation: [2020] NSWCC 229

The Commission determines:

1. That the applicant suffered injury to his neck and back arising out of and in the course of his employment with the respondent namely an aggravation of underlying degenerative changes which is deemed to have occurred on 19 November 2018 in accordance with section 16 of the *Workers Compensation Act 1987*.
2. That the applicant's employment was the main contributing factor to these injuries.
3. The applicant has not established that he suffered injury to his shoulders or left hip arising out of or in the course of his employment with the respondent.
4. As a result of the injuries in paragraph 1 above the applicant was partially incapacitated from 19 November 2018 to 3 January 2019 and had no current earning capacity from 4 January 2019 to date.
5. Between 19 November 2018 and 18 November 2019, the applicant's PIAWE was \$2,332.95 per week and from 18 November 2019 it was \$879.32 per week.
6. Award for the applicant as follows:
 - (a) \$956.30 per week from 19 November 2018 to 3 January 2019;
 - (b) \$2,145.30 per week from 4 January 2019 to 18 February 2019, pursuant to section 36.
 - (c) \$1,886.36 per week from 19 February 2019 to 17 November 2019; and
 - (d) \$879.32 per week from 18 November 2019 to date and continuing pursuant to section 37 until same is terminated or suspended in accordance with the provisions of the 1987 Act.
7. Liberty to apply in respect of the above calculations.
8. Respondent to pay the applicant's medical and hospital expenses in respect of the applicant's neck and back pursuant to section 60.

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

Paul Sweeney
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 PAUL SWEENEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

INTRODUCTION

1. John Sarkis (the applicant) is a long-term employee of Brickworks Limited (the respondent). It is common ground that between 16 November 1992 and 17 November 2018 he consistently performed heavy manual work at the respondent's premises at Punchbowl. In September 2018, he applied for a redundancy. The respondent accepted his application and he ceased work on 17 November 2018.
2. After leaving the respondent's employ, the applicant served a Notice of Injury form by which he alleged that he suffered injuries to his back, neck, both shoulders and left leg as a result of the "nature and conditions of work" with the respondent. He alleged that he has been incapacitated for work since the cessation of his employment and totally incapacitated from 3 January 2019 by reason of these injuries.

PROCEDURE BEFORE THE COMMISSION

3. By these proceedings, the applicant claims weekly payments of compensation from 12 November 2018 to date and continuing. He alleges that his incapacity results from the arduous nature of his work over the years which caused injury to his neck, back and shoulders and from a frank injury in September/October 2018, when:

"The worker fell at the respondent's Punchbowl factory and injured his left hip and leg when he struck an edge while mixing glaze."

The respondent disputes that the applicant suffered the injuries alleged and, if proven, that incapacity results from these injuries.

4. Unfortunately, the evidence before the Commission on critical issues is extremely meagre. Only Dr Bodel and Dr Panjraton, orthopaedic surgeons who were retained by the respective solicitors comment on the issue of causation. There is no report from Dr Milad, the general practitioner who has treated the applicant for many years. The applicant's evidence does not directly address other critical issues in the case.
5. When the matter came on for conciliation and arbitration by telephone on 15 June 2020, Mr Hickey of counsel represented the applicant and Mr Grimes of counsel represented the respondent. I was informed by counsel that negotiations in the matter had been exhausted during a previous listing of the matter and during discussions prior to the conciliation/arbitration. I have no doubt that the parties, who were represented by experienced legal practitioners, had ample opportunity to consider settlement but were unable to reach a mutually satisfactory resolution.

EVIDENCE

6. The following documents were in evidence before the Commission:
 - (a) the Application to Resolve a Dispute (the Application) and the documents attached;
 - (b) the Reply and the documents attached, and
 - (c) an Application to Admit Late Documents lodged by the respondent and the documents attached.

7. There was no application to adduce further written evidence at the arbitration. There was no application to adduce oral evidence. There was no objection to the material attached to the documents enumerated above.

SUBMISSIONS

8. The submissions of the parties are recorded, and I do not propose to reiterate each of the arguments of counsel in these short reasons. I will attempt to deal with the primary thrust of counsel's arguments in resolving the issues in dispute below.
9. Mr Grimes made no application to cross-examine the applicant. Nonetheless, he submitted that the applicant's evidence was unreliable. In particular, he argued that aspects of the history given by the applicant to medical practitioners was inconsistent with other evidence in the matter.
10. He submitted that the applicant had continued to perform arduous manual work up until the cessation of his employment without complaint or report of injury to the respondent. Upon cessation of work, there was a dramatic escalation in the level, and areas of pain which the applicant alleged resulted from employment injury.
11. Mr Grimes argued that the applicant had knowledge of the workers compensation system as he had reported previous injuries and had ample opportunity to inform his employer of the alleged injuries prior to the termination of his employment in November 2018. His failure to report the injuries alleged militated against a conclusion they were caused by employment.
12. Further, there was an alternative explanation of the applicant's bilateral shoulder condition conditions. He had informed medical practitioners that he had lifted weights for recreation outside his employment and experienced symptoms in his shoulders as a result.
13. Mr Hickey took the Commission to the notes of the applicant's general practitioner in some detail. He argued that a referral letter from Dr Milad to Dr Damodaran suggested a causal connection between the applicant's fall and his neck pain. He also submitted that the reference to shoulder pain/injury caused by weightlifting in the clinical notes was isolated in time and occurred a long time ago. In the circumstances, it would not detract from the accuracy of Dr Bodel's history.
14. In order to understand the submissions of the parties and the way in which the Commission has resolved the dispute, it is necessary to briefly consider the evidence of the applicant, of Dr Bodel and Dr Panjratana and some aspects of the contemporaneous medical evidence relevant to the issue. What appears below is not a comprehensive survey of the evidence. I merely set out the salient points of the evidence of each of the witnesses.

The applicant

15. By a signed statement dated 21 January 2020, the applicant says that he commenced work with the respondent at its Punchbowl plant on 16 November 1992. He described his work at the pipe extruder machine and in the process of tile production as extremely heavy work. It involved scraping clay off the sides of the hopper, utilising a long steel bar with a shovel on the end of it at the commencement of each day. He also lifted hardwood pallets to put them on the machine, and loaded pipes on to the pallets and sand on to the machine manually. He says:

"The sand I used was delivered in a tip truck and I had to shovel the sand from the tip truck into a drum from ground level and then a forklift would carry it to the machine where I would use it for the non-sticking process".

16. The applicant recounts that the work of tile production was “physically harder” to perform as he had to lift the tiles by hand and put them onto frames. He continues:

“We would stand at the conveyor which brought the tiles out of the extruder and we would stand and bend to knee height to slide the tiles off the conveyor and onto the stillage frames and when each frame was nearly full the fork lift would arrive and take the frame away and then we would start the process again.”

17. The applicant also describes picking up boxes of tiles weighing up to 40 kg, placing the pavers on pallets and other work that involved considerable physical effort. He describes one aspect of the process of manufacturing pavers as follows:

“I threw these over the 5 foot-fence from where they had previously fallen onto the floor in an isolated area under the production machine. It was not possible to get a bin into that isolated area and so I had to get in there and throw all the bits of bricks, pipes and pavers over the 5 foot fence and into a large style of skip bin which had been placed on the outside of the fence. I think this was the process which put particular strain on my shoulders and eventually injured my left shoulder. Sometimes there were about 3,000 bricks on a kiln car.”

18. The applicant also describes work manhandling 25 kg bags of powder, drums which weighed 160 kg and shovel and cleaning and dumping of product off pallets.

19. The applicant says that at the time of his redundancy in late 2018:

“I was in too much pain in my neck area, arms wrists elbows, shoulders and my thoracic spine and lower back/lumbar pain.”

He continued:

I was offered redundancy at that time and took that offer as I could not work anymore at the brickworks due to all the pain I was experiencing.”

20. The applicant also describes an incident in mid-2018 when he tripped on a raised area of the premises while carrying a bag of oxide. He does not specifically state what injury he sustained at the time. He says:

“I stayed on running the machine that I was working on but the pain in my neck was becoming more and more severe until I could not remain at work anymore. I could not even lift the hose anymore.”

21. The applicant says that he had seen Dr Balo, the company doctor in relation to pain in his back and was told that it was due to “wear and tear”. He recounts that he been treated by Dr Milad in relation to his complaints and had been referred to Dr Damodaran, a neurosurgeon on 28 December 2008.

22. The applicant recounts that after his redundancy he attempted to work at Tile Power at Moorebank as a warehouse supervisor. He says that this work was lighter than his employment with the respondent. He says that he was unable to continue with the work because he:

“Could not lift anything without pain which had continued to be there since leaving Brickworks Limited in 2018.”

He says that he continues to suffer pain throughout his body and that he doubts that he could return to any form of work.

DR BODEL

23. Dr Bodel saw the applicant on 31 July 2019 and provided a report to his solicitor dated 31 July 2019. Dr Bodel's report includes an occupational history, which records that the applicant had performed "very physical work" for the respondent for some 27 years. He also recorded, however, that the history of onset of his symptoms was "very vague and imprecise." Dr Bodel obtained a history of a fall "in about September or October 2018" but stated:

"It appears however that that was just the end point of his problems and in fact he had been experiencing pain for at least three or four years earlier."

24. Dr Bodel recorded that the applicant's "problems began in the right shoulder". He saw Dr Milad and underwent investigations and treatment. As he was unaware that he was covered by workers compensation, he self-funded the treatment.
25. Then, in September or October 2018, the applicant fell onto his outstretched arms and "jarred his neck and both shoulders and his back and left hip." He again saw Dr Milad and was treated conservatively. Shortly after this he took a voluntary redundancy and accepted a position with another employer.
26. Dr Bodel expressed the following opinion:

"As best as I can determine, this gentleman has developed pain in the neck, both shoulders, the back and left hip over a period of several years in association with the nature and conditions of his work in general."

27. Dr Bodel thought that the "history is a very difficult issue". Nonetheless, he continued:

"Clearly, he has done very heavy work over many years at Brickworks. In my view, the likely history is that he has had an aggravation, acceleration, exacerbation and deterioration of disease processes, being rotator cuff pathology in both shoulders and the cervical degenerative disc disease and the lumbosacral degenerative disc disease and that aggravation, acceleration, exacerbation and deterioration has been caused by work."

28. Dr Bodel stated that he disagreed with the contrary opinion of Dr Panjratana, who expressed the view that the applicant had wide-spread degenerative changes which were unrelated to his employment. He thought that the applicant was not fit for his previous occupation and was "severely incapacitated by the pathology that I have identified". He thought that he may need to consider surgery, which had been recommended by Dr Damodaran.

Dr Panjratana

29. Dr Panjratana saw the applicant at the request of the respondent in April 2019 and provided a report dated 24 April 2019. He also obtained a history that the applicant performed heavy work for the respondent over a period of 26-27 years. The history of the onset of symptomatology was slightly different to that subsequently recorded by Dr Bodel. Dr Panjratana recorded that the applicant had a number of injections in his left shoulder and "one right shoulder injection about 3-4 years ago". This apparently "settled the shoulder" and the applicant found it unnecessary to see a specialist to whom he had been referred by Dr Milad. The applicant complained to Dr Panjratana of neck and lower back pain "going on for a while, around 1-1½ years."

30. Dr Panjratana also recorded the history of a fall which occurred before he left the respondent. The applicant told him that he fell while mixing glaze and “started developing sharp pains in his leg and could not work”. However, he continued to work and “did not make an incident report”. The doctor records that the applicant “was advised to see his general practitioner but declined”.
31. The applicant informed Dr Panjratana that he had been issued with a written warning for “not doing his duties”. He said that he could “not do his work because of his multiple aches and pains”.
32. Dr Panjratana stated that it was difficult to “get Mr Sarkis to be precise about anything, and he was very vague.”. He also recorded that there was “pain focused behaviour and exaggeration” during his examination. He continued:

“The presentation was dramatic and behaviour almost that of an invalid, needing support to walk, a lot of verbal expression of pain.”
33. He expressed the opinion that the applicant had severe cervical spondylosis, which he thought was “idiopathic and age-related”. He stated:

“I do not believe that Mr Sarkis’s employment has anything to do with his incapacity. Once he started developing pain in the neck, he started feeling generalised pain. It is interesting that no investigations have been done of the low back or the hip.”

THE NOTES OF DR MILAD’S PRACTICE

34. Relevantly, the clinical notes of Dr Milad's practice record that the applicant was seen on 27 May 2003 with a complaint of pain in his right shoulder which came on “while body building”. On 28 May 2003, the doctor recorded that the pain had not settled with Naprosyn and requested an ultrasound. On 4 June 2003, it is recorded that the “ultrasound shows minor tear in supraspinatus”. The applicant was seen by Dr Milad for cortisone injections.
35. On 10 June 2012, the applicant saw Dr Milad with left shoulder pain. He was “unable to abduct left shoulder”. He was referred for an ultrasound. The ultrasound report of Dr Stein stated that the applicant had subacromial bursitis but that the “rotator cuff tendons were intact”.
36. On 4 March 2013, Dr Milad injected the applicant's left shoulder with steroid. On 23 April 2013, the applicant complained of bilateral shoulder pain. He may have been referred for further investigations at that time.
37. An ultrasound of the right shoulder of 21 April 2015, demonstrated a full thickness complete tear of the supraspinatus tendon, the suprascapular tendon and the biceps tendon.
38. On 26 March 2018, the applicant reported that he was unable to abduct his left shoulder and underwent a further ultra-sound. He was treated with further steroid injections of the left shoulder.
39. An ultrasound of 23 April 2018, of the applicant's left shoulder recorded that he was “unable to adduct for two years”. The radiologist reported that there was the following pathology:

“Small tear of the SST with severe subdeltoid bursitis causing an extreme reduction in mobility, LHBT synovitis, IST tendinopathy, and SCT degeneration. Extreme reduction in mobility.”

40. On 28 May 2018, Dr Milad saw the applicant for "left shoulder pain". On 16 August 2018, Dr Milad wrote a referral for the applicant to consult Dr Kuo, an orthopaedic surgeon specialising in shoulder surgery. The applicant has not seen the doctor.
41. On 9 October 2018, Dr Milad recorded that the applicant experienced severe pain and loss of movement in his neck. He referred him for a CT scan of the cervical spine.
42. On 17 November 2018, Dr Milad recorded that the applicant was suffering from neck pain. He was prescribed Tramal and Mersyndol.
43. On 2 December 2018, the applicant reported to Dr Do that he was "sore all over body for 6-7 months". He reported that he used to work as a brick maker but was now working in a tile factory.
44. On 8 December 2018, Dr Milad recorded that the applicant had an exacerbation of neck/back pain. On 27 December 2018, the applicant was referred for an MRI of his cervical spine. On 15 January 2019, Dr Milad recorded that the applicant had a very sore neck, back and shoulder.
45. On 2 January 2019, Dr Milad issued a certificate stating that the applicant had no current capacity for any employment between 19 November 2018 and 19 January 2019. The doctor recorded that the relevant work related injuries were:

"Neck, left shoulder, back injuries, left hip + legs pain".
46. The doctor certified that the date of injury was October 2018 when the applicant "hit an edge at work, fell carrying heavy bags." However, he also expressed the view that the applicant had recurrent neck and back pain because of heavy lifting at work. The doctor issued certificates in identical terms certifying the applicant as unfit for work until, at least, 25 August 2019.

ROSS HOY

47. Mr Hoy, a physiotherapist saw the applicant in respect of a lower back injury following a fall which he suffered at work, on 20 November 2015, 23 November 2015 and 27 November 2015. He states that on the last occasion, the applicant reported that his "pain now 0/10 and he was ready to return to full duties".
48. The physiotherapist reported that the applicant was observed to carry out a pain free range of active motion of his lumbar spine and hips. Mr Hoy continues:

"Mr Sarkis was cleared at this consultation and returned to work with no observable difficulties. Mr Sarkis was checked periodically on site by the on-site physiotherapist for the following four weeks and reported on each occasion to be fully functional and performing his pre-injury duties without difficulty."
49. That report also contains the following history in respect of the applicant's shoulders:

"He reported a long history of bilateral shoulder pain as a result of conducting many years of heavy weight lifting as a younger man. He reported that he had long since ceased this activity."

DISCUSSION AND FINDINGS

2018 injury

50. Although there is no reason to doubt that the applicant fell at work in “September/October 2018”, it is unlikely, in my opinion, that he suffered any significant injury on that occasion.
51. Curiously, the Application asserts that the applicant injured his left hip and leg in the incident. While Dr Milad refers to left hip and leg pain in his certificates, there is no cogent evidence that the applicant has pathology in the hip or the leg. There are no investigations of these sites in the clinical record and Dr Bodel, who puts the applicant’s case at its highest, explains these symptoms as referred pain from the disease process in the applicant’s back. He does not identify discrete injury to the leg or hip.
52. In his statement, the applicant describes an incident as occurring in “mid-2018” when he tripped and was “injured”. He does not state that he injured his neck, back or shoulders in the incident. Rather, he records that he continued to work and the pain in his neck became worse.
53. It appears from the medical histories that the applicant did not formally report the injury in September or October to his employer, lost no time from work, and did not see a medical practitioner. That would account for the fact that the respondent has no record of the incident and that a number of the respondent’s witnesses do not recall it.
54. It is true, as Mr Hickey submitted, that the applicant complained to Dr Milad of neck pain on 17 November 2018 but there is no history in the notes that the neck pain followed or was in any way attributable to a specific work incident. Dr Milad’s referral to Dr Damodaran might hint at a suggestion, but the more extensive history recorded by Dr Damodaran does not attribute the applicant’s cervical condition to a frank injury. He records

“These symptoms started two weeks after he stopped work. He had these symptoms for many years, but the symptoms have worsened since a new job.”
55. That formulation is not compatible with injury in the incident in September /October. In the circumstances, I am not satisfied that the frank injury pleaded caused or materially aggravated any of the injuries which the applicant alleges occurred as a result of his employment.

Disease injury

56. It is then necessary to consider the injuries which allegedly result from a disease process caused or materially aggravated by the nature of his employment. Prima facie, the applicant should have a formidable case that he suffered injury to his neck and both shoulders due to the nature of his work. It is true, that his description of the onset of symptoms is surprisingly vague. Nonetheless, his evidence that he performed extremely arduous work for the respondent for more than a quarter of a century is not in dispute. Secondly, the radiological evidence demonstrates quite significant degenerative change of the applicant's cervical spine and shoulders.
57. Dr Damodaran, the treating neurosurgeon, was in little doubt that the applicant's cervical disease was such that he should consider an anterior cervical discectomy and fusion. He stated, however, that even this radical treatment would not alleviate all of the applicant's symptoms.

58. While these conditions may be “idiopathic” as Dr Panjratana asserts, the nature and duration of the work and the extent of the degenerative changes argue in favour of work influencing the disease process. Indeed, Dr Panjratana concedes the possibility of aggravation of the applicant's cervical condition by reason of the applicant's employment. While he makes no such concession in relation to the applicant's shoulders, his opinion on this aspect of the claim is attenuated by the fact that he did not have access to the various ultrasounds of the applicant's shoulders. These, of course, show marked pathology.

Reliability

59. The first hurdle placed in the applicant's path, is his failure to inform his employer that he suffered symptoms in the body parts claimed before his application for redundancy. I have little doubt, as Mr Grimes submitted, that the applicant was aware of the need to report injuries suffered at work. It is likely that this is precisely what occurred in 2015, when the applicant injured his back. He saw Mr Hoy on several occasions following this injury, and I infer also saw the company general practitioner, who the applicant identifies as Dr Balo, in respect of his back. Unfortunately, Dr Balo's notes are not evidence.

60. On the other hand, there is no event or incident to report in circumstances where the injury consists of the aggravation, exacerbation, acceleration or deterioration of a disease by reason of the nature of the worker's employment. Sections 15 and 16 of the 1987 Act exist largely because it is often impossible to identify the time of a distinct pathological change or of a distinct aggravation of a disease. In such cases, the impact of work on the disease process maybe imperceptible. It is not surprising, therefore, that a worker would not inform his employer or his doctor of the gradual development of symptoms over many years of employment.

61. In this case, the applicant may not have had any real insight into the nature of the injury or its legal implications until he saw a specialist medical practitioner. It is true that he knew that his back condition was the result of “wear and tear”. But he may not have known this could constitute an injury.

62. The worker's evidence that he “knew nothing” about workers compensation is probably disingenuous. That he provides no explanation as to why he didn't mention his multiple aches and pains to Mr Barham, the plant manager, at the time of their discussion in respect of redundancy is also problematic. Nonetheless, I doubt that these matters undermine the applicant's reliability to such an extent that his evidence should not be accepted. In reaching this conclusion, I have also borne in mind Dr Panjratana's account of the applicant's presentation on his examination.

63. I prefer, therefore, to determine the injury issue on the medical evidence rather than, as Mr Grimes argued, the applicant's diminished reliability by reason of lack of complaint to his employer or to medical practitioners over the years.

64. The only explanations of the aetiology of the applicant's back and neck conditions put by the medical evidence are degenerative disease, the impact of work upon degenerative disease or a combination of both. Dr Panjratana doubts whether the applicant has any significant pathology but concedes the possibility of aggravation of degenerative disease of the cervical spine. The position is different with respect to the condition of the applicant's shoulders. The histories recorded by the medical practitioners suggest an alternative aetiology in the applicant's weightlifting.

The applicant's shoulder pain

65. The notes of Dr Milad record a history of right shoulder pain which came on while the applicant was bodybuilding in 2003. He was referred to Dr Millar, a sports physician for treatment. Subsequently, in 2015, the applicant told Mr Hoy that his shoulder problems of related to "heavy weightlifting" as a younger man. The applicant also told Mr Hoy that he had "long since ceased this activity". Unfortunately, the applicant's written evidence does not address this issue. Neither Dr Bodel nor Dr Panjratan were provided with this history and to that extent their reports are inadequate.

66. The precise date when the applicant ceased weightlifting is not established by the evidence. In 2011, Dr Freedman, a cardiologist expressed the opinion that the steroids which the applicant took as part of his bodybuilding program may have contributed to his coronary disease. On 3 May 2011, Dr Freedman advised the applicant that he should concentrate on "more cardio exercise". The doctor stated:

"As far as physical activity is concerned I think he can gradually go back to the Gym although I don't think he should be doing the full weights and should gradually work up to half what he was doing in the past."

67. A number of the respondent's witnesses also refer to the applicant's health and physique. Mr Brial the applicant's manager between 2002 and 2004 observed that he:

"was heavily into the gym and really looked after himself. He had the body of someone that could compete in a body building competition. He did a lot of gym work. The claimant's 'perfect' physique was at a competition bodybuilding level. He would not have got his physique without considerable gym work. He had a body like 'Arnold Schwarzenegger'."

68. I accept Mr Hickey's submission that the only clear reference in Dr Milad's notes to shoulder injury caused by weightlifting is that in 2003. But it is likely that the applicant continued weightlifting for many years after that incident. In 2016, the applicant attributed his shoulder pain to his weightlifting.

69. The clinical notes evidence intermittent treatment of significant symptoms arising from obvious pathology in the applicant's shoulders over the years without identifying any cause of the need for treatment. There is no report from Dr Milad addressing the issue. The doctor's medical certificates certify the applicant's left shoulder as a work injury but not the right shoulder. Whether this reflects the doctor's view that the applicant does not have incapacitating symptoms in his right shoulder or, alternatively, that the symptoms do not result from employment injury remains a mystery. A third possibility might be that it is merely oversight by the doctor. But Dr Milad's silence on the issue means that there is not a scrap of treating medical evidence which addresses the issue of the cause of the applicant's right shoulder symptoms.

70. Ultimately, I have reached the conclusion that the evidence before the Commission does not establish injury to the shoulders. The applicant does not address the issue of weightlifting/bodybuilding in his statement. While it is possible that both bodybuilding and the nature of the applicant's work materially contributed to the condition of the shoulders, I am reluctant to reach that conclusion in the absence of medical evidence based upon an adequate history.

71. Assuming that it was accepted that the employment was a contributing factor, it would be necessary for a doctor with an appropriate history to weigh the evidence to determine whether it was the main contributing factor. This has not occurred in this case.

72. I do not consider that Dr Bodel has an appropriate history of the onset of the applicant's shoulder problems. He does not have any history of bodybuilding. Plainly, the applicant performed weightlifting/bodybuilding consistently for a very long time. Plainly, he believed in 2016 that it was the cause of his shoulder problems. Dr Bodel, however, has no history of these matters. Plainly, the applicant had ample opportunity to address these matters in his written evidence and did not do so. In the circumstances, I am not persuaded that weight can be given to Dr Bodel's opinion in relation to shoulder injury.
73. I do not regard the absence of a history of bodybuilding work/weightlifting as "trifling". In my opinion, it is important data: see *Paric v John Holland Constructions Pty Ltd* 59 ALJR 844 (19 September 1985).
74. Conversely, I accept that the applicant has sustained injury to his neck and low back as a result of his employment with the respondent over many years. Obviously, Dr Milad is of the opinion that the applicant has a neck and back condition caused by employment. Dr Damodaran, the applicant's treating neurosurgeon expresses the opinion that the applicant has quite sinister pathology in his cervical spine.

Subsequent employment

75. After leaving the employment of the respondent, the applicant commenced employment as a warehouse manager with a business known as Tile Power, which was operated by a close friend. He continued that work until 3 January 2019. Contrary to the applicant's evidence, the work of a warehouse manager involved some arduous physical activity, although probably not to the same extent as his employment with the respondent.
76. The evidence suggests that symptoms in the applicant's neck and, possibly, in his low back worsened during this period. However, there is no medical evidence that this short period of employment was a substantial contributing factor to the cause or aggravation of the applicant's neck or lumbar problems.
77. Accepting that the applicant suffers from a disease process in his neck and back which has been aggravated by his employment as Dr Bodel opines, I am of the opinion that the respondent is the last relevant employer of the worker for the purposes of section 16.
78. As it was not suggested that there were other aggravating factors operative in respect of the applicant's cervical spine and back, I have no difficulty in finding that employment was the main contributing factor to the aggravation of the degenerative changes in the applicant's back and neck. These appear on the evidence to have become symptomatic in the several years before the applicant ceased work and a considerable time after he ceased lifting weights.

Incapacity

79. I have reached the conclusion that the applicant was partially incapacitated for work from 19 November 2018 to 3 January 2019 and had no current work capacity thereafter. Dr Milad's certification must be treated with some caution as he has issued a certificate certifying the applicant as unfit for work during the period in which he was employed at Tile Power. Nonetheless, his certification of the total incapacity from January 2019 must be given some weight.
80. Dr Bodel expresses the opinion that the applicant is totally incapacitated. I suspect this must be largely because of the applicant's neck and back. Dr Panjraton, who doubted that employment contributed to the applicant's injuries did not suggest that he was fit for employment.

81. I doubt that after a long history of employment, the applicant would have ceased work at Tile Power in January 2019 if he was capable of continuing to perform manual work. While I have expressed some doubts about the applicant's reliability, he does have an admirable work history. The duration of his employment with the respondent is impressive. The respondent's witnesses state that he would readily accept over-time and, according to Mr Brial, worked two jobs in the period during which he managed him. The applicant continued to work without significant loss of time in the face of health problems unrelated to his employment, which are chronicled in Dr Milad's notes. These matters are not consistent with the applicant malingering. In my opinion the surveillance material to which I was briefly referred does not undermine this picture of the applicant.
82. To be fit for suitable employment there must be a real job which the applicant can perform whether or not it is readily available to him on the open labour market: see *Wollongong Nursing Home Pty Ltd v Dewar* [2014] NSWCCPD 55 (2 September 2014). On the limited medical evidence available, I have been unable to readily identify any suitable employment for which the applicant was fit to undertake by reason of his neck and back condition after 3 January 2019.
83. While I generally refrain from finding workers totally incapacitated unless there is compelling evidence, the applicant in this case has performed heavy labouring work throughout his working life and it is not readily apparent what alternative options might be suitable. It is not evident that he has had more than a rudimentary education or that he has retained skills which would permit him to perform alternative work. As he is a relatively young man, hopefully some alternative occupations can be identified in the near future.
84. It was agreed at the arbitration hearing that the applicant's preinjury average weekly earnings (PIAWE) was \$2,332.95 per week from 18 November 2018 to 17 November 2019 and \$879.32 per week thereafter. During his employment with Tile Power, the applicant earned the sum of \$1,260 per week. Accordingly, I propose to make findings and orders as follows:
- (a) That the applicant suffered injury to his neck and back arising out of and in the course of his employment with the respondent namely an aggravation of underlying degenerative changes which is deemed to have occurred on 19 November 2018 in accordance with section 16 of the 1987 Act.
 - (b) That the applicant's employment was a substantial contributing factor to these injuries.
 - (c) The applicant has not established that he suffered injury to his shoulders or left hip arising out of or in the course of his employment with the respondent.
 - (d) As a result of these injuries the applicant was partially incapacitated from 19 November 2018 to 3 January 2019 and had no current earning capacity from 4 January 2022 date.
 - (e) Between 19 November 2018 and 18 November 2019 the applicant's PIAWE was \$2,332.95 per week and from 18 November 2019 it was \$879.32 per week.
 - (f) Award for the applicant as follows:
 - (i) \$956.30 per week from 19 November 2018 to 3 January 2019;
 - (ii) \$2,145.30 per week from 4 January 2019 to 18 February 2019, pursuant to section 36.
 - (iii) \$1,886.36 per week from 19 February 2019 to 17 November 2019;and

- (iv) \$879.32 per week from 18 November 2019 to date and continuing pursuant to section 37.
- (g) Liberty to apply in respect of the above calculations.
- (h) Respondent to pay the applicant's medical and hospital expenses in respect of the applicant's neck and back pursuant to section 60.

