

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 3637/19  
**Applicant:** Shayne Michael Taylor  
**Respondent:** Soxami Pty Ltd;  
Burrangong Pet Foods Pty Ltd;  
Burrangong Meat Processors Pty Ltd;  
Burrangong Abattoirs Pty Ltd (in receivership)  
**Date of Determination:** 11 December 2019  
**Citation:** [2019] NSWCC 396

The Commission determines:

1. The respondent is to pay weekly payments to the applicant pursuant to section 41 of the *Workers Compensation Act 1987*:
  - (a) in the sum of \$993.70 per week from 7 January 2016 to 31 March 2016, and
  - (b) in the sum of \$1006.90 per week from 1 April 2016 to 8 April 2016.

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

William Dalley  
**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 WILLIAM DALLEY , ARBITRATOR, WORKERS COMPENSATION COMMISSION.

*A MacLeod*

Ann MacLeod  
Acting Senior Dispute Services Officer  
**As delegate of the Registrar**



# STATEMENT OF REASONS

## BACKGROUND

1. Shayne Michael Taylor (Mr Taylor/the applicant) filed an Application to Resolve a Dispute in the Commission seeking weekly payments, domestic assistance and treatment expenses in respect of injuries which occurred in the course of his employment with the respondent, at an abattoir in Young. The abattoir had been owned by a number of different corporate entities with the injury to the low back occurring on 31 October 1997 and injury to the right ankle occurring on 27 September 2002.
2. These injuries appeared to have occurred when the abattoir was owned by Burrangong Abattoirs Pty Ltd trading as "Burrangong Abattoirs". That company subsequently went into receivership. Relevant workers compensation insurance was in place in respect of the earlier injury with CGU Workers Compensation and in respect of the later injury with Employers Mutual NSW Limited. It is convenient to refer to Burrangong Abattoirs Pty Ltd (in receivership) as "the respondent".
3. The respondent disputed the respective claims and the matter proceeded to conciliation conference and arbitration hearing at Queanbeyan on 23 September 2019. At hearing the respondent withdrew the claims for medical treatment and domestic assistance and amended the claim for weekly payments by deleting the claim for weekly payments asserted in the Application to Resolve a Dispute and inserting a revised claim for weekly payments:
  - (a) from 3 February 2010 to 31 December 2012 pursuant to section 37 of the *Workers Compensation Act 1987* (the 1987 Act) as preserved pursuant to clause 3 of Part 19H of Schedule 6 to the 1987 Act, and
  - (b) from 7 January 2016 to 8 April 2016 pursuant to section 41 of the 1987 Act.
4. Following the arbitration hearing a Certificate of Determination was issued on 17 October 2019:

"The Commission determines:

1. Pursuant to section 162 (1)(d) of the *Workers Compensation Act 1987* (the 1987 Act) the Commission declares that the respondent, being a corporation, had commenced be wound up after having entered into a contract with CGU Workers Compensation in respect of liability for injury on 31 October 1997 and with Employers Mutual NSW Limited in respect of any liability under the 1987 Act in respect of injury on 27 September 2002.
2. The Application to Resolve a Dispute is amended:
  - (a) by deleting the claim for domestic assistance and for medical expenses, and
  - (b) by amending the claim for weekly payments to claim weekly payments:
    - (i) from 3 February 2010 to 31 December 2012 pursuant to section 37 of the 1987 Act as preserved pursuant to clause 3 of Part 19H of Schedule 6 to the 1987 Act, and
    - (ii) from 7 January 2016 to 8 April 2016 pursuant to section 41 of the 1987 Act.

3. The respondent is to make weekly payments to the applicant pursuant to section 37 of the 1987 Act as preserved pursuant to clause 3 of Part 19H of Schedule 6 to the 1987 Act as follows:
    - (a) from 3 February 2010 to 31 January 2010 at the rate of \$500.50 per week;
    - (b) from 1 April 2010 to 30 September 2010 at the rate of \$510.10 per week;
    - (c) from 1 October 2010 to 31 March 2011 at the rate of \$516.90 per week;
    - (d) from 1 April 2011 to 30 September 2011 at the rate of \$527.40 per week;
    - (e) from 1 October 2011 to 31 March 2012 at the rate of \$536.40 per week;
    - (f) from 1 April 2012 to 30 September 2012 at the rate of \$546.50 per week, and
    - (g) from 1 October 2012 to 31 December 2012 at the rate of \$555.30 per week.
  4. The applicant is to file and serve written submissions on or before close of business on 29 October 2019 addressing the following issues:
    - (a) What power does the Commission have to make an award of weekly payments pursuant to section 41 of the 1987 Act in the light of *Lee v Bunnings Group Ltd* ([2013] NSWCCPD 54)?
    - (b) How is it alleged the applicant 'had current work capacity prior to suffering the incapacity resulting from the injury related surgery' (section 41(5)(a) of the 1987 Act)?
    - (c) Do the words 'being medical treatment for which the insurer has accepted liability under this part' (section 41(4)) extend to medical treatment for which the insurer has not accepted liability but which the Commission has held results from the subject injury?
  5. The respondent is to file and serve submissions in reply on or before close of business on 13 November 2019.
  6. Any response to the respondent's submissions in reply is to be filed and served on or before close of business on 20 November 2019.
  7. The issue of weekly payments in the period 7 January 2016 to 8 April 2016 will then be decided on the papers in the light of the further submissions received."
5. Written submissions were received from the applicant and the respondent and have been taken into consideration in deciding the issue of the applicant's entitlement to payments pursuant to section 41 of the 1987 Act.

## **EVIDENCE**

### **Documentary evidence**

6. 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;
  - (c) Documents attached to Application to Admit Late Documents dated 11 September 2019 by the applicant, and

- (d) Documents attached to Application to Admit Late Document dated 16 September 2019 by the respondent.

### Oral evidence

7. No application was made to introduce oral evidence or to cross examine any witness.

### FINDINGS AND REASONS

8. The history of the matter was recorded in the Certificate Determination issued on 17 October 2019 as follows:
- “2. Mr Taylor suffered a back injury on 31 October 1997 in the course of his employment and injury to his right ankle on 27 September 2002.
  3. Following his back injury in October 1997 Mr Taylor was paid weekly compensation up to 20 November 2001.
  4. Mr Taylor was also paid lump-sum compensation in respect of the back injury in proceedings which were settled in September 1999 and, in 2003 a further sum was agreed upon in respect of whole person impairment of the right lower extremity. Despite these injuries, an earlier bout of Q fever and an injury to the left arm, Mr Taylor continued in his employment performing modified duties until the abattoir closed in February 2010.
  5. Proceedings in 2013 and 2015 were discontinued.
  6. A further claim was made on 28 November 2016 for permanent impairment compensation in respect of the injuries on 31 October 1997 and 27 September 2002. The claims were disputed and an Application to Resolve a Dispute was filed in the Commission.
  7. The allegations of injury in October 1997 were pleaded in the alternative as injuries pursuant to section 4(a) of the Workers Compensation Act 1987 (the 1987 Act) and section 4(b), that is as ‘frank’ injuries and ‘disease’ injuries. A claim was also made for weekly payments, domestic assistance, treatment expenses and a declaration that back surgery represented reasonably necessary treatment in respect of the October 1997 injury pursuant to section 60 (5) of the 1987 Act.
  8. At hearing the applicant discontinued the claims for weekly benefits, medical and treatment-related expenses, domestic assistance and the section 60(5) declaration. An award was made on 17 August 2017 remitting the further claims pursuant to section 66 to the Registrar for referral to an Approved Medical Specialist to assess:
    - (a) ‘Pursuant to the Table of Disabilities, the degree of the permanent impairment of the applicant’s back in the permanent loss of efficient use of the right leg at or above the knee the date of injury of 31 October 1997.
    - (b) The degree of the applicant’s whole person impairment in relation to the right lower extremity (foot and ankle) with a date of injury of 27 September 2002.’
  9. There was an award for the respondent ‘in relation to disease injury claims for the lower back and right lower extremity’.

10. Subsequently a request for assessment of a threshold dispute seeking assessment of whole person impairment in respect of injury on 31 October 1997 was added.
11. Pursuant to that request, the Approved Medical Specialist, Dr Davis, assessed 30% whole person impairment in respect of injury on 31 October 1997 in respect of the lumbar spine and right lower extremity.
12. The applicant then applied for a reconsideration of the orders referring the dispute to the Approved Medical Specialist seeking to add a request for assessment of scarring consequential upon surgery (L5/S1 fusion) performed by Dr Nicholas Tsai. That claim was contested by the respondent and was the subject of a further determination based upon the respective submissions of the parties. After discussion of the submissions the Arbitrator concluded:

‘Based on the reasons in findings made above and the interests of justice, I find that Order 4 in the Certificate Determination dated 17 August 2017 should have included a remittance to the Registrar for referral to an Approved Medical Specialist to assess the degree of Mr Taylor’s whole person impairment in relation to the back (lumbar spine), right lower extremity and skin (surgical scarring to the back) with the date of injury of 31 October 1997.’
13. The order remitting the dispute was amended accordingly.
14. In a Medical Assessment Certificate dated 17 May 2018 the Approved Medical Specialist, Dr Davis, noted the history:

‘On 31 October 1997, in the process of pulling meat out of the freezer, he developed pain in the lower back and right leg. After a period of conservative treatment, there was a referral to a neurosurgeon, Dr Sheehy, who initially recommended conservative treatment.

On 27 September 2002, when operating a forklift, Mr Taylor was involved in an accident. The forklift slid off a ramp landing heavily on his right foot and ankle, particularly aggravating the low back pain. There was a specialist referral to Dr Tsai who performed an L5/S1 fusion on 7 January 2016. Physiotherapy followed.’
15. Dr Davis noted the appearance of the surgical scar and noted the absence of symptoms. He noted that there had been previous low back injuries which were relevant. He noted ‘Mr Taylor suffered an injury to his lower back and right leg, as a result of that injury undergoing surgery that involved in L5/S1 fusion’ he diagnosed; ‘Aggravation of degenerative disc disease of the lumbar spine (L5/S1 fusion) with an associated surgical scar in the lumbosacral area midline.’
16. Applying the New South Wales Workers Compensation Guidelines for the Evaluation of Permanent Impairment, TEMSKI Scale, Dr Davis assessed 0% whole person impairment as result of the surgical scarring.
17. In the light of the assessment by the Approved Medical Specialist, a consent award was made on 18 January 2018 for additional sums pursuant to section 66 of the 1987 Act in respect of permanent impairment of the back and permanent loss of efficient use of the right leg at or above the knee attributable to the injury on 31 October 1997 as well as an additional sum attributable to the ankle injury on 27 September 2002.

18. Subsequently a consent award was made on 15 August 2018 finding that Mr Taylor suffered from a 30% whole person impairment in accordance with the Medical Assessment Certificate as a result of the injuries he sustained on 31 October 1997.
19. On 28 May 2019 Mr Taylor's solicitors made a claim for weekly benefits from 3 February 2010 to date and continuing and a claim for treatment expenses including the L5/S1 discectomy and fusion performed by Dr Tsai.
20. The respondent disputed liability. In a notice pursuant to section 78 of the *Workplace Injury Management and Workers Compensation Act 1998* the respondent stated:
 

‘We do not agree that you are entitled to weekly payments for your claimed injury because you do not have total or partial incapacity for work resulting from an injury as required by section 33 of the *Workers Compensation Act 1987*.

We also do not agree that you are entitled to medical or related treatment for your claimed injury because the medical or related treatment is not reasonably necessary as a result of an injury as required by section 59 and 60 of the *Workers Compensation Act 1987*.’
21. The respondent asserted that the effects of the injury on 31 October 1997 would have resolved within four weeks in accordance with the opinion of Dr Casikar. In addition the respondent disputed that the need for surgery performed by Dr Tsai resulted from injury on 31 October 1997.”

#### **Weekly payments pursuant to section 41 of the 1987 Act**

9. It is now necessary to consider the claim for weekly payments pursuant to section 41 of the 1987 Act. Counsel for the respondent submitted:
 

“It was my impression following the Conciliation phase of the Conciliation/Arbitration Conference that certain deletions and other amendments were made to the ARD at Arbitration, namely:

  - a) withdrawal of the claim for domestic assistance & medical expenses;
  - b) amendment of the claim pleaded for weekly payments from a continuing claim dating historically from 3 February, 2010 to date & continuing; to claim specifically:
    - i. from 3 February, 2010 until 31 December, 2012; the latter date being the last date of the second entitlement period, following which the arbitrator ceases to have jurisdiction, to make orders for weekly payments [citing *Lee v Bunnings Group* [2013] NSWCCPD 54,
    - ii. from 7 January 2016 to 8 April 2016 pursuant to section 41 of the 1987 Act (as amended).

It is submitted that the weekly payments claim set out in 2(b) above were in fact withdrawn in their entirety during the Conciliation phase. It was submitted that **no claim was in evidence of the existence of a dispute** concerning weekly payments, which was justiciable by the Commission, in relation to the weekly payments claims generally (original emphasis).

The only issue in dispute at Arbitration was whether the need for lumbar surgery in 2016 was reasonably necessary as a result of the lumbar spine injury in 1997. In that respect the worker sought only a declaration of the Commission which the worker's counsel submitted was relevant to the assessment in the future by an AMS of any further lumbar impairment, resulting from the 1997 injury".

10. Although no formal transcript has been prepared, I have listened to the recording of the arbitration hearing and noted the relevant portion as follows:

"Mr Dodd (Counsel for the applicant): Can I substantially simplify the proceedings before you as follows, that is to seek your leave to withdraw the claim in Part 5.4 for domestic assistance...

Arbitrator: Yes.

Mr Dodd: and similarly to withdraw the claim for medical expenses in Part 5.3?

Arbitrator: Yes

Mr Dodd: Regarding the claim for weekly payments, to restrict that claim from 3 February 2010 to 31 December 2012 pursuant to, I'll call it 'old Act rates' that is because, on my reading of the legislation, your jurisdiction expires at 31 December 2012 regarding that part of the claim. The second aspect of the claim.

Arbitrator: The applicant not being a...

Mr Dodd: He was not an existing recipient at 1 October 2012.

Arbitrator: Mr Hanrahan [Counsel for the respondent] are you happy with that?

Mr Hanrahan: Yes

Mr Dodd: The second aspect of the claim that will be pursued before you is for the period from 7 January 2016 to 8 April 2016. It was on 7 January 2016 that the applicant underwent a fusion operation on his back.

Arbitrator: What was the date of the fusion?

[Discussion as to the date of the fusion operation]

Mr Dodd: So from 7 January 2016 to 8 April 2016, being a period of 13 weeks pursuant to section 41, and in turn that brings in the section 37 rates which are pleaded in the ARD.

Arbitrator: Section 37 before the amendment, is that it? Is it under the transitional rate?

Mr Dodd: Under the transitional rate – that is correct. And as I understand it the issue, subject to correction by my learned friend, is whether the operation is reasonably necessary medical treatment as a result of the injury of 31 October 1997 and secondly the extent of the applicant's incapacity in that period.

Arbitrator: Mr Hanrahan, do you agree with that?

Mr Hanrahan: I missed it, I'm sorry.

Mr Dodd: I'll just repeat it – my understanding, subject to correction, is that the issue regarding the second period is whether the surgery was reasonably necessary and secondly the degree of incapacity during the 13 week period.

Mr Hanrahan: Okay.

Arbitrator: Very well – they are agreed to – the issues.”

11. I am satisfied that the issue of weekly payments was appropriately before the Commission and was to be determined in the current proceedings.
12. Counsel for the respondent submitted that, if the transcript disclosed that weekly payments were in issue, then:
  - “a) there was no evidence of the level of capacity during the relevant period [from 3 February, 2010 until 31 December, 2012] or any consideration of the worker’s ability to earn during that specific period; and
  - b) there was no evidence of dependency during the relevant period.”
13. These issues were the subject of the Certificate of Determination issued on 19 October 2019 as set out above.
14. With respect to the claim pursuant to section 41 of the 1987 Act, the issues were defined at hearing as:

“With respect to the claim for weekly payments in the period 7 January 2016 to 8 April 2016:

  - (i) was the surgery which gave rise to the alleged incapacity reasonably necessary treatment in respect of injury to lumbar spine on 31 October 1997, and
  - (ii) if so, what is the extent of the incapacity flowing from that surgery?”
15. Section 41 of the 1987 Act provides:

“Compensation for incapacity after second entitlement period resulting from surgery

**41 COMPENSATION FOR INCAPACITY AFTER SECOND ENTITLEMENT PERIOD RESULTING FROM SURGERY**

  - (1) An injured worker who suffers incapacity resulting from injury related surgery is entitled to weekly payments of compensation (‘special compensation’) as provided by this section in respect of that incapacity when the incapacity occurs after the second entitlement period.
  - (2) The special compensation provided for by this section is payable at the rate provided under section 37, as if the period of incapacity in respect of which the special compensation is payable occurred during (not after) the second entitlement period.
  - (3) Special compensation is not payable in respect of any period of incapacity that occurs:
    - (a) during the first 13 consecutive weeks after the end of the second entitlement period, or
    - (b) more than 13 weeks after the surgery concerned, or
    - (c) during any period in respect of which the worker is otherwise entitled to compensation after the second entitlement period (under section 38).



- (4) Surgery is 'injury related' if it is surgery that the worker undergoes in the course of medical treatment provided to the worker as a result of an injury (the 'initial injury') received by the worker (being medical treatment for which the insurer has accepted liability under this Part).
- (5) The following requirements must be satisfied for a worker to be eligible for the special compensation provided for by this section:
  - (a) the worker must have received weekly payments of compensation in respect of the initial injury and have had current work capacity prior to suffering the incapacity resulting from the injury related surgery,
  - (b) the worker must have returned to work after the initial injury (whether in self-employment or other employment) for a period of not less than 15 hours per week and have been in receipt of current weekly earnings (or current weekly earnings together with a deductible amount) of at least \$155 per week.
- (6) This section does not limit section 52 (Termination of weekly payments on retiring age)."

16. Having considered the terms of section 41, I concluded that the issues identified at the arbitration hearing did not completely address the remedy sought by the applicant and, as noted above, further submissions were sought in respect of those issues. It is convenient to deal with the issue of jurisdiction first.

### **Jurisdiction.**

17. The respondent submitted that after the last date of the second entitlement period "following which the arbitrator ceases to have jurisdiction to make orders for weekly payments" citing *Lee v Bunnings*<sup>1</sup>.

18. In that case Deputy President Roche said:

51. The Commission is a statutory tribunal. It may only exercise the powers and functions that are granted to it by statute. Section 105 of the 1998 Act sets out the jurisdiction of the Commission. It can be seen from the provisions of s 105, that the Commission has been vested with very broad powers to hear and determine all matters arising under both the 1987 and 1998 Acts.
52. The 'exclusive jurisdiction' granted to the Commission pursuant to s 105(1) is qualified by express statutory provisions in s 43(3) and s 44(5) of the 1998 Act. These provisions remove the Commission's jurisdiction to determine any dispute about a work capacity decision of an insurer and prevent the Commission making a decision in respect of a dispute before it that is inconsistent with a work capacity decision of an insurer (s 43(3)).
53. Section 44(5) prohibits the Commission from making a decision in proceedings concerning a dispute about weekly payments of compensation payable to a worker while a work capacity decision by an insurer is the subject of a review under that section.
54. There is no dispute in the present case that Mrs Lee had exhausted her entitlement to compensation under ss 36 and 37 of the 1987 Act. The remaining dispute, which was the subject of the Arbitrator's determination of 14 June 2013, concerned her entitlement to compensation under s 38. Pursuant to s 38(1) a worker's entitlement to compensation ceases upon the expiration of the second entitlement period unless the worker is entitled to compensation after that period as assessed under s 38.

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<sup>1</sup> [2013] NSWCCPD 54

55. Under s 38(2), a worker who is assessed by the insurer as having no current work capacity is entitled to ongoing payments, provided the incapacity is likely to continue indefinitely.
  56. Under s 38(3), the continuation of payments to a worker who is assessed by the insurer as having a current work capacity is entitled to additional payments 'only if':
    - (a) the worker has applied to the insurer in writing for the continuation of payments;
    - (b) the worker has returned to work for a period of not less than 15 hours per week and is in receipt of current weekly earnings of at least \$155 per week; and
    - (c) the worker is assessed by the insurer as being likely to continue indefinitely of being incapable of undertaking further or additional employment or work that would increase the worker's current weekly earnings.
  57. It is clear from the unambiguous terms of s 38 that an entitlement to compensation under that section must be assessed by the insurer, not by the Commission."
19. The applicant submitted that the decision in *Lee v Bunnings* had no application to the current situation but should be confined to claims which fell within section 38 of the 1987 Act. Section 41 created a further basis upon which "special compensation" by way of weekly payments could be awarded in the circumstances described in section 41.
  20. The applicant submitted that section 41 provided a discrete head of power within section 105 of the 1998 Act.
  21. I accept the submission of the applicant that the Commission does have jurisdiction to award "special compensation" pursuant to section 41, if the conditions set out in that section are satisfied.
  22. The wording of section 41(1) clearly establishes that the weekly payments under consideration constitute "special compensation" and are intended to be an exception to the limitations imposed by section 38.
  23. The "special compensation" is to be paid "at the rate provided under section 37, as if the period of incapacity in respect of which the special compensation is payable occurred during (not after) the second entitlement period"<sup>2</sup>. That appears to me to disclose a clear intention to create an exception to the restrictions otherwise imposed on payments after the second entitlement period.
  24. I am satisfied that the Commission has jurisdiction to make an award pursuant to section 41 of the 1987 Act if the requirements in section 41(1) and (5) are satisfied.
  25. Section 41(1) requires:
    - (a) there must be surgery which is "injury related", defined as "surgery that the worker undergoes in the course of medical treatment provided to the worker as a result of an injury (the 'initial injury') received by the worker (being medical treatment for which the insurer has accepted liability under this Part)" (section 41(4)).
    - (b) The incapacity arising from the "injury related" surgery must occur after the completion of the second entitlement period.

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<sup>2</sup> Section 41(2)

26. The respondent submitted that the applicant had not established that the surgery was “injury related” as it was not reasonably necessary treatment in respect of injury. I accept that this was the case with respect to the injury to the ankle in 2002, but I am satisfied that the surgery constituted reasonably necessary treatment and was “injury related” within section 41(4) with respect to the injury to the back in October 1997.
27. In the Certificate of Determination dated 19 October 2019 I found as follows:
- “61. I am satisfied that the surgery performed by Dr Tsai on 7 January 2016 was surgery that resulted from the earlier injury in October 1997. That is indisputable given that scarring was referred for assessment by the Approved Medical Specialist, Dr Davis. The scarring clearly resulted from the surgery performed by Dr Tsai and the inescapable inference is that the back surgery which gave rise to the scarring resulted from the October 1997 injury. If that were not the case then there would have been no basis for referral of the scarring for assessment.
62. I am satisfied that there is an implicit finding that the surgery resulted from the earlier injury. Whether this is issue estoppel or Anshun<sup>3</sup> estoppel would depend on the contents of the dispute notice issued in respect of the claim for lump-sum compensation made in Mr Taylor’s solicitors’ letter dated 28 November 2016. That dispute notice does not appear to be in evidence although an earlier notice dated 27 February 2013 in respect of a claim for weekly payments was included as was the section 78 notice dated 14 August 2019.
63. If the respondent specifically disputed that the surgery resulted from the subject injury then that dispute appears to have been resolved in favour of the applicant by the order remitting the claim for scarring which resulted from the surgery for impairment as a result of the first injury. There would then be issue estoppel.
64. If not specifically raised then Anshun estoppel appears to apply given that it would be reasonably expected that the respondent would raise the issue of whether there was a causal connection between the surgery and the injury in connection with the claim for lump-sum impairment which depended in part for assessment upon the effects of surgery.
65. In the Medical Assessment Certificate dated 8 November 2017, the Approved Medical Specialist, Dr Davis, recorded a history:
- ‘In the normal course of the claimant’s employment, on 31 October 1997, he was pushing down forcefully on a sheep carcass, when he felt “the back go”. There was pain in the lower back
- He finished that shift and then sought medical advice. He sought advice from his GP, who initially prescribed anti-inflammatory and analgesic medication and physiotherapy. CT and MRI Scans were performed identifying an L5/S1 disc lesion. At this stage, as well as back pain, he developed pain in the right leg. He was still working
- [the AMS then recorded history of injury on 27 September 2002 and subsequent treatment)
- Throughout this period, he continued with pain in the lower back, radiating into the right leg and there was a neurosurgical referral to Dr Tsai who performed surgery on 7 January 2016 involving L5/S1 disc decompression and fusion.’

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<sup>3</sup> *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45; (1981) 147 CLR 589

66. Putting to one side the issue of estoppel, the evidence is clear that the Approved Medical Specialist assessed lumbar spine impairment arising from injury on 31 October 1997 as including an additional 3% whole person impairment 'because there is radiculopathy following spinal surgery'. That assessment clearly supports a finding that the surgery resulted from the injury and I accept that this is the case. Accordingly I am satisfied that the surgery performed by Dr Tsai on 7 January 2016 resulted from injury to the lumbar spine on 31 October 1997."

28. The respondent conceded in its written submissions that:

"the words *'being medical treatment for which the insurer has accepted liability under this part'* [original emphasis] (section 41(4)) extend to medical treatment for which the insurer has not accepted liability, but which the Commission has subsequently held results from the subject injury".

29. Accordingly I am satisfied that the surgery performed by Dr Tsai on 7 January 2017 was "injury related surgery".

30. It is agreed between the parties that incapacity arising from the "injury related surgery" occurred after the expiration of the second entitlement period.

31. Section 41(5) requires:

- (a) the worker must have received weekly payments of compensation in respect of the initial injury;
- (b) the worker must have had current work capacity prior to suffering the incapacity resulting from the injury related surgery;
- (c) the worker must have returned to work after the initial injury for a period of not less than 15 hours per week, and
- (d) following return to work the worker must have been in receipt of current weekly earnings of at least \$155 per week.

32. The Dispute Notice dated 14 August 2019 in evidence from GIO records; "We confirm that you have been paid 56 weeks of weekly compensation as a result of your lower back injury sustained on 31 October 1997." That statement establishes that Mr Taylor had received weekly payments of compensation in respect of the initial injury on 31 October 1997.

33. The respondent submitted that:

"The worker has not only provided no evidence of his capacity prior to surgery, he has not adduced any evidence of receipt of weekly payments (in fact there were none), nor has he demonstrated that he has returned to, in the sense of having continued to remain at work, after the initial injury for a period of not less than 15 hours per week, nor shown any earnings greater than \$155 per week.

The words *'must have returned to work'* (original emphasis) as referred to in s 41(5)(a) refer to the period immediately before the proposed surgery, resulting in a relevant incapacity. The relevant incapacity is expressly contrasted with 'current work capacity' in the period immediately prior to the surgery. This is the ordinary English meaning of those words."

34. I do not accept that the requirement to demonstrate current work capacity prior to suffering the incapacity resulting from the surgery is limited to the period immediately before the surgery. The provision does not provide any limitation on the period when current work capacity is to be demonstrated.

35. It is highly likely that, in the period prior to the surgery, the level of incapacity resulting from the initial injury suffered by a worker would have increased to the point where surgery was then required. The situation envisaged by section 41 is that of a worker who has returned to work on a greater than nominal basis but who subsequently requires surgery. That situation would often arise where the level of incapacity and the symptoms arising from the initial injury have increased to the point where surgery is appropriate.
36. It would create an absurd situation if an increase in the level of symptoms led to an incapacity to perform work which would then disqualify the worker from receiving benefits pursuant to section 41 because he then had no current work capacity. The intent of the section is clearly to benefit workers who require surgery following the expiration of the second entitlement period. That intention could not be met if the requirement for surgery resulted in loss of capacity to perform work prior to the surgery.
37. I am satisfied that the requirement for the worker to “have had current work capacity prior to suffering the incapacity resulting from the injury related surgery” can be met by current work capacity at any time following the initial injury.
38. The phrase “current work capacity” is defined in section 32A to mean; “in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment.” To that extent the phrase does not bear its normal English meaning but has the meaning attributed by section 32A.
39. I am satisfied that, following the initial injury to the lumbar spine October 1997, Mr Taylor returned to work after a period on suitable duties. Mr Taylor’s initial statement dated 10 March 2010 records that Mr Taylor returned to work in a role which he described as “a goffer”. He also performed work making twine loops for hanging carcasses. By September 2002 Mr Taylor was driving a forklift. He then injured his right ankle and was off work and was paid weekly compensation which he recalled was in the sum of \$475 per week for the first 26 weeks.
40. The inference is that he was earning at least that sum per week prior to the ankle injury.
41. The GEERS (General Employee Entitlements & Redundancy Scheme) documentation in evidence contains a declaration by Mr Taylor that he was earning \$597.74 as his weekly wage at the time when the abattoir closed in February 2010.
42. I therefore do not accept the submission of the respondent that there is no evidence of earnings.
43. I am satisfied that Mr Taylor, following the initial injury, returned to work and had a current work capacity performing alternative duties including driving a forklift and was earning in excess of \$155 per week.
44. As an expert tribunal, the Commission is familiar with weekly wage rates and their relation to hours worked. The sum referred to by Mr Taylor in his statement to the effect that he received weekly compensation in the sum of \$475 following the injury to the right ankle in 2002, together with the evidence of the GEERS application establishes that Mr Taylor was, at the relevant times, employed for more than 15 hours per week.
45. I find that the provisions of section 41(4) and (5) are satisfied.

## **Incapacity.**

46. As a result of injury to the lumbar spine in 1997 Mr Taylor was assessed as suffering 20% whole person impairment and 10% whole person impairment in respect of injury to the right ankle in 2002.
47. Mr Taylor underwent an L5/S1 disc decompression and fusion on 7 January 2016. In his statement which appears to be dated 3 April 2017 Mr Taylor detailed the problems that he was having following that surgery. He said that his son was doing the outside work around the home. He said he had difficulty making beds, cleaning his car, putting his shoes on, cutting his toenails and dressing. He said he was taking Endone for pain relief as well as Panadol, Nurofen and Panadeine Forte.
48. Mr Taylor said that he was continuing to suffer pins and needles radiating down the back of both thighs to his toes and that his perception was that the pain had not improved at all at that time. He confirmed that he informed Dr Dixon that his back pain interfered with his ability to sleep and restricted his ability to sit, stand and drive.
49. Mr Taylor said he also suffered pain and stiffness in the right ankle with clawing of the toes causing him to limp. He was unable to jog or run and had difficulty with stairs, steps and squatting due to ankle pain as well as back pain. He said that he remained on a disability pension.
50. Mr Taylor was examined by Dr Drew Dixon, orthopaedic surgeon, on 10 August 2016. Dr Dixon had previously assessed Mr Taylor on 18 March 2015 for the purposes of his claims pursuant to section 66 of the 1987 Act.
51. Dr Dixon was supplied with the reports of the operating surgeon, Dr Tsai and the Canberra hospital records as well as radiological investigations. Dr Dixon noted the history of interference with activities of daily living as recorded in Mr Taylor's statement noted above.
52. On review Dr Dixon noted persisting pain in the lower back with lumbar stiffness following spinal fusion with pain still referred to the lumbosacral facet joints. Dr Dixon noted that the back pain continue to disturb Mr Taylor's sleep and that he had restricted sitting standing and driving tolerance of half an hour and walking tolerance of 20 minutes.
53. On examination Dr Dixon noted stiffness of the lumbar segment "with forward flexion to his knees with slow and jerky recovery with pain on back extension which was decreased by one half as was lateral flexion to the right and left."
54. Dr Dixon noted wasting of the right leg below the knee and depressed medial hamstring jerks. There was stiffness of the right ankle. Dr Dixon noted that Mr Taylor walked with a limp on the right and had difficulty with toe and heel walking.
55. Dr Dixon reported "he remains unfit to do his abattoir work and continues on a Disability Pension". He noted that Mr Taylor's prognosis was poor for being able to return to manual work. He noted that Mr Taylor "has permanently retired and does not have the clerical skills to do an office job." He reported that Mr Taylor;  
  
"is restricted for remunerative employment for the reasonably foreseeable future and is not fit to do his pre-injury duties as an abattoir worker nor as a labourer in the mines. His condition is static and stable and no further improvement is expected. His prognosis for returning to manual work is poor. He does have permanent impairment."

56. Mr Taylor was examined by A/Professor Paul Minter on 18 July 2019 at the request of the respondent. A/Professor Minter noted the history of the two injuries and the subsequent L5/S1 fusion with “an unfortunately poor outcome”.
57. With respect to the surgery A/Professor Minter reported; “As you know, surgery for back pain itself is often a failure and he told me today that there had been no benefit to him from the surgical procedure.” A/Professor Minter did not regard the back injury in 1997 as significant. He also noted that Mr Taylor had undergone knee surgery and had suffered from diabetes. A/Professor Minter reported: “In my opinion, he is not fit for any duties on the open labour market. I would agree that he is fit for a disability pension or at the very least is unable to return to work on the open labour market.”
58. A/Professor Minter reported that he could see no reason why Mr Taylor had been unable to return to some type of employment following his back injury in 1997. He said: “I would allow Mr Taylor to work if he wishes to do so but I doubt that he has any qualifications which allow him to obtain employment.” He felt that incapacity was attributable to factors unrelated to employment.
59. The report of Dr Casikar in evidence was prepared prior to the surgery and does not assist determination of the extent of incapacity following the fusion surgery.
60. The evidence relating to Mr Taylor’s intellectual disability is set out in paragraphs 34 and 35 of the reasons accompanying the Certificate of Determination dated 17 October 2019. I accept the opinion of Ms Toni Smith, Occupational Psychologist, from the Commonwealth Rehabilitation Service that “a person with this level of intellectual ability has no alternative employment options other than unskilled manual work.”
61. Mr Taylor’s capacity for employment in the period of the claim pursuant to section 41 has to be considered in the light of Part 3, Division 2 of the 1987 Act. The definition of “current work capacity” is referred to above. The phrase “suitable employment” is defined in section 32A of the 1987 Act:

“**suitable employment**’ , in relation to a worker, means employment in work for which the worker is currently suited--

(a) having regard to--

- (i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and
- (ii) the worker's age, education, skills and work experience, and
- (iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and
- (iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and
- (v) such other matters as the Workers Compensation Guidelines may specify, and

(b) regardless of--

- (i) whether the work or the employment is available, and
- (ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and
- (iii) the nature of the worker's pre-injury employment, and
- (iv) the worker's place of residence.

62. The respondent submitted that Mr Taylor, in the period of the claim pursuant to section 41, would have had some capacity to perform work. I do not accept that submission.
63. I accept that Mr Taylor underwent fusion surgery on 7 January 2016 with a poor outcome.
64. The medical evidence does not directly address capacity for employment in the 13 week period that is the subject of the claim pursuant to section 41. The applicant was assessed by an Approved Medical Specialist, Dr Davis, as having 22% whole person impairment resulting from injury to the lumbar spine on 31 October 1997 as well as 10% whole person impairment arising from injury to the right leg on 27 September 2002<sup>4</sup>. I am satisfied that level of impairment would have severely impacted Mr Taylor's capacity to perform
65. Mr Taylor was aged 47 at the date of the fusion operation. He had a limited intellectual capacity and would be fit for manual tasks only. His employment skills were extremely limited and the labouring type work which he had pursued up to the 1997 injury had involved significant manual labour.
66. I accept the opinion of Dr Dixon that Mr Taylor had no capacity for manual work when examined in August 2016. I prefer the report of Dr Dixon over that of A/Professor Minter. Dr Dixon's opinion is supported by the report of the psychologist, Ms Smith, from the Commonwealth Rehabilitation Service.
67. A/Professor Minter's opinion is that Mr Taylor was incapacitated for work when examined in 2019 but this was not attributable to employment injuries. A/Professor Minter does not appear to have taken into account the finding that Mr Taylor had significant whole person impairment assessed as a result of injuries to his lumbar spine and his right ankle.
68. There is no evidence of any rehabilitation services being offered to Mr Taylor in the period following the fusion surgery in January 2016. He was at that time on a disability pension.
69. The type of work available to Mr Taylor which following his back injury in 1997, driving a forklift, was no longer available following the injury to the right ankle in 2002. He was also severely restricted by his intellectual incapacity which would have prevented him obtaining the necessary licence and which would probably have prevented him retraining.
70. On the balance of probabilities it seems to me that, following the fusion surgery on 7 January 2016 Mr Taylor would have had no capacity for work in the period 7 January 2016 to 8 April 2016.
71. I am satisfied that the applicant is entitled to be paid weekly payments of compensation for the period 7 January 2016 to 8 April 2 for 16 pursuant to section 41 of the 1987 Act.
72. The applicant submitted that the appropriate rate was the transitional amount prescribed by Schedule 6, Part 19H, Clause 2(1) to the 1987 Act. That submission was not opposed by the respondent. The transitional amount as at 7 January 2016 was \$993.70 per week. That amount was adjusted as at 1 April 2016 to the sum of \$1,006.90 per week.
73. I accept the applicant's submission as to the rate of weekly payments. The applicant is entitled to an award pursuant to section 41 of the 1987 Act providing for payment of weekly payments:
  - (a) from 7 January 2016 to 31 March 2016 in the sum of \$993.70 per week, and
  - (b) from 1 April 2016 to 8 April 2016 at the rate of \$1006.90 per week

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<sup>4</sup> Medical Assessment Certificate dated 8 November 2017 in proceedings 954/17