

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 4271/19
Applicant: Sangita Kumar
Respondent: Fairfield City Council
Date of Determination: 19 December 2019
Citation: [2019] NSWCC 412

The Commission determines:

1. The applicant suffered an injury within the meaning of Section 4 of the *Workers Compensation Act 1987* on 17 November 2018.
2. Employment was the main contributing factor to the aggravation, acceleration or exacerbation of the condition.
3. The applicant was totally unfit for work from 24 May 2018 until 4 November 2018.
4. The respondent is to pay the applicants reasonably incurred medical expenses.
5. The applicant has brought her claim within time.

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

E BEILBY
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 E BEILBY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Sangita Kumar (the applicant) was employed by Fairfield City Council (the respondent) as a full-time childcare assistant. She commenced employment there in 2009.
2. In the applicant's statement¹ she explains that she experienced pain and restriction around her left shoulder in a few months after commencing her employment. The applicant described it as an aching type of pain.
3. The applicant underwent a left shoulder ultrasound in April 2009.² The investigation notes:

"On the left side demonstrated a full thickness tear of essentially the entire width of the supraspinatus extending over 17mm."
4. The applicant consulted with Dr James Powell in 2010 as her condition was not improving, by that time she was experiencing pain in both shoulders.
5. The applicant consulted with Dr Chandra Dave³ in 2011 who diagnosed the applicant has having bilateral subacromial impingement of both shoulders and rotator cuff tendonitis.
6. Fortunately her symptoms improved and Ms Kumar was able to continue work without pain and restriction until November 2017.
7. In 2017, the applicant was transferred out of the pre-school room to the early learners and babies' room. The applicant explained in her statement that caring for babies and toddlers under three years of age required a significant amount of repetitive lifting which included changing nappies, setting up beds, packing beds, replacing beds, it was also necessary to bend and lift children and equipment throughout the day. In contrast in the pre-school room there was not nearly as much lifting.
8. On 17 November 2017⁴ the applicant was lifting a heavy male infant out of a cot. She experienced initial discomfort that subsided over a period and then developed into pain and numbness in the left shoulder, symptomology she said she had not experienced before.
9. The applicant says she spoke to her colleagues in the room identifying them as "Kian Mann" and "Nicky" and explained to them both that her shoulder was painful and she was having difficulty lifting. The applicant says that her colleagues kindly accommodated her in the next period so that she did not have to do as much lifting as she did previously. There is no evidence before me from Kian Mann or Nicky to dispute the applicants' evidence.
10. The applicant says in her statement⁵ that the pain did not go away so she sought treatment from her general practitioner Dr Kallan on 20 November 2017. Whilst the applicant was able to continue to work she avoided heavier lifting.

¹ Page 187 of the Application to Resolve a Dispute ("the Application") dated 27 February 2019

² At page 62 of the Reply

³ Respondents late documents page 66, report dated 28 July 2011

⁴ Par 30 of the applicant's statement

⁵ Par 4 of the applicant's statement

11. The applicant underwent an MRI scan on 3 January 2018⁶. The MRI scan disclosed there was a 15 mm full thickness tear of the supraspinatus with retraction by 13 to 14 mm. There was also a mild degree of muscle atrophy and there was a 14 mm intra-substance ganglion within the infraspinatus at the musculo-ligotendinosis junction. She also consulted with Dr Geoffrey Smith.
12. At the end of March 2018 the applicant observed her arm was becoming very stiff and at that stage she decided to make a claim for workers compensation benefits and for the costs of proposed surgery.
13. The applicant says that following the surgery that took place on 24 May 2018, she was totally incapacitated for work. She attempted to return to work on a part-time basis on 29 October 2018 and then full-time on 16 November 2018. The return to work on 29 October 2018 was short-lived as the respondent required medical certification that the applicant could perform her duties.
14. The applicant has also prepared a supplementary statement⁷. The statement addresses the history of injury. The applicant plainly rejects any suggestion that she has fabricated the history of injury on 17 November 2017 as described. The applicant confirms that she has consulted with Dr Powell in the past but states clearly that her shoulder condition improved and she had no problem in respect of the shoulder for five or six years before the 2017 incident.
15. So far as reporting injury, the applicant explains in paragraph 7 that she spoke to an Angela Morgan at work and was instructed to put down the date of injury as the date she went to the doctor.

ISSUES FOR DETERMINATION

16. The parties agree that the following issues remain in dispute:
 - (a) Whether the applicant suffered an injury within the meaning of s4 of the *Workers Compensation Act 1987* (the 1987 Act)?
 - (b) Whether employment was a substantial contributing factor to the alleged injury (s9A of the 1987 Act), or alternatively if the alleged injury was disease, or aggravation, acceleration or exacerbation of disease, where employment was the main contributing factor pursuant to s4B(2) of the 1987 Act?
 - (c) Is the applicant incapacitated for employment?
 - (d) Has the claim been made too late?

PROCEDURE BEFORE THE COMMISSION

17. The parties attended a Conciliation and then Arbitration on 28 October 2019. 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.

⁶ Page 16 of the Application

⁷ Page 188 of the Application

EVIDENCE

Documentary evidence

18. 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) Reply to the Application to Resolve a Dispute, and
 - (c) Application to Admit Late Documents from the respondent.

Oral evidence

19. There was no application to adduce oral evidence.

The evidence

20. I will now outline and discuss the medical evidence in this case.

Medical evidence

General practitioner's notes - discussed

21. The notes from the general practitioner have been helpfully annexed to the Application and provide some support for the applicant's report of injury in November 2017.⁸ The general practitioner's notes indicate the following histories:

"Recalls lifting a crying baby up. Maybe the reason for recurring shoulder pain this time. Left shoulder pain is discussed."⁹

And then further:

"Undecided about WorkCover. A few more weeks in the baby room and then she is posted in the bigger kids room at Fairfield Council Childcare Centre so she can get away with no lifting. Advise that Council called for rv as per her decision."

22. There are further entries regarding left shoulder symptomatology including 21 December 2017, 29 December 2017 and 4 January 2018. These entries support the applicant's allegation that she had increased pain following the events on 17 November 2017. Conversely there are no entries for the left shoulder symptomatology following the events in 2009 to 2011 until late 2017.

23. On 23 April 2018,¹⁰ the following history is obtained:

"pain left shoulder ongoing since 2012. Chronic. Recently increasing to the point she cannot function. And severe pains when working lifting babies in a childcare most recently."

24. Then on 27 April 2018, the following entry is found:

"Submitted workers compensation claim to manager. Sent home. No duties. Surgery in public hospital cancelled as emergency procedure booked."

⁸ General Practitioner's notes commence at page 76

⁹ 20 November 2017 page 76 the Application

¹⁰ Page 73 of the Application

25. On 8 May 2018, the notes indicate the applicant “had been experiencing pain in November 2017 in her shoulder... After she picked up a baby at childcare and felt numb in her left arm with more pain not getting better.” I observe that this is consistent with the applicant’s statement.
26. There are ongoing reports of symptomatology in the left shoulder but the next relevant entry is that of 26 October 2018. On that occasion the applicant and her son enquired about the clinical records in relation to shoulder problems and seeking in detail about what had been recorded in respect of the applicant’s long-term shoulder problems in particular since 2009 and then 2012.
27. Dr Kallan has also provided a report in respect of this matter dated 30 April 2018¹¹. The general practitioner observes that the applicant has had left sided shoulder pain in 2009 and intermittently since 2012. It is noted that the applicant has been able to undertake work functions with the use of anti-inflammatories. Dr Kallan’s report says that the applicant “suddenly felt severe pain” in November 2017. The doctor links the pain to ‘lifting babies’ in the workplace.

Other medical evidence - the experts

28. Dr Christopher Oates examined the applicant at the request of her solicitors on 4 October 2018¹². Dr Oates takes a history of the applicant’s employment with Fairfield Council since 2009. The applicant reported to Dr Oates that in mid-November 2017 she was lifting a heavy 11-month old male child when she felt some shoulder discomfort and numb feeling that seemed to subside. The applicant again attended to the baby and felt left shoulder numbness and discomfort but kept working. The applicant says she made a verbal report to the room’s leader and to co-workers.
29. Crucially in respect of the applicant’s past history, there was no reporting of any symptomatology or incidents in relation to the left shoulder. In particular, the doctor notes in respect of the left shoulder that there was “nil relevant to the left shoulder”.
30. The applicant reported that following shoulder surgery she now had less pain which she reported to be about 1 or 2 out of 10 on a visual analogue scale compared to 9 out of 10 before. Whilst the applicant did have some crepitus in her shoulder before surgery she now did not. Dr Oates was provided with pathology which included an ultrasound of the left shoulder dated 20 November 2017 and an MRI of the left shoulder dated 3 January 2018.
31. Dr Oates diagnosed the applicant as suffering from a full thickness rotator cuff tear affecting the supraspinatus component in the left shoulder. He opined that the incident, which occurred in mid-November 2017, was the substantial contributing factor to the right shoulder tear of the rotator cuff.
32. Dr Oates prepared a second report dated 6 March 2019¹³ after he had been provided with a report of Dr Kallan dated 27 November 2018 and also the report of Dr Powell dated 20 April 2010.
33. Crucially the information that Dr Oates now had was the treatment to the left shoulder provided by Dr Powell in 2010. The history that Dr Powell provided was that the applicant had developed gradual onset of left shoulder pain radiating into the arm that had developed similar symptoms in the right side.

¹¹ Pages 18 of the Application

¹² Page 1 of the Application

¹³ Page 9 of the Application

34. Dr Oates then understood it was Dr Powell's opinion that the applicant in 2010 had developed a spontaneous left supraspinatus tear and recommended that whilst the applicant could have surgery on the basis of the presence of the tear, he could not guarantee the outcome of such surgery. Dr Powell had advised that the natural history for the applicant's shoulders would be gradually increasing stiffness, pain and reduced use over the years.
35. Dr Oates also has a report from Dr Kallan, the general practitioner dated 27 November 2018, which reports attendance by the applicant on Dr Kallan's practice in May 2010 with left shoulder pain.
36. In light of the history provided to Dr Oates, he appears to resile from his opinion from the two lifting incidents that occurred in mid-2017 caused a full thickness rotator cuff tear of the left shoulder of symptoms and an aggravation of a pre-existing rotator cuff tear of the left shoulder.
37. Dr Oates opined that he considered it is more likely than not that the nature and conditions of employment as a childcare assistant from 2009 represented the main contributing factor to the development of a rotator cuff tear in the form of a degenerative disease condition rather than acute traumatic injury, which subsequently became asymptomatic and quiescent, until it was re-aggravated and exacerbated by the subject incidents of lifting the male infant on two occasions on the same day in mid-November 2017.
38. Dr Anthony Smith examined the applicant on 23 May 2018¹⁴ at the request of the respondent's insurer. Whilst applicant described the incident in November 2017 she once again did not provide any other relevant past medical history.
39. Dr Smith opined that the applicant had rotator cuff disease with a supraspinatus tear which had been confirmed on ultrasound and MRI. Dr Smith formed the view that the pathology indicated in the radiology predated the onset of the applicant's symptoms. Dr Smith was concerned that the symptomology of pain was coming from the neck to the shoulder tip with neck movement. Dr Smith was cautious about the outcome of proposed surgical intervention as the result was difficult to predict.
40. Dr Kallan is the applicant's treating general practitioner and has prepared a report, which is annexed at page 23 of the Application. Dr Kallan describes the applicant as having a reoccurrence of her shoulder pain. He notes that restricted movements and symptoms seem to be triggered by lifting a baby at the workplace.
41. The applicant's treating surgeon is Dr Geoff Smith. The applicant consulted with Dr Smith in February 2018 after referral from her general practitioner Dr Kallan. Dr Smith recommended surgery to repair the tear for both symptomatic relief and prevention of tear extension.
42. Dr Smith also took a history of the onset of pain in respect of working in the babies' room. Dr Smith at page 10 observes:

"Insidious onset of left shoulder pain since November ... found particular troubles with doing work in childcare involved with lifting babies. Because of her shoulder she was transferred to an older age group."
43. Dr James Powell treated the applicant in respect of her shoulder condition in April 2010. Helpfully there is a report from him dated 20 April 2010¹⁵ He took a history at that time that about seven months before their consultation the applicant had started to develop pain in the superior aspect of the left shoulder which gradually increased in severity and radiated to the proximal arm. Movements such as lifting aggravated the pain. Dr Powell indicated at that stage operative repair would be considered generally on the basis of pain rather than the

¹⁴ Page 8 of the Reply

¹⁵ Page 39 of the Application

presence of a tear itself. He also observed that the natural history for shoulders was they would gradually increase in stiffness with episodes of pain and reduced use as the years go by.

44. The applicant consulted with Dr Chandra Dave in July 2011.¹⁶ Dr Dave diagnosed the applicant as suffering from bilateral subacromial impingement of shoulders with rotator cuff tendonitis. He suggested treatment be undertaken by way of ultrasound controlled injections.

FINDINGS AND REASONS

Factual findings

45. One of the threshold issues that needs to be determined is whether an event happened on 17 December 2018 or not. It was the respondent's contention at arbitration that the injurious event that allegedly occurred on that day was fabricated.
46. In support of its submission the respondent identified the failure to give an adequate history (or indeed any history) of previous symptomatology and investigation to Dr Oats, Dr Jeffrey Smith and Dr Anthony Smith. Further compounding this failure to give a proper history were entries in the general practitioner's clinical notes enquiring as to the past history recorded in respect of the left shoulder (26 October 2018).
47. In anticipation of such a submission the applicant put on a further statement that deals with the failure to give the correct history to these doctors. In that statement the applicant discloses that she did indeed see Dr Powell for treatment. The applicant says that her shoulder condition improved she had no problem with her shoulder in the five or six years before the events in 2017.
48. It is then submitted by the respondent that because the applicant has given such a poor factual history to doctors that the applicant's evidence needs to be considered in light of that falsehood. That is, where the applicant's evidence is not specifically corroborated it should not be accepted.
49. The applicants claim form clearly has the incorrect date of 20 November 2018 not 17 November 2018. The applicant explains in her statement that she was directed to put this date down by Angela Morgan, as this was the date she sought medical treatment in respect of the alleged injury.
50. There is a statement from Angela Morgan, Director of the Bonnyrigg Early Learning Centre dated 29 August 2019. Miss Morgan indicates that she only gave instruction to Ms Kumar in regard to a Notification of Injury form to be descriptive and detailed as possible. She said this on the basis that she was not aware of the applicant ever sustaining an injury in the workplace. She denies instructing the applicant to insert the date of 20 November 2017 because she does not know of any such injury occurring on that date or any other date.
51. I have considered the submission made by the respondent with careful consideration. I am unwilling to accept that the events on 17 December 2018 are a fabrication as submitted. The reasons I declined to make a factual finding as sought are outlined below.
52. The first reason I reject this submission is that the applicant has given a consistent history to many doctors of the events in November 2018. The history is consistent regarding the lifting of a child which (would be a regular event in her employment) and experiencing symptomatology. The history is consistent as to that event as provided to Dr Oates, Dr Geoff Smith, Dr Anthony Smith and also to the applicant's general practitioner.

¹⁶ Page 66 of the Reply

53. The applicant states that the history in the general practitioner's notes is consistent with the applicant's recollection as to how her condition came on. That is, she has moved into the babies' room and experienced symptomatology when lifting a baby.
54. I found this to be indicative and supportive of a factual finding that there was some type of injurious event on 17 December 2018.
55. Secondly, there is no history of ongoing symptomatology between the years 2011 to 2017, that is the treating notes from the general practitioner support the applicant's contention that she had no ongoing treatment or complaint in respect of her shoulder between 2011 to November 2017. Then we have an attendance upon the general practitioner on 20 November 2017 with a consistent history being provided. Dr Oates all the relevant information when he prepares his second opinion and I find his opinion detailed and well reasoned.
56. I place little weight upon the factual dispute between the applicant and Ms Morgan. I do not think that it is determinative of events. Simply put, there appears to be some misunderstanding between them and nothing really turns upon the dispute to my mind.
57. In making a finding of fact that an event occurred on 17 December 2018 I take into account the applicant's attendance upon her general practitioner to ascertain what history there was of a previous injury to her right shoulder before the alleged events. I can understand the disquiet the respondent would have in respect of that attendance, however I am not of the view that the attendance seeking information is persuasive enough to ground a finding of fact in respect of fabrication of evidence as to the event on 17 November 2019. In any event there was a significant hiatus in complaint between the two periods.
58. I therefore find the event on 17 November 2018 where the applicant lifted a child and felt the onset of symptomatology was not fabricated.
59. I will now proceed to discuss other matters in this case having dealt with this factual issue.

Was there an 'Injury' on 17 November 2018?

60. Having found an event occurred on 17 November 2018 does not necessarily lead to a finding the applicant sustained an injury pursuant to the 1987 Act.
61. Section 4 of the 1987 Act provides definition for "injury" as following:

"4. DEFINITION OF 'INJURY'

(cf former s 6 (1))

In this Act—

'injury' -

- (a) means personal 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."

62. Whether a worker has received a personal injury pursuant to s4a requires a determination of whether the worker has suffered a personal injury arising out of or in the course of employment. The phrase "arising out of" necessarily involves a causative element. In determining whether the employment has caused the injury the Commission should adopt a common sense approach as seen in cases such as *Badawi*¹⁷.
63. Deputy President Roche in *AP v NSW Police Force* [2013] NSWCCPD 11 observed that for a worker to receive a personal injury, it is necessary that the events complained of had physiological effects (*Yates v South Kirkby Collieries Ltd* [1910] 2 KB 538). Deputy President Roche also provided guidance that whether a worker has suffered a physiological effect would depend on the nature and severity of the symptoms. Such an effect may be experienced as a result of a specific event or develop over time to multiple events.
64. In *Australian Conveyor Engineering Pty Ltd v Mecha Engineering Pty Ltd*¹⁸ the Court of Appeal considered the nature of an injury in circumstances where the evidence suggested there had been an aggravation of degenerative changes. In that decision Justice Powell discussed the legislative history of s4 of the 1987 Act and the High Court decision in *Zickar v MGH Plastic Industrie*¹⁹ and relevantly said that

"The effect of a decision of the majority is, thus, first, that if there can be identified an incident which involves either by being itself the change, or by bringing about the change, a physical change in a worker, then, even though that change may be no more than the culmination of a progressive disease, and not the product of some external force, that damage is to be regarded as an 'injury' within the meaning of para (a) of the definition of 'injury' in Sec. 4 of the Act ... In the present case, the medical evidence which was before the Trial Judge was sufficient to demonstrate that, even before the fall which he sustained on 11 February 1992, the worker's lumbosacral spine had begun to degenerate ... This notwithstanding, the evidence of the worker, which was accepted by the Trial Judge, was that, prior to the fall, his back condition was asymptomatic.

The worker's evidence, which was supported by that of his general practitioner, was that, following his fall, he began to suffer pain in his back and neck, which pain grew worse and led to him ceasing work for a period ...

There thus having been an identifiable incident, which incident appears to have caused, at least, ligamentous injury to the lumbar spine segment, the sequelae of which involved pain, which was, for a time disabling, and which, in any event, has continued over the years, the decision of the majority in *Zickar v. MGH Plastic Industries Pty Ltd* would seem to dictate that, even if it be the fact that the result of the incident was merely that the worker's pre-existing back condition was rendered symptomatic, he was nonetheless to be regarded as having sustained an injury within the meaning of paragraph (a) of the definition of 'injury'"

¹⁷ *Badawi v Nexon Asia Pacific Pty Ltd t/as Commander Australia Pty Ltd* [2009] NSWCA 324

¹⁸ *Australian Conveyor Engineering Pty Ltd v Mecha Engineering Pty Ltd* [1998] NSW CC51; (1998) 45 NSWLR 606

¹⁹ *Zickar v MGH Plastic Industries Pty Ltd* [1996] HCA 31

65. Applying the above guidance to the factual matrix in this case it is quite clear that the applicant indeed had a pre-existing problem with her left shoulder in 2009 and 2010. The ultrasound dated 30 April 2009 showed a 17 mm tear, which is extremely similar to the MRI undertaken in 2018. This similarity led to a submission being made by Mr Macken to the extent that the tear being so similar to the applicant's tear 20011 that there was no injury. Mr Macken submitted that pathology is different to an increase in symptomatology.
66. After considering the evidence in this case and the authority referred to in paragraphs 62 to 65 above, I accept that the applicant had an increase in symptomatology following the events on 17 November 2017. She attended upon her general practitioner and sought specialist consultation and investigation. I accept as a finding of fact that her pain levels increased substantially arising from the events on 17 November 2018. This then leads to a finding of injury, as there has been a change in the nature and severity of symptoms (which now required surgery).
67. The nature of the injury given my observations of the applicant's previous MRI in 2011 leads to a finding describing the injury as to an exacerbation or aggravation of an underlying condition. The underlying condition is that as was disclosed in the MRI in 2011.
68. I am therefore satisfied on the balance of probabilities, that the applicant's condition in her shoulder was exacerbated and/or aggravated by the incident in the workplace, specifically when she had to lift a small child on 17 November.
69. The applicant obviously needs to satisfy the test of main contributing factor to the "aggravation, acceleration, deterioration or exacerbation" as required by section 4(b)(ii) of the 1987 Act.
70. To this extent I follow the analysis of my brother Arbitrator Harris in *Goodson*²⁰. That is employment has to be the main contributing factor to the injury, that is the aggravation, acceleration, exacerbation or deterioration of the disease. Employment does not need to be the main factor to the overall pathology because if it was then the concluding words of section 4(b) (ii) would be to the overall pathology and/or the disease, and not to the aggravation, acceleration, exacerbation or deterioration of the disease. Given that the applicant had a long period where there is no evidence of her shoulder condition being symptomatic and after the events on 17 November her shoulder becoming significantly more symptomatic, it is easy for me to find that employment was the main contributing factor to the aggravation, acceleration, deterioration or exacerbation of her condition.

What is the incapacity?

71. At part 5.1 of the application the applicant claims weekly compensation in the sum of \$1,200 per week from 24 May 2018 to 23 August 2018 and then from 24 August 2018 to 16 November 2018 in the sum of \$896.70 per week. It is essentially a 'closed period' claim.
72. The parties were able to agree to a PIAWE figure of \$891.32 at Arbitration.
73. Submissions at the Arbitration were understandably based on the central dispute of injury. I therefore need to focus upon the evidentiary documents before me so far as incapacity is concerned.
74. The certifications as to capacity that I can find in the application from the general practitioner indicate that an ability to do the following:

- (a) totally unfit to work from 1 June 2018 to 31st of July 2018²¹;

²⁰ *Melissa Goodson v Wingecarribee Shire Council* 30 August 2019, matter number WCC 2097/19

²¹ Page 34 of the Application

- (b) totally unfit for work from 30 July 2018 and 31 August 2018 and
- (c) totally unfit for work from 1 September 2018 to 30 September 2018.

75. Following this date, Dr Kallan said that the applicant had no restrictions to work other than being part-time for 5 November 2018 to 9 November 2018 with alternative daily duties so that she could recover from the surgery. Dr Kallan then goes on to say that the applicant had informed him that she had performed full-time unrestricted eight-hour work at the centre on 5 November 2018.
76. In addition Dr Geoff Smith certified the applicant as being unfit for work from 6 June 2018 to 3 July 2018²² and also from 3 July 2018 to 14 August 2018²³ and then from 14 August 2018 to 14 September 2018. Dr Smith in a further report dated 13 November 2018 opines the applicant is fit for full duties from 14 November 2018.
77. The respondent did make a submission referring to an entry in general practitioner's notes on 16 May 2018 when the applicant was caring for her husband and requested a carer's certificate.
78. The respondent asked for an inference that if one were able to care for a husband, caring for small infants would be relatively inconsequential. I decline to make such an inference. I am unaware of the nature of the husband's illness and therefore cannot agree that caring for a partner would necessarily involve heavy lifting or lifting of any type. It may only involve periodical observation for instance.
79. No submissions were made on behalf the respondent that if the applicant were successful in respect of the primary issue so far as it concerned injury that following the surgery that incapacity would not be compensable.
80. Doing the best that I can on the limited information that I have it appears to me that the applicant does have certification for being unfit for work and should be compensated in accordance with that.
81. The applicant underwent surgery on 24 May 2018 and any incapacity for work should commence as of that day. The applicant certainly would have been unable to perform any duties during that period. Dr Kallan opined that the applicant was unfit to work until to 30 September 2018. This is evidence of the applicant's total incapacity.
82. I am not assisted by any evidence from the applicant directly in respect of incapacity and what her symptomatology was during the claimed period however I accept that the general practitioner would have been in a good position to be able to observe the applicant to provide the appropriate certification. I observe that this certification is consistent with that of the treating surgeon.
83. I therefore find the applicant was incapacitated for work from 24 May 2018 to 4 November 2018 at which point where Dr Kallan opined that the applicant will be fit to return to work, though be it on restricted duties. Further it is the applicant's own evidence that she was able to perform a full day as at 5 November 2018. This is also consistent with the opinion of Dr Oates on 8 October 2019 where he opined that the applicant would be fit to work on a trial basis in approximately two to three weeks²⁴. I direct the respondent to pay compensation accordingly.

²² Page 42 of the Application

²³ Page 44 of the Application

²⁴ Page 5 of the Application

Other matters

84. The respondent in its section 78 notice raises the issue of the late making of the claim. Whilst no submissions were made to in support of such a defence, the defence was not formally abandoned. To the extent that the defence applies, I find that I accept that the applicant told her team leader about the incident, there being no evidence to the contrary. Indeed the injury as being found provides a deemed date of injury in May 2018 so there is no substantive evidence to allow me to find that there has been a late claim made in any event.
85. The parties agreed that if the applicant was successful in her claim that there was to a general order made pursuant to s60 of the 1987 Act.

SUMMARY

86. The applicant suffered an injury within the meaning of Section 4 of the 1987 Act on 17 November 2017.
87. Employment was the main contributing factor to the aggravation, acceleration or exacerbation of the condition
88. The applicant was totally unfit for work from 24 May 2018 until 4 November 2018.
89. The respondent is to pay the applicant's reasonably incurred medical expenses.
90. The applicant has brought her claim within time.