WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **3278/19**
Applicant: **Ann Elizabeth Bath**
Respondent: **Corowa RSL Limited**
Date of Determination: **15 October 2019**
Citation: **[2019] NSWWCC 333**

The Commission determines:

1. The applicant did not suffer a consequential injury to the lumbar spine as a result of the accepted injury to the left ankle on 4 August 2011.

2. The applicant suffered an injury to her lumbar spine as a result of the nature and conditions of her employment with the respondent on 6 December 2018 (deemed) within the meaning of section 4(b)(ii) of the *Workers Compensation Act 1987*, to which employment was the main contributing factor.

3. The applicant also suffered a personal injury to her lumbar spine in the form of a L4/5 foraminal broad-based disc protrusion arising out of or in the course of her employment with the respondent on 6 December 2018 within the meaning of section 4(a) of the *Workers Compensation Act 1987* to which employment was a substantial contributing factor.

4. The applicant has had no current work capacity within the meaning of section 32A of the *Workers Compensation Act 1987* from 7 December 2018.

The Commission orders:

5. Award for the respondent in relation to the alleged consequential injury to the lumbar spine as a result of the accepted injury to the left ankle on 4 August 2011.

6. The respondent, through its relevant insurer, Club Employers Mutual, is to pay the applicant weekly compensation in respect of the injury to the lumbar spine on 6 December 2018 as follows:

    (a) $756.07 per week from 7 December 2018 to 8 March 2019 pursuant to section 36(1) of the *Workers Compensation Act 1987*.

    (b) $636.69 per week from 9 March 2019 to date pursuant to section 37(1) of the *Workers Compensation Act 1987*.

    (c) Such weekly payments to continue in accordance with the provisions of the *Workers Compensation Act 1987*.

7. The respondent, through its relevant insurer, Club Employers Mutual, is to pay the applicant's reasonably necessary medical and related expenses as a result of the injury to the lumbar spine on 6 December 2018 pursuant to section 60 of the *Workers Compensation Act 1987*.

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

Anthony Scarcella
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 OFANTHONY SCARCELLA, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. The applicant, Ms Ann Elizabeth Bath, is a 53-year-old woman who was employed on a permanent part-time basis by Corowa RSL Limited (the respondent) as a bar attendant.

2. On 4 August 2011, at the respondent's premises, Ms Bath alleges that, whilst stepping down off a stage, she rolled her left ankle when she put her foot down on the metal edging of the dance floor and injured it. She completed an Employee Injury Notification Form on 4 August 2011[1] and made a claim for benefits on CGU Workers Compensation (NSW) Limited (CGU) under the *Workers Compensation Act 1987* (the 1987 Act). She was paid benefits by CGU.[2] She underwent a left ankle reconstruction and thereafter, has continued to experience pain and discomfort in her left ankle. She returned to her pre-injury duties with the respondent in about July 2012.

3. On or about 6 December 2018, at the respondent's premises, Ms Bath alleges that during a five hour shift, she was performing heavy manual work including, but not limited to, moving full kegs of beer weighing about 50 kg; lifting and carrying cartons of beer; lifting heavy wine casks; moving heavy bar stools; and carrying large buckets of water. As a result of such heavy manual work, she injured her lower back.

4. On 14 December 2018, Ms Bath completed an Injured Person Lodgment Form[3] and made a claim for benefits on Club Employers Mutual (CEM) under the 1987 Act.

5. On 13 February 2019, CEM issued a Dispute Notice pursuant to section 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act)[4] denying injury under sections 4 and 9A of the 1987 Act and any entitlement to reasonably necessary medical and related treatment expenses under sections 59 and 60 of the 1987 Act. The relevant reason for the declinature was stated to be that Ms Bath's altered gait caused by her 2011 left ankle injury was responsible for her back injury.

6. On 7 March 2019, Ms Bath lodged a recurrence claim with AAI Limited t/as GIO (GIO)[5] as GIO was now handling the 4 August 2011 injury claim in place of CGU.

7. On 2 April 2019, GIO issued a Dispute Notice pursuant to section 78 of the 1998 Act denying that Ms Bath's lumbar spine condition was consequential to her left ankle injury.[6]

8. On 29 April 2019, CEM issued a further Dispute Notice pursuant to section 78 of the 1998 Act denying injury under sections 4(a), 9A, 4(b)(i) and 4(b)(ii) of the 1987 Act and any entitlement to weekly benefits and reasonably necessary medical and related treatment expenses under sections 33, 59 and 60 of the 1987 Act.[7]

9. On 5 June 2019, Ms Bath sought a review of the CEM Dispute Notice dated 29 April 2019.[8]

[1] CEM Reply at pages 176-177
[2] GIO Application to Admit Late Documents dated 14 August 2019 at page 3
[3] Application for Determination at pages 11-12
[4] ARD at pages 24-31
[5] ARD at pages 14-15
[6] ARD at pages 32-41
[7] ARD at pages 42-49
[8] ARD at pages 71-72

10. On 24 June 2019, CEM issued a further Dispute Notice pursuant to sections 78 and 287A of the 1998 Act denying injury under sections 4, 9A, 15 and 16 of the 1987 Act and any entitlement to weekly benefits and reasonably necessary medical and related treatment expenses under sections 33, 59 and 60 of the 1987 Act.[9]

11. The Application to Resolve a Dispute (ARD) dated 2 July 2019 was registered in the Commission.

12. The Reply dated 24 July 2019 lodged in the interests of CEM was received in the Commission.

13. The Reply dated 24 July 2019 lodged in the interests of GIO was received in the Commission.

ISSUES FOR DETERMINATION

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

    (a) Whether Ms Bath suffered a consequential injury to her lumbar spine as a result of the accepted left ankle injury on 4 August 2011.

    (b) Whether Ms Bath suffered an injury to her lumbar spine on 6 December 2018 within the meaning of sections 4(a) and 9A of the 1987 Act.

    (c) Whether Ms Bath suffered an aggravation, acceleration, exacerbation or deterioration of any disease process to her lumbar spine on 6 December 2018 within the meaning of section 4(b)(ii) of the 1987 Act.

    (d) Whether Ms Bath is entitled to weekly payments for total or partial incapacity within the meaning of section 33 of the 1987 Act arising from her alleged lumbar spine injury and/or left ankle injury and whether she had a current work capacity to work in suitable employment within the meaning of section 32A of the 1987 Act during the period claimed.

    (e) Whether Ms Bath's medical and related treatment expenses were reasonably necessary as a result of injury within the meaning of sections 59 and 60 of the 1987 Act.

Matters previously notified as disputed

15. The issues in dispute were notified in CEM's Dispute Notices pursuant to section 78 of the 1998 Act dated 13 February 2019, 29 April 2019 and 24 June 2019.

16. The issues in dispute were notified in GIO's Dispute Notice pursuant to section 78 of the 1998 Act dated 2 April 2019 and with the leave of the Commission, the matters notified in Part 3 of the GIO Reply dated 24 July 2019 were notified as being in dispute.

Matters not previously notified

17. No other issues were raised.

[9] ARD at pages 50-58

PROCEDURE BEFORE THE COMMISSION

18. The parties attended a conciliation conference/arbitration in Albury on 3 September 2019. Mr Simon Hunt of counsel appeared for Ms Bath; Mr Lachlan Robison of counsel appeared for the respondent in the interests of CEM and Mr Dewashisha Adhikary of counsel appeared for the respondent in the interests of GIO.
19. During the conciliation phase the parties agreed as follows:

    (a) In relation to Ms Bath's left ankle injury, the date of injury is 4 August 2011.

    (b) The injury sustained to Ms Bath's left ankle on 4 August 2011 is not disputed.

    (c) In relation to Ms Bath's lumbar spine injury, the date of injury is on or about 6 December 2018.

    (d) In relation to the injury on or about 6 December 2018, Ms Bath's relevant pre-injury earnings (PIAWE) are $795.86.

    (e) In relation to the 4 August 2011 injury, Ms Bath's current weekly earnings are $476.17.

    (f) If Ms Bath's claim is determined in her favour, then a general order for reasonably necessary medical and related treatment expenses as a result of injury within the meaning of section 60 of the 1987 Act should be made.

    (g) No oral evidence is to be called.

20. 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.

EVIDENCE

Documentary evidence

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

    (a) ARD dated 2 July 2019 and attached documents;

    (b) CEM Reply dated 24 July 2019 and attached documents;

    (c) GIO Reply dated 24 July 2019 and attached documents;

    (d) GIO's Application to Admit Late Documents dated 14 August 2019 and attached documents;

    (e) Applicant's Application to Admit Late Documents dated 27 August 2019 and attached documents;

    (f) CEM's Application to Admit Late Documents dated 27 August 2019 and attached documents, and

    (g) Applicant's Application to Admit Late Documents dated 2 September 2019 and attached documents.

Oral evidence

22. At the teleconference on 31 July 2019, the applicant was granted leave to cross-examine the respondent's witnesses, Ms Karen Lee Young, Ms Helen Elizabeth King and Ms Raquel Maria Lavis, in the event that the respondent sought to rely on signed statements from the abovenamed, which were not yet attached to the Replies. Signed statements were eventually attached to CEM's Application to Admit Late Documents dated 27 August 2018 and were not objected to by the applicant or GIO.

23. At the conciliation/arbitration, neither party sought leave to adduce oral evidence from or to cross-examine any witness.

AN ANALYSIS OF THE EVIDENCE

Ms Ann Elizabeth Bath

24. In evidence, there is a statement by Ms Ann Elizabeth Bath dated 29 April 2019.[10] I will now refer to the relevant parts of Ms Bath's statement.

25. In relation to her education, Ms Bath stated that she completed Year 10 at Corowa High School and thereafter, undertook a secretarial course. Later, she completed a Certificate III in Hospitality as well as attaining a Responsible Service of Alcohol Certificate, Responsible Conduct of Gambling Certificate and Senior First Aid Certificate through the respondent.

26. Ms Bath stated that she had always worked in the hospitality industry in between raising her children and afterwards. On or about 4 April 2008, she commenced work with the respondent as a bar attendant and has worked there ever since.

27. Ms Bath stated that on or about 5 August 2011 (the parties agreed that the correct date was 4 August 2011), she stepped down off a stage at the respondent's premises, rolled her left ankle and tore ligaments. As a result of this incident, Dr Michael Falkenberg carried out a left ankle reconstruction in or about March 2012. Ms Bath was in a cast for about three months following the surgical procedure. The cast was removed in or about June 2012 and ever since, she has walked with a limp and continues to suffer from pain and discomfort in her left ankle. After the cast was removed, she underwent physiotherapy for the next 12 months but "the ankle never really came good."[11]

28. Ms Bath went on to describe her experience after left ankle surgery as follows:

> "I put up with the pain for the next 6 or so years. Because I was walking with a limp, I usually got some pain in my lower back. The pain in my lower back was localised to my lower back and it did not radiate down my legs. I think the ankle injury gave me an altered walking gait which then caused back pain because I was walking funny. In order to assist with the localised back pain, I just took Panadol or Panadol Osteo. The pain in my lower back that I was experiencing after the ankle injury never prevented me from working. Sometimes I would have the odd day off due to pain in my lower back and I would see the chiropractor. After seeing my chiropractor, I was fine and the back pain had resided [sic] enough so that I could go back to work and do my usual duties. I also suffered with pain and discomfort in my left ankle but it did not stop me making a full return to my work and my employer did not have to modify my duties or provide me with suitable duties because I was able to return to my full pre-injury employment after I had the ankle surgery in 2012."[12]

[10] ARD at pages 1-9
[11] ARD at page 2 at [15]
[12] ARD at page 3 at [18]

29. Ms Bath summarised the effect of her left ankle injury in the following terms:

> "I soldiered on and I continued to work in my pre-injury capacity and I simply put up with the pain."[13]

30. Prior to her left ankle injury, Ms Bath usually consulted a general practitioner at the Corowa Medical Centre. Since her left ankle injury, she has continued to consult Dr Heinz Deiter of the same medical centre.

31. On or about 6 December 2018, Ms Bath commenced a five hour shift at the respondent's premises at about 11.00 am, during which time she stated that she performed "very heavy and manual work."[14] Ms Bath's description of such work may be summarised as follows:

    (a) Lifting and carrying cartons of beer to the refrigerator and then placing them in the refrigerator.

    (b) Lifting and carrying cartons of beer from the storeroom into the bar area one at a time and then removing the beer from the cartons and stacking the beer away.

    (c) Lifting and carrying 20 kg wine casks from the storeroom into the bar area and then lifting them to chest and neck height to place them into the refrigerators.

    (d) Moving a heavy table and a couple of heavy stools weighing between 15 kg and 20 kg in the club area in order to put them back in their proper places.

    (e) Carrying big buckets of water used for cleaning duties.

    (f) Wrestling beer kegs in the cool room into position by manually pushing and pulling them.

32. Ms Bath recalled that the manoeuvring of two heavy beer kegs took place towards the end of her shift between 3.00 pm and 4.00 pm on 6 December 2018. She described her handling of the beer kegs in the following terms:

> " … I walked from the bar area around to the cool room and unhooked the empty kegs. I remember it was either Carlton Dry or Carlton Draught. I unhooked the keg from the line and dragged the empty keg out of the way. Then I grabbed hold of a full keg and I manually pushed that keg back into the position where I had just removed the empty keg. I then removed another empty keg which could have been Carlton Dry or Carlton Draught and pulled it out of the way, and then I grabbed another full keg and I had to push it back into position. Moving these kegs is a difficult job as they weigh around 50 kg or more. I don't know exactly how much they weigh but they are so heavy that I could not lift them off the ground but simply had to wrestle them around into position by pulling on them and pushing them into position."[15]

33. Ms Bath described having "a fair bit of back pain"[16] once she arrived home after completing her shift on 6 December 2018. On the following day, she described the back pain as "terrible"[17] and stated:

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[13] ARD at page 3 at [20]
[14] ARD at page 3 at [24]
[15] ARD at page 4 at [28]
[16] ARD at page 5 at [30]
[17] ARD at page 5 at [31]

> " … This pain was more than what I usually suffer and this day I had a shooting and stabbing pain going from my lower back into my left buttock and down my left leg. The pain was like someone was stabbing me in the lower back and then shooting electricity down my left leg and left buttock and the pain would get to my left calf muscle and then it would feel like someone was stabbing me in the left calf muscle. I had never ever felt pain like this before. I had always had a slight and dull pain in my lower back after a shift but I never had this sharp, shooting pain that was running from my lower back into my left leg."[18]

34. Ms Bath stated that she consulted Dr Daniel Lewis, Chiropractor on or about 7 December 2018, who recommended that she return for further consultation after undergoing an x-ray. Following her session with the chiropractor, the pain failed to abate. She tried to rest but if she sat for too long or walked around for too long, the sharp and shooting pain would return. She took pain relieving medication, but it provided no relief from the pain. She stated:

> " … I was worried that I had done something terrible to my lower back and I was a bit unsure of why I was in so much pain."[19]

35. Ms Bath stated that she was unable to return to work for the respondent on her next shift, namely, on 10 December 2018. She reported her injury to the respondent and advised that her back condition may have been due to the way she was walking because of her left ankle injury.

36. On or about 10 December 2018, Ms Bath underwent an x-ray of her lower back and returned to consult Dr Lewis on the same day. Dr Lewis explained that she had some problems with the discs in her lower back; recommended pain relieving medication and the application of ice packs. Dr Lewis also referred Ms Bath for an MRI scan of her lower back, which she underwent on or about 18 December 2018.

37. Ms Bath was unable to obtain an appointment with her general practitioner, Dr Deiter until about 27 December 2018. She provided Dr Deiter with the results of her lower back x-rays and MRI scan. Dr Deiter initially opined that she had suffered a muscle strain in her lower back. Ms Bath questioned Dr Deiter as to whether it might be related to her left ankle injury. Dr Deiter responded that it may have, but he also mentioned that it may have been caused by the heavy lifting she had performed on her shift at work on 6 December 2018. Dr Deiter referred her for a CT guided steroid injection into her lower back.

38. Ms Bath underwent a CT guided steroid injection in her lower back in January 2019. She had endeavoured to obtain treatment for her lower back and lodged a claim with CEM but CEM advised her to submit a recurrence claim to GIO.

39. Ms Bath has continued to receive conservative treatment to her lower back. Dr Deiter recommended physiotherapy and home exercises. However, the sharp and shooting pain in her lower back, radiating down her left buttock and into her left leg is not improving. She requested a referral to a specialist, but because CEM and GIO have each declined her claim and each allege that the other is responsible, such consultation has not yet taken place as she cannot afford to pay for it out of her own pocket. She has used all her sick leave entitlements with the respondent.

[18] ARD at page 5 at [31]
[19] ARD at page 5 at [33]

40. Ms Bath stated that she did not believe that she could currently perform her pre-injury duties because:

> " … The pain in my lower back and the radiculopathy that I experience in my left leg would prevent me from lifting and carrying cartons of beer, casks of wine, and I would find it extremely difficult to even move a full keg more than 2 cm. My injury prevents me from push, pull and lift movements and I find it very difficult to stand or sit in one place for too long and I have to get up and walk around as necessary to alleviate the pain."[20]

41. Ms Bath stated that currently pain is preventing her from working and impacts on her everyday life. The pain is a constant stabbing pain with a shooting electric shock down her left leg. She also experiences numbness in the left leg. She experiences difficulty sleeping, which makes her tired and irritable. She finds it difficult to perform any physical movements including pushing, pulling, lifting, walking for prolonged periods, kneeling and generally moving around.

42. Ms Bath stated that:

> "I really need to see a specialist so that I can get the treatment I need and get back to work. I am keen to get back to work just like I did last time, however, Club Employers Mutual and GIO seem to be passing the buck."[21]

43. Ms Bath concluded her evidentiary statement by saying:

> "I just wish this never happened and I wish I could go back to work."[22]

44. In evidence, there is a supplementary statement by Ms Ann Elizabeth Bath dated 29 August 2019.[23] The supplementary statement principally responds to the evidentiary statements by the respondent's employees, Ms Raquel Maria Lavis, Ms Karen Lee Young and Ms Helen Elizabeth King. As a matter of convenience, I will refer to the relevant parts of the comments in Ms Bath's supplementary statement when analysing the relevant parts of the statements of Ms Lavis, Ms Young and Ms King.

Ms Raquel Maria Lavis

45. In evidence, there is a statement by Ms Raquel Maria Lavis dated 23 July 2019.[24] I will now refer to the relevant parts of Ms Lavis' statement.

46. Ms Lavis stated that she has been employed by the respondent since July 2011 and has known Ms Bath since then. Ms Lavis is the respondent's Human Resources Manager.

47. Ms Lavis confirmed that Ms Bath is employed by the respondent as a bar attendant on a permanent part-time basis. She also confirmed that Ms Bath commenced employment with the respondent on 4 April 2008.

[20] ARD at page 8 at [52]
[21] ARD at page 9 at [60]
[22] ARD at page 9 at [61]
[23] Applicant's Application to Admit Late Documents dated 2 September 2019 at pages 1-14
[24] CEM Application to Admit Late Documents dated 27 August 2019 at pages 15-26

48. Ms Lavis described Ms Bath's duties to include serving patrons, money handling, TAB, operating the cashbox serving people from poker machine wins, Keno service and making coffees and sandwiches in the coffee shop. By way of response, in her supplementary statement dated 29 August 2019, Ms Bath agreed with Ms Lavis' summary of her duties but added that, in addition to such tasks, she also stocked the refrigerators with boxes and/or casks of wine; changed kegs in the cool room when the kegs ran out of beer and the duty manager was unavailable; moved and straightened furniture when moved around by patrons; tidied up the poker machine area by moving poker machine barstools back into place; collected dirty glasses and stacked them in the dishwasher on large trays; stacked dishes and arranged for glasses and dishes to be cleaned and moved them in and out of the dishwasher.[25] She further stated that there were 200 poker machine barstools at the respondent's club which, at the end of each nightshift, had to be moved by bar attendants into the middle of each aisle to enable the clearance staff to empty poker machines early the following morning.[26] Ms Bath stated that, on 6 December 2018, the duty manager, Karen Young, was unavailable to change the two beer kegs; so, she had to do it.[27]

49. Ms Lavis described the respondent's premises as that of an RSL club with a bowling green, bar, food area, bistro, auditorium, function rooms, a squash court and 200 poker machines.

50. Ms Lavis stated that there were no training records on file in terms of Ms Bath's role and that she believed she mainly received on-the-job training and coffee training. She noted that Ms Bath had completed a Certificate III in Hospitality through the respondent and that an induction checklist was completed on 3 April 2008. By way of response, in her supplementary statement dated 29 August 2019, Ms Bath added that whilst employed by the respondent, she had also completed a barista training course at Wodonga TAFE and the Carlton Draught Beer Academy Fundamentals Course[28] (about beer, the beer dispensary system, using and changing kegs, cleaning beer lines, stock ordering, cellar work, tapping kegs, shutting down kegs at the end of bar trading, basic two keg multiple coupling setups, party keg setups and the gas system) at Elgin's Pub in Wodonga sometime between 2009 and 2011.

51. Ms Lavis was aware of Ms Bath's left ankle injury on 4 August 2011. Ms Lavis managed the workers compensation claim in this regard and her recollection was that Ms Bath fell off the stage in the main club area when she was drawing the raffle on stage. Ms Lavis referred to medical certificates and return to work plans relating to Ms Bath. She stated that Ms Bath underwent surgery for an ankle reconstruction by Dr Falkenberg on 15 March 2012.

52. Ms Lavis stated that Ms Bath "has never walked right even before the injury to her ankle".[29] She believed that Ms Bath had some sort of condition. She observed a wobble in her walk and that had always been the case. By way of response, in her supplementary statement dated 29 August 2019, Ms Bath, after taking some offence at the comment, confirmed that she had had a slight pigeon toed walk since childhood but that it never stopped her from working or participating in any of her social activities.[30]

[25] Applicant's Application to Admit Late Documents dated 2 September 2019 at page 1 at [4]
[26] Applicant's Application to Admit Late Documents dated 2 September 2019 at page 2 at [6]
[27] Applicant's Application to Admit Late Documents dated 2 September 2019 at page 2 at [7]
[28] Applicant's Application to Admit Late Documents dated 27 August 2019 at pages 64-87
[29] CEM Application to Admit Late Documents dated 27 August 2019 at page 20 at [42]
[30] Applicant's Application to Admit Late Documents dated 2 September 2019 at page 5 at [23]

53. Ms Lavis stated that once Ms Bath returned to work, she made complaints about pain in her ankle, but she had no knowledge of her making complaints of back pain. Ms Bath did not struggle with any of her duties other than those times she spent on her feet. She was undergoing physiotherapy fortnightly following her return to work until she returned to her normal duties. As far as Ms Lavis was aware, Ms Bath did not have any other time off work for ankle pain other than on 19 September 2011. She did not recall Ms Bath ever complaining of pain after she resumed normal duties with the respondent. She did not complain about pain in her back, nor did she complain about any of her duties. She was working her full hours. By way of response, in her supplementary statement dated 29 August 2019, Ms Bath stated that whilst she had pain and discomfort in her ankle, she never bothered complaining about it in great detail to anyone because no one wants to listen to a whinger.[31]

54. Ms Lavis stated that the respondent's records did not disclose any significant periods of absence from work after Ms Bath returned to work in 2012 following surgery.

55. As far as Ms Lavis was aware, Ms Bath was carrying out her normal bar duties on 6 December 2018. Moving furniture was not part of Ms Bath's job description and Ms Lavis doubted that Ms Bath would move kegs as it was normally the duty manager's role. She believed that Ms Bath would change wine casks, but they were 5 litre and 10 litre casks. By way of response, in her supplementary statement dated 29 August 2019, Ms Bath questioned whether Ms Lavis even understood her job description. Ms Bath confirmed that everyone was required to move furniture back into place when patrons moved furniture around. The tables had a very heavy base and were awkward to move. She also confirmed that whenever the duty manager was unavailable, which was often, bar staff were required and instructed to change kegs in the cool room. It was part of her role.[32] In relation to the wine casks, Ms Bath stated that they were between 10 litres and 15 litres casks and weighed approximately 10 kg to 15 kg.[33]

56. Ms Bath called in sick for her 10 December 2018 shift and stated that she was going to consult a doctor about her sore back. She did not say that it had happened at work. On 7 December 2018, Ms Bath provided Ms Lavis with a chiropractor's certificate. Ms Lavis observed that Ms Bath was limping. On 12 December 2018, Ms Bath advised Ms Lavis that she would make a workers' compensation claim. Ms Bath informed her that her back condition arose from wear and tear. Ms Bath did not mention any connection between her back pain and her foot injury. By way of response, in her supplementary statement dated 29 August 2019, Ms Bath stated that she spoke with Ms Helen King, duty manager, on 9 December 2018 and explained to her what had happened after her shift on 6 December 2018 and advised her that she would not be in for her shift on 10 December 2018. Further, she denied attending the respondent's premises on 7 December 2018. She provided Ms Lavis with the chiropractor's certificate on or about 12 December 2018. She denied telling Ms Lavis that her injury did not occur at work. Ms Bath stated that she attended work on 27 December 2018 because she really wanted to come back to work. She was provided with a TAB shift, which did not involve heavy work. She worked from 11.00 am to 4.00 pm but experienced "horrendous pain"[34] and the pain was even worse towards the end of her shift. Ms Bath spoke with Ms Lavis at the end of that shift and advised the latter that she would be consulting Dr Deiter because she could not cope with the pain. It was after Ms Bath consulted Dr Deiter, that she mentioned to Ms Lavis that Dr Deiter thought her back pain may be through wear and tear or may be related to her ankle injury. She only relayed what she had been told by Dr Deiter.

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[31] Applicant's Application to Admit Late Documents dated 2 September 2019 at page 5 at [24]
[32] Applicant's Application to Admit Late Documents dated 2 September 2019 at page 5 at [27]-[28]
[33] Applicant's Application to Admit Late Documents dated 2 September 2019 at page 5 at [29]
[34] Applicant's Application to Admit Late Documents dated 2 September 2019 at page 6 at [36]

57. Ms Lavis stated that the respondent had a manual handling policy. She did not believe that there were any policy documents for Ms Bath's role as there was no heavy lifting involved. Nor did she believe that there were any risk assessments or safety procedures for Ms Bath's area of work. There was no heavy lifting in Ms Bath's job description. She was not required to lift kegs or furniture. The duty manager usually moved the kegs with trolleys. Ms Bath never complained about moving kegs or furniture, nor have any other staff members. By way of response, in her supplementary statement dated 29 August 2019, Ms Bath again confirmed that, whenever a duty manager was unavailable, bar staff were required to change the kegs. The changing of kegs involved pushing and pulling the kegs around on the cool room floor. The kegs were 55 litre kegs, and when you add the beer weight and the weight of the keg, they weighed between 50 kg and 60 kg. Mr Jim Beveridge, a former employee of the respondent had shown bar staff, including Ms Bath, how to push and pull the kegs around the cool room floor so that empty kegs could be moved out of the way and enable the hooking up of full kegs so that beer continued to flow at the taps. The duty managers seemed to be unavailable a lot of the time and she was required to change kegs regularly as part of her role. Further, a bag trolley was available. However, it was too large to use to move the kegs around in the available cool room space.

Ms Karen Lee Young

58. In evidence, there is a statement by Ms Karen Lee Young dated 1 August 2019.[35] I will now refer to the relevant parts of Ms Young's statement.

59. Ms Young stated that she had been employed by the respondent since February 2018 as a Senior Duty Manager but that she has been on leave since 7 April 2019.

60. Ms Young stated that, whilst she was unaware of what training Ms Bath's underwent when the former commenced her employment with the respondent, she was aware that Ms Bath undertook a beer keg training and beer pulling course that Ms Young had organised. She confirmed that Ms Bath was employed by the respondent as a part time bar attendant, TAB operator and gaming steward. She would have been trained to perform such duties. By way of response, in her supplementary statement dated 29 August 2019, Ms Bath explained that the beer training system organised by Ms Young had nothing to do with the system of work designed for the changing of beer kegs. The training related to the "Glycol" beer system and centred on gas and air issues in the beer lines and not the moving of kegs.

61. Ms Young used to allocate Ms Bath to the TAB stand, cash box and café. On the TAB stand, Ms Bath would process bets and serve drinks when there was no one at the TAB. When on the cash box, Ms Bath would process tickets, change money and serve drinks on the gaming floor. When in the café, Ms Bath would make coffees, toasted sandwiches, milkshakes and ice creams.

62. Changing kegs was the duty manager's job. If the duty manager was off the floor, other staff members would have to change the kegs as backup. That is why Ms Young organised the beer keg training referred to above for Ms Bath and others. Ms Bath would only have had to change kegs infrequently. By way of response, in her supplementary statement dated 29 August 2019, Ms Bath stated that, during her shift on 6 December 2018, Ms Young was rostered on as duty manager. Ms Young was unavailable to change the two kegs during that shift and she was expected to do it and, she did so.

[35] CEM Application to Admit Late Documents dated 27 August 2019 at pages 27-33

63. The beer kegs were located in the cellar, which was on the same level as the bar. The process involved unhooking, screwing and slipping off the line, depending on the beer type and then moving the empty keg out of the way and the new one into position. Ms Young used to easily slide the kegs on the metal floor and move the new kegs into place. She conceded that they were heavy if full, "but if you got behind them, they would slide easily."[36] By way of response, in her supplementary statement dated 29 August 2019, Ms Bath stated that she had to move two empty kegs out of the way and slide two kegs back into place and then reconnect them to the beer lines. She had to do this manually because the trolley would not fit in the cool room. The kegs were heavy and weighed at least 50 kg.

64. Ms Young stated:

> "The kegs would have to be moved a maximum of 2-3 metres as our cellar man would pack them close to where they would be changed but he had to leave enough room to walk through. I used to get behind the keg and put both hands on it and push and slide it into place."[37]

By way of response, in her supplementary statement dated 29 August 2019, Ms Bath stated that the full kegs were, at least, about two metres away from where she was required to connect them to the beer line. She had to slide the full beer kegs about two metres. She had to use both hands to slide the full beer kegs.

65. Ms Young stated that there was no policy document setting out how the kegs were to be moved but she believed that it would have been part of the training.

66. Ms Young further stated:

> "There was a trolley that the cellar man used to bring the kegs in but it was easier to slide it than use a trolley to change the keg."[38]

67. The kegs contained 49 litres of beer. The height of the beer kegs came to just over the height of her knee. She stated that she is 5'9" tall. By way of response, in her supplementary statement dated 29 August 2019, Ms Bath agreed that there were about 49 litres of beer in a full keg, but one also had to take into account the weight of the beer keg itself.

68. Ms Young stated that the wine casks contained 10 litres and were kept in a refrigerator. They were heavy but she told staff to use the trolley to move them and not to carry them. The trolley was in the café kitchen. There was no document that set out how to move the wine casks with the trolley. By way of response, in her supplementary statement dated 29 August 2019, Ms Bath stated that the wine casks contained between 10 litres and 15 litres and they were heavy.

69. In relation to Ms Bath's cleaning duties, Ms Young explained:

> "… Ann only did general cleaning which included sweeping and mopping her area, cleaning glass chillers and lifting up beer trays and cleaning them. We had cleaners to clean the club. We have 4 full time cleaners and 2 part time that cleaned every day."[39]

[36] CEM Application to Admit Late Documents dated 27 August 2019 at page 30 at [22]
[37] CEM Application to Admit Late Documents dated 27 August 2019 at page 30 at [23]
[38] CEM Application to Admit Late Documents dated 27 August 2019 at page 30 at [25]
[39] CEM Application to Admit Late Documents dated 27 August 2019 at page 31 at [29]

Ms Young further stated that Ms Bath was not required to lift buckets of water as there was a large hose available to fill the mop bucket, which was a "health and safety bucket with wheels on the bottom".[40] By way of response, in her supplementary statement dated 29 August 2019, Ms Bath stated that the wheeled bucket was often filled in the sink and one needed to lift it out of the sink. If one filled the bucket in the sink it did not leave a puddle.

70. Ms Young was critical of Ms Bath's work performance. She opined that Ms Bath did not like to work. About one month prior to leaving work (presumably, 6 December 2018), Ms Bath refused to do drinks service; ignored people; and was rude to customers. Ms Young asked her to leave the floor and go to lunch. When Ms Bath returned from lunch, she apologised to Ms Young and explained that she had a sore ankle and did not want to walk and do the drinks service. By way of response, in her supplementary statement dated 29 August 2019, Ms Bath stated that the incident Ms Young was referring to occurred at a time during her shift when there was no one else around to assist her. Ms Bath usually had two colleagues working with her but, on this occasion, she was performing the work of three people on her own. It was really busy. She endeavoured to serve patrons as best she could in the order she observed that they came to the bar. She was not ignoring any patrons, she was simply serving each one as quickly as she could. Ms Young had asked her to serve someone a drink out of order. However, she kept serving patrons in the correct order. She was not being rude to patrons. She could not do two things at once. She conceded to being "a bit abrupt"[41] with Ms Young and they did have words about her being unable to serve everyone at once when she was on her own. After Ms Bath came back from lunch, she apologised to Ms Young and used words to the following effect:

> "Sorry about before Karen, I was so busy and my ankle pain has flared up a bit today."[42]

71. Ms Young stated that Ms Bath had not shown any signs that her ankle was hurting her but commented that "she does walk funny anyway"[43] and walked with a sort of waddle, as she usually did. She recollected that Ms Bath used to complain about her foot on about a monthly basis.

72. Ms Young confirmed that Ms Bath had no restrictions placed on her duties with the respondent whilst she (Ms Young) had been working there. Ms Bath did not request a change in her duties.

73. Whilst Ms Young did not recall working with Ms Bath on 6 December 2018, she was advised by Ms Lavis that she was the duty manager on shift that day. By way of response, in her supplementary statement dated 29 August 2019, Ms Bath stated that Ms Young was definitely her duty manager during her shift on 6 December 2018. She had not seen too much of Ms Young on the floor that day.

74. Ms Bath did not complain to Ms Young about any of the respondent's systems of work. She stated:

> "There was no risk assessment for Ann's role as there was no risk in what she used to do."[44]

[40] CEM Application to Admit Late Documents dated 27 August 2019 at page 31 at [30]
[41] Applicant's Application to Admit Late Documents dated 2 September 2019 at page 9 at [59]
[42] Applicant's Application to Admit Late Documents dated 2 September 2019 at page 9 at [60]
[43] CEM Application to Admit Late Documents dated 27 August 2019 at page 32 at [35]
[44] CEM Application to Admit Late Documents dated 27 August 2019 at page 33 at [59]

Ms Helen Elizabeth King

75. In evidence, there is a statement by Ms Helen Elizabeth King dated 3 August 2019.[45] I will now refer to the relevant parts of Ms King's statement.

76. Ms King stated that she had been employed by the respondent for 30 years. She had been a full-time Duty Manager from 2013. During the last six months, her role has been that of Senior Duty Manager. She has known Ms Bath since the latter commenced employment with the respondent.

77. Ms King assumed that Ms Bath had undergone an induction and that following the induction she participated in a buddy up system as was normally done. However, she had no specific recollection that this was the case. By way of response, in her supplementary statement dated 29 August 2019, Ms Bath stated that she had never been allocated a 'buddy' by the respondent. She recalled being "thrown in the deep end"[46] on her first shift at a blue light disco and left to figure it all out herself.

78. Ms Bath was initially employed by the respondent as a casual bar steward and later became permanent part-time.

79. The respondent's club is large and consists of many function rooms, a TAB and Keno, a restaurant and bistro, a large gaming lounge and a VIP and smoking gaming lounge.

80. Ms Bath's role involved serving customers, pulling beer, serving soft drinks and serving spirits. She also worked the till and kept the refrigerators stocked up. She did not perform a lot of cellar work. A few of the staff are trained in a group to do cellar work and Ms Bath was one of them. Ms Bath did not say that she did not know how to do the cellar work. By way of response, in her supplementary statement dated 29 August 2019, Ms Bath stated that at the commencement of her employment with the respondent she did not know how to change a keg. She later underwent group training with Mr Jim Beveridge and regularly changed kegs thereafter.

81. The task of changing the beer kegs fell on the permanent employees and, if they were not available, then the permanent part-timers if they were trained in doing so.

82. The beer kegs were in banks and there was always one close by so that one just needed to flick the cap on top and push the handle down to connect it. One really did not need to move the keg far. A cellar man brought the empty kegs up and put the full ones down. The full ones were always close by and at most, needed to be moved two feet. By way of response, in her supplementary statement dated 29 August 2019, Ms Bath stated that sometimes the full kegs were closer to the connecting handle but, on 6 December 2018, the full kegs were about two metres away and she had to move the empty kegs out of the way to slide the full kegs in.

83. Ms King described the moving of the beer kegs in the following terms:

> "There is nothing to move the keg with. The cellar man has a trolley jack but if a staff member was to move it to connect it you would just give it a tussle on the ground. The floor is a shiny commercial grade tile so it slips easy. The Keg [sic] has handles on the side so you just pull or push it into place.
>
> The kegs come to just above my knee and I am 5ft 11. I do not know how much they weigh. I don't think they would weigh 50 kg."[47]

[45] CEM Application to Admit Late Documents dated 27 August 2019 at pages 35-43
[46] Applicant's Application to Admit Late Documents dated 2 September 2019 at page 10 at [64]
[47] CEM Application to Admit Late Documents dated 27 August 2019 at page 37 at [15]-[16]

By way of response, in her supplementary statement dated 29 August 2019, Ms Bath confirmed that she estimated the weight of a beer keg to be 50 kg.

84. In relation to the cleaning work performed by Ms Bath, Ms King stated that Ms Bath only performed very general cleaning as the respondent employed cleaners for what she referred to as "the main cleaning".[48] Ms Bath would wipe down the bar, place dirty glasses into the dishwasher and, when clean, put the glasses away. She might take the garbage bin out and there would be some wiping down of tables when clearing them. As far as Ms King was aware, Ms Bath was not required to lift buckets of water. By way of response, in her supplementary statement dated 29 August 2019, Ms Bath stated that, on 6 December 2018, she did not lift any full buckets of water. However, she had done so in the past. The wheeled bucket held about 15 litres of water or perhaps up to 20 litres of water.

85. Ms King stated that Ms Bath did complain of a sore back sometime in the 12 months preceding her going off work. Ms Bath did not say that her sore back was work-related. She recalled that on one occasion, Ms Bath said that she took two days off work to spend in her garden weeding. Ms Bath also told her that, afterwards, she was exhausted and that her arm and back were sore. By way of response, in her supplementary statement dated 29 August 2019, Ms Bath stated that she had experienced dull backache from muscular pain since she injured her ankle in 2011. The backache was something she put up with and it never stopped her from working. She did not experience "the radiculopathy pain before 6 December 2018."[49] She denied suffering an injury or aggravating any injury from gardening. She conceded that she may have complained about her back being a bit sore at one point in time but could not specifically recall doing so.

86. Ms King stated that Ms Bath had always walked with a limp or rather, a waddle. She described Ms Bath as being pigeon toed. She did not observe any change in the way Ms Bath walked after her 2011 injury. By way of response, in her supplementary statement dated 29 August 2019, Ms Bath stated that she did not have a limp prior to 2011 and conceded that she was pigeon toed.

87. Ms King could not recall whether she was working with Ms Bath on 6 December 2018. She conceded that she may have been. By way of response, in her supplementary statement dated 2 September 2019, Ms Bath stated that Ms King was not working on her shift on 6 December 2018. Ms King was rostered on for the night shift and was supposed to commence at 4.00 pm, which was the time that Ms Bath was due to complete her shift.

88. Ms King was unable to say whether Ms Bath was moving beer kegs on 6 December 2018. However, she assumed not because, in her observation, she was not keen to go into the cellar because she did not feel confident in effecting the keg changeover. By way of response, in her supplementary statement dated 29 August 2019, Ms Bath confirmed that she did move the kegs towards the end of her shift on 6 December 2018.

89. Ms King stated that Ms Bath never had to move furniture to her knowledge because the cleaners came in early and so, if customers had moved the tables around, the cleaners would move them back into place. There were tables, chairs and a few couches in the bar area. However, the couches were never moved. There were tall chairs for the poker machines. There were lounge chairs with small tables. "None of these are what you would call excessively heavy."[50] By way of response, in her supplementary statement dated 29 August 2019, Ms Bath confirmed that she did have to move furniture back into its place and referred to the photographs in evidence.[51]

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[48] CEM Application to Admit Late Documents dated 27 August 2019 at page 37 at [17]
[49] Applicant's Application to Admit Late Documents dated 2 September 2019 at page 10 at [72]
[50] CEM Application to Admit Late Documents dated 27 August 2019 at page 41 at [48]
[51] Applicant's Application to Admit Late Documents dated 27 August 2019 at pages 61-63

90. Ms King stated that, five years ago, there were 20 litre wine casks. Now the respondent uses 4 to 5 litre wine casks. Trolleys are available to move the casks if required. The cellar is on the same floor as the bar and is more like a cool room. By way of response, in her supplementary statement dated 29 August 2019, Ms Bath confirmed that the wine casks used to be 20 litres. Now they are between 10 litres and 15 litres. The wine casks are about the same size as a carton of beer. The wine casks needed to be lifted to the height of her head to be placed in the refrigerator.

91. Ms King stated that whilst the respondent had manual handling handbooks in different areas of the club, there was nothing that directly related to Ms Bath's role. There was signage around the club relating to proper lifting techniques. However, it was not a big part of Ms Bath's role to lift things. By way of response, in her supplementary statement dated 29 August 2019, Ms Bath confirmed that it was part of her role to move kegs and re-stock wine casks and beer. She performed such tasks "basically every shift".[52]

92. Ms King stated that there was a trolley jack for moving the beer kegs a distance. However, that it would not be proper to use it to move the kegs a few feet for connection purposes. There was a bag trolley in the cool room at all times. By way of response, in her supplementary statement dated 29 August 2019, Ms Bath confirmed that there was a bag trolley available in the cool room or sometimes just outside the cool room. However, the problem was that it was difficult to manoeuvre in the cool room to use it properly. The manner in which the kegs were stored in the cool room made it difficult to get the trolley in there and difficult to get the trolley underneath the kegs and tilt the kegs back due to the lack of space.

93. Ms King stated that Ms Bath never complained to her about any of the respondent's systems of work.

94. Ms King stated that the most one would carry in the bar was a slab of drinks. She did not consider that would cause any issues. If one stocks from the refrigerators, there are trolleys available and they are at the right height. By way of response, in her supplementary statement dated 29 August 2019, Ms Bath confirmed that in order to place the wine casks in the refrigerator, she had to lift them head high. Further, she was also involved in moving cartons of beer and beer kegs.

Dr Michael Falkenberg, Orthopaedic Surgeon

95. On 30 September 2011, Ms Bath consulted Dr Michael Falkenberg, Orthopaedic Surgeon on the referral of Dr Ashraf Islam of the Corowa Medical Centre in relation to the accepted left ankle injury she sustained in the course of her employment with the respondent on 4 August 2011. Dr Falkenberg took a history of injury consistent with the evidence. At the time of the examination, he only had available to him an x-ray report which demonstrated no abnormality. He diagnosed Ms Bath as having suffered a torn lateral ligament and capsule of the left ankle and opined that her condition would settle within six months without the need for any further investigation or surgery. He encouraged Ms Bath to continue with physiotherapy and her light duties with the respondent.[53]

96. On 21 December 2011, Ms Bath consulted Dr Falkenberg who noted that her pain was sub-fibula on the left ankle and not anterior pain, as is usually the case. He observed swelling and recommended further investigation by way of an MRI scan.[54]

[52] Applicant's Application to Admit Late Documents dated 27 August 2019 at page 11 at [82]
[53] ARD at page 82
[54] ARD at page 83

97. On 31 January 2012, Ms Bath underwent an MRI scan by Dr Bartek Szkandera, Radiologist on the referral of Dr Falkenberg. Dr Szkandera concluded that there was thickened and increased signal within the left anterior talofibular ligament consistent with a prior high grade injury; and a prominent ganglion cyst arising from the talonavicular joint or sinus tarsi.[55]

98. After having reviewed the MRI scan dated 31 January 2012, Dr Falkenberg wrote to Ms Bath recommending surgery to her left ankle.[56]

99. On 15 March 2012, Ms Bath underwent a left ankle excision of ganglion and reconstruction of talonavicular joint capsule and ligament by Dr Falkenberg.[57]

100. On 3 October 2013, Ms Bath underwent a CT scan of her left ankle by Dr Irosha De Silva, Radiologist on the referral of Dr Tan of the Corowa Medical Centre.[58] Dr De Silva concluded that there was non-specific mild stranding of the soft tissues on the anterior lateral aspect of the ankle. No significant osseous pathology was evident.

101. On 25 October 2013, Ms Bath consulted Dr Falkenberg complaining of left ankle pain.[59] Dr Falkenberg observed no swelling or lump in the left ankle and observed that the joint seemed stable. He noted that, as he had been on medical leave, Ms Bath was referred to Dr Gordon Slater for management, who recommended arthroscopy and a reconstruction of the ligaments on the lateral side of the ankle. Dr Falkenberg disagreed with Dr Slater's recommendation and wrote to Dr Brett Todhunter seeking his opinion.

Dr Brett Todhunter, Specialist in Anaesthesia and Pain Medicine

102. On 19 November 2013, Ms Bath consulted Dr Brett Todhunter, Specialist in Anaesthesia and Pain Medicine on the referral of Dr Falkenberg.
103. On 22 January 2014, Dr Todhunter reported to CGU Workers Compensation.[60] Dr Todhunter provided a provisional diagnosis of Complex Regional Pain Syndrome. He was of the opinion that Ms Bath had sufficient symptoms and signs to make such a diagnosis. He noted that she suffered constant dull pain when weightbearing but not mechanical pain.

104. Dr Todhunter felt that, at that stage, Ms Bath did not require any treatment for her neuropathic pain, but that if it became worse, she could trial Lyrica. He opined that further surgery would be hazardous and likely to make the pain worse. The chances of reducing Ms Bath's pain by way of surgery were "virtually zero".[61]

Diagnostic imaging – lumbar spine

105. On 7 June 2016, Ms Bath underwent an x-ray of her cervical spine, thoracic spine and lumbar spine by Dr Litherland, Radiologist on the referral of Dr Day.[62] In relation to Ms Bath's lumbar spine, Dr Litherland found degenerative spondylosis demonstrated at L5/S1 with reduced intervertebral disc height posteriorly associated with anterior osteophytosis. There was no acute fracture or aggressive osseous lesion. There was moderate facet joint degenerative arthropathy at L4/5 and L5/S1.

[55] ARD at page 93-94
[56] ARD at page 84
[57] ARD at page 85
[58] ARD at pages 97-98
[59] ARD at pages 88-89
[60] ARD at pages 90-91
[61] ARD at 90
[62] ARD at page 99

106. On 10 December 2018, Ms Bath underwent an x-ray of the cervical spine, thoracic spine and lumbar spine by Dr James Mullins, Radiologist on the referral of Dr Daniel Lewis, Chiropractor.[63] The clinical notes in the x-ray report produced by Dr Mullins referred to "chronic low back pain with acute flareup".[64] In relation to Ms Bath's lumbar spine, Dr Mullins found that the lumbar disc space heights were preserved; facet joint degenerative changes were observed at L3/4, L4/5 and L5/S1; and there was some sclerosis on the iliac side of both the sacroiliac joints.

107. On 19 December 2018, Ms Bath underwent an MRI scan of her lumbar spine by Dr Andrew Baird, Radiologist on the referral of Dr Lewis. The clinical notes in Dr Baird's MRI scan report[65] referred to clinical signs and symptoms of nerve root compression from the left leg to the foot. Degenerative changes were observed at the L3/4, L4/5 and L5/S1. Dr Baird concluded as follows:

> "A left L4/5 foraminal broad-based disc protrusion is seen which may potentially compromise the exiting L4 nerve root,??? if [sic] the symptoms suggestive of an L4 radiculopathy. Non-displaced bilateral sacral alar insufficiency type fractures."[66]

108. On 9 January 2019, Ms Bath underwent a CT guided left L4 nerve root injection by Dr Ben Moharami on the referral of Dr Heinz Deiter without any periprocedural complication.

Dr Daniel Lewis, Chiropractor

109. In evidence, there are the clinical records produced Dr Daniel Lewis, Chiropractor.[67] I will now refer to the relevant parts of those clinical records.

110. Dr Lewis' covering email dated 13 May 2019 to his clinical records referred to Ms Bath suffering from "acute pain down her right leg".[68] The reference to the right leg is inconsistent with the preponderance of evidence and to references to Ms Bath's left leg in other parts of Dr Lewis' clinical records. I take Dr Lewis' reference to Ms Bath's right leg as being a typographical error.

111. Dr Lewis treated Ms Bath conservatively with eight chiropractic treatments on 7, 10, 12, 14, 17, 19, 21 and 24 December 2018, which were somewhat effective in easing her acute pain prior to the Christmas break. Dr Lewis noted that Ms Bath cancelled her consultation with him on 15 January 2019 to pursue alternative treatment elsewhere.

Dr Heinz Deiter and Corowa Medical Centre

112. In evidence, there is a letter from Dr Deiter to CEM dated 6 February 2019.[69] The letter is in response to a request from CEM as to the cause of Ms Bath's low back pain with left-sided sciatica. Dr Deiter responded as follows:

> "Based on my clinical history and examination of Ann Bath, I believe that her previous ankle injury has contributed to a change in gait and therefore is a substantial contributing factor to her current back pain but by all means is not the only factor."[70]

[63] ARD at page 103
[64] ARD at page 103
[65] ARD at pages 104-105
[66] ARD at page 105
[67] ARD at pages 249-257
[68] ARD at page 249
[69] ARD at page 92
[70] ARD at page 92

113. In evidence, there are the clinical records produced by Corowa Medical Centre.[71] I will now refer to the relevant parts of those clinical records.

114. On 5 August 2011, being the day following the accepted work-related left ankle injury, Dr Stephen Shiao referred to Ms Bath's left ankle and left foot and prescribed Panadeine Forte tablets. No other information was recorded.[72]

115. On 8 August 2011, Dr Ashraf Islam recorded that Ms Bath's left ankle was still sore. He made reference to a left ankle x-ray and the issuing of a WorkCover certificate. Thereafter, there were regular entries in the clinical records relating to Ms Bath's left ankle pre-and post-dating the surgery performed by Dr Falkenberg.[73]

116. On 13 August 2013, Dr Woo Tan recorded Ms Bath as complaining of ankle pain sometimes at night and that she was unable to sleep.[74]

117. On 30 May 2016, Dr Rachel Day recorded Ms Bath as complaining of a sore back in her lower thoracic area, which was aggravated on prolonged sitting with referred pain across her back. Dr Day recorded that Ms Bath was tender at the T10/11/12/L/1. This was the first reference to back pain in these clinical records. There was no reference to Ms Bath's left ankle injury affecting her back or any reference to an altered gait.[75]

118. On 28 April 2017, Dr Han Chua recorded Ms Bath as complaining of tiredness with work; bilateral hand paraesthesia and in the midline of the upper thoracic spine. Dr Chua noted that Ms Bath had been working fairly hard and that her prior x-rays demonstrated multilevel osteoarthritis.[76]

119. On 25 October 2018, Dr Biswajit Roy recorded that Ms Bath had injured her left foot seven years ago; undergone ankle reconstruction surgery in 2012; had not been better since then; experienced soreness in her anterior heel immediately over the last few weeks; and worsening pain as the day progresses. He also noted that Ms Bath was always on her feet at work at the RSL club. He queried a diagnosis of planter fasciitis.

120. On 27 December 2018, Dr Deiter recorded that Ms Bath had got out of bed three weeks ago and instantly noticed severe pain in her lower back into her left leg around the buttock to the anterior knee and mid shin. He also noted that, initially, Ms Bath could barely walk and had been taking Panadol, Panadeine Forte and Tramal. She had undergone an x-ray and MRI scan of her spine. Dr Deiter noted that the MRI scan demonstrated significant left L4 nerve root irritation/compression. The recorded reason for visit was "sciatica".[77] There was no reference to Ms Bath's left ankle injury affecting her back or any reference to an altered gait.

121. On 14 January 2019, Dr Htun recorded that Ms Bath attended requesting a WorkCover certificate in relation to low back pain which she had been experiencing for two years and which she felt was work-related. She had been working at the Corowa RSL club for 10 years walking on concrete, pushing, lifting, bending, twisting and turning. He also recorded Ms Bath as complaining of low back pain with left-sided sciatica. He noted that she had recently undergone a CT guided steroid injection. He issued a WorkCover certificate and recommended that she continue management with Dr Deiter.[78]

[71] ARD at pages 107-248
[72] ARD at page 121
[73] ARD at page 121
[74] ARD at page 124
[75] ARD at page 129
[76] ARD at page 131
[77] ARD at page 134
[78] ARD at page 135

122. On 22 January 2019, Dr Deiter recorded, amongst other things, the following:

> "The thinking here is as follows:
> Pt worked the day before at RSL, where she has been working for many years. The following day she could barely get out of bed (see my notes from 27/12). In 2011, she had an extensive injury to her left ankle, which has left her with an irregular walk and she feels this has caused or at least contributed to her back problem havuing [sic] to walk on hard surfct [sic] for many years. I did not write these notes until 2 hrs later and I had moe [sic] time to think about what Ann was claiming. I did speak to Mark for about 7 to 8 minutes on the phone. In retrospect this was probaly [sic] not a good idea as I did not really feel confident that I could answer his questions as I did not really understand how Ann's current issues relate to her w/c injury."[79]

In the same note, Dr Deiter recorded Mark as the person representing an insurance company in Sydney (the person to whom his letter to CEM dated 6 February 2019 was addressed). Dr Deiter recorded Ms Bath's reason for visit as back pain with radiculopathy.

123. On 23 January 2019, Dr Deiter recorded, amongst other things, that he had reviewed Ms Bath's whole history and her current symptoms which involved left leg pain. Ms Bath admitted that the pain had reduced from 10/10 to 2/10 since undergoing the steroid injection. He suggested she undergo physiotherapy with the possibility of a repeat steroid injection and/or the need for surgery sooner rather than later.[80]

124. In Dr Deiter's referral letter to Northeast Life Physiotherapy dated 23 January 2019, he stated, amongst other things:

> "At this stage we are claiming that the sciatic is related to this ankle injury as Miss Bath has never walked normally again and she was performing heavy lifting of 10 kg wine boxes and pushing around heavy beer kegs as well as moving carrying heavy bar stool [sic] the day before she woke up with the pain. She initially just saw a chiropractor, who helped with the back pain but not the sciatica."[81]

125. On 6 February 2019, Dr Deiter recorded, amongst other things, that Ms Bath had undergone four sessions of physiotherapy over the past two weeks and was also undertaking home-based exercises three times per day. He discussed his letter to CEM dated 6 February 2019 at length and recorded that:

> "while Ann agrees that the gait issue has contributed to her back problem it is not the only substantial factor."[82]

126. On 22 February 2019, Dr Deiter recorded, amongst other things, that Ms Bath had not undergone much improvement despite weekly physiotherapy; she had a good range of movement with pain; and certainly, had an antalgic awkward gait.[83]

127. On 1 April 2019, Dr Deiter recorded, amongst other things, that essentially, nothing had changed in relation to Ms Bath's left-sided sciatica; there was no change in her limitations with sitting, standing and walking; she was now undergoing hydrotherapy with physiotherapy; and her overall pain level had not changed.[84]

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[79] ARD at page 136
[80] ARD at page 136
[81] ARD at page 242
[82] ARD at page 136
[83] ARD at page 137
[84] ARD at page 138

128. On 30 April 2019, Dr Deiter recorded, amongst other things, that Ms Bath's condition remained unchanged, although she experienced occasional better days.[85]

Certificates of Capacity

129. In evidence there are WorkCover NSW Certificates of Capacity relating to Ms Bath issued by the Corowa Medical Centre dated 14 January 2019[86] and 28 January 2019.[87]

130. The Certificate of Capacity dated 14 January 2019 was issued by Dr Htun of the Corowa Medical Centre. The diagnosis provided was one of degenerative changes of the lumbar spine, L4/5 disc protrusion with L4 radiculopathy. In response to the question of how the injury/disease was related to work, the certificate stated:

> "Patient states that she has been having low back pain for 2 years which has been worsened over last 5-6 weeks. She states that her back pain is related to her work where she has to walk on a concrete floor, push and carry heavy objects, do twisting, turning and bending actions at work for many years."[88]

Further, the Certificate of Capacity certified Ms Bath as having no current work capacity for any employment from 7 December 2018 to 24 January 2019.

131. The Certificate of Capacity dated 28 January 2019 was issued by Dr Deiter of the Corowa Medical Centre. No diagnosis was provided in the appropriate box on the certificate. In response to the question of how the injury/disease was related to work, the certificate stated:

> "Has an accepted work injury involving her left ankle in 2011. Has never been able to walk in a normal fashion since due to pain and paraesthesia in her left foot. The day before she woke with left-sided sciatica she had been lifting heavy wine casks weighing 10 kg, moving heavy beer kegs and moving barstools."[89]

Dr Deiter identified chronic back pain in recent years as being a relevant pre-existing factor to Ms Bath's condition. Further, the Certificate of Capacity certified Ms Bath as having no current work capacity for any employment from 24 January 2019 to 6 February 2019.

132. There are no other Certificates of Capacity in evidence relating to Ms Bath's alleged injury to the lumbar spine.

Dr James Bodel, Orthopaedic Surgeon

133. On 23 May 2019, Ms Bath consulted Dr James Bodel, Orthopaedic Surgeon at the request of her lawyers.

134. In evidence, there is a report by Dr Bodel dated 23 May 2019.[90] I will now refer to the relevant parts of that report.

135. Dr Bodel took an occupational history from Ms Bath which may be summarised as follows:

    (a) Prior to commencing her employment with the respondent, Ms Bath had been employed in hospitality and similar types of roles.

[85] ARD at page 139
[86] GIO Application to Admit Late Documents dated 24 July 2019 at pages 21-23
[87] GIO Application to Admit Late Documents dated 24 July 2019 at pages 24-26
[88] GIO Application to Admit Late Documents dated 24 July 2019 at page 21
[89] GIO Application to Admit Late Documents dated 24 July 2019 at page 24
[90] ARD at pages 73-81

(b) Ms Bath commenced her employment with the respondent on 4 April 2008 and was employed on a permanent / part time basis, working about 30 hours per week on variable shifts of between 5 and 8.5 hours.

(c) Ms Bath's duties included working as a bar attendant, working in the gaming area, the TAB, the cashbox area and working in the cellar.

136. Dr Bodel described the history provided to him by Ms Bath in relation to the subject injury as follows:

> "This lady had a heavy day's work at the workplace on Thursday, 06 December 2018. She was lifting boxes of casks of wine, moving kegs and putting beer on tap and doing a general heavy day's work. She states that in the past she had some mild backache after moving the kegs and that backache occurred again on this day. She went home to rest in bed.
>
> The next morning, she woke with severe back pain, left buttock pain and left thigh pain with numbness and tingling extending all the way down the left leg to the foot.
>
> It is noteworthy that this lady has had a previous work related injury to the left foot and ankle which had left her with residual pain in the left ankle on the lateral border of the ankle and also some numbness and tingling into the first toe and the second toe. After this episode of left-sided sciatic pain, she had pain, numbness and tingling extending into all five digits of the left foot."[91]

137. The post 6 December 2018 history of treatment provided to Dr Bodel was consistent with the evidence.

138. In relation to past medical history, Dr Bodel reported that Ms Bath suffered from mild hypertension and a raised cholesterol level, both conditions being well-controlled with medications. In relation to Ms Bath's 2011 left ankle injury, Dr Bodel reported that it occurred whilst she was stepping down off a stage onto a dance floor and inadvertently rolled her left foot and ankle on the edge of the dance floor. He reported that Ms Bath was treated by Dr Falkenberg, who performed a lateral ligament repair. Whilst her condition improved over time, it never completely resolved, and she was left with pain and some stiffness in the lateral aspect of the left ankle and numbness and tingling in the first and second toes of the left foot.

139. Dr Bodel reported Ms Bath's current complaints as a constant dull aching pain across the lower part of the back; left buttock and thigh pain; numbness involving the whole of the leg and a cramping sensation in the calf muscles, both medially and laterally; and numbness down the whole of the left leg into all five toes.

140. In relation to Ms Bath's activities of daily living affected by her lower back and left leg condition, Dr Bodel reported that her driving tolerance had been reduced to about 45 minutes; that she struggled with household maintenance and cleaning activities; that she struggled with gardening; and that any bending, twisting or lifting aggravated the pain.

[91] ARD at page 74

141. On examination, Dr Bodel observed discomfort throughout the interview, noting that Ms Bath sat selectively on the right buttock at times. He also observed that she rose slowly from a seated position; walked with a mild left-sided limp; there was tenderness on palpation at the lumbosacral junction on the left side and guarding; forward flexion reached with hands only to the knees with increased backache, left buttock and thigh pain at that point and also on extension; marked discomfort in the left side of the lower part of the back on lateral bending to the right; straight leg raising was 80° on the right and 60° on the left with positive nerve root tension signs; left calf was 1.2 cm smaller than the right; knee and ankle jerk reflexes were present and equal; diminished left medial hamstring reflects; sensory loss in the L5 distribution on the left; weakness of extension of the left great toe; and no clinical signs of radiculopathy in the right leg but positive signs of L5 radiculopathy on the left leg.

142. Dr Bodel referred to Dr Deiter's physiotherapy referral letter dated 23 January 2019 and noted his reference to previous injury and mention of back pain with radiculopathy on 16 May 2017. Dr Bodel stated:

> "This lady indicated to me that she could not recall any prior problems with the back or the left leg although I was concerned that the initial injury in 2011, when she injured the left ankle, may in part have been an early disc injury as well. She did fall on the ground at the time and she twisted the left ankle.
>
> She has had some intermittent chiropractic treatment over the years to manage mild backache but it appears likely to me that the heavy day's work on 06 December 2018 has caused at the very least, the aggravation, acceleration, exacerbation and deterioration of a disc prolapse at the lumbosacral junction which may have been caused by those earlier injuries.
>
> I note that there is documentation from both the GIO and Club Employers Mutual. It appears that both insurers are denying liability. I am satisfied that a probable 'new injury' did occur on 06 December 2018 in the manner that I have described previously.
>
> On perusal of the documentation, I could not find any specific reference to any other accident or injury involving the back with left-sided sciatica apart from the injury that occurred at work in December 2018 and possibly as a result of the twisting injury to the left foot and ankle that occurred in 2011."[92]

143. Dr Bodel opined that Ms Bath had suffered a disc injury at the L4/5 level as a consequence of the heavy work she performed on 6 December 2018. He noted that the pathology is principally at the L4/5 level.

144. In relation to causation, Dr Bodel opined as follows:

> "I am satisfied that the nature and conditions of this lady's work in general, but specifically, the heavy day's work on 06 December 2018 is the cause of the disc injury which has led to her back pain and left-sided sciatica. This has occurred during the course of her work at the Corowa RSL Club Limited. The nature of her work therefore is a substantial contributing factor to this injury."[93]

[92] ARD at page 77
[93] ARD at page 78 at [3]

Dr Bodel then further opined as follows:

> "There is definite evidence on the MRI scan that there is some pre-existing degenerative change involving the discs generally but particularly at the L5/S1 level. At least in part the nature and conditions of her work may have caused an aggravation, acceleration, exacerbation and deterioration of that disease process and the nature of work is the main substantial contributing factor to that aggravation, acceleration, exacerbation and deterioration of the disease process in this circumstance."[94]

145. In relation to work capacity, Dr Bodel opined that Ms Bath had no current work capacity. She requires further treatment, which may include a further block injection and/or possible surgery. However, if Ms Bath "does settle further",[95] she may be able to perform part-time light duty work.

146. Dr Bodel opined that Ms Bath was restricted by back pain and left leg pain and unable to engage in prolonged sitting, bending, twisting or lifting activities at the present time. He also opined that Ms Bath's ability to find work on the open labour market has been severely compromised by the effects of the injury.

147. In relation to the treatment received by Ms Bath, he opined that the treatment in the form of physiotherapy, chiropractic treatment, medication and block injection was reasonably necessary for the management of her injury. He opined that future treatment is required. The block injection gave rise to some improvement in Ms Bath's symptoms and she may need to undergo another. Surgery is also a possibility.

148. Having been requested to comment on Dr Deiter's report dated 6 February 2019 and the Certificates of Capacity issued by him, Dr Bodel responded as follows:

> "In response to that specific question, I would indicate that Dr Deiter has considered that there is a causal link between work and the injury to the back as far as I can determine. I also note in her statement the record of the nature and conditions of the work that she did on 06 December 2018 and I am satisfied that this is sufficient to cause aggravation, acceleration, exacerbation and deterioration to an abnormal disc which is clinically evident at L3/4, L4/5 and L5/S1.
>
> I note specifically on 06 February 2019 that Dr Deiter talks about a 'gait issue'. I would agree that this is in part contributing to the overall level of pain but I am also concerned that she may have in fact had a disc injury at the time of the original injury in 2011 as I have indicated above, although it was quiescent and not a major problem until this heavy day's work which caused an external rupture at the L4/5 level causing the sciatica that she clinically has."[96]

149. Dr Bodel also opined that the history contained in Dr Deiter's Certificate of Capacity dated 28 January 2019, that is, Ms Bath waking up on 7 December 2018 with left-sided sciatica after having lifted heavy wine casks weighing 10 kg, moving heavy beer kegs and moving barstools on the previous day, satisfied him that her work was a substantial contributing factor to the development of the pathology he found on examination.

[94] ARD at page 79 at [4]
[95] ARD at page 79 at [5(b)]
[96] ARD at page 80 at [11(a)]

Dr James Powell, Orthopaedic Surgeon

150. On 18 July 2019, Ms Bath consulted Dr James Powell, Orthopaedic Surgeon at the request of CEM.

151. In evidence, there is a report by Dr Powell dated 12 August 2019.[97] I will now refer to the relevant parts of that report.

152. Dr Powell took a history from Ms Bath which may be summarised as follows:

    (a) Ms Bath's duties with the respondent involved various aspects of service to customers, but also involved cleaning duties, getting kegs of beer in and out of tapping areas and storing other items. She was working 30 hours per week over five days with the respondent.

    (b) Ms Bath became aware of discomfort in her lower back in about 2015 without any specific incident. These symptoms became more noticeable as the months progressed with physical activities and, in particular, shifting the kegs which were quite heavy and awkward to get in and out, particularly when full. The symptoms fluctuated in intensity

    (c) Ms Bath consulted her local doctor, who referred her for x-rays, which demonstrated degenerative discs in her lumbar region. No specific treatment was suggested at the time. She was advised to be careful with activity.

    (d) On 6 December 2018, Ms Bath shifted kegs into place at work and felt more severe discomfort in her lower back. Upon arising the following morning, she suffered severe back pain radiating into her left buttock and along the left leg to the ankle. She also experienced a sensation of pins and needles into the left leg. She found it difficult to get out of bed.

    (e) Ms Bath's symptoms did not improve. She consulted a chiropractor and underwent some massage and chiropractic movement. She subsequently underwent x-rays and later an MRI scan of her lumbar spine. She consulted her general practitioner, who referred her for physiotherapy. In early January 2019, she underwent an injection at the L4/5 level of her lumbar spine. The injection reduced her pain, but the sensation of numbness in her left leg has persisted. She continued with physiotherapy and hydrotherapy. She was prescribed analgesics and anti-inflammatories. She was to be referred to Dr McMahon, Neurosurgeon in Albury. The consultation with Dr McMahon had not yet taken place.

    (f) Some years ago, she sustained an injury to her left ankle at work when she slipped. The left ankle injury required a reconstructive procedure. Thereafter, some left lateral ankle pain persisted, and she continues to suffer some ankle discomfort and stiffness.

    (g) Ms Bath has not returned to work since her lumbar related pain increased in December 2018.

[97] CEM Application to Admit Late Documents dated at pages 1-12

153. On examination, Dr Powell, amongst other things, observed that Ms Bath was a little slow walking into the room and tended to limp on her left leg; heel and toe walking proved uncomfortable and caused a loss of balance; she demonstrated adequate power on toe walking; was able to perform single leg stands on both sides, although uncomfortable on the left; she was not particularly tender to palpation in the lumbar spine, but there was some discomfort with percussion; spinal movements demonstrated slight restriction of extension with discomfort but without guarding; lateral flexion and rotation was symmetric in range and without obvious irritation, and movements were synchronous; forward flexion was hands to mid-shin, but was able to get a little lower with activity, with synchronous recovery; some discomfort at the left iliac wing to compression; slight discomfort with AP loading at the symphysis but not posteriorly; tenderness in the left iliac fossa region and the left hypochondrial region and at the left posterior abdominal wall; sensation was intact in the lower limbs; reflexes were present at the knees and ankles but were slightly slow at all positions; plantar responses were equivocal; power to manual testing was symmetric and within normal limits; straight leg raising was to 70° right and left limited by tight hamstrings without causing pain; hip and knee movements were symmetric and normal.

154. Dr Powell referred to the CT scans of the cervical and thoracic spine dated 3 May 2017; the abdominal x-ray dated 9 December 2018; plain x-ray of the spine dated 10 December 2018; the MRI scan of the lumbar spine dated 18 December 2018; and the CT guided injection into the left L4 nerve root on 9 January 2019. However, Dr Powell did not refer to the plain x-ray of Ms Bath's cervical spine, thoracic spine and lumbar spine dated 7 June 2016.

155. Dr Powell provided the following summary:

> "Ms Bath has a long history of non-specific lumbar back pain since 2015 with episodes of symptomatic aggravation associated with physical activities in her work, particularly shifting heavy objects such as kegs.
>
> Increase of back pain symptoms with left leg radiation occurred after shifting the keg in December 2018, with symptoms persisting and fluctuating.
>
> Her current examination does not indicate mechanical derangement in the lumbar region. She does have some unusual findings of abdominal tenderness and also has noted increase of tendency to bruising associated with anti-inflammatory medication on a background of easy bruising.
>
> Imaging has identified degenerative change throughout the spine in the cervical, thoracic and lumbar regions."[98]

156. In response to a question posed by CEM as to the exact mechanism of the alleged orthopaedic injuries, Dr Powell opined:

> "From Ms Bath's given history and description of symptoms, the development of acute symptoms and the distribution in December 2018, combined with the imaging findings of longstanding degenerative disease, would suggest that the incident of 6 December 2018 caused mechanical strain in the lumbar region and symptomatic aggravation of an underlying lumbar spondylosis with radicular symptoms into the left lower limb. There is no clear indication of discrete disc prolapse that might produce an acute nerve root compression and radicular symptoms, but the imaging changes combining to produce the degree of foraminal stenosis may produce some relative impingement neural structures and the referred symptoms that she described. (Ms Bath's current examination does not indicate any signs of compressive radiculopathy, nor of nerve root irritation arising at the lumbar foraminal level that would indicate the radiculopathy.)

[98] CEM Application to Admit Late Documents dated 27 August 2019 at page 6

> While it is difficult to determine what might constitute an '*orthopaedic injury*', Ms Bath's history, presentation and examination findings would suggest that she had mechanical aggravation of established lumbar spondylosis with non-specific radiating symptoms but no sign of acute structural failure which might be considered to be an actual structural injury."[99]

157. Dr Powell was of the view that Ms Bath's presentation was one of mechanical back pain symptoms since 2015 associated with physical activities, most frequently in the workplace. He opined that it was a typical presentation of age related spondylitic change in the lumbar spine that has commenced to be symptomatic through physical activity, mainly at work. However, this did not imply that the condition was work-related. The aetiology of the degenerative disease is principally constitutional and age-related. Dr Powell stated:

> "It just so happened that symptoms became apparent in her work when shifting heavy objects, but this is the only association with her work.
>
> The widespread changes throughout the lumbar spine indicate an advanced degenerative process and is not in the distribution that might be associated with repetitive mechanical lifting and similar activities. Her work has had no influence on the aetiology nor the development of this condition and is only associated with it symptomatic presentation."[100]

158. Dr Powell also opined that there was no particular indication of any consequential injury arising from Ms Bath's initial presentation, nor of any influence on her long-standing disease process. In relation to the specific issue as to whether Ms Bath's ankle injury on 5 August 2011 and altered gait thereafter was causally connected to the condition of her lumbar spine, Dr Powell stated:

> "There is no clinical indication Ms Bath has chronic gait asymmetry. There was no reliable evidence that connects minor gait abnormality with the natural history of other common musculoskeletal conditions such as lumbar spondylosis. Very severe prolonged uncorrected gait abnormalities may have an associative relationship with degenerative disease elsewhere in the musculoskeletal system, but these situations are generally quite obvious."[101]

159. Dr Powell further opined that Ms Bath's previous left ankle injury "does not have any impact on her current presentation".[102]

160. In relation to the issue as to whether the treatment received by Ms Bath was reasonably necessary, Dr Powell opined that the treatment and management she received would be considered reasonable and necessary for her lumbar spine injury and persisting symptoms, largely arising from the event of December 2018, and also on a background of developing lumbar back pain symptoms since about 2015 associated with physical activity. Dr Powell added:

> "The need for these interventions have arisen as a direct result of the workplace incident of December 2018 and persisting pain symptoms."[103]

[99] CEM Application to Admit Late Documents dated 27 August 2019 at page 7 at [1]
[100] CEM Application to Admit Late Documents dated 27 August 2019 at page 9 at [3
[101] CEM Application to Admit Late Documents dated 27 August 2019 at page 10 at [4]
[102] CEM Application to Admit Late Documents dated 27 August 2019 at page 7 at [2]
[103] CEM Application to Admit Late Documents dated 27 August 2019 at page 11 at [5 b)]

161. In relation to the issue of Ms Bath's work capacity, Dr Powell opined that her lumbar spondylosis did not currently appear to be active. However, she continued to experience symptoms, the source of which have not been determined. He felt that she did have work capacity from a musculoskeletal perspective. He opined that, given her lumbar spondylosis and being prone to mechanical symptoms, her work would best be modified to avoid repetitive heavy lifting; forward bending; lifting or carrying beyond about 10 kg in weight; avoid working at low levels; distribute her activities, such as, turning, twisting, mopping and sweeping, throughout the working day to minimise the potential of mechanical aggravation of her established degenerative disease. Ms Bath would be fit to undertake work of a light to moderate nature on the open labour market.

162. Dr Powell opined that the effect of the incident at work on 6 December 2018 had passed.

163. Responding to the invitation to comment on Dr Bodel's report, Dr Powell stated that he differed with Dr Bodel as he was unable to identify any localised orthopaedic or musculoskeletal explanation for her presentation, other than the temporary components he had already identified. He did not agree with Dr Bodel's opinion that Ms Bath's presentation was localised primarily to lumbosacral spine aggravation.

164. Dr Powell was unable to comment on the report of Dr Deiter as he was unable to locate the report.

SUBMISSIONS

165. The parties made oral submissions at the arbitration hearing which were sound recorded. The sound recording is available to the parties.

GIO's submissions

166. GIO's submissions, through its counsel, Mr Adhikary, may be summarised as follows:

    (a) Ms Bath's lumbar spine condition did not result from, nor was it a consequence of the accepted left ankle injury which occurred on 4 August 2011.

    (b) Ms Bath sustained a frank injury to her lumbar spine or an aggravation thereof on 6 December 2018 as a result of her work duties.

    (c) In the alternative, Ms Bath's back condition was a result of the nature and conditions of her employment and pursuant to section 16 of the 1987 Act, the appropriate deemed date of injury is 6 December 2018, being the date when she first became incapacitated, and when CEM was on risk.

    (d) Ms Bath's activities at work with the respondent on 6 December 2018 were physically demanding. She went home from work that day with a fair bit of back pain, thinking that it was her usual back pain caused from limping around. However, the following day, she suffered terrible shooting and stabbing pain from her lower back into her left buttock and down her left leg. She had never felt pain like that before. Ms Bath's evidence is clear that the pain was completely different to that which she had previously experienced. She stated that she had to take more medication than she used to take sometimes for her dull back pain after finishing a shift at work.

    (e) There was no mention of Ms Bath's left ankle in the clinical records of the chiropractor, Dr Lewis.

(f) Dr Falkenberg's reports made no mention of any effect of Ms Bath's left ankle injury had upon her lumbar spine. There was no mention of Ms Bath having an altered gait.

(g) Dr Todhunter's report dated 22 January 2014 referred to the presenting problem as left lower limb, ankle and foot pain. There was no reference to any consequential injury which flowed from Ms Bath's left ankle injury. There was no reference to an altered gait. Despite reporting ongoing left lateral ankle compartment pain, pain medially running towards the great toe and medially proximal to the ankle in the lower leg, Dr Todhunter noted that Ms Bath continued to work eight hours a day, wearing supporting bandages around her ankle with adequate footwear.

(h) In the clinical records of the Corowa Medical Centre, the entries in relation to Ms Bath's left ankle injury commence on 5 August 2011. None of those entries refer to any injuries consequential to the left ankle injury. The first entry in the clinical records which referred to back pain was on 30 May 2016. There was no connection of the back pain made with the ankle. The entry on 28 April 2017 recorded a diagnosis of osteoarthritis. The entry on 25 October 2018 referred to the left ankle injury history and recorded heel pain and a diagnosis of planter fasciitis. There was no reference to the left ankle symptoms having any effect on Ms Bath's lumbar spine.

(i) The first entry in the clinical records of the Corowa Medical Centre which referred to the December 2018 lumbar spine incident was recorded on 27 December 2018. No mention was made in that entry to any impact the left ankle injury may have had on Ms Bath's back.

(j) The entry made in the clinical records of the Corowa Medical Centre on 14 January 2019, made no connection between Ms Bath's left ankle injury and her lower back condition. Dr Htun opined that Ms Bath's low back condition may have been aggravated by her work with the respondent.

(k) Dr Deiter made the entry in the clinical records of the Corowa Medical Centre on 22 January 2019. He provided his thoughts in relation to Ms Bath's lower back condition. He referred to the 2011 extensive left ankle injury and Ms Bath's feeling that her irregular walk following the ankle injury caused or contributed to her back problem, having had to walk on hard surfaces for many years. He did not really understand how her back issues related to her work-related left ankle injury.

(l) The entry made in the clinical records of the Corowa Medical Centre on 23 January 2019, made no connection between Ms Bath's left ankle injury and her lower back condition.

(m) The entry made in the clinical records of the Corowa Medical Centre on 6 February 2019, made a connection between Ms Bath's left ankle injury and her back injury, that is, the latter being a consequential condition. There had been no mention of gait issues until this time in the clincal records or specialist reports referred to above, one could not be satisfied that, just based on the 6 February 2019 entry, that there is a connection between Ms Bath's left ankle and her back. The entry is elaborated upon in a report by Dr Deiter dated 6 February 2019. There is no other evidence in this regard and Dr Deiter did not provide any reasons for his opinion.

(n) The evidence is that the back pain Ms Bath experienced prior to and then post 6 December 2018 was different.

(o) In Dr Deiter's referral letter to Northeast Life Physiotherapy dated 23 January 2019, he attempted to relate Ms Bath's lumbar spine injury with left-sided sciatica to her abnormal gait following her 4 August 2011 left ankle injury and the heavy lifting of boxes, pushing of beer kegs and carrying heavy bar stools on 6 December 2018. Dr Deiter's reports and opinions hypothesise and make no actual link.

(p) The medical imaging does not provide Ms Bath with any great assistance in relation to the claim for a consequential injury to the lumbar spine. The imaging demonstrated degenerative conditions throughout Ms Bath's spine. There was no mention of any relationship to Ms Bath's left ankle or any issues relating to gait in the clincal notes of the imaging reports.

(q) The medicolegal reports in evidence did not support the claim that Ms Bath's lumbar spine condition was consequential to her accepted left ankle injury on 4 August 2011.

(r) Dr Bodel opined that Ms Bath may have sustained a disc injury to her lower back at the time she fell and injured her ankle on 4 August 2011. There is no evidence to support any disc injury to Ms Bath's lumbar spine on 4 August 2011. Accordingly, Dr Bodel's opinion in this regard should be given no weight at all. Dr Bodel opined that the injury to Ms Bath's lumbar spine on 6 December 2018 was a frank injury and a result of the nature and conditions of her employment generally with the respondent.

(s) Dr Powell noted Ms Bath's gait showed a slight limp on the left leg. In unambiguous terms, Dr Powell opined that there was no particular indication of any consequential injury arising from Ms Bath's initial presentation, nor of any influence on her long-standing disease process. Ms Bath's previous left ankle injury did not have any impact on her current presentation and provided the reasoning behind his opinion.

(t) The reports and entries in the clinical records referred to above support the submission that Ms Bath's lumbar spine condition was not a consequence of the accepted left ankle injury which occurred on 4 August 2011.

(u) The evidentiary statements of Ms King, Ms Young and Ms Lavis demonstrated that from the time Ms Bath recovered from her left ankle surgery and returned to work, she had not been on any restricted duties with the respondent. There was no indication Ms Bath was going to go on restricted duties. She returned to her full duties with the respondent. The said evidentiary statements also demonstrated that even prior to 4 August 2011, Ms Bath had gait issues.

(v) In relation to the issue of work capacity, Ms Bath was undertaking her usual hours and her usual duties until the events of 6 December 2018. There is no evidence that the condition of her left ankle would have caused her to stop working in December 2018 or at any time in the future. Ms Bath's evidence is that her situation completely changed after 6 December 2018 and brought about the holistic change about what she could do and determined what she could not do. Accordingly, there should be no finding of incapacity and/or liability for medical expenses relating to the left ankle injury.

(w) If there is a finding of injury under section 4(b)(ii) of the 1987 Act, then GIO relies upon the operation of section 16 and in such circumstances, CEM is liable.

CEM's submissions

167. CEM's submissions, through its counsel, Mr Robison, may be summarised as follows:

(a) In relation to the issue of incapacity, there are a number of scenarios. One is that there was a back injury as well as a left ankle injury for which GIO would be liable. On some of the evidence, there was a new back injury, which was either a consequence of an altered gait in respect of which GIO would be liable or alternatively or in addition, the nature and conditions of work claim in respect of which CEM would be liable. A further scenario is any ongoing effect of the left ankle injury, in respect of which GIO would be liable.

(b) In order for CEM to be liable on a disease basis, the pathology would have to be identical. The evidence seems to demonstrate a division of pathology and therefore, two back injuries.

(c) Whatever the liability might be between the two insurers, incapacity has ceased on the basis that there is no current lumbar symptomology. There is the added complicating factor that CEM has the benefit of the repeal of section 40 of the 1987 Act, which does not favour GIO.

(d) Ms Bath's left ankle injury was a significant one having torn ligaments in her left ankle that required a reconstruction procedure, including the insertion of screws in the tendons and ligaments to fix them back to the bone. One would expect such an injury to produce symptoms on an ongoing basis, which is consistent with Ms Bath's evidence of the ankle never really coming good and walking with a limp since June 2012.

(e) In relation to the disease issue and the division of pathology, reference was made to *Department of Juvenile Justice v Edmed* [2008] NSWWCCPD 6 (*Edmed*) and *Woolworths Ltd v Wagg* [2017] NSWWCCPD 13 (*Wagg*). Ms Bath's evidence was that her low back symptoms following the left ankle injury was localised to her lower back and did not radiate down her legs. She had always had a dull pain in her lower back but never a sharp shooting pain. So, there seems to be some neurological damage which did not exist prior to 6 December 2019. If there is a finding of a lumbar spine injury consequential to the left ankle injury, then the liability rests with the GIO completely. If the lumbar spine injury is due to the nature of work, then it is CEM's liability but only in so far as it created an injury not by way of a disease process.

(f) Ms Bath's 6 December 2018 accident description must be read in the context of the lay witness statements. She did not have to lift the beer kegs, but they would have to be rolled.

(g) Ms Bath's post 6 December 2018 back pain was different. The legal significance is that it was a different injury and that GIO has a continuing liability.

(h) In relation to Ms Bath's supplementary evidentiary statement, Ms Bath stated that she has had a slight pigeon toe walk since childhood. So, there have been issues with her stability going back a long time. She continued to suffer pain and discomfort in her left ankle but did not complain about it in great detail to anyone. Clearly, her ankle problems were still affecting her. Ms Bath referred to manually sliding kegs. She was not lifting the kegs.

(i) There is more detail to be ascertained from the lay witness statements. However, the case will turn on medical opinion and some technical issues regarding causation. Ms Young did not contradict Ms Bath's evidence per se but added further detail about the sliding of the beer kegs to a maximum of two or three metres. In relation to the casks of wine, Ms Young conceded they were heavy, but people were told to use the trolley and not carry the wine casks.

(j) Ms King's evidentiary statement did not contradict Ms Bath's version of events but did provide more context. Ms King described Ms Bath's day to day role was that of a bartender, whilst she occasionally performed the other duties referred to, such as keeping the fridges stocked and cellar work (changing the beer kegs). The beer kegs only had to be moved, at most, two feet.

(k) Ms Lavis' evidentiary statement referred to Ms Bath making some complaints about her ankle. She was able to stand for two hours and there was a chair nearby for her to sit when needed. Such evidence goes to the point that part of Ms Bath's incapacity, if any, is in relation to the ankle injury.

(l) Dr Deiter's report dated 6 February 2019 was prepared in response to CEM's enquiry as to causation. He opined that Ms Bath's previous ankle injury contributed to a change in gait and was, therefore, a substantial contributing factor to her current back pain. Dr Deiter stated that it was not the only factor but did not identify any other factors and therefore, such other factors must be de minimus. The report can be considered in conjunction with Dr Deiter's referral letter to Northeast Life Physiotherapy dated 23 January 2019, where again, he is live to the causation issue. He is aware of the heavy nature and conditions of her work and still attributes the sciatic pain to the ankle injury.

(m) Dr Bodel believed it noteworthy that Ms Bath had a previous work-related injury to the left foot and ankle which had left her with residual pain in the left ankle, having taken a history of Ms Bath having been involved in a heavy day's work. He noted that Ms Bath's left ankle injury had never completely resolved.
Dr Bodel's reference to Ms Bath's complaints would suggest different pathologies for the purposes of *Edmed*. He was concerned that in the 2011 accident may have, in part, involved a disc injury to the lumbar spine as well.

(n) GIO did not put into evidence any independent medicolegal report in support of its submissions.

(o) Dr Powell's report truly complies with the Expert Witness Code of Conduct and demonstrates his independence, in that, he goes against CEM's primary argument on liability in relation to the lumbar spine condition being consequential to the left ankle injury. Dr Powell's report should be given a significant amount of weight. Dr Powell puts an end date on the period of weekly benefits. It would be impossible to determine with certainty when Ms Bath's lumbar spine symptoms ceased to cause any incapacity, but it certainly ceased by the time of her consultation with Dr Powell on 18 July 2019.

(p) Dr Powell found that Ms Bath had lumbar spondylosis which did not appear to be currently active. Incapacity comes from symptoms rather than pathology. So, whether the lumbar spondylosis is active is a crucial issue in relation to the claim for weekly benefits based on his examination of Ms Bath's lumbar spine.
Dr Powell opined that from a musculoskeletal perspective, Ms Bath has work capacity because she is no longer experiencing the effects of whatever occurred in 2018.

(q) In the CEM Injured Person Lodgment Form dated 14 December 2018, Ms Bath referred to severe lower back pain built up over a period of time. Such description is consistent with an altered gait over a period of time as opposed to experiencing a tough day at work after moving kegs.

(r) Dr Todhunter, some three years following Ms Bath's left ankle injury, noted that she was still wearing supporting bandages around her ankle, which supports the submission that she was still having significant problems with her left ankle.

(s) The x-ray report by Dr Litherland dated 7 June 2016 demonstrated evidence of degenerative spondylosis in Ms Bath's lumbar spine before her complaints of having performed heavy work in 2018.

(t) The x-ray report by Dr Mullins dated 10 December 2018 referred to chronic low back pain with an acute flare up in the clinical notes. This description is consistent with having arisen from her left ankle injury or original back injury in 2011.

(u) In relation to the issue of Ms Bath's gait, an entry in the Corowa Medical Centre clinical records on 3 December 2003 referred to a tender and swollen lateral right mid foot. There seems to be some bilateral cause for instability with her gait.

(v) An entry in the Corowa Medical Centre clinical records on 22 January 2019 recorded that Ms Bath herself felt that her irregular walk caused or contributed to her back problem. The doctor did not dissuade her of that view and accepted that view as stated in his report dated 6 February 2019.The entry in the clinical records on 22 February 2019 confirmed the awkward gait.

(w) CEM's primary submission is that there is no liability on CEM but to the extent that there is, it is a closed period claim.

Ms Bath's submissions

168. Ms Bath's submissions, through her counsel, Mr Hunt, may be summarised as follows:

(a) There is no issue that Ms Bath did not perform the duties referred to in her evidentiary statement on 6 December 2018. The issue goes to the extent she performed those duties.

(b) Ms Bath was trained in cellar work by the respondent and there can be only one reason she was so trained, that is, to perform the duties of a cellar person.

(c) The evidence, including that in the Corowa Medical Centre clinical notes, make it clear that Ms Bath's left ankle symptoms were continuing but following her recovery from surgery, she returned to her full duties and such symptoms did not incapacitate her for work with the respondent.

(d) There was evidence that Ms Bath suffered from a sore back in 2016 but no evidence of radiculopathy at that time.

(e) There was evidence that Ms Bath suffered from some thoracic pain in 2017 and underwent investigation in the form of a cervical and thoracic CT scan. Whilst there is evidence of radiculopathy, it is not lumbar spine radiculopathy. There was no suggestion of any sciatica at that stage.

(f) An entry in the Corowa Medical Centre clinical records on 25 October 2018 by Dr Roy referred to Ms Bath's left ankle injury when she presented with left heel pain. There was no evidence that she was taking time off work due to her left ankle symptoms.

(g) Ms Bath's evidence is that her back pain following 6 December 2018 was different. It was terrible back pain and went from her lower back into her left buttock and left leg.

(h) Dr Bodel's reference to the noteworthiness of Ms Bath's previous left ankle injury, referred to in CEM's submissions, referred to the numbness and tingling in the all the digits of the left foot following the 6 December 2018 incident.

(i) Ms Bath has been totally incapacitated for work since 6 December 2018 and there has been certification in this regard from her general practitioner. In addition, Dr Bodel's opinion confirms that she has no current work capacity.

(j) Dr Bodel found evidence of lumbar radiculopathy which was not evident prior to the frank incident on 6 December 2019.

(k) Dr Bodel opined that Ms Bath suffered a disc injury at the L4/5 level as a consequence of the injury that occurred at work as a result of the heavy day's work on 6 December 2018. The pathology was principally at the L4/5 level, which is consistent with the development of the sciatic symptoms.

(l) Dr Bodel considered the effect that the nature and conditions of Ms Bath's work with the respondent may have had in relation to her lumbar spine. Dr Bodel confirmed that Ms Bath had a pre-existing degenerative disease in her lumbar spine. Dr Bodel opined that the nature and conditions of Ms Bath's heavy work over a period of time with the respondent in general may have aggravated the degenerative changes in her lumbar spine. This was consistent with Ms Bath's evidence that the pain fluctuated from day to day depending on her activities.

(m) The frank pathology, the L4/5 disc, the minor bulge at L5 and the onset of sciatica, coincided with the frank incident on 6 December 2018.

(n) Dr Bodel considered Ms Bath's gait issue. Dr Bodel agreed that gait may have had an effect but did not retract his opinion that overall the nature and conditions of the work performed over time and the events on 6 December 2018 were causative of the symptoms from which Ms Bath now suffered. Dr Powell excluded gait as having been causative. Taking those two opinions into consideration, the conclusion must be that the claim is a nature and conditions type claim over a period of time which aggravated degenerative changes in the lumbar spine as well as one of frank pathology that occurred as a result of the incident on 6 December 2018.

(o) Dr Powell examined Ms Bath's upper body. He found a full motion at the cervical spine and the thoracic spine. Dr Powell's examination did not refer to him having conducted a neurological examination of the lumbar spine and lower limbs. Dr Powell referred to there being no radiculopathy but there was no indication as to how he tested that.

(p) Dr Powell took a long history of non-specific lumbar back pain since 2015 with episodes of symptomatic aggravation associated with physical activities in Ms Bath's work, particularly shifting heavy objects such as kegs. He noted that the increase of back pain symptoms with left leg radiation occurred after shifting a keg in December 2018, with symptoms persisting and fluctuating. Dr Powell referred to the incident of 6 December 2018 causing a mechanical strain in the lumbar region and symptomatic aggravation of underlying lumbar spondylosis with radicular symptoms into the left lower limb. He also opined that there was no clear indication of discrete disc prolapse that might produce an acute nerve root compression and radicular symptoms. However, that is not consistent with the lumbar MRI scan, Ms Bath's description of symptoms or Dr Bodel's clinical findings. Dr Powell did not disclose a basis for his opinion, and he failed to consider the symptoms disclosed by Ms Bath. He conceded that there was an aggravation of Ms Bath's symptoms.

(q) The evidence is that a prolapse occurred at L4/5 and to a lesser extent at L5 on 6 December 2018.

(r) Dr Powell's opinion was that Ms Bath presented with a typical age-related spondylitic change in the lumbar spine that had started to become symptomatic through physical activity and it just so happened that the physical activities giving rise to symptoms were in the workplace. Such opinion supported a disease case.

(s) In relation to the issue of Ms Bath's capacity, Dr Powell opined that her capacity was difficult to determine. Ms Bath is 53 years of age; educated to Year 10; and completed a secretarial course many years ago. She has worked in the hospitality industry in work which is manual in nature and involved prolonged standing, bending and lifting. She has continuing left ankle symptoms, a back injury with pathology at L4/5 with sciatica. There is no real job she could do in her circumstances. She is totally incapacitated.

(t) Ms Bath suffered an aggravation of an underlying degenerative change which caused symptoms due to the nature and conditions of her employment with the respondent and then a frank injury on 6 December 2018, being the prolapse at L4/5 and L5 with the development of sciatica, which left her incapacitated for work.

GIO's submissions in reply

169. GIO's submissions in reply may be summarised as follows:

(a) GIO can only be found liable if there is a finding of a consequential injury to the lumbar spine as a result of the accepted left ankle injury on 4 August 2011 and then only after 7 December 2018.

(b) Dr Powell makes it clear that the lumbar spine condition is not related to the left ankle injury.

(c) The clinical records refer to pain in Ms Bath's left ankle. It is trite law that the mere mention of pain to the primary injury body part does not mean that a consequential injury has been sustained.

(d) Simply because there are degenerative issues in the lumbar spine does not mean that a consequential injury existed, even if Ms Bath had prior degenerative issues.

CEM's submissions in reply

170. CEM's submissions in reply may be summarised as follows:

    (a) Heavy lifting was not a huge feature of Ms Bath's employment.

    (b) Both Ms Bath and GIO have submitted that disc pathology was caused in 2018. So, that must mean that there are two back injuries. If there was still symptomology consequent upon the left ankle injury, then, that is a separate matter which continued, as well as having a discal injury. GIO is liable for the former.

    (c) Dr Powell was criticised for not expressing that he carried out neurological testing. However, Dr Powell found that there was not radiculopathy present at the time of his examination. So, by the time he had examined Ms Bath, the consequences of the discal injury had ceased from a symptomatic point of view. That means that any residual lumbar problems remain the liability of GIO.

    (d) Even the above submission is wrong about Dr Powell and the disease question, the disease, if there is one, goes back to Ms Bath's gait following her left ankle injury, rather than the nature of her work.

FINDINGS AND REASONS

171. I have carefully considered the evidence and the oral submissions made by the parties.

Whether Ms Bath suffered a consequential injury to her lumbar spine as a result of the accepted left ankle injury on 4 August 2011

172. The relevant legal principles are outlined below.

173. In this case, I am required to conduct a common sense evaluation of the causal chain to determine whether the lumbar spine and left leg symptoms complained of by Ms Bath have resulted from the accepted injury to her left ankle on 4 August 2011.

174. The Commission has considered and explained the difference between an "injury" and a condition that has resulted from an injury in several decisions:

    Moon v Conmah Pty Ltd [104]; *Superior Formwork Pty Ltd v Livaja*[105] (*Moon*);
    Cadbury Schweppes Pty Ltd v Davis[106];
    North Coast Area Health Service v Felstead[107];
    Australian Traineeship System v Turner[108];
    Kumar v Royal Comfort Bedding Pty Ltd[109] (*Kumar*), and
    Bouchmouni v Bakos Matta t/as Western Red Services[110].

175. It is unnecessary for me to determine whether Mr Bath's lumbar spine and left leg symptoms are in themselves 'injuries' pursuant to section 4 of the 1987 Act. In *Moon*, Roche DP observed:

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[104] *Moon v Conmah Pty Ltd* [2009] NSWWCCPD 134 at [43], [45] and [50]
[105] *Superior Formwork Pty Ltd v Livaja* [2009] NSWWCCPD 158 at [122]
[106] *Cadbury Schweppes Pty Ltd v Davis* [2011] NSWWCCPD 4 at [28]-[32] and [39]-[42]
[107] *North Coast Area Health Service v Felstead* [2011] NSWWCCPD 51 at [84]
[108] *Australian Traineeship System v Turner* [2012] NSWWCCPD 4 at [28] and [29]
[109] *Kumar v Royal Comfort Bedding Pty Ltd* [2012] NSWWCCPD 8 at [35]–[49] and [61])
[110] *Bouchmouni v Bakos Matta t/as Western Red Services* [2013] NSWWCCPD 4

> "It is therefore not necessary for Mr Moon to establish that he suffered an 'injury' to his left shoulder within the meaning of that term in section 4 of the 1987 Act. All he has to establish is that the symptoms and restrictions in his left shoulder have resulted from his right shoulder injury. Therefore, to the extent that the Arbitrator and Dr Huntsdale approached the matter on the basis that Mr Moon had to establish that he sustained an 'injury' to his left shoulder in the course of his employment with *Conmah* they asked the wrong question.
>
> The test of causation in a claim for lump sum compensation is the same as it is in a claim for weekly compensation, namely, has the loss 'resulted from' the relevant work injury (see *Sidiropoulos v Able Placements Pty Limited* [1998] NSWCA 7; (1998) 16 NSWCCR 123; *Rail Services Australia v Dimovski & Anor* [2004] NSWCA; (2004) 1 DDCR 648)."[111]

176. Section 9A of the 1987 Act does not apply to a condition that has resulted from an injury: *Tiritabua v Bartter Enterprises Pty Ltd*[112].

177. In considering the difference between an "injury" and a condition that has resulted from an "injury", the Commission has consistently applied the principles in *Kooragang Cement Pty Ltd v Bates*[113] (*Kooragang*). In *Kooragang*, in perhaps the most commonly cited passage on causation, Kirby P said:

> "The result of the cases is that each case where causation is in issue in a workers compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase 'results from', is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent death or injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is a commonsense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation."[114]

178. The High Court of Australia, in *Comcare v Martin*[115] (*Martin*), raised some concerns about the *Kooragang* common sense evaluation of the causal chain test. *Martin* involved the definition of injury under section 5A in the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act). The High Court of Australia's conclusion commences with a caution concerning the use of the "common sense" test:

> "Causation in a legal context is always purposive. The application of a causal term in a statutory provision is always to be determined by reference to the statutory text construed and applied in its statutory context in a manner which best effects its statutory purpose. It has been said more than once in this Court that it is doubtful whether there is any 'common sense' approach to causation which can provide a useful, still less universal, legal norm. Nevertheless, the majority in the Full Court construed the phrase 'as a result of' in s 5A(1) as importing a 'common sense' notion of causation. That construction, with respect, did not adequately interrogate the statutory text, context and purpose.[116]

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[111] *Moon v Conmah Pty Ltd* [2009] NSWWCCPD 134 at [45-46]
[112] *Tiritabua v Bartter Enterprises Pty Ltd* [2008] NSWWCCPD 145 at [47]
[113] *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796
[114] *Kooragang Cement Pty Ltd v Bates* (1994) 10 NSWCCR 796 at 810
[115] *Comcare v Martin* [2016] HCA 43
[116] *Comcare v Martin* [2016] HCA at [42]

179. As I understand it, when referring to applying "common sense", Kirby, P in *Kooragang* was not suggesting that it be applied "at large" or that issues were to be determined by "common sense" alone but by a careful analysis of the evidence. Therefore, the legislation must be interpreted by reference to the terms of the statute and its context in a fashion that best effects its purpose. Such a concept is not new. Sections 4(b), 9A and 11A of the 1987 Act contain specific requirements and the provisions need to be interpreted using standard principles of interpretation. This does not mean that the common sense approach has no place in the application of the legislation to the facts of the case.

180. In *Kirunda v State of New South Wales (No 4),*[117] (*Kirunda*) Snell DP stated:

> "In *Kooragang Cement Pty Ltd v Bates* Kirby P said that causation 'is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions'.[118] A finder of fact, dealing with issues of causation, is entitled to 'have some recourse' to 'the sequence of events and commonsense'.[119] However, where an 'issue lies outside the realm of common knowledge and experience' it 'falls to be determined by reference to expert medical evidence'.[120] In *Lithgow City Council v Jackson* the plurality said, of a finding on causation:
>
> > 'That proposition is not self-evident. To establish it would call for more than the application of 'commonsense' or the court's experience of ordinary life. The proposition turns on an inference from the nature of the respondent's injuries to their probable cause. That inference could only be drawn in the light of expert medical evidence.'"[121]

181. I accept Ms Bath as a witness of truth, who did her best to provide a history of her injuries, her treatment and her complaints to her various treating doctors and the forensic medical specialists. The histories she provided of injury, treatment and complaints of symptoms were, in the main, consistent over a long period of time. The preponderance of the evidence also demonstrated and led me to conclude that Ms Bath was a hard worker with a strong work history. She was and is keen to return to work as evidenced by her return to work following what was a significant injury to her left ankle.

182. Whilst the consequential injury to Ms Bath's lumbar spine was pleaded in the ARD, it was CEM that provided submissions supporting the same despite its own forensic medical specialist, Dr Powell, rejecting the proposition.

183. The unchallenged evidence was that Ms Bath sustained an injury to her left ankle at the respondent's premises on 4 August 2011 whilst stepping down off a stage and rolling her left ankle when she put her foot down on the metal edging of the dance floor. She was treated by Dr Falkenberg, who performed a left ankle excision of ganglion and reconstruction of talonavicular joint capsule on 15 March 2012. Following the surgical procedure, Ms Bath was in a cast until about June 2012. She underwent physiotherapy for a period of about 12 months, but her left ankle never fully recovered. She was able to return to her full pre-injury employment following her recovery from left ankle surgery by putting up with the ongoing pain.

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[117] *Kirunda v State of New South Wales (No 4)* [2018] NSWWCCPD 45 at [136]
[118] (1994) 35 NSWLR 452, 464B.
[119] *Hevi Lift (PNG) Ltd v Etherington* [2005] NSWCA 42; 2 DDCR 271, [89] (per McColl JA, Mason P and Beazley JA agreeing).
[120] *Tubemakers of Australia Ltd v Fernandez* (1976) 50 ALJR 720, 724E (per Mason J, Barwick CJ and Gibbs J agreeing).
[121] *Lithgow City Council v Jackson* [2011] HCA 36; 244 CLR 352; 281 ALR 223; 85 ALJR 1130, [66].

184. Ms Bath's evidence was that, since her left ankle injury, she has walked with a limp and continued to suffer from pain and discomfort in the left ankle. Since 2015, she has suffered a dull pain across her lower back, which she hypothesised was caused by her left ankle injury limp.

185. Ms Lavis' evidence was that the respondent's records did not disclose any significant periods of absence from work when she returned following left ankle surgery in 2012. She recalled Ms Bath making complaints about pain in her ankle following her return to work, but not after returning to her normal duties. She did not recall Ms Bath complaining about pain in her lower back. Ms Lavis had observed Ms Bath as always having had a wobble in her walk. She did not refer to it as a limp. She recalled that Ms Bath resumed her normal duties after completing physiotherapy.

186. Ms Young's evidence was that Ms Bath had not shown any signs that her ankle was hurting whilst at work. However, she did recall that, about one month prior to 6 December 2018, Ms Bath referred to a flareup in her ankle pain. Ms Young did observe that Ms Bath always had an unusual walk and walked with a waddle. Ms Bath had no restrictions placed on her duties in her employment with the respondent.

187. Ms King's evidence was that Ms Bath had always walked with a limp or rather, a waddle. She observed that Ms Bath was pigeon toed. Ms Bath conceded that she was pigeon toed. Ms King did not observe any change in the way Ms Bath walked after her left ankle injury. Ms King recalled that Ms Bath complained of a sore back sometime in the 12 months preceding 6 December 2018. She recalled that one such complaint by Ms Bath followed time spent weeding her garden.

188. Dr Falkenberg's evidence did not refer to Ms Bath having an altered or awkward gait related to her left ankle injury or that her left ankle injury had any impact on her lumbar spine.

189. Dr Todhunter's evidence referred to Ms Bath's presenting problem as the left lower limb, left ankle and left foot pain. Dr Todhunter did not refer to any consequential injury arising from Ms Bath's left ankle injury. He made no reference to an awkward or altered gait.

190. The medical imaging in evidence does not support a claim for a consequential injury to the lumbar spine.

191. The entries made in Ms Bath's Corowa Medical Centre clinical records between 5 August 2011 and 14 January 2019 made no connection between her left ankle injury and her lower back condition. The clinical records during the above mentioned period made no reference to an awkward or altered gait. Dr Htun opined that Ms Bath's low back condition may have been aggravated by her work with the respondent.

192. In the entry made by Dr Deiter in Ms Bath's Corowa Medical Centre clinical records on 22 January 2019, the doctor referred to Ms Bath's extensive left ankle injury in 2011 and her feeling that her irregular walk following the ankle injury caused or contributed to her lower back condition. He noted that he did not really understand how her current issues related to her workers compensation injury.

193. In Dr Deiter's referral letter to Northeast Life Physiotherapy dated 23 January 2019, he attempted to relate Ms Bath's lumbar spine injury with left-sided sciatica to her abnormal gait following her 4 August 2011 left ankle injury and the heavy lifting of boxes, pushing of beer kegs and carrying heavy bar stools on 6 December 2018. Dr Deiter's reports and opinions hypothesise and make no actual link.

194. On 6 February 2019, Dr Deiter appears to have taken up Ms Bath's hypothesis, despite having expressed the uncertainty referred to above in his clinical records entry on 22 January 2019. In his letter to CEM dated 6 February 2019, he advocated that Ms Bath's previous ankle injury had contributed to a change in gait and was, therefore, a substantial contributing factor to her current back pain. However, his statement was qualified, in that, he made it clear that it was not the only factor. He did not explain what those other factors were. Although, one might infer that those other factors were the heavy lifting of boxes, pushing of beer kegs and carrying heavy bar stools on 6 December 2018 he referred to in his referral letter to Northeast Life Physiotherapy dated 23 January 2019.

195. I have formed the view that Dr Deiter's opinion in relation to the causal relationship between Ms Bath's left ankle injury and her lower back condition is more of a hypothesis, having seemingly taken up the role of advocate on her behalf when responding to CEM's request. Dr Deiter did not offer an explanation as to how any altered gait experienced by Ms Bath was related to her left ankle injury, nor did he offer any reasoning or explanation as to how it affected her lower back. On the balance of probabilities, I am not satisfied that Dr Deiter's evidence has established a sufficient causal chain connecting the condition of the lumbar spine to the accepted left ankle injury.

196. Dr Bodel agreed that the gait issue raised by Dr Deiter may, in part, have contributed to the overall level of Ms Bath's low back pain. However, he did not disclose any reasoning behind his opinion in this regard. Accordingly, I give Dr Bodel's opinion on this issue no weight.

197. Dr Powell was unequivocal when it came to the issue of the lumbar spine condition being consequential upon the left ankle injury. He was clear that Ms Bath's previous left ankle injury did not have any impact on her current presentation. Dr Powell explained the reasoning behind his opinion in this regard, which included, no clinical indication of chronic gait symmetry; no reliable evidence that connected minor gait abnormality with the natural history of other common musculoskeletal conditions such as lumbar spondylosis. I prefer the reasoned opinion of Dr Powell in relation to this issue.

198. As was stated in *Kirunda*, a finder of fact, dealing with issues of causation, is entitled to 'have some recourse' to 'the sequence of events and commonsense'.[122] However, where an 'issue lies outside the realm of common knowledge and experience' it 'falls to be determined by reference to expert medical evidence'.[123]

199. Therefore, having regard to the whole of the evidence, applying a common sense test and for the reasons referred to above, I am not satisfied that Ms Bath has discharged the onus of proving on the balance of probabilities that there is a sufficient causal chain connecting the condition of her lumbar spine to the accepted injury to the left ankle on 4 August 2011 and I find accordingly.

Whether Ms Bath suffered an injury to her lumbar spine within the meaning of section 4 of the 1987 Act

200. Having found that Ms Bath did not suffer a consequential injury to her lumbar spine as a result of the accepted left ankle injury on 4 August 2011, I now turn to consider and determine the issue of injury within the meaning of section 4 of the 1987 Act.

201. The relevant legislation and legal principles are outlined below.

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[122] *Hevi Lift (PNG) Ltd v Etherington* [2005] NSWCA 42; 2 DDCR 271, [89] (per McColl JA, Mason P and Beazley JA agreeing).
[123] *Tubemakers of Australia Ltd v Fernandez* (1976) 50 ALJR 720, 724E (per Mason J, Barwick CJ and Gibbs J agreeing).

202. Section 4 of the 1987 Act provides:

> "In this Act:
>
> 'injury':
>
> (a) means personal injury arising out of or in the course of employment,
>
> (b) includes a 'disease injury', which means:
>
> (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and
>
> (ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease, and
>
> (c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the *Workers' Compensation (Dust Diseases) Act* 1942, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined."

203. The onus of establishing injury falls upon Ms Bath and the standard of proof is on the balance of probabilities, meaning that I must be satisfied to a degree of actual persuasion or affirmative satisfaction: *Department of Education and Training v Ireland*[124] (*Ireland*) and *Nguyen v Cosmopolitan Homes*[125] (*Nguyen*).

204. The issue of causation must be based and determined on the facts in each case. I have already referred to the principles espoused in *Kooragang, Martin* and *Kirunda* above.

Section 4(a) of the 1987 Act

205. In order to establish that a "personal injury" has been suffered within the meaning of section 4(a) of the 1987 Act, Ms Bath must establish, on the balance of probabilities, that there has been a definite or distinct "physiological change" or "physiological disturbance" in her lumbar spine for the worse which, if not sudden, is at least, identifiable: *Kennedy Cleaning Services Pty Ltd v Petkoska*[126] (*Kennedy*) and *Military Rehabilitation and Compensation Commission v May*[127] (*May*). The word "injury" refers to both the event and the pathology arising from it: *Lyons v Master Builders Association of NSW Pty Ltd*[128] (*Lyons*). While pain may be indicative of such physiological change, it is not itself a "personal injury".

206. *Castro v State Transit Authority*[129] (*Castro*) provides a useful review of the authorities and makes it clear that what is required to constitute "injury" is a "sudden or identifiable pathological change". In *Castro*, a temporary physiological change in the body's functioning (atrial fibrillation: irregular rhythm of the heart), without pathological change, did not constitute injury.

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[124] *Department of Education and Training v Ireland* [2008] NSWWCCPD 134
[125] *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246
[126] *Kennedy Cleaning Services Pty Ltd v Petkoska* [2000] HCA 45
[127] *Military Rehabilitation and Compensation Commission v May* [2016] HCA 19
[128] *Lyons v Master Builders Association of NSW Pty Ltd* (2003) 25NSWCCR 496
[129] *Castro v State Transit Authority* [2000] NSWCC 12; (2000) 19 NSWCCR 496

207. *Zickar v MGH Plastic Industries Pty Ltd*[130] highlighted that a worker can rely on injury simpliciter despite the existence of a disease. The terms "personal injury" and "disease" are not mutually exclusive categories. A sudden identifiable physiological (pathological) change to the body brought about by an internal or an external event can be a personal injury and the fact that the change is connected to an underlying disease process does not prevent the injury being a personal injury: *North Coast Area Health Service v Felstead*.[131]

208. If it is established that Ms Bath suffered a personal injury within the meaning of section 4(a) of the 1987 Act, section 9A of the 1987 Act must be satisfied.

209. Section 9A of the 1987 Act is reproduced below in full:

> "(1) No compensation is payable under this Act in respect of an injury (other than a disease injury) unless the employment concerned was a substantial contributing factor to the injury.
>
> **Note:** In the case of a disease injury, the worker's employment must be the main contributing factor. See section 4.
>
> (2) The following are examples of matters to be taken into account for the purposes of determining whether a worker's employment was a substantial contributing factor to an injury (but this subsection does not limit the kinds of matters that can be taken into account for the purposes of such a determination):
>
> (a) the time and place of the injury,
>
> (b) the nature of the work performed and the particular tasks of that work,
>
> (c) the duration of the employment,
>
> (d) the probability that the injury or a similar injury would have happened anyway, at about the same time or at the same stage of the worker's life, if he or she had not been at work or had not worked in that employment,
>
> (e) the worker's state of health before the injury and the existence of any hereditary risks,
>
> (f) the worker's lifestyle and his or her activities outside the workplace.
>
> (3) A worker's employment is not to be regarded as a substantial contributing factor to a worker's injury merely because of either or both of the following:
>
> (a) the injury arose out of or in the course of, or arose both out of and in the course of, the worker's employment,
>
> (b) the worker's incapacity for work, loss as referred to in Division 4 of Part 3, need for medical or related treatment, hospital treatment, ambulance service or workplace rehabilitation service as referred to in Division 3 of Part 3, or the worker's death, resulted from the injury.
>
> (4) This section does not apply in respect of an injury to which section 10, 11 or 12 applies."

[130] *Zickar v MGH Plastic Industries Pty Ltd* [1996] HCA 31; 187 CLR 310
[131] *North Coast Area Health Service v Felstead* [2011] NSWWCCPD 51 at [77]

210. Section 9A(2) of the 1987 Act provides a non-exhaustive list of matters to be taken into account in determining whether employment was a substantial contributing factor.

211. Whether employment is a substantial contributing factor to an injury is a question of fact and is a matter of impression and degree: *Dayton v Coles Supermarkets Pty Limited*[132] (*Dayton*); *McMahon v Lagana*[133] (*McMahon*) to be decided after a consideration of all the evidence. See also *WorkCover Authority of NSW v Walsh.*[134]

212. Under section 9A of the 1987 Act, employment must be a substantial contributing factor to the injury, not to the incapacity, the need for treatment or the loss: *Rootsey v Tiger Nominees Pty Ltd*.[135]

213. What is required is the careful analysis of what the worker was doing at the time of the injury and the strength of the causal link between the employment concerned and the injury. Other causative factors may be present. The probability that the injury could have occurred anyway or at the same stage of the worker's life must be considered, as must the lifestyle of the worker. The determination is an evaluative one, leaving a broad area for the personal judgment of the decision maker: *Hevi Lift (PNG) Limited v Everington*[136] (*Hevi Lift*).

214. In *Badawi v Nexon Asia Pacific Pty Ltd t/as Commander Aust Pty Ltd*[137] (a full bench of the NSW Court of Appeal reviewed the provisions of section 9A of the 1987 Act. *Mercer v ANZ Banking Group*[138] was not followed. Allsop P, Beazley and McColl JJA, (Handley AJA dissenting) held that the phrase "substantial contributing factor" in section 9A involved a causative element. The causal connection be must be real and of substance.

215. In *Badawi*, Allsop P, Beazley and McColl JJA, (Handley AJA dissenting) held that in determining whether a worker's employment was a substantial contributing factor, the matters specified in section 9A(2) must be taken into account to the extent that they are relevant. Their Honours considered that section 9A(2)(b) directed attention to the nature of the work performed and the particular tasks of that work and not to what the employee was doing at the actual time of the injury.

216. Basten JA concurred with the decision of the majority, considering that the causal test imposed by section 9A was more stringent than that imposed by section 4. His Honour observed that if the conduct out of which the injury arose occurred in the course of employment and was the effective cause of the injury, absent misconduct on the part of the employee, the only conclusion reasonably open is that the employment was a substantial contributing factor to the injury. His Honour also said that the words "employment concerned" in section 9A(1) reinforced the view that it is the work activity in which the worker was actually engaged at the time of injury that is relevant and that the ultimate question is whether the activity or task was a "substantial contributing factor to an injury" bearing in mind that the concept is exegeted in sections 9A(2) and 9A(3).

217. Mr Bath bears the onus of establishing that employment was a substantial contributing factor. A finding that Ms Bath sustained a personal injury arising out of or in the course of her employment with the respondent on 6 December 2018 within the meaning of section 4(a) of the 1987 Act of itself is not sufficient to satisfy the requirements of section 9A of the 1987 Act: section 9A(3)(a). As discussed above, section 9A also involves a causative element and the causal connection must be real and of substance.

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[132] *Dayton v Coles Supermarkets Pty Limited* [2001] NSWCA 153 at [29]
[133] *McMahon v Lagana* [2004] NSWCA 164 at [32]
[134] *WorkCover Authority of NSW v Walsh* [2004] NSWCA 186
[135] *Rootsey v Tiger Nominees Pty Ltd* (2002) 23 NSWCCR 725
[136] *Hevi Lift (PNG) Limited v Everington* [2005] NSWCA 42
[137] *Badawi v Nexon Asia Pacific Pty Ltd t/as Commander Aust Pty Ltd* (2009) NSWCA 324
[138] *Mercer v ANZ Banking Group* [2000] NSWCA 138

Section 4(b)(ii) of the 1987 Act

218. As to the meaning of disease, in *Federal Broom Co Pty Ltd v Semlitch*[139] (*Semlitch*), Kitto J said:

> "In its ordinary meaning 'disease' is a word of very wide import, comprehending any form of illness; and there is no reason I can see for reading it in the present context as not extending to mental illness."[140]

This decision was applied by the Court of Appeal in *Cook v Midpart Pty Ltd t/as McDonalds Foster*[141].

219. In *Commissioner for Railways v Bain*[142] Windeyer J stated:

> "The word 'disease' seems to me apt to describe any abnormal physical or mental condition that is not purely transient …"[143]

220. In *Semlitch*, Kitto J said:

> "There is an exacerbation of a disease where the experience of the disease by the patient is increased or intensified by an increase or intensifying of symptoms. The word is directed to the individual and the effect of the disease upon him rather than being concerned with the underlying mechanism".[144]

221. In *Semlitch* Windeyer J said:

> "The question that each [aggravation; acceleration; exacerbation; deterioration] poses is, it seems to me, whether the disease has been made worse in the sense of more grave, more grievous or more serious in its effects upon the patient."[145]

222. In *Semlitch* Windeyer J also posed the following questions:

> "Was the applicant suffering from a disease? If so, was there an aggravation, acceleration, exacerbation or deterioration of it? If so, was her (or his) employment a contributing factor? If so, did a total or partial incapacity for work result from such aggravation, acceleration, exacerbation or deterioration?"[146]

In relation to injuries received on or after 19 June 2012, employment must be the main contributing factor to the aggravation, acceleration, exacerbation or deterioration.

Discussing whether there was "aggravation, acceleration, exacerbation or deterioration" Windeyer J said:

> "… the answer depends upon whether for the sufferer the consequences of his affliction have become more serious".[147]

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[139] *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626
[140] *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626 at 632
[141] *Cook v Midpart Pty Ltd t/as McDonalds Foster* [2008] NSWCA 151
[142] *Commissioner for Railways v Bain* [1968] HCA 5; 112 CLR 246
[143] *Commissioner for Railways v Bain* [1968] HCA 5; 112 CLR 246 at 272
[144] *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626
[145] *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626 at 639
[146] *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626 at 638
[147] *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626 at 637

223. Burke CCJ, applying *Semlitch* in *Cant v Catholic Schools Office*[148] (*Cant*) said:

> "The thrust of these comments is that irrespective of whether the pathology has been accelerated there is a relevant aggravation or exacerbation of the disease if the symptoms and restrictions emanating from it have increased and become more serious to the injured worker."[149]

224. In *Australian Conveyor Engineering Pty Ltd v Mecha Engineering Pty Ltd*[150] (*Mecha*) the Court of Appeal (Sheller JA) said the words "injury consists in the aggravation ...of a disease" in 16(1) of the 1987 Act should be construed as not referring to something which is an injury independently of its aggravating effects on a previously existing disease, but as being confined to what are entirely injuries by aggravation.

225. In *Rail Services Australia v Dimovski*[151] [2004] NSWCA 267; (2004) 1 DDCR 648 Hodgson JA considered the decision of *Mecha* and said:

> "The majority held that, although the injury on 11 February 1992 could fall within either paragraph (a) or (b)(ii) of the definition in s.4, the words 'injury consists in the aggravation...of a disease' in s. 16(1) should be construed as not referring to something which is an injury independently of its aggravating effects on a previously existing disease, but as *being confined to what are entirely injuries by aggravation*." (emphasis added)[152]

226. The proper test is whether the aggravation impacted the individual concerned. It is not necessary for the particular disease to be made worse: *Cabramatta Motor Body Repairers (NSW) Pty Ltd v Raymond*[153] (*Raymond*) applying *Semlitch* and *Cant*. In *Raymond*, Roche ADP (as he then was) was satisfied that, on the whole of the evidence, it was open to the Arbitrator to conclude that the worker suffered an aggravation of his occupational asthma, in the sense that the symptoms increased and became more serious while employed.[154]

227. Roche DP in *Kelly v Western Institute NSW TAFE Commission*[155] (*Kelly*), citing *Semlitch*, said:

> "An aggravation or exacerbation of a disease occurs where the experience of the disease by the applicant is increased or intensified by an increase or intensifying of symptoms."[156]

228. In *Veolia Environmental Services Pty Ltd v Gwynne*[157] there is a review of the decisions relevant to the meaning of "aggravation" within section 16 of the 1987 Act. Keating P held that as the medical evidence established that the worker had the same incapacity both before and after the alleged aggravation, there was no aggravation within section 16 of the 1987 Act.

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[148] *Cant v Catholic Schools Office* [2000] NSWCC 37; (2000) 20 NSWCCR 88
[149] *Cant v Catholic Schools Office* [2000] NSWCC 37; (2000) 20 NSWCCR 88 at [17]
[150] *Australian Conveyor Engineering Pty Ltd v Mecha Engineering Pty* Ltd (1998) 45 NSWLR 606 at 616
[151] *Rail Services Australia v Dimovski* [2004] NSWCA 267; (2004) 1 DDCR 648
[152] *Rail Services Australia v Dimovski* [2004] NSWCA 267; (2004) 1 DDCR 648 at [64]
[153] *Cabramatta Motor Body Repairers (NSW) Pty Ltd v Raymond* [2006] NSWWCCPD 132; (2006) 6 DDCR 79
[154] *Cabramatta Motor Body Repairers (NSW) Pty Ltd v Raymond* [2006] NSWWCCPD 132; (2006) 6 DDCR 79 at [45-47]
[155] *Kelly v Western Institute NSW TAFE Commission* [2010] NSWWCCPD 71
[156] *Kelly v Western Institute NSW TAFE Commission* [2010] NSWWCCPD 71 at [66]
[157] *Veolia Environmental Services Pty Ltd v Gwynne* [2014] NSWWCCPD 10

229. Section 4(b)(ii) of the 1987 Act requires that the employment must be the main contributing factor to the injury, namely, the aggravation, acceleration, exacerbation or deterioration of the disease condition.[158] The word "main" in the phrase "main contributing factor" means "chief" or "principal".[159]

230. Roche DP in *State Transit Authority v El-Achi*[160] (*El-Achi*) said:

> "That a doctor does not address the ultimate legal question to be decided is not fatal. In the Commission, an Arbitrator must determine, having regard to the whole of the evidence, the issue of injury, and whether employment is the main contributing factor to the injury. That involves an evaluative process."[161]

Applying the relevant legislation and legal principles to the evidence

231. I now turn to the application of the relevant legislation and the legal principles referred to above to the available evidence in this matter, bearing in mind that Ms Bath bears the onus of establishing her case on the balance of probabilities.

232. Firstly, and for the sake of completeness, I will deal with CEM's submission that it is open for me to find that Ms Bath sustained a disc injury to her lower back in the work-related incident on 4 August 2011, even though it was not raised as an issue at the teleconference or prior to the commencement of the arbitration.

233. Dr Bodel expressed concern that Ms Bath may have, in fact, sustained an injury to a disc in her lower back when she fell on 4 August 2011, which may have been quiescent and not a major problem until 6 December 2018. There is just no evidence, contemporaneous or otherwise, apart from Dr Bodel's expressed concern in his report dated 23 May 2019, that Ms Bath sustained an injury to her lower back when she fell at the respondent's premises on 4 August 2011. I cannot be satisfied on the balance of probabilities, to a degree of actual persuasion or affirmative satisfaction, that a definite or distinct physiological change or disturbance in Ms Bath's lumbar spine affecting a disc arising out of or in the course of her employment with the respondent on 4 August 2011 has been established. There was no evidence of any sudden identifiable pathological change. Accordingly, I find that Ms Bath did not sustain an injury to her lumbar spine injury arising out of or in the course of employment with the respondent on 4 August 2011 within the meaning of section 4 of the 1987 Act.

234. I will now turn to the issues as to whether Ms Bath suffered injury to her lumbar spine within the meaning of sections 4(a) and 4(b)(ii) of the 1987 Act.

235. The duties Ms Bath performed in her employment for the respondent and described in her evidentiary statements are, on the whole, not disputed by CEM or GIO. The issue went to the extent to which she performed those duties.

236. The unchallenged evidence is that Ms Bath was employed by the respondent as a bar attendant (also described elsewhere as a bar steward). Ms Bath's job description listed her responsibilities, main activities, special requirements and other features of the job.[162]

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[158] *Ariton Mitic v Rail Corporation of NSW* (Matter No 008497/2013: 8 April 2014)
[159] *Meaney v Office of Environment and Heritage – National Parks and Wildlife Service* [2014] NSWWCC 339 at [138]-[147] and *Wayne Robinson v Pybar Mining Services Pty Ltd* [2014] NSWWCC 248 at [78]-[88]
[160] *State Transit Authority v El-Achi* [2015] NSWWCCPD 71 (*El-Achi*).
[161] *State Transit Authority v El-Achi* [2015] NSWWCCPD 71 at [72].
[162] CEM Reply dated 24 July 2019 at pages 186-187

237. Ms Lavis described Ms Bath's duties to include serving patrons, handling money, TAB service, operating the cashbox, serving patrons from poker machine wins, Keno service and making coffees and sandwiches in the coffee shop. Ms Lavis stated that moving furniture was not part of Ms Bath's job description. She doubted that Ms Bath would move kegs as it was normally the duty manager's role. The latter statement was not consistent with the evidence of Ms Young and Ms King, who conceded that Ms Bath was trained in the changing of beer kegs and was expected to do so in the absence of the duty manager, although that would occur infrequently. However, Ms Young and Ms King were not always present when Ms Bath was working her shift, in particular, if they were elsewhere in this large and busy club attending to their duties. Ms Bath's evidence was that a part of her role was to move beer kegs and restock wine casks and beer "basically every shift".[163] I prefer Ms Bath's evidence in this regard and find that she was involved in the changing of beer kegs more frequently than Ms Young and Ms King realised.

238. I accept Ms Bath's evidence that, during the course of employment with the respondent over many years, her duties, in addition to those as a bar attendant, included lifting and carrying cartons of beer to the refrigerator and then placing them in the refrigerator; lifting and carrying cartons of beer from the storeroom into the bar area one at a time and then removing the beer from the cartons and stacking the beer away; lifting and carrying 20 kg wine casks (more recently reduced in weight to between 10 kg and 15 kg) from the storeroom into the bar area and then lifting them to chest and neck height to place them into the refrigerators; collecting dirty glasses and stacking them in the dishwasher from large trays; stacking dishes and arranging for glasses and dishes to be cleaned and moved in and out of the dishwasher; moving and straightening heavy furniture moved by patrons; moving poker machine bar stools weighing between 15 kg and 20 kg to the middle of each isle to enable the clearance staff to empty poker machines early the following morning; lifting and carrying large buckets of water used for cleaning duties; and wrestling full and empty beer kegs weighing about 50 kg in the cool room into position by manually pushing and pulling them.

239. In relation to the changing of beer kegs, Ms Bath's evidence was that she would have to slide the full beer kegs about two metres. Ms Young's evidence was that the kegs would have to be moved a maximum of two to three metres. Ms King's evidence was that the kegs had to be moved a few feet for connection purposes.

240. I accept and find that the nature of Ms Bath's duties with the respondent were of a mainly manual nature and, at times, of a heavy nature involving carrying, lifting and forceful pushing and pulling of the moderately heavy to heavy objects referred to in the evidence.

241. The unchallenged evidence is that Ms Bath experienced an onset of symptoms in her lumbar spine from 2015 with episodes of symptomatic aggravation associated with physical activities at work. The dull pain was localised in her lower back and did not radiate into her legs. It did not prevent her from working. Although, sometimes, she would have the odd day off work due to low back pain to consult a chiropractor and then return to her usual duties at work.

242. On 7 June 2016, Ms Bath underwent an x-ray of her cervical spine, thoracic spine and lumbar spine by Dr Litherland. In relation to Ms Bath's lumbar spine, Dr Litherland found degenerative spondylosis demonstrated at L5/S1 with reduced intervertebral disc height posteriorly associated with anterior osteophytosis. There was no acute fracture or aggressive osseous lesion. There was moderate facet joint degenerative arthropathy at L4/5 and L5/S1.

[163] Applicant's Application to Admit Late Documents dated 27 August 2019 at page 11 at [82]

243. I accept Ms Bath's evidence that on 6 December 2018, she was working a five hour shift at the respondent's club commencing at 11.00 am during which time she performed heavy manual work including lifting and carrying cartons of beer to the refrigerator; lifting and carrying cartons of beer from the storeroom into the bar area and then removing the beer from the cartons and stacking the beer away; lifting and carrying wine casks from the storeroom into the bar area and lifting them to chest and neck height to place them into refrigerators; moving a heavy table and a couple of heavy stools in the club area in order to put them back in their proper places; wrestling beer kegs in the cool room into position by manually pushing and pulling them. The manoeuvring of the beer kegs was awkward and difficult in a reasonably confined space. The full beer kegs weighed about 50 kg and had to be slid into position after the empty beer kegs had been removed. On 6 December 2018, Ms Bath removed two empty beer kegs and replaced them with two full beer kegs and reconnected them to the line in the manner described above.

244. The unchallenged evidence is that, once Ms Bath arrived home following her shift on 6 December 2018, she was suffering from a fair amount of back pain. The following morning, she experienced terrible back pain, more than she had previously experienced. It was a different kind of pain, that is, a shooting and stabbing pain going from her lower back into her left buttock and down her left leg. There was a sensation of electricity shooting down her left buttock and left leg into her left calf muscle. She had never experienced those symptoms before.

245. On 19 December 2018, Ms Bath underwent an MRI scan of her lumbar spine by Dr Baird. The clinical notes in Dr Baird's MRI scan report referred to clinical signs and symptoms of nerve root compression from the left leg to the foot. Degenerative changes were observed at the L3/4, L4/5 and L5/S1. There was also a left L4/5 foraminal broad-based disc protrusion present which he thought may potentially compromise the exiting L4 nerve root. Dr Baird opined that the symptoms were suggestive of an L4 radiculopathy.

246. I found Dr Powell's evidence somewhat unclear. Dr Powell opined that Ms Bath's history and description of symptoms suggested that the incident on 6 December 2018 caused mechanical strain in the lumbar region and symptomatic aggravation of an underlying lumbar spondylosis with radicular symptoms into the left lower limb. However, he opined that there was no clear indication of discrete disc prolapse that might produce an acute nerve root compression and radicular symptoms, but that the imaging changes combining to produce the degree of foraminal stenosis, may have produced some relative impingement of neural structures and the referred symptoms described by Ms Bath. It could not be considered as an actual structural injury because there was no sign of acute structural failure. This opinion is inconsistent with the findings of Dr Baird in the lumbar MRI scan report dated 19 December 2018 where the latter found a left L4/5 foraminal broad-based disc protrusion potentially compromising the exiting L4 nerve root. It is also inconsistent with Dr Bodel's evidence. Dr Powell did have a copy of Dr Baird's MRI scan report dated 19 December 2018 and referred to its findings under the heading "Investigations". Dr Powell failed to engage with the MRI scan finding of a left L4/5 foraminal broad-based disc protrusion and explain the reasoning behind it not being a sign of an actual structural injury or acute structural failure.

247. Dr Powell was of the view that Ms Bath's presentation was one of mechanical back pain symptoms since 2015 associated with physical activities, most frequently in the workplace. He opined that it was a typical presentation of age related spondylitic change in the lumbar spine that had commenced to be symptomatic through physical activity, mainly at work. He further opined, however, that this did not imply that the condition was work-related. The aetiology of the degenerative disease is principally constitutional and age-related. The only association with her work was that symptoms became apparent when shifting heavy objects.

248. At the time of his examination, Dr Powell opined that Ms Bath did not have any signs of compressive radiculopathy or nerve root irritation arising at the lumbar foraminal level that would indicate radiculopathy. This is not consistent with Ms Bath's evidence and description of continuing symptoms or the findings on examination by Dr Bodel. Dr Powell does not appear to have fully engaged with the ongoing symptoms described to him by Ms Bath. He did note that Ms Bath continued to experience symptoms but that the source of those symptoms had not yet been determined. Dr Powell also opined that Ms Bath's lumbar spondylosis did not currently appear to be active. I accept that Ms Bath continues to experience a constant dull aching pain across the lower part of the back; left buttock and thigh pain; numbness involving the whole of the leg and a cramping sensation in the calf muscles; and numbness down the whole of the left leg into all five toes. Dr Powell opined that the effect of the incident at work on 6 December 2018 had passed by the time of his examination of Ms Bath on 18 July 2019. I find Dr Powell's opinions unconvincing.

249. On the other hand, Dr Bodel engaged with the evidence of Ms Bath and in particular, the lumbar MRI on 19 December 2018. Dr Bodel actually viewed the MRI scan itself which, in his opinion, confirmed definite disc pathology at the lumbosacral junction. He opined that, in particular, there was disc pathology in the lower three lumbar discs at L3/4, L4/5 and L5/Sl. The most dramatic in his view was at the L4/5 level.

250. Dr Bodel opined that there was definite evidence on the lumbar MRI scan that Ms Bath had some pre-existing degenerative change involving the discs generally and that, at least in part, the nature and conditions of her work may have caused an aggravation, acceleration, exacerbation and deterioration of that disease process to which work was the main contributing factor. Further, Ms Bath's heavy day's work as described by her on 6 December 2018, was the cause of the disc injury at the L4/5 level which led to her back pain and left-sided sciatica to which work was a substantial contributing factor. I prefer the opinions of Dr Bodel over those of Dr Powell for the reasons referred to above.

251. I am satisfied on the balance of probabilities, to a degree of actual persuasion or affirmative satisfaction, that, within the meaning of section 4(b)(ii) of the 1987 Act, Ms Bath suffered an aggravation, acceleration, exacerbation or deterioration of a degenerative condition in her lumbar spine as a result of the nature and conditions of her employment with the respondent. I am also satisfied that Ms Bath's employment was the main contributing factor to such aggravation, acceleration, exacerbation or deterioration of a degenerative condition in her lumbar spine. Applying section 16(1)(a)(i) of the 1987 Act, the deemed date of injury for the purposes of the claim for weekly compensation would be 6 December 2018, being the date of Ms Bath's incapacity.

252. Further, on the basis of the principles espoused in *Zickar*, I am satisfied that, despite the fact that Ms Bath's lumbar spine injury could be characterised as a disease which was present as at 6 December 2018, it did not preclude reliance on the definite or distinct physiological change or disturbance in her lumbar spine in the form of a L4/5 foraminal broad-based disc protrusion on that date as a "personal injury" within the meaning of section 4(a) of the 1987 Act. The terms "personal injury" and "disease" are not mutually exclusive categories. A sudden identifiable physiological (pathological) change to the body brought about by an internal or an external event can be a personal injury and the fact that the change is connected to an underlying disease process does not prevent the injury being a personal injury. The parties made no submissions in relation to section 9A of the 1987 Act. I have considered the factors set out in section 9A(2) of the 1987 Act. I am satisfied and find that there was a causal relationship between the injury and the work Ms Bath was required to do on 6 December 2018, that is, there was a connection with her employment which was real and of substance. Accordingly, I am satisfied that Ms Bath's employment was a substantial contributing factor to her injury within the meaning of section 9A of the 1987 Act.

Ms Bath's entitlement to weekly benefits under sections 36 and 37 of the 1987 Act

253. Section 33 of the 1987 Act provides that if total or partial incapacity for work results from an injury, the compensation payable by the employer under the Act to the injured worker shall include weekly payments during the period of incapacity.

254. An assessment of Ms Bath's capacity involves a consideration of whether she has no current work capacity, or a current work capacity as defined in section 32A of the 1987 Act.

255. Section 32A of the 1987 Act defines the relevant terms as follows:

> "**current work capacity**, 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.
>
> **no current work capacity**, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to work, either in the worker's pre-injury employment or in suitable employment.
>
> **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 WorkCover 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."

256. Section 43 of the 1987 Act in existence prior to the 2012 amending Act and the authorities suggested that regard was to be had to "the realities of the labour market in which the employee was working or might reasonably be expected to work".[164]

257. Since the 2012 amending Act, it is clear that "total incapacity" differs from "no current work capacity". "No current work capacity" requires a consideration of the worker's capacity to undertake not only his or her pre-injury duties, but also suitable employment, irrespective of its availability. This was confirmed by Roche DP in *Mid North Coast Local Health District v De Boer*[165]and in *Wollongong Nursing Home Pty Ltd v Dewar*[166] (*Dewar*).

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[164] *Arnott's Snack Products Pty Ltd v Yacob* [1985] HCA 2; 155 CLR 171
[165] *Mid North Coast Local Health District v De Boer* [2013] NSWWCCPD 41
[166] *Wollongong Nursing Home Pty Ltd v Dewar* [2014] NSWWCCPD 55

258. In *Dewar*, Roche DP stated:

> "… employment for which the worker is currently suited is determined 'regardless of' whether the work or employment is 'available' and regardless of whether it is 'of a type or nature that is generally available in the employment market'. However, other aspects of *Lawarra Nominees* and *Woods* remain relevant in determining whether a worker is 'suited' for suitable employment.[167]
>
> However, while the new definition of suitable employment has eliminated the geographical labour market from consideration, it has not eliminated the fact that 'suitable employment' must be determined by reference to what the worker is physically (and psychologically) capable of doing, having regard to the worker's 'inability arising from an injury'. Suitable employment means 'employment in work for which the worker is currently suited' … However, whether, under the new provisions, he or she would be found to have no current work capacity will depend on a realistic assessment of the matters listed at (a) and (b) of the definition of suitable employment. Depending on the evidence, it is difficult to see that work tasks that are totally artificial, because they have been made up in order to comply with an employer's obligations to provide suitable work under s 49 of the 1998 Act, and do not exist in any labour market in Australia, will be suitable employment."[168]

259. If Ms Bath has 'no current work capacity' as has been submitted by her counsel, I must assess whether she was able to return to both her pre-injury duties and suitable employment since 6 December 2018.

260. Ms Bath's unchallenged evidence is that the sharp shooting pain in her lower back, radiating down her left buttock and into her left leg is not improving. The pain is a constant stabbing pain with a shooting electric shock down her left leg. She experiences difficulty sleeping, which makes her tired and irritable. Such symptoms would prevent her from returning to her pre-injury employment with the respondent which included lifting and carrying cartons of beer, casks of wine and moving a beer keg even only 2 cm. She cannot perform pushing, pulling and lifting actions and finds it difficult to stand and sit in one place for too long. She has to stand up and move around to relieve the pain. She also experiences numbness in her left leg. The pain impacts not only her ability to work but also her everyday life.

261. On 1 April 2019, Dr Deiter recorded, amongst other things, that essentially, nothing had changed in relation to Ms Bath's left-sided sciatica; there was no change in her limitations with sitting, standing and walking; she was then undergoing hydrotherapy with physiotherapy; and her overall pain level had not changed. On 30 April 2019, Dr Deiter recorded, amongst other things, that Ms Bath's condition remained unchanged, although she experienced occasional better days.

262. Dr Bodel opined that Ms Bath was restricted by back pain and left leg pain and unable to engage in prolonged sitting, bending, twisting or lifting activities at the present time. She had a driving restriction of 45 minutes. He also opined that Ms Bath's ability to find work on the open labour market had been severely compromised by the effects of the injury. Dr Bodel opined that Ms Bath had no current work capacity.

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[167] *Dewar* at [56]
[168] *Dewar* at [57]-[60]

263. Dr Powell opined that Ms Bath's lumbar spondylosis did not currently appear to be active. However, she continued to experience symptoms, the source of which had not been determined. He felt that she did have work capacity from a musculoskeletal perspective. He opined that, given her lumbar spondylosis and being prone to mechanical symptoms, her work would best be modified to avoid repetitive heavy lifting; forward bending; lifting or carrying beyond about 10 kg in weight; avoid working at low levels; distribute her activities, such as, turning, twisting, mopping and sweeping, throughout the working day to minimise the potential of mechanical aggravation of her established degenerative disease.

264. Having carefully considered the evidence, I find that Ms Bath would have had no capacity for her pre-injury duties for the period claimed and beyond.

265. The next matter for consideration is whether Ms Bath was fit for suitable employment as defined in section 32A of the 1987 Act. This requires a consideration of the nature of the incapacity and the details provided in medical information, the worker's age, education, skills and work experience, any return to work plan and any occupational rehabilitation services that have been provided, irrespective of whether the work is available to her or of a type or nature that is generally available in the employment market.

266. The Certificate of Capacity issued by Dr Htun dated 14 January 2019 certified Ms Bath as having no current work capacity from 7 December 2018 to 24 January 2019. The Certificate of Capacity issued by Dr Deiter dated 28 January 2019 certified Ms Bath as having no current work capacity from 24 January 2019 to 6 February 2019.

267. On 23 May 2019, Dr Bodel opined that Ms Bath's ability to find work on the open labour market had been severely compromised by the effects of the injury that she had no current work capacity.

268. Dr Powell opined that that Ms Bath did have work capacity from a musculoskeletal perspective. However, given her lumbar spondylosis and proneness to mechanical symptoms, her work would be best modified as referred to in [263] above. I prefer the opinion of Dr Bodel in regard to Ms Bath's work capacity over that of Dr Powell for the reasons referred to previously.

269. I have referred to Ms Bath's evidence as to her ongoing pain and restrictions in [260] above. I accept Ms Bath's evidence in this regard. Ms Bath is 53 years of age. She successfully completed Year 10 at Corowa High School and thereafter, undertook a secretarial course. Later, she completed a Certificate III in Hospitality as well as attaining a Responsible Service of Alcohol Certificate, Responsible Conduct of Gambling Certificate and Senior First Aid Certificate through the respondent. Ms Bath's secretarial skills gained from the course she undertook many years ago would be well and truly out of date as she had always worked in the hospitality industry in between raising her children and afterwards.

270. There was no plan or document prepared as part of a return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act in evidence.

271. There was no evidence of any occupational rehabilitation services that are being, or have been, provided to or for Ms Bath.

272. Having regard to Mr Bath's evidentiary statements, the medical evidence as to her capacity, her age, skills, work experience and the other relevant factors to be considered in accordance with section 32A of the 1987 Act, I am satisfied on the balance of probabilities that she had no current work capacity in the period 7 December 2018 to date and continuing.

273. Ms Bath seeks weekly payments from 7 December 2018 to date and continuing. According to Part 5.2(b) of the ARD, the 13-week first entitlement period expired on 8 March 2019.

274. The pre-injury average weekly earnings were agreed at $795.86. This amount does not exceed the statutory maximum referred to in section 34 of the 1987 Act. The pre-injury average weekly earnings are indexed every six months in accordance with section 82A of the 1987 Act. There is no evidence before me of any non-pecuniary benefits.

275. Section 35(1) of the 1987 Act provides definitions of the terminology used in the quantification of an injured worker's weekly payments as follows:

> "'**AWE'** means the worker's pre-injury average weekly earnings.
>
> **'D'** (or a '**deductible amount'**) means the sum of the value of each non-pecuniary benefit (if any) that is provided by the employer to a worker in respect of that week (whether or not received by the worker during the relevant period), being a non-pecuniary benefit provided by the employer for the benefit of the worker or a member of the family of the worker.
>
> **'E'** means the amount to be taken into account as the worker's earnings after the injury, calculated as whichever of the following is the greater amount:
>
> (a) the amount the worker is able to earn in suitable employment,
>
> (b) the workers current weekly earnings.
>
> **'MAX'** means the maximum weekly compensation amount."

276. Weekly payments during the initial aggregate period of 13 weeks (the first entitlement period) is governed by section 36 of the 1987 Act, which provides:

> "**36 Weekly payments in first entitlement period (first 13 weeks)**
>
> (1) The weekly payment of compensation to which an injured worker who has no current work capacity is entitled during the first entitlement period is to be at the rate of:
>
> (a) (AWE x 95%) – D, or
>
> (b) MAX – D,
>
> whichever is the lesser.
>
> (2) The weekly payment of compensation to which an injured worker who has current work capacity is entitled during the first entitlement period is to be at the rate of:
>
> (a) (AWE x 95%) – (E + D), or
>
> (b) MAX – (E + D),
>
> whichever is the lesser."

277. In accordance with section 36(1) of the 1987 Act, Ms Bath's entitlement to weekly compensation during the first entitlement period from 7 December 2018 to 8 March 2019 is as follows:

    AWE x 95% - D
    ($795.86 x 95%) - $0 = $756.07 per week.

278. The second entitlement period is that of 117 weeks, postdating the initial 13 weeks. Weekly payments during the second entitlement period is governed by section 37 of the 1987 Act, which provides:

    "**37 Weekly payments in second entitlement period (weeks 14-130)**

    (1) The weekly payment of compensation to which an injured worker who has no current work capacity is entitled during the second entitlement period is to be at the rate of:

        (a) (AWE x 80%) – D), or

        (b) MAX – D,

        whichever is the lesser.

    (2) The weekly payment of compensation to which an injured worker who has current work capacity and has returned to work for not less than 15 hours per week is entitled during the second entitlement period is to be at the rate of:

        (a) (AWE x 95%) – (E + D), or

        (b) MAX – (E + D),

        whichever is the lesser.

    (3) The weekly payment of compensation to which an injured worker who has current work capacity and has returned to work for less than 15 hours per week (or who has not returned to work) is entitled during the second entitlement period is to be at the rate of:

        (a) (AWE x 80%) – (E + D), or

        (b) MAX – (E + D),

        whichever is the lesser."

279. In accordance with section 37(1) of the 1987 Act, Ms Bath's entitlement to weekly compensation during the second entitlement period from 9 March 2019 to date, with such weekly payments to continue in accordance with the provisions of the 1987 Act, is as follows:

    AWE x 80% - D
    ($795.86 x 80%) - $0 = $636.69 per week.

280. Ms Bath will be entitled to an award in accordance with the above calculations and the respondent's relevant insurer, CEM, will need to make the appropriate adjustments pursuant to sections 82A and 44C(1)(b) of the 1987 Act. I grant the parties liberty to apply within 14 days in relation to the calculation of weekly benefits.

Ms Bath's entitlement to reasonably necessary medical and related treatment expenses as a result of injury under section 60 of the 1987 Act

281. Dr Bodel expressed the opinion that Ms Bath's treatment in the form of physiotherapy, chiropractic treatment, medication and block injection was reasonably necessary for the management of her injury. He opined that future treatment is required. The block injection gave rise to some improvement in Ms Bath's symptoms and she may need to undergo another. He also opined that surgery is a possibility.

282. Dr Powell opined that the treatment and management Ms Bath received would be considered reasonable and necessary for her lumbar spine injury and persisting symptoms, largely arising from the event of 6 December 2018, and also on a background of developing lumbar back pain symptoms since about 2015 associated with physical activity. The need for these interventions had arisen as a direct result of the workplace incident of 6 December 2018 and persisting pain symptoms.

283. On the evidence and having received an award in her favour, Ms Bath is entitled to recover the cost of reasonably necessary medical, hospital and related expenses pursuant to section 60 of the 1987 Act from the respondent's relevant insurer, CEM, and I make a general order in this regard.

SUMMARY

284. Ms Bath did not suffer a consequential injury to the lumbar spine as a result of the accepted injury to the left ankle on 4 August 2011.

285. Ms Bath suffered an injury to her lumbar spine as a result of the nature and conditions of her employment with the respondent on 6 December 2018 (deemed) within the meaning of section 4(b)(ii) of the 1987 Act, to which employment was the main contributing factor.

286. Ms Bath also suffered a personal injury to her lumbar spine in the form of a L4/5 foraminal broad-based disc protrusion arising out of or in the course of her employment with the respondent on 6 December 2018 within the meaning of section 4(a) of the 1987 Act, to which employment was a substantial contributing factor.

287. Ms Bath has had no current work capacity within the meaning of section 32A of the 1987 Act from 7 December 2018.

288. Award for the respondent in relation to the alleged consequential injury to the lumbar spine as a result of the accepted injury to the left ankle on 4 August 2011.

289. The respondent, through its relevant insurer, CEM, is to pay Ms Bath weekly compensation in respect of the injury to the lumbar spine on 6 December 2018 as follows:

    (a) $756.07 per week from 7 December 2018 to 8 March 2019 pursuant to section 36(1) of the 1987 Act.

    (b) $636.69 per week from 9 March 2019 to date pursuant to section 37(1) of the 1987 Act.

    (c) Such weekly payments to continue in accordance with the provisions of the 1987 Act.

290. The respondent, through its relevant insurer, CEM, is to pay Ms Bath's reasonably necessary medical and related expenses as a result of the injury to the lumbar spine on 6 December 2018 pursuant to section 60 of the1987 Act.