WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **6118/19**
Applicant: **Peter Jiear**
Respondent: **Parmenter Jiear Builders Pty Ltd**
Date of Determination: **8 April 2020**
Citation: **[2020] NSWWCC 113**

The Commission determines:

1. The respondent is to pay the applicant's expenses under section 60 of the *Workers Compensation Act 1987* as a result of injury deemed to have occurred on 1 January 1993 on production of accounts and/or receipts and/or Medicare Notice of Charge.

2. The matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) to assess the degree of permanent impairment, if any, in respect of the back and left leg at or above the knee as a result of injury deemed to have occurred on 1 January 1993.

3. The documents to be forwarded to the AMS are those admitted into evidence by consent in these proceedings as follows:

    (a) The Application to Resolve a Dispute and all documents attached;
    (b) The late documents filed by the applicant on 3 February 2020, and
    (c) The Reply and all documents attached.

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

Jane Peacock
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF JANE PEACOCK, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. By Application to Resolve a Dispute (the Application), Mr Jiear (the applicant) seeks compensation under sections 60 and 66 of the *Workers Compensation Act 1987* (the 1987 Act) as a result of injury to his back and left leg deemed to have occurred on 1 January 1993.

2. The respondent is Parmenter Jiear Builders Pty Ltd (Parmenter). The relevant insurer for the purposes of workers compensation is ICARE Nominal Insurer (the insurer).

ISSUES FOR DETERMINATION

3. There is no dispute that Mr Jiear suffered injury to his back and left leg which is deemed to have occurred on 1 January 1993. I have not been asked to make any determination on the question of injury.

4. Mr Jiear brings a claim for compensation under sections 60 and 66 of the 1987 Act.

5. It is common ground that the claim for compensation is out of time by virtue of the provisions of section 261(1) which requires the claim for compensation to have been made within six months after the injury happened.

6. Parmenter says that Mr Jiear is barred from the recovery of compensation because the claim was not bought within time.

7. Mr Jiear seeks to avail himself of the protection afforded by the provisions of section 261(4). He submits that the failure to make a claim within time was due to ignorance. Parmenter did not wish to be heard on this point.

8. Parmenter, however, disputes that the exemption under section 261(4)(b) applies because they say that the claim does not arise from an injury which has resulted in the serious and permanent disablement of Mr Jiear. In fact, Parmenter conceded that the injury has resulted in permanent disablement but they dispute that the injury has resulted in disablement which could be classed as “serious”. They seek an award for the respondent on this basis.

9. In the event Mr Jiear is successful before me and I find that the exemption under section 261(4)(b) applies, Parmenter consents to a general order for the payment of section 60 expenses and consents to the matter being remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for assessment as to the degree of permanent impairment, if any, of the back and left leg at or above the knee as a result of injury deemed to have occurred on 1 January 1993. The documents to be forwarded to the AMS would be the documents admitted into evidence by consent in these proceedings.

PROCEDURE BEFORE THE COMMISSION

10. The parties attended a conciliation arbitration in Newcastle. Both parties were represented by counsel with Mr Hunt appearing for Mr Jiear and Mr Barnes appearing for Parmenter. 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

11. The following documents were in evidence before the Commission being admitted by consent, and taken into account in making this determination:

    For Mr Jiear:

    (a) Application and all attached documents, and
    (b) Late documents filed 3 February 2020.

    For Parmenter:

    (a) The Reply and all attached documents.

Oral evidence

12. Mr Jiear did not seek leave to adduce further oral evidence and counsel for the respondent did not seek leave to cross-examine Mr Jiear.

FINDINGS AND REASONS

13. Counsel for Parmenter submitted that there is no dispute about injury in this matter and that injury to the back and left leg at or above the knee is deemed to have occurred on 1 January 1993. I have not been asked to make any determination on the question of injury.

14. Mr Jiear brings a claim for compensation under sections 60 and 66 of the 1987 Act.

15. It is common ground that the claim for compensation is out of time by virtue of the provisions of section 261(1) which requires the claim for compensation to have been made within six months after the injury happened.

16. Parmenter says that Mr Jiear is barred from the recovery of compensation because the claim was not bought within time.

17. Mr Jiear seeks to avail himself of the protection afforded by the provisions of section 261(4). He submits that the failure to make a claim within time was due to ignorance. Parmenter did not wish to be heard on this point.

18. Parmenter however disputes that the exemption under section 261(4)(b) applies because they say that the claim does not arise from an injury which has resulted in the serious and permanent disablement of Mr Jiear. In fact, Parmenter conceded that the injury has resulted in permanent disablement but they dispute that the injury has resulted in disablement which could be classed as “serious”.

19. I must make a determination on the balance of probabilities on the evidence in this case in accordance with the law.

20. The applicable law is set out in section 261 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) which provides as follows:

    “261 Time within which claim for compensation must be made

    (1) Compensation cannot be recovered unless a claim for the compensation has been made within 6 months after the injury or accident happened or, in the case of death, within 6 months after the date of death.

(2) If a claim for compensation was made by an injured worker within the period required by this section, this section does not apply to a claim for compensation in respect of the death of the worker resulting from the injury to which the worker's claim related.

(3) For the purposes of this section, a person is considered to have made a claim for compensation when the person makes any claim for compensation in respect of the injury or death concerned, even if the person's claim did not relate to the particular compensation in question.

(4) The failure to make a claim within the period required by this section is not a bar to the recovery of compensation if it is found that the failure was occasioned by ignorance, mistake, absence from the State or other reasonable cause, and either—

(a) the claim is made within 3 years after the injury or accident happened or, in the case of death, within 3 years after the date of death, or

(b) the claim is not made within that 3 years but the claim is in respect of an injury resulting in the death or serious and permanent disablement of a worker.

(5) The failure to make a claim within the period required by this section is not a bar to the recovery of compensation if the insurer concerned determines to accept the claim outside that period. An insurer cannot determine to accept a claim made more than 3 years after the injury or accident happened or after the date of death (as appropriate) except with the approval of the Authority.

(6) If an injured worker first becomes aware that he or she has received an injury after the injury was received, the injury is for the purposes of this section taken to have been received when the worker first became so aware.

(7) If death results from an injury and a person who is entitled to claim compensation in respect of the death first becomes aware after the death that the death resulted or is likely to have resulted from the injury, the date of death is, for the purposes of the application of this section to a claim by that person, taken to be the date that the person became so aware.

(8) In a case where 2 or more persons are liable or partly liable in respect of compensation (whether or not that liability arises from the same or from different injuries), a claim is for the purposes of this section taken to have been made when a claim is made on any one of those persons.

(9) When particulars of any injury received by a worker are entered in a register of injuries kept by the employer under this Act, the making of that entry suffices for the purposes of this section as the making of a claim for compensation in respect of the injury."

21. It is common ground that that claim was not brought within time. The dispute before me is dispute is confined to whether section 261(4)(b) applies:

"(4) The failure to make a claim within the period required by this section is not a bar to the recovery of compensation if it is found that the failure was occasioned by ignorance, mistake, absence from the State or other reasonable cause, and either—

(a) the claim is made within 3 years after the injury or accident happened or, in the case of death, within 3 years after the date of death, or
(b) the claim is not made within that 3 years but the claim is in respect of an injury resulting in the death or serious and permanent disablement of a worker."

22. Mr Jiear's says that his failure to make a claim within the requisite period was occasioned by ignorance. Counsel for Parmenter said that he would not be making any submissions on this issue and as he pointed out, he did not cross-examine Mr Jiear.

23. Mr Jiear gave evidence in statement dated 2 October 2019 as follows:

"14. As stated, I had back pain and symptoms since the early days of my career but persevered with it, particularly when I was working in my own business. I never made a claim for compensation before because primarily I wasn't aware that I could as I didn't realise until more recent times that as an employee/director, I had workers compensation rights. My only involvement with workers compensation whilst working was paying premium. I note that I had people working for me who went off on compensation benefits but I never contemplated that I could do the same thing.

15. I then consulted Mr Martin Kelly from Harris Kelly and Associates in relation to a potential claim for Industrial Deafness in January 2019. In talking to Mr Kelly generally about my employment, director/my position of employee of my company, and duties, he advised me that I may very well have a claim for compensation regarding my lower back and I instructed him to make enquiries and investigations in relation to same.

16. I had never consulted a solicitor nor sought legal advice regarding any injury or potential claims until this time. The doctors I had seem over the years never mentioned anything to me regarding the capability of claiming either.

17. This was the first time I was aware that I may have an Entitlement Claim Compensation Benefits, notwithstanding that I ceased doing the work to which this problem is due many years ago.

18. I then consulted Dr Issacs on behalf of Mr Kelly who has attributed a level of impairment and loss of use to my back and leg from my work place. I instructed Mr Kelly to bri8ng a claim for compensation benefits in relation to lump sum payments to which the Worker's Compensation Insurer have declined saying that I am out of time to bring that claim. I wish to dispute this.

19. I did not receive any advices regarding any entitlements I may or may not have until I consulted Mr Kelly this year.

20. I continue to suffer with pain, restriction of movements, loss of strength and lack of mobility into my back and legs from the injury and subsequent surgery. It affects everything I do. I cannot lift, carry, bend without trisection and pain.

21. I understand the insurer believe I do not have a viable claim due to delay but I seek the discretion of the Commission to allow my claim as I unaware of the ability to lodge a claim until this year."

24. Counsel for Parmenter did not challenge Mr Jiear's evidence by cross-examination.

25. Counsel for Parmenter did not wish to be heard on this issue of whether Mr Jiear's failure to make a claim within time was occasioned by ignorance.

26. I am satisfied having regard to the unchallenged evidence of Mr Jiear, that Mr Jiear's failure to make a claim within time was occasioned his ignorance of his entitlements and the need to make a claim for his entitlements within the period required.

27. The dispute argued before me was limited to the criteria in subsection (4)(b) – that is whether the claim is in respect of an injury resulting in the serious and permanent disablement of Mr Jiear.

28. Counsel for Parmenter voluntarily conceded that the undisputed injury has resulted in permanent disablement.

29. Counsel for Parmenter concentrated his submissions on whether the claim was in respect of an injury resulting in permanent disablement that was also "serious".

30. Counsel for Parmenter referred me to the authorities of *Broken Hill Proprietary Company Ltd v Kuhna* (1992) 8 NSWCCR 401 (*Kuhna*) and *Gregson v L & M Dimasi Pty Ltd* [2000] NSWCC 47; (2000) 20 NSWCCR 520 (*Gregson*). Counsel for Mr Jiear referred me to the authority of *Griffin v Qantas Airways Ltd* [2010] NSWCCPD 22 (*Griffin*), a decision of Deputy President Roche.

31. Deputy President Roche when approaching the issue of serious and permanent disablement in that case, provided a helpful summary of the authorities as follows:

> "'228. The leading authorities on this issue are *Broken Hill Proprietary Company Ltd v Kuhna* (1992) 8 NSWCCR 401 ('*Kuhna*') and *Gregson v L & M Dimasi Pty Ltd* [2000] NSWCC 47; (2000) 20 NSWCCR 520 ('*Gregson*').
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> 229. In Kuhna the Court of Appeal considered the meaning of the phrase in the context of section 14(2) of the 1987 Act which deals with situations where a worker has sustained an injury as a result of his 'serious and wilful misconduct'. In that situation compensation is not payable in respect of such an injury unless the injury has resulted in death or 'serious and permanent disablement'.
>
> 230. Mr Kuhna suffered multiple abrasions to both elbows, a fractured nose, a fracture of two ribs on the right side, a comminuted fracture of the os calcis and an undisplaced fracture of the left lateral malleolus. As a result of his injuries he was unfit for any work from 4 June 1988 until 14 August 1988. He was permanently unfit for his pre injury work as a miner. The employer argued on appeal that the proper question was: was the worker seriously and permanently disabled for work generally, not just for his pre injury job? Cripps JA agreed with the employer's submission that 'disablement' in section 14(2) 'is to be understood in an employment context' (at 405E). His Honour added, 'that is to say, it is not sufficient merely to conclude that a worker suffers an impairment'. On this issue his Honour referred to Peters *Ice Cream Pty Ltd v Feeney* [1970] 3 NSWR 125 at 127 where Jacobs JA, in dealing with the same phrase in the 1926 Act, said:
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> > 'The condition required under the section now being considered will be satisfied provided there is evidence that the disability was both serious and permanent. In the context it is correct, I think, to apply those words to employment situations, and it seems to me that that is what the medical evidence did in this case.'

231. Cripps JA then continued at 406B:

> ’In the present case, there was evidence that the worker not only suffered an impairment but that that impairment affected his physical capacity to undertake work. The argument, as I understand it, on behalf of the employer is that the disablement cannot be said to be serious because, before such a finding could be made, it was necessary for the learned trial Judge to consider the whole range of the worker’s activity and, it is submitted, that was not done.’

232. The Court rejected that submission. Cripps JA added that the fact that the worker may have been earning as much as he would have been earning had he remained an underground miner ’did not mandate a conclusion that he had not been seriously and permanently disabled‘ (at 406G).

233. Mahoney JA agreed with Cripps JA and added at 402B:

> ’No doubt the word ‘disablement’ primarily refers to disablement in respect of capacity to perform work. But provided the disablement or interference with capacity is ‘serious’, the provision may be satisfied notwithstanding that other work may be undertaken and even undertaken more remuneratively.’

234. *Gregson* concerned the meaning of ’serious and permanent disablement‘ in section 65(13) of the 1998 Act, though the consideration of the phrase by Burke CCJ was strictly *obiter*. Nevertheless, the facts and his Honour’s comments are instructive. At [78] his Honour said:

> ’In this matter the question becomes whether Mr Gregson suffers a serious and permanent disablement. Does he have a disability, is it serious, is it permanent, does it impinge adversely upon his capacity to work? If all questions were answered in the affirmative then he would satisfy that requirement. The basic question then presenting is the degree of the applicant’s incapacity and losses before a considered answer to those previous questions is available.’

235. In that case, the worker suffered a back injury with consequential back and leg pain. In cross-examination, the worker conceded that he could do some suitable light work but could not do his pre-injury duties. There were conflicting diagnoses in the case: Dr Stephenson diagnosing a lumbar strain and Dr Combe diagnosing a ’disc derangement‘. The CT scan disclosed ’discal anomalies‘ (at [83]). On the question of impairment, Dr Stephenson assessed a 10 per cent impairment of the back and Dr Combe a 30 per cent impairment. In respect of the legs, Dr Stephenson assessed there to be no loss of use of the legs and Dr Combe assessed a 10 per cent loss of use of each leg. His Honour preferred the evidence of Dr Combe. Having regard to the findings made, his Honour added (at [105]) that the worker ’certainly falls within‘ the description of ’serious and permanent disablement‘ in section 65(13).”

32. Deputy President Roche in Griffin went on to find serious and permanent disablement as follows:

> "236. I considered the medical evidence earlier in this decision and will not repeat that analysis. I have found that Mr Griffin suffered an injury in the nature of a permanent aggravation, acceleration and exacerbation of the disease of obsessive compulsive disorder and the anxiety spectrum symptoms that go with that disorder. The question is whether that injury is an injury that has resulted in serious and permanent disablement of Mr Griffin. His injury has increased the severity of his condition and made it chronic. The worsening of his condition, caused by the fact that he continued to fly until November 1981, caused his symptoms to become increasingly entrenched and pervasive and generally worsened his obsessive compulsive disorder (Dr Phillips report 21 August 2009).
>
> 237. Until his injury, Mr Griffin had been a successful pilot with other business and recreational interests. Since ceasing work with Qantas, he has been unable to work as a pilot and his business wound down and ceased. Every attempt to engage in alternative pursuits has failed and his life never returned to normal. Mr Griffin's evidence of his subsequent attempts to continue flying comfortably satisfy me that he was unfit to work as a pilot from 29 August 1979 or, in the alternative, from November 1981. This evidence is consistent with Dr Phillips' conclusion, which I accept, that Mr Griffin was not suitable to continue his career as a pilot and was 'substantially incapacitated for employment following the time of his resignation from Qantas and he remains incapacitated to undertake employment in the competitive open workforce at the present time' (Dr Phillips report 21 August 2009). In these circumstances, I have no hesitation in finding that Mr Griffin's injury was serious and that it resulted in permanent disablement that prevented him from continuing in his usual occupation as a pilot and from engaging in higher-level technical work."

33. Each case must be decided on its own facts. Mr Jiear worked as a builder up until 1993. Mr Jiear gave evidence in his statement dated 2 October 2019 about the heavy and physically demanding nature of the work he performed on the tools until 1993 as follows:

> "5. Physically, I remained working 'on the tools' until 1993 and thereafter worked in the office…doing quotes and management of the company.
>
> 6. The duties as a builder involved constant heavy and respective lifting, bending, twisting, turning, squatting, shovelling, reaching, working in confined spaces and awkward positions we would always be erecting scaffolding as well as doing general building works which involved physically manhandling product as well as finishing concrete by hand and constructing homes as you would expect from a builder. It was quite physically arduous work. I continued to do this until 1993."

34. Mr Jiear gave evidence about the symptoms of back pain he experienced while working which progressively became worse. He gave evidence as follows:

> "7. During the course of my employment I suffered many niggles and first noticed back pain in or around 1979. It progressively got worse.
>
> 8. I sought treatment for it through my general practitioner from 1979 onwards and had some scanning and imaging done periodically. I was prescribed ant-inflammatory and rests as well as physiotherapy.

9. The first specialist I saw was in 1987 when I saw Dr Issacs. He injected my lower back which gave me immediate improvement into my leg pain but it came back and the back pain remained.

10. In view of the continuing problems I was having. I returned to see Dr Issacs in 1993 and he suggested surgery."

35. Mr Jiear goes on to give evidence that he sought a second opinion from Professor Ghabrial who recommended not to have the surgery until the pain became unbearable. Mr Jiear gave evidence that progressively the sciatica became worse and treatment was not helping. Mr Jiear ultimately underwent lumbar decompression surgery at the hands of Dr Spitaller in March 2012.

36. Turning now to an examination of the medical evidence in this case.

37. I note that the medical evidence has all been filed in Mr Jiear's case and that Parmenter has not filed any competing medical opinion.
38. Dr Issacs saw Mr Jiear at his lawyer's request and provided a report dated 13 May 2019.

39. Dr Issacs takes a history consistent with Mr Jiear's evidence in these proceedings of the heavy nature of Mr Jiear's employment up until he went off the tools in 1993 as follows:

> "He said until he started work with his father-in-law, Mr Ray Parmenter, in 1970, he did not have any problems with his back. Since then, until he went off the tools in 1993, his work involved squatting, lifting, shovelling, reaching, erecting scaffolding, installing steel inlet beams using brick saw, using brick wall cutting saw, using large and small jackhammers, installing trench and sheet mesh, pouring concrete, finishing concrete by hand, constructing house frames by hand, securing roof structure by hand and excavating by hand."

40. Dr Issacs takes a history of injuries consistent with the other evidence that is before me as follows:

> "though he has sustained a number of injuries to his back, Mr Jiear was unable to recall the exact dates send the following are the information he could provide as far as he could remember.
>
> He started to develop back pain in 1979 and over the years, progressively, it got worse. He has x-rays of the lower back dated 19 November 1979, 26 July 1982, 17 January 1986 and 10 March 1987.
>
> He tells me initially his back pain was treated by his family doctor with anti-inflammatory and analgesic, rest and physiotherapy. Gradually his pain started to radiate down his left leg and the pain gradually got worse.
>
> In 1987, he was seen by Dr Issacs and he further investigated him and eventually injected the disc with disease. Though he had initial improvement in his leg pain, the pain and the back and leg came back and persisted.
>
> In 1993, in view of the aggravation of the pain in his back and in the left leg, Mr Jiear saw Dr Issacs gain. At that time, after further investigating him, surgery was suggested. At that time, in view of the fear he had in regard to surgery, Mr Jiear wanted to get another opinion and he went and saw Professor Ghabrial.
>
> Mr Jiear saw Professor Ghabrial at Belmont hospital. Dr Ghabrial reviewed the X-ray's and the MRI and he was told not have an operation until the pain became unbearable. This advice was given in March 2012.

> Mr Jiear saw Professor Ghabrial again and at the time the sciatica had become progressively worse and the pain became more or less continuous. Unfortunately, medication, chiropractic treatment, osteopathic treatment and acupuncture did not help him.
>
> Sometime in March 2012, his family doctor referred him to Dr Spitaller, Neurosurgeon."

41. Dr Issacs went onto record that Dr Spitaller, neurosurgeon, on 13 March 2012 performed surgery on Mr Jiear by decompressing the lumbar spine from L2 to L4.

42. Dr Issacs recorded the disabilities affecting his activities at work and home and extracurricular activities as follows:

> "He tells me that though most of the household tasks are done by his wife, if he attempts to help his wife, any works such as cleaning, wiping, vacuuming, making beds, hanging clothes, washing clothes, moving furniture, if he does for a few minutes it aggravates the pain in the back .
>
> Though he uses an electric mower to mow the lawns, it takes a considerable amount of time. He does not involve himself in any other type of gardening activities. Though he still keeps himself occupied with extracurricular activities, such as fishing and once a month playing golf, he is not able to do these without using a buggy and his swing is badly affected. He is also unable to fish for a prolonged period."

43. Dr Issacs noted that Mr Jiear looks after his back.

44. Dr Issacs reviewed the radiological investigations noting an MRI scan of the lumbar spine dated 28 February 2012 showed:

> "extensive degenerative changes are present within the lumbar spine. These are most at L4/5 where there is bilateral foraminal compromise, bilateral L4 nerve root compromise and a moderate central canal stenosis."

45. Dr Issacs conducted a physical examination which had positive findings.

46. Dr Issacs diagnosed as follows:

> "1. Spinal canal stenosis/left sciatica
> 2. decompression of the lumbar spine L2 to L4"

47. Dr Issacs provided the following opinion on causation:

> "The nature and condition of Mr Jiear's work as a tradesman, carpenter/builder, in the construction injury, has contributed to the aggravation and acceleration of the age related degeneration of the lumbar spine. Specific injuries as sustained during the period of employment have further aggravated his symptoms to such an extent for which he needed surgery.
>
> Based on the history of Mr Jiear that he provided, I believe that his employment in the building industry, on balance of probabilities, has more likely than not been the substantial contributing factor to his injury resulting in his disability."

48. I note that there is no dispute about injury in this matter.

49. Dr Issacs concluded that "the accepted work-related injury has resulted in permanent impairment since the disabilities related to the injuries has affected his activities of daily living."

50. In a supplementary report dated 23 May 2019 Dr Issacs provided an assessment of permanent impairment under the table of disabilities of 20% permanent impairment of the back and 5% permanent loss of the efficient use of the left leg at or above the knee. Mr Jiear brings his claim for lump sum compensation based on this report. There is no competing medical evidence filed by Parmenter.

51. Counsel for Parmenter pointed me to the authorities of *Kuhna* and *Gregson*. He submitted that whilst I would be satisfied that the injury had resulted in permanent disablement, I would not be satisfied that the injury resulted in serious and permanent disablement as I would not be satisfied that it was serious. Whilst he pointed me to the authorities he did not really elaborate on why I would find the disablement not to be serious. In each of the authorities referred to the injury was found to result in serious and permanent disablement. Each case will turn on its own facts.

52. When I weigh all of the evidence in the balance I am satisfied that Mr Jiear's undisputed injury has resulted in serious and permanent disablement. The only medical opinion before me on this issue is that of Dr Issacs whose opinion "is that the accepted work related injury has resulted in permanent impairment since the disabilities related to the injuries has affected his activities of daily living."

53. Dr Issacs has gone on to assess permanent impairment under the table of disabilities. Counsel for Parmenter says I would be satisfied on this basis that the injury has resulted in permanent disablement.

54. When I weigh all of the evidence in the balance I am satisfied that the disablement is both serious and permanent.

55. Mr Jiear stopped working on the tools in 1993. At that time the pain and restriction in his back and left leg was such that he saw Dr Issacs who recommended surgery. Mr Jiear had a fear of surgery so he sought a second opinion from Professor Ghabrial who advised him to hold off on the surgery. Ultimately the pain progressed to the point where surgery was undertaken by Dr Spitaller, neurosurgeon in 2012.

56. I am satisfied when I weigh all of the evidence that the work that resulted in injury was heavy work. Mr Jiear stopped that heavy work in 1993. He continued to work in the building industry but in a managerial capacity. When all of the evidence is weighed in the balance I am satisfied that Mr Jiear was incapacitated for his prior employment as a builder working "on the tools" as a result of injury agreed deemed to have occurred on 1 January 1993. He remains incapacitated for that employment and his injury is such that it impacts his activities of daily living. That he was able to work in a managerial role in the building industry after injury from 1993 until 2012 does not preclude a finding that the injury resulted in serious and permanent disablement. The authorities including the authority to which counsel for Parmenter referred me to, are very clear on this point. In *Gregson*, Cripps JA said that the fact that the worker may have been earning as much as he would have been earning had he remained an underground miner "did not mandate a conclusion that he had not been seriously and permanently disabled" (at 406G). Mahoney JA agreed with Cripps JA and added at 402B:

> "No doubt the word 'disablement' primarily refers to disablement in respect of capacity to perform work. But provided the disablement or interference with capacity is 'serious', the provision may be satisfied notwithstanding that other work may be undertaken and even undertaken more remuneratively."

57. When I weigh all of the evidence in the balance I am satisfied that the injury has resulted in serious and permanent disablement of Mr Jiear.

58. This means that my findings are that Mr Jiear's failure to make a claim within time was occasioned by ignorance and the claim is in respect of an injury resulting in serious and permanent disablement of Mr Jiear. This brings Mr Jiear's claim within the provisions of section 261(4)(b) such that he is not barred from recovering compensation.

59. It was agreed that in the event this was my finding a general order for the payment for medical expenses could be made and the matter remitted to the Registrar for referral to an AMS.

60. Accordingly, I will order as follows:

    (a) The respondent is to pay the applicant's expenses under section 60 of the *Workers Compensation Act 1987* as a result of injury deemed to have occurred on 1 January 1993 on production of accounts and/or receipts and/or Medicare Notice of Charge.

    (b) The matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) to assess the degree of permanent impairment, if any, in respect of the back and left leg at or above the knee as a result of injury deemed to have occurred on 1 January 1993.

    (c) The documents to be forwarded to the AMS are those admitted into evidence by consent in these proceedings as follows:

        (i) The Application to Resolve a Dispute and all documents attached;
        (ii) The late documents filed by the applicant on 3 February 2020, and
        (iii) The Reply and all documents attached.