

## SUBMISSION OF THIRUAVUKKARASU KANAPATHIPPILLAI



Years of service: 10 years

Mail officer – Dandenong Letters Centre

1. I would request that the Inquiry examine the Decision and Reasons for Decision of the AAT on my case dated 23 December 2008 as attached.
2. This decision shows why the opinion of the treating specialist should be preferred to the various FNDs. I refer you to the poorly recorded history taken by [REDACTED] recorded at paragraphs 108 – 110. I describe the true history of the incident at paragraph 50.
3. The other submission I would like to make is about the importance of the Tribunal Member understanding the work that Australia Post employees undertake. I believe it was most helpful that Mr John Handley, Senior Member of the Tribunal was able to visit was at a time of very low production. It is important to view the pace of work and its highly repetitive nature.
4. Since this AAT Decision I have had a L4/L5 laminectomy in late February 2009 and have been off work until 13 November 2009. My sciata is gone but I have other chronic pain for which I have received pain management. I am on a graduated return to work.



# Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION [2008] AATA 1159

ADMINISTRATIVE APPEALS TRIBUNAL )  
GENERAL ADMINISTRATIVE DIVISION )

No 2007/0850  
2007/2511  
2007/2513

Re THIRUAVUKKARASU  
KANAPATHIPPILLAI

Applicant

And AUSTRALIAN POSTAL  
CORPORATION

Respondent

## DECISION

**Tribunal** Mr John Handley, Senior Member

**Date** 23 December 2008

**Place** Melbourne

**Decision** The decisions under review in these proceedings are set aside and in substitution IT IS DECIDED

1. On and from the dates when the respondent decided it had no present liability the applicant has been entitled to compensation pursuant to sections 16 and 19 of the *Safety, Rehabilitation and Compensation Act 1988* (The Act).
2. The respondent is liable to pay compensation to the applicant including the costs of medical treatment for a proposed

laminectomy which is reasonable to the applicant to obtain within the meaning of section 16 of the Act.

3. The respondent shall pay the applicant's costs pursuant to paragraph 6.8 of the Tribunal's *Guide to the Workers' Compensation Jurisdiction* published in March 2007.

(Sgd) John Handley  
Senior Member

**COMPENSATION** – applicant a mail officer engaged in work involving repeated bending, lifting, twisting, turning and standing – pre-existing degenerative spinal disease – L4/5 lumbar canal stenosis with degeneration at L4/5 and L5/S1 facet joints – whether disease temporarily or permanently aggravated by employment – whether any material contribution – decisions set aside

*Safety, Rehabilitation and Compensation Act 1988 (Cth) s 16 and s 19*

*Federal Broom Company Pty Limited v Semlitch* (1965) 110 CLR 626

*Comcare v Sahu-Khan* [2007] FCA 15

*Treloar v Australian Telecommunications Commission* (1990) 26 FCR 316

*Repatriation Commission v Bendy* (1989) 10 AAR 323

*Comcare v Holt* (2007) 94 ALD 576

## REASONS FOR DECISION

23 December 2008

Mr John Handley, Senior Member

1. Mr Kanapathippillai, the applicant in these proceedings, has issued three applications challenging a number of decisions that had been made by the respondent. Principally, the applicant seeks restoration of liability which has been denied for back injury and to have the respondent accept liability for compensation for an L4 / 5 laminectomy. The history of claims made by the applicant and the corresponding decision of the respondent is set out below.

### Date of Injury/Incident

### Description of Injury and Decision of Respondent

28 February 2003

*Injury to lower back*

Claim made on 14 May 2003. Liability accepted on 27 May 2003.

8 June 2005

*Low back injury*

Claim made on 14 June 2005. Liability denied on 23 August 2005 but reconsidered on own motion of respondent on 13 April 2006 and liability accepted pursuant to s14 for the period 8 June 2005 to 2 March 2006 for the condition of *temporary aggravation of underlying degenerative condition of the lumbar spine*.

3 March 2006

*Back pain, sciatica, exacerbated by trauma to back at work*

Claim made on 27 March 2006. Liability accepted on 4 April 2006.

- On 13 December 2006, the respondent decided it had *no present liability* in respect of the claims made following injury on 28 February 2003 and 3 March 2006. That decision was affirmed on reconsideration on 15 February 2007.

**The applicant applied to review the decision of 15 February 2007 by application 2007/850**

*Claims* made by Mr de la Harpe, Orthopaedic Surgeon on behalf of the applicant –

- (i) on 13 July 2006 for cost of CT guided L4/5 injection was accepted on 14 July 2006.
- (ii) On 14 September 2006 for cost of L4 laminectomy was denied on 17 November 2006 and affirmed on reconsideration on 11 May 2007.

16 January 2007

*Lower back pain*

Claim made on 25 January 2007. Liability denied on 30 January 2007 and affirmed on reconsideration on 11 May 2007.

**The applicant applied to review the decisions of 11 May 2007 by applications 2007/2511 and 2007/2513.**

**BACKGROUND**

2. The applicant is a 57 year old married man of Sri Lankan decent who commenced employment with Australia Post in 1999 at the Nunawading Mail Centre. He was later transferred to the Melbourne City Mail Centre (MMC) and became a permanent employee in 2000. In 2002 he was transferred to the Dandenong Mail Centre (DMC) where he remains employed. He has always worked a 30 hour per week night shift commencing at 6.00pm between Monday and Friday inclusive.

3. The injury suffered by the applicant was the subject of comment and opinion by a number of doctors who gave evidence in these proceedings. The diagnosis

was in dispute. The applicant's treating surgeon, [REDACTED] described the injury as L4/5 lumbar canal stenosis with degenerative changes at the L4/5 and L5/S1 facet joints. The respondent has conceded that the applicant does have a degenerative lumbar spine which, from time to time, was temporarily aggravated by the employment. However, the respondent has contended that the employment did not materially contribute to any permanent aggravation or acceleration of degenerative disease and upon the expiration of the temporary effects of the aggravation, the applicant's lumbar spine returned to the degenerative state that it would otherwise have endured. The respondent has also denied liability for the costs and subsequent incapacity of a laminectomy because it contends that the applicant has not suffered a compensable injury and the treatment, in the circumstance, is not *reasonable* (refer s 16 (1) of the *Safety, Rehabilitation and Compensation Act 1988*).

4. The evidence of the medical witnesses will be summarised later in these reasons.

#### THE WORKPLACE

5. The applicant was engaged in a number of different activities in the workplace at the DMC. On the first day of hearing it became difficult to comprehend his description of the duties in which he was engaged and I gratefully accepted the invitation of both counsel to adjourn the hearing to conduct a view of the workplace. I am grateful to both counsel for their suggestion and I am grateful also to officers of the respondent who, at the commencement of the view, in addition to permitting an extensive inspection of the workplace, made available a coloured brochure which contained photographs of the machinery which processed mail and at which the applicant worked. The brochure also contained a description of the function and purpose of the machines which the applicant accepted as being accurate upon the hearing resuming at a later date. Accordingly, the description of the workplace recorded below takes account of the evidence of the applicant, the observations at the workplace and the descriptions from the coloured brochure made available by the respondent and which was received into evidence as Exhibit A3.

6. For the purposes of the description which follows, references will be made to *letter trays* and *large letter trays (tubs)*. These are containers which are used to store mail during processing. The letter trays store *standard mail* being mail within A4 size envelopes. Plastic letter trays are 54cm by 26cm by 13cm high and cardboard letter trays are 54cm by 30cm by 13cm high. When filled, they contain 255 standard mail items. The large letter trays (tubs) contain non standard mail and are approximately the same width and depth but are considerably higher. They are of white plastic construction and have handles on each side to assist lifting. The brochure produced by the respondent records that *the vast majority of letter trays weigh between 6 to 8kg* and have a maximum weight of 16kg. The tubs can weigh between 12 and 16kg when filled.

7. Reference will also be made in the following description to a *ULD (unit load device)* and a *kingfisher*. A *ULD* is a 1200mm steel cube constructed of a steel frame with steel mesh sides. One side is hinged to permit the top half to be lowered to permit ease of access for the purposes of loading and unloading bags of mail, tubs and trays. A *kingfisher* is a trolley used to convey letter trays of mail. It is mounted on four wheels and is of steel construction having two shelves, one being immediately above the level of the wheels and the other at approximately waist height.

#### **CULLER – FACER – CANCELLOR (AKA TOSHIBA)**

8. *Toshiba* is a reference to the manufacturer of the machinery which is used to cull and sort mail after it arrives from post offices and street post boxes. Mail is delivered in bags which are tipped into a hopper which then conveys the mail to a conveyor belt. A *pre-cull* process is only engaged by the respondent during busy mail periods (e.g. at Christmas) and the applicant was therefore only engaged in this process at those times. The applicant was engaged in a similar process described as the *culler* where he and other employees would stand on each side of the conveyor belt and remove non standard mail items (e.g. small or large parcels or large letters). The items removed are placed in a tub. When the tubs are full, the applicant must then turn and bend and place the tub onto an adjacent mobile trolley, which is then pushed away when laden with full tubs.

9. The standard mail items remained on the belt and were transported to a *stacker* where the mail was deposited into another part of the machine which required an operator to manually take handfuls of mail and place them in the letter trays. When the trays are filled, they are placed on a trolley, which is then pushed to the Multi Line Optical Character Recognition (MLOCR) area for further processing. The applicant said when working as a *stacker* he was not required to bend when lifting the mail from the stacker or when carrying the cardboard trays to the trolley but the job involved standing.

#### **MULTI LINE OPTICAL CHARACTER RECOGNITION (MLOCR)**

10. The MLOCR is a machine which reads the addresses on standard mail which is brought to it in the cardboard trays at the completion of the culling process (refer above). The MLOCR is serviced by four employees. One person is the *operator*, another person is the *feeder* and the other two persons unload it. All four persons work on this machine in 30 minute rotations. The MLOCR, having read the address on a standard mail item then prints a barcode and then sorts the mail into destination trays.

11. The operator is the person responsible for starting and operating the machine and is therefore responsible for its smooth operation. The operator is required to stop the machine if there is a blockage. If that happens, the operator is required to investigate and clear the blockage and restart the machine. It is a job which requires standing and without any bending or lifting or twisting.

12. The feeder is the person who lifts a tray of mail from a roller conveyor adjacent to and parallel to the MLOCR. The tray is carried to the machine and mail is lifted out and placed on its bottom edge on the feeder table being a smooth steel bench approximately 2 metres in length and 86cm above floor level. The letters are automatically taken by the machine from the feeder table, the addresses are read and a barcode printed. The letters then pass through the machine and are deposited into destination trays. Approximately 30,000 standard mail items are processed per hour.



13. The process of lifting the cardboard trays of standard mail off the conveyor onto the feeder table does not involve bending but it does require the feeder to twist and turn 180° for each operation. That is to say, mail is lifted off the conveyor and the *feeder* turns around to the feeding table to unload the mail. The distance between the feeding table and the conveyor is one or two paces. When the tray is unloaded it is placed in a storage area and the feeder then turns around to face the conveyor to lift another tray of mail and repeat the process. The respondent brochure records that the letter trays weigh between 6 and 8kg. In evidence the applicant said that the trays weighed between 10 and 16kg but were *mostly over 10kg*. By reason of the trays containing 255 standard items and the machine processing 30,000 items per hour, the applicant said he was required, when feeding, to work quickly.
14. When the barcode is printed, the mail passes through the machine and is deposited into *slides* which are contained within a *stacker*. The *slides* are steel containers being approximately the same size as a standard envelope but having a considerable depth where the envelopes, when deposited, rest on their bottom edge. Each slide determines the destination of the letter. The machine automatically, having recognised the destination by the address on the letter, deposits it in an appropriate slide. The persons unloading are required to manually pull the mail to the forward edge of the slide and then lift the mail out and place it into letter trays located immediately underneath. The *stacker* is made up of two levels of slides being 1.25m and 70cm from floor level. When the cardboard letter trays are filled the person unloading turns 180° and walks one or two paces to a conveyor located behind and running parallel to the *stacker*. The person unloading would then be required to insert an empty cardboard tray back into the area immediately below the level of the slide which had been emptied.
15. The operators are also required to work at pace having regard to the number of mail items processed each hour. The unloading function requires considerable twisting and turning and bending, if removing mail from the lower level of the *stacker*.

### BARCODE SORTER (BCS)

16. The BCS is similar to the MLOCR in function but is comprised of a team of three persons where the operation and feeding function is conducted by one person. The other two persons are responsible for unloading (or *taking off*).

17. The BCS reads the printed barcode and conveys the mail into steel chutes which are labelled by destination. That is to say, the machine reads the barcode which permits it to determine the destination of the envelope and it is then deposited in the corresponding chute. The persons *taking off* manually lift handfuls of mail from the chutes and place them into trays which have corresponding destination labels. The trays are located on a stacker immediately adjacent to and parallel to the destination chutes.

18. The destination chutes and the stacker containing the trays are each of four levels. The lower two levels of the destination trays and the stacker require bending (they are each 80cm and 62cm respectively from ground level). The work also requires considerable twisting and turning.

19. When the trays are filled they are removed and placed on an adjacent conveyor where they are then transported to another area for processing.

### VERTICAL SORTING FRAME (VSF)

20. From time to time the applicant would also work manually sorting large letters. That task involved him working in a seated position in front of a VSF which contained a number of *pigeon holes* into which he would manually insert the large letters. The mail is brought to the applicant when performing this task on a kingfisher in plastic tubs. That job did not involve any bending, twisting or turning.

### SPECTRUM (LARGE LETTER INDEXER)

21. This process involves the manual coding for each large mail item by postcode and placing that item on a conveyor belt. That function is performed in a seated position. Alternatively the applicant may then work at the other end of the conveyor

belt which receives coded large letters which are placed into plastic tubs which are then carried to a conveyor. At the end of that conveyor the filled tubs are removed and placed into a two level stacker (the lower level being on the floor). The work filling and lifting the tubs involve some walking and carrying tubs up to 16kg in weight and some bending when filled tubs are placed into the lower level. The work is not required to be undertaken quickly and the speed of the conveyors can be manually determined.

#### **BUNDLING**

22. This is a process where a ULD of loaded letter trays are brought to a sorting area. The trays of mail are manually unloaded and placed onto a kingfisher. The kingfisher is then manually pushed to an area where a stacker of three levels contains a number of trays labelled by destination. Mail is removed from the letter trays on the kingfisher and placed into letter trays on the stacker. When the trays on the stacker are filled they are removed and placed onto another kingfisher and it is then pushed to the tray management system (refer below). Some bending is required when lifting trays out of the ULD and when filling trays at the lower level of the stacker. The applicant said that this job could be undertaken at his own pace.

#### **TRAY MANAGEMENT SYSTEM (TMS)**

23. This part of the respondent's operations involves the loading of standard mail trays onto a conveyor or the unloading of standard mail trays from the conveyor.

24. The respondent's brochure (Exhibit A3) at page 5 refers to the *induction* process also described as the loading process. The applicant said that that process is not now undertaken at the DMC but he had worked loading or carrying trays of standard mail and placing them onto a conveyor. The letter trays were removed from a ULD and placed on the conveyor every few seconds, which required bending and twisting.

25. At the other end of the conveyor, trays of standard mail were taken from it, lids were fitted or the trays were strapped and then carried and placed into a ULD.

**BULLRING**

26. This is a *staging area* where ULDs of bagged mail are deposited and where a team of two persons is required to unload the ULD and then manually carry the bags to other ULDs labelled by destination. The ULD is lifted by a mechanical trolley to a safe working height and its hinged side is opened. The bags of mail are supposed to be up to 16kg in weight but the applicant said they sometimes exceed that limit. If a bag is heavier than 16kg he was expected to ask for help from the other member of his team or if that person was not available the bag would be dragged onto a trolley and it would then be moved to the ULD where it would eventually be deposited. The applicant said that the expectation of the employer was for a team of two persons to empty six ULDs of bagged mail per hour.

**THE APPLICANT**

27. Taking evidence from the applicant was a laborious process. His verbal English was poor and he frequently did not answer questions asked of him. This required the same question to be frequently asked in order to elicit an answer.

28. The applicant said he first suffered back pain in January 2002 when working at the Melbourne Mail Centre. He was then working on an MLOCR. The applicant attended [REDACTED] his family doctor, who arranged for him to have a CT scan. Later in 2002 the applicant was transferred to the DMC and thereafter he attended [REDACTED] a practitioner nominated by the respondent and who thereafter provided him with medical certificates for reduced work hours and work with restrictions.

29. After the incident in 2002 until an incident in March 2003 the applicant said he had continuing back pain. In March 2003 the applicant claimed compensation for *injury to lower back*. The claim for compensation is found at T5 pages 13 and 14. The form describes the injury as having occurred whilst working on the AEG. (The AEG is a machine which is not depicted in Exhibit A3 but was observed during the view. It is a machine similar in nature and function to the MLOCR). The applicant said he experienced pain in his lower middle back which he said was at L4, L5. He

also said he had pinching of his nerves in the left and right side of his lower back causing pain. He said the level of pain in his back was greater after the 2003 episode than it was following the 2002 episode. The applicant again saw [REDACTED] who imposed restrictions on his work being limitation on weights being lifted and work rotations involving sitting and standing. [REDACTED] also referred the applicant for physiotherapy treatment and prescribed him with Panadeine Forte medication.

30. The applicant said the work on the AEG required him to manually lift boxes of mail. At or about that time he had also been working on the MLOCR, the barcode sorter and with ULDs loading and unloading boxes of mail.

31. On 10 June 2005 the applicant made another claim because of pain in his lower back after he had been working in the bullring sorting cardboard mail trays (T8, p18). The applicant said between 2003 and 2005 he had continued to work a pattern of rotation as prescribed by [REDACTED] and between those years he had back pain which became worse after the 2005 incident. The applicant said that the work sorting the letter trays immediately prior to the 2005 claim being made involved lifting trays of mail from ULDs. The back pain then experienced was again located in his lower middle back. The applicant again saw [REDACTED] who had continued to provide certificates and on this occasion the applicant thought, despite his imperfect memory, that further restrictions were imposed. The applicant understood that the respondent also accepted liability for the claim made in June 2005.

32. The applicant made another claim in March 2006 where the symptoms then recorded were *lower back pain / pins and needles in left leg and left arm* (T17, p43). On that occasion the applicant had been sorting mail that he had removed from a kingfisher. Another employee was moving a ULD. In the course of that ULD being unloaded it struck an empty ULD which was pushed forward and struck the applicant. He said that he then felt sudden pain and after being detained in the respondent's medical centre for a short time he was taken by ambulance to Dandenong Hospital where he was admitted. He was treated by rest and observation, he received an injection, was given some medication and was discharged some hours later.

33. The claim form completed by the applicant (T19, p52) records *back pain. Sciatica exacerbated by trauma to back at work* as the injury or illness suffered. The claim was made on 14 March 2006. The incident occurred on a Friday night and the applicant rested at home on the following Saturday and Sunday. He returned to work on Monday at one hour per day and the hours that he worked gradually increased. Restrictions were also placed on the weights to be lifted. The back pain then suffered was again to his lower middle back but on this occasion he also suffered leg pain which he said mainly occurred in his right leg but sometimes in his left leg by movements in his back which he thought was caused by *nerves pinching*.

34. The applicant was then unable to attend [REDACTED] and he made arrangements to consult his family doctor who referred him to [REDACTED] an orthopaedic surgeon. [REDACTED] injected the applicant with steroid (a CT guided injection) which eliminated back pain for approximately two weeks but it then returned. The applicant said that he also had leg pain on standing or movement but did not suffer it when resting.

35. In January 2007 the applicant claimed again for injury described as *lower back pain* which arose out of *running duties* on 16 January. That work involved the manoeuvring of ULDs on a power jack which was being pushed and pulled. The applicant said that he twisted or turned his back suddenly and with one of his arms outstretched in order to caution or warn other employees in the vicinity that he was moving the ULD.

36. The applicant had remained on restricted duties at January 2007 as initially certified by [REDACTED] and had been providing a certificate monthly from his general practitioner, [REDACTED]. The applicant said that he was restricted to rotation of one hour of standing and one hour of sitting whilst at work but it would appear from evidence that emerged later that the restrictions placed upon the applicant by [REDACTED] and which were adopted by the respondent in January 2007 restricted him to periods of 30 minutes of standing and 30 minutes of sitting in rotation. The restricted duties were described in a document dated 9 January 2007 and received as Exhibit 2. Other restrictions then imposed was prohibiting the

applicant from lifting greater than 10kg and not to perform duties involving repeated bending, pushing or pulling.

37. At 11 February 2008 another restricted duties program was devised by the respondent apparently in response to certificates from [REDACTED]. The duties then devised were similar to those of January 2007 except that the applicant was permitted to rotate between 60 minute periods of standing and 60 minute periods of sitting. Additionally he was permitted to relieve on the Toshiba and undertake the work of culling for 15 minute periods, however the applicant said that work exposes him to bending and twisting *all the time* (Trans p37).

38. Presently the applicant continues to consume prescribed medication being Pandaine Forte, Valium, Ducene and Effexor which is prescribed to relieve anxiety.

39. In cross-examination the applicant said that he had taken Panadeine Forte twice in the preceding two months but *sometime if the pain not easing using continuously* (Trans p68). He had also recently been prescribed another drug by his general practitioner for headaches.

40. The applicant was then taken to the restrictions imposed by [REDACTED] which were reflected in a list of restricted duties published by the respondent in January 2007 and February 2008. The applicant said that he understood that he was restricted to lifting no more than 10kg and in the event that he was exposed to greater weights he would ask for assistance. He also understood that he was restricted from undertaking repetitive bending or rotation of his back. Those restrictions apparently were honoured by the respondent because the applicant had not worked on the MLOCR since April 2007 and then he was only operating or feeding it. Recently the applicant's work on the BCS was restricted to feeding and operating that is, he was restricted from the take off function which would have exposed him to lifting and bending. When he was working on those machines prior to the recent restrictions, the applicant said that reaching to lower levels involved bending his back and when he demonstrated that manoeuvre it appeared that he was bending over a distance of about three feet at about 30°. The applicant said it

was not possible to undertake that work by bending his knees and keeping his back rigid. The applicant said he continued to work on the Toshiba and mainly worked in the culling procedure. That work he said did require him to bend forward to gather mail when it is being separated and then turn sideways to place mail in tubs. The applicant denied the suggestion put to him that [REDACTED] recorded restrictions based on the applicant's description of his level of comfort. He said [REDACTED] imposed restrictions based on his examination of him and his enquiry of the work being undertaken. Those restrictions would then be adopted by the respondent's representatives and become embodied in a list of restrictions which would be made available to the applicant's supervisor. The applicant also said that if he notified his employer that he was in pain his restrictions would be reduced to 15 minute rotations. Alternatively, if he notified the employer that he was without pain, the restrictions would be put at 30 minute rotations. The applicant agreed that the clinical notes of [REDACTED] record a number of references to him having low back pain when standing and an absence in the notes of complaints of back pain by bending or twisting. However, he said that when working whilst standing, he was required to bend or lift.

41. Subsequent to April 2007 the applicant said that he had not worked in the bullring nor had he undertaken any bending or lifting work associated with the large letter indexer (spectrum). It would appear by the applicant's response to questions with respect to the spectrum that he had been engaged only as an operator that is, working in a seated position recording the postcode of non standard mail and returning those letters to a conveyor belt. The applicant said that he has not been restricted from bundling mail in the direct mail area but has not been rostered to do it. It would seem therefore since April 2007 he has worked on the Toshiba as a culler, feeding and operating the BCS, some pushing of trolleys and working in a seated position elsewhere.

42. The applicant said (Trans p83) that he was engaged in greater periods of bending at the MMC than at DMC but later said that the degree of bending between both facilities was similar. However, the MMC had four or five MLOCR machines and five barcode machines but there were 15 of each of those machines respectively located at the DMC. The applicant also said that he worked longer periods on those



machines at the DMC than he did at the MMC. He said there were similar periods of lifting at MMC and DMC but at the DMC there were more periods of standing.

43. In March 2003 [REDACTED] referred the applicant to [REDACTED] a physiotherapist. She first attended the applicant on 27 March 2003 and took a history of low back pain 12 months previously which had settled *after 3 / 4 session*. The applicant said he could recall having physiotherapy in 2002 but could not recall giving the history as recorded.

44. The history also recorded at 27 March 2003 is of back pain from three weeks previously which was gradually worsening and with pain *worse in either leg dependent on which he's using*. The history recorded is of aggravation of pain by twisting, bending and lifting. The applicant said that he had been working on the barcode sorter at or about that time for six hours continuously. [REDACTED] records suggest that he attended her on five or six occasions. The last visit was in August 2003. The applicant said that he did not continue to have treatment with [REDACTED] (the respondent having admitted liability for six visits only) because he did not think that continuing physiotherapy would be helpful. The applicant was put on notice that it would be alleged that between 2003 and 2005 he did not have any physiotherapy or chiropractic treatment and further that the treatment in 2003 by [REDACTED] must have been helpful because he returned to her clinic in June 2005 following the workplace incident which had then occurred. The applicant also agreed that he did not attend [REDACTED] after August 2003 until June 2005.

45. The applicant was referred to a report completed by [REDACTED] on 4 January 2002 (T50, p127). The certificate refers to the applicant suffering from back pain *due to prolonged standing and lifting heavy containers*. The applicant said that he thought the reference to *containers* would have been to cardboard mail trays which in his experience weighed between 6 and 10kg and sometimes up to between 15 and 16kg. The applicant said he was working on the MLOCR and the pain had increased over a number of hours on the day of his complaint of pain. He was adamant that the pain did not occur by a single episode or incident. He could not recall whether [REDACTED] had certified him as being fit for restricted duties for a succeeding period of three months. The applicant could not explain the handwritten

note on the certificate *no rehab program – did not want one*. He said that he would have given that certificate to management at the MMC where he was then working. He thought that he may have been on lighter or restricted duties for the succeeding period of three months as [REDACTED] apparently recommended but he could not recall.

46. Thereafter the applicant said that his back gradually improved and he continued to work until 2003 although in rotation. The applicant could not recall the work that he was then performing but by reference to his claim form (T4, p9 – 11) it would appear that he was then sorting mail on the large letter frame and felt increased back pain. The applicant could not remember those circumstances but he did not think that the 2003 episode of pain was a frank incident. He said *I think recurrent, reactivation or something happened*. He also said *because the pain same place. There is nothing different places or some. The pain later all through the leg, sciatic pain*. (Trans p95).

47. The applicant could not recall the duration of pain he suffered after the episode in February 2003 but did acknowledge that [REDACTED] recorded at June 2003 that he had pain after lifting, pushing and pulling at work for one hour. Whilst it would appear that the applicant was then working on full duties but on rotation, he was required to work on the MLOCR, in the bullring and in the large letter area where from time to time he would have been required to lift trays of mail and push a kingfisher. He would have also been lifting tubs out of a ULD and placing them on a kingfisher or moving ULDs on a power lifter which would have required the machine to be pulled.

48. In the 2005 episode the applicant said that he was working in the bullring unloading mail trays and plastic tubs of mail from an elevated ULD and placing them into other ULDs located on the bullring floor. In his notification of injury report the applicant recorded that his *current injury of the lower back got worse after 35 minutes of commencing duties*. The applicant said that the pain did not occur suddenly but during the course of sorting the mail trays and tubs from one ULD to another. He said the weights of the trays and tubs were more than 10kg and on occasions were up to 16kg. The work involved bending, twisting and standing. The

applicant said that he was working under restrictions after 2003 and thought that one of the restrictions was a limit on the weights to be lifted. The applicant had been undertaking this work since at least 2003 and as part of his rotation program he performed it for up to one hour at a time. If he had a complaint of back pain, he would report it and he would be relocated.

49. In the 2006 episode the applicant said that he was struck by a ULD which had been propelled forward after it had been struck by another ULD which was being deposited by a high lifter. The applicant said that he had his back to the ULD and was sorting mail at or near a kingfisher. The effect of being struck by the ULD was to push him forward across the kingfisher. The applicant said he was struck on the lower left side of his back and on his upper left thigh. He thought that he was struck by one of the corner vertical edges of the ULD at or near its opened gate.

50. The applicant was then taken to the clinical notes of [REDACTED] a facility doctor to whom he presented on 7, 10 and 24 March 2006 following the ULD incident. It was suggested to the applicant that his complaints and presentation were inconsistent as evident by comments made by [REDACTED]. The applicant denied that he reported to [REDACTED] that he was struck by the ULD on the right side of his lower back. He said he notified [REDACTED] that he had pain in his left leg. He was adamant that he did not give a history of being struck on the right side of his back. He also denied that he *changed story again for the third time* as [REDACTED] reported because he consistently gave a history of being struck on the lower left side and his left leg. He acknowledged that he did have pain in both legs and when he had been asked by [REDACTED] how he was feeling, he complained of bilateral leg pain.

51. In August 2006 the applicant agreed that he applied for full time hours. He said he made such an application because full time employees on restricted duties work in different locations whereas part time employees on restricted duties work on rotation within the same area. The applicant described the rotation as a full time employee as being a *proper rotation*. Additionally full time employees have two 15 minute tea breaks and a 35 minute meal break during a daily shift whereas a part time employee has a 15 minute tea break only. He said full time employees

therefore have greater opportunities for rest. The applicant said that his application to become a full time employee was refused.

52. The January 2007 incident occurred when the applicant was working in the bullring moving loaded ULDs of mail. In the course of lowering a ULD into position the applicant noticed persons walking in his vicinity. He suddenly thrust his arm forward or to the side to warn those persons of his presence and in so doing suddenly turned his back and he then experienced lower back pain.

53. The applicant said that he undertakes some Yoga exercises daily at his home before he leaves for work. The exercises involve him being seated on a mat on the floor in a cross legged position and bending forward. The applicant demonstrated that position and also demonstrated a manoeuvre of lying on his back and lifting his legs. When the applicant got to his feet and immediately before resuming his evidence he was holding his lower back in apparent pain.

54. The applicant also said by way of exercise that he walks on a treadmill set at a speed of 5km per hour for 10 to 15 minutes each day.

55. In concluding cross-examination the applicant was asked to look at a booklet entitled *Safe Operating Procedures*. The applicant acknowledged (as the booklet recorded) that there were signs located around the mail centre recommending lifting by bending from the knees rather than from the waist and signs recommending carrying mail trays close to the body. The applicant said that he had not seen signs which described safe working procedures and practices on various machines.

56. In re-examination the applicant said that he had been advised by *an Indian lady* at a physiotherapy clinic to undertake Yoga exercises. He said that he had also been instructed in Yoga techniques whilst at school in Sri Lanka. The applicant said that on occasions he is unable to practice Yoga because of severe back pain but on other occasions when the pain is lesser, he will undertake the exercises, but slowly. He said the Yoga exercises do not relieve back pain because it is always present. He said he undertakes Yoga exercises to be *able to walk freely and if I go to the work able to do – start freshly*.

57. The applicant was then taken to the Safe Operating Procedure booklet submitted in cross-examination and was asked to comment on references in the section concerning the barcode sorter and a section concerning the MLOCR which recommended, where practicable, that taller persons should unload upper sections and shorter persons should unload lower sections. The applicant said that in his experience employees were not allocated jobs depending on their height and he had not ever heard of shorter persons being told to clear the lower levels of the stackers.

58. The applicant said if he had a work practice of bending at the knees, rather than the waist, he would not be able to keep up with the speed of the MLOCR or the BCS and the work would not be completed. Bending his knees, on each lift, he said would take considerably longer. If the mail is not unloaded at the speed of the machine there will be a blockage which will cause the machine to stop and a complaint would be made by the supervisor.

59. In completing re-examination the applicant said that the mail centre is busy after 5.00 or 6.00 pm as opposed to during the day, (when the view was conducted). Before evening shift, the work mostly involves labelling or repairing labels *and some sort of small work. Sometimes running machines very rare, very small amount.*

[REDACTED]

60. [REDACTED] is the applicant's treating surgeon who provided reports of 2 November 2006, 27 March 2007 and 18 January 2008. The respondent gave its approval to [REDACTED] to conduct a CT guided L4 / 5 sub-articular injection of local steroid but did not grant approval for him to perform an L4 laminectomy.

61. [REDACTED] was of the opinion that the applicant suffered from L4 / 5 lumbar canal stenosis (arthritic degeneration) which was causing pressure on the L5 nerve roots. He said that condition essentially causes two symptoms being back pain and radicular or nerve pain that is, leg pain.

62. The witness said that the extent of back and leg pain will *wax and wane* consistent with the evolution of the lumbar canal stenosis. He said that there will be

occasions where the applicant will be relatively asymptomatic depending on his activities and on other occasions he will have increasing back and leg pain but inevitably the condition will deteriorate with time. It was his opinion that the applicant suffered facet joint damage by reason of the repetitive lifting undertaken by him in the workplace. He explained that facet joints are located behind each spinal vertebra and by their shape, size and coating (by cartilage) they guide and determine the direction of spinal movement. When the cartilage wears, arthritic spurs develop into the areas through which nerves travel and exit and therefore cause irritation and pain. The most common level of this irritation is at L4 / 5. [REDACTED] said that the nerves rub against the spur and then become inflamed and painful. The leg pain, especially, becomes a *significant feature*.

63. [REDACTED] was aware of three radiology reports which were received into evidence as Ex A10. A lumbo-sacral CT conducted on 12 March 2002 reporting moderate arthropathy at the L5 / S1 facet joint with other facet joints elsewhere appearing normal was interpreted by [REDACTED] as indicating that the radiologist was of the opinion that the appearances were normal for the applicant's age. An MRI of the lumbar spine of 4 August 2005 of mild facet joint arthropathy at L4 / L5 and L5 S1 bilaterally resulting in mild to moderate foraminal narrowing was interpreted by him as indicating arthritic changes at the L4 / 5 and L5 / S1 facet joints. In those circumstances [REDACTED] was of the opinion that there had been progression of the degenerative changes in the applicant's spine. An MRI of the lumbar spine of 5 May 2006 concluding that there was bilateral L4 / 5 and right L5 / S1 facet joint degenerative changes was understood by [REDACTED] as indicating a similar conclusion to the MRI of 2005. He said to be certain he would prefer to have examined the films of the two MRI investigations and compare them to determine if there had been any significant progression of the disease. He concluded that the radiology reports were consistent with his diagnosis.

64. [REDACTED] understood that the applicant had been engaged in employment moving bags of mail weighing 16kg. In evidence in chief he learnt that there had been evidence of the applicant performing work, often at speed and repetition, involving bending, lifting and twisting whilst holding trays of mail, the work being conducted in rotation of more than 30 minutes and bending was often to lower

levels with an inability to squat and rise to a standing position. In those circumstances it was his opinion that the repetitive movements and the weights being lifted together with the twisting and lifting activities amounted to *hyperextension* which caused excessive load on the facet joints, (having been damaged) and would therefore accelerate or aggravate the degenerative process. In his opinion and experience, once the surface cartilage is damaged, it does not repair itself and it becomes a *permanent problem*.

65. [REDACTED] was aware of an opinion expressed by [REDACTED] who assessed the applicant on behalf of the respondent and who reported that the MRI report of 5 May 2006 did not indicate any nerve root compression. He said that an MRI is better than a CT scan for identifying soft tissue detail whereas a CT scan is preferable to determine bone detail. It was in those circumstances and because of the applicant's complaints that [REDACTED] sought approval for, and conducted, a CT guided injection in order to determine whether there was L5 nerve root impingement. When the applicant obtained *significant relief* for some weeks after the injection he was satisfied that the L5 nerve roots were trapped beneath the facet joints and a laminectomy would then free the exiting nerves. Additionally the applicant's most severe symptoms were of left leg pain and later he developed right leg pain. If the main complaint was of back pain, a laminectomy would be contraindicated because that procedure will relieve leg pain only. In his experience a laminectomy is an operation of approximately 20 minutes, it is very *straight forward*, it has *excellent results for leg pain* and the success rate for laminectomy exceeds 80 per cent (refer report 2 November 2006).

66. [REDACTED] disagreed with an opinion expressed by [REDACTED] that the applicant suffered a temporary aggravation of the degenerative disease by the employment. He explained that the disease process will suffer exacerbation from time to time by activity which will aggravate symptoms and may cause further damage to the facet joint surface. The symptoms may settle and whilst a single incident may not of itself have materially contributed to the present condition, continuing episodes of wear and tear, without the ability of the facet joint surface to repair itself, will cause continuing degeneration.

67. [REDACTED] was also asked to comment on the clinical notes completed at the Dandenong Hospital which recorded the absence of any signs of trauma or skin injury or bruising. It was his opinion that bruising will not necessarily indicate the aggravation of an arthritic lumbar spine. However the reported complaint of pain and tenderness over the lower back and pain radiating through the left buttock and the back of the left thigh is consistent with the diagnosis of degenerative disease.

68. In concluding examination in chief [REDACTED] said that the aggravation of an underlying degenerative disease may cause immediate or acute onset of pain or there may be a manifestation later. For example, a person might be engaged in gardening over a weekend but may not suffer increased pain until the following Monday.

69. In cross-examination [REDACTED] said that a laminectomy is a procedure to remove bony spurs from the facet joint. Removal of the facet joint itself would only be undertaken if a spinal fusion was performed. [REDACTED] was aware that [REDACTED] a specialist who assessed the applicant on behalf of the respondent reported that a laminectomy should only be recommended if there was evidence of lumbar prolapse. When asked to comment whether that was a *conservative* opinion [REDACTED] said that he was *conservative enough to not want to operate* without having previously conducted a CT guided injection to determine nerve root impingement. It was for the same reasons, that is, the recommendation to undertake CT guided injection, that the radiology evident from the 2005 and 2006 MRI reports demonstrated minimal change and the reports of themselves were *on the borderline of recommendation to do a laminectomy*.

70. [REDACTED] said that he would not necessarily expect that with *significant impingement* a patient would have neurological deficit. He dismissed the suggestion that there would be loss of ankle jerk because such a phenomena will not be caused by injury to the L5 nerve root. He acknowledged that ankle force inflection or big toe extension would be associated with impingement by L5 nerve root entrapment and in his experience some persons do present with impingement but *a majority of people present with pain alone*. He did not accept the suggestion put to him that the CT guided injection may have a *placebo element*. However in the case of the applicant



he became pain free for a few weeks after the injection but the effect of it wore off. In those circumstances the witness said that his suspicion of nerve impingement in the sub-articular recess was confirmed because the applicant had become pain free.

71. [REDACTED] acknowledged that a clinical judgement of the extent or severity of the stenosis would be the severity of leg pain. He would expect that there would be some restriction by walking and by being seated. However in his experience the most aggravating factor for the condition is hyperextension of the lumbar spine that is, either arching backwards or twisting when arching backwards. Straight leg raising would put the lumbar nerve under tension but straight leg raising of itself is a test more sensitive to determining lumbar disc prolapse rather than sub-articular stenosis. [REDACTED] said that sitting increases intra discal pressure by 20 per cent compared to standing and will aggravate the applicant's back. He did not dismiss the benefits to the applicant of yoga because being able to do it and bend forward whilst in a seated position is an act of stretching and *he's actually opening his spine up and people who have lumbar canal stenosis, that's what they do to relieve their symptoms.*

72. [REDACTED] said he was reassured about his diagnosis because of the findings on the CT guided injection and the relief from pain for a few weeks subsequently. Additionally it was his experience by conducting 700 spinal operations per year that the extent of nerve root compression is often found to be worse than demonstrated by radiology. He reaffirmed that the procedure is to relieve leg pain which was the chief presenting problem when he first consulted the applicant. He also reaffirmed that the condition of spinal degeneration waxes and wanes and he was unimpressed by the conclusions of [REDACTED] who also examined on behalf of the respondent and who reported comments which were interpreted as suggesting a non organic basis for the complaint of pain. [REDACTED] said that he was *not overly concerned* about those conclusions and thought that the interpretations made by [REDACTED] were *vague*. It was for all of these reasons that he reaffirmed that a laminectomy was an appropriate procedure for the applicant to undertake for the relief of his leg pain.

73. In terms of the development and progression of degenerative disease, [REDACTED] agreed that it is progressive and may or may not be affected by work or sporting events or other life experiences. He said the deterioration was *natural* but heavy manual work would be expected to progress the disease at a faster rate. The typical exercise that he would recommend for a person would be swimming because a person then becomes weightless and they would not be expected to aggravate or hasten the progress of the disease.

74. [REDACTED] said that he understood that the applicant was involved with repetitive lifting in the workplace involving lifting of bags of mail and having to turn and twist and place the bags on a conveyor belt. He assumed that that activity formed a major part of his daily work activity. He also knew that the applicant had subsequently worked on modified duties. In anticipation of the questions that were likely to be put to him, [REDACTED] volunteered that he would be unable to give any degree of contribution measured in percentage terms by the employment to the progression of the degenerative disease. The only occupational study that he knew of with respect to degenerative spinal disease was of truck drivers who, when compared with a similar age related group, demonstrated that they *all had worse backs*. He again acknowledged that the applicant did have a pre-existing degenerative condition and although movement and exercise will nourish the cartilage which provides a coating to the facet joint, *excessive strain takes it one step further and does damage*. In his opinion the indication of excessive strain is the production of pain.

75. [REDACTED] was aware that the applicant commenced to have back pain in about 2002 having started work with the respondent in 1999. He first saw the applicant in 2006. He had assumed that repetitive manual labour had been undertaken for about seven years. When he was given details of the restrictions under which the applicant worked, he said in his experience when completing workers' compensation certificates, he restricts persons to lifting up to 5kg and no repetitive bending or twisting or sitting or standing in one position beyond 30 minutes. Those restrictions are imposed to alleviate the potential for pain and to minimise the risk of further damage to the spine. When he learnt that in addition to work involving lifting the applicant was also required to bend and twist, it was his

opinion that activity of that type would contribute to the degenerative spinal disease. Whilst again reaffirming that he is unable to quantify in percentage terms the extent of contribution by employment, he said that the work undertaken by the applicant was *repetitive heavy work and even if mailbags had been lifted for an hour or half an hour as part of the rotation process, it would be heavy work but of limited duration*. He dismissed the suggestion that not lifting mailbags for most of the day would not be regarded as heavy work. He said that the applicant would have been exposed to the weight of the bags and the issue was the accumulating effect on his spine by the lifting.

76. With respect to activity involving bending [REDACTED] said that bending of itself relieves spinal pressure. He referred back to the earlier evidence concerning the applicant undertaking yoga whilst leaning or stretching forward. He said that when a person rises from a bent position a *loading force* is placed across the spinal joints and if when standing up from a bent position a person is carrying something in their hands the load on the spine *increases dramatically*. When he learnt the applicant may be bending to a level below waist height and standing up holding trays of mail weighing between 7 and 8kg he said that he was sure that there would be a contribution to the spinal disease by that activity, even if that work was undertaken for limited duration, because the work exposed the applicant to *repetitive strain on an already damaged articular surface*. He agreed that getting into and out of a motor car or rising from a chair or getting out of bed did not involve repetitive strain because it did not involve lifting weight from differing heights and twisting in the one movement.

77. In concluding cross examination [REDACTED] agreed that a patient presenting with non organic symptoms would suggest that a laminectomy would not be appropriate but he was not prepared to find that the notes recorded by [REDACTED] supported the proposition being advanced by the respondent. It was his opinion that degenerative spinal disease does wax and wane, that the applicant's left leg has always had more severe pain than the right leg and the applicant should not be painted as a person who would necessarily be confused as was reported by [REDACTED]. He said [REDACTED] may have been confused because of the change in the presenting symptoms. [REDACTED] interpreted the notes of [REDACTED] as a

person who was *obviously struggling to work out exactly what's going on* however he did note that he [REDACTED] had reported that the applicant had *lower back pain since 2002 and wear and tear in your back* which was an indication that the applicant suffered from osteoarthritis of the lumbar spine. [REDACTED] said he did not understand, from [REDACTED] notes, that the applicant presented as a person who was confused.

78. [REDACTED] was also dismissive of the interpretation placed on the notes of the Dandenong Hospital by the respondent. He said he was often surprised to receive reports from referring emergency doctors reporting that a person suffers from back pain when in fact they have true sciatica. He said that a relationship did not necessarily exist between severity of incident and symptoms and was not concerned by the reported absence of any bruising or marks around the applicant's lower back after the ULD incident. He said the affect on the applicant's spine by being struck by the ULD would be relevant to the complaint of pain rather than the complaint of pain not having any organic basis (as was being suggested) by the absence of bruising or marks on the skin.

79. In re-examination [REDACTED] reaffirmed his earlier opinions that the CT guided injection was the most significant radiological evidence, that being relieved from pain for two weeks following that procedure dismissed the suggestion that it was of placebo value, that work in the bullring lifting bags of mail and performing rotational duties of repetitive lifting, twisting and bending did contribute to a deterioration in the degenerative disease and having worked without restrictions between 2003 and 2005 does not detract from his opinions because he has continued to lift and twist repetitively.

80. [REDACTED] also reaffirmed that bending, straightening up and then twisting whilst carrying a tray of mail will accelerate the degenerative disease especially if the weight being carried is held away from the body which has the effect of placing greater strain on the lower spine.

81. In conclusion there was nothing about the presentation of the applicant which suggested to [REDACTED] that his complaints were not genuine. He was

impressed by the applicant reporting to him that he wanted relief from his leg pains and was even prepared to meet the cost of the surgery himself.

82. Discussion then followed, initiated by me, in an attempt to achieve some assistance in making findings later as to whether there was any material contribution to the injury by the employment. I permitted both Counsel to ask further questions of [REDACTED] on this issue.

83. He said in answer to questions from Counsel for the applicant that episodes of lifting 16kg mailbags from ground level and twisting or turning was an *undue amount of strain that would not normally be expected in a person who works in an office environment or a person who was retired*. He added *I think I can use the word, there would be a significant contributing factor in that he was not just lifting 5kg packages of mail he was lifting 16kg or plus bags of mail from lower positions up onto elevated positions*.

84. When questioned by Counsel for the respondent [REDACTED] said that he used the word *significant* deliberately because the work accelerated the applicant's degenerative condition. He was impressed because the applicant repetitively lifted, twisted, turned and performed bending type movements over a number of years. He also thought that was significant. He was aware that the applicant did not perform those movements for most of each working day because he understood that he worked on rotation. He was impressed by the *accumulation* to the disease process by the repetitive lifting, bending, twisting and turning. Whilst acknowledging that he sees degenerative spinal disease in persons who are retired and who have never performed work similar to the applicant, he acknowledged that there may be a genetic component. But he reaffirmed the opinions previously expressed by him that the employment undertaken by the applicant did materially contribute to the degenerative disease manifesting in spur growth on the facet joints and consequent complaints of pain. He acknowledged that the underlying degenerative disease may become symptomatic from time to time but he was satisfied that the work that has been undertaken by the applicant contributed to the deterioration of the disease.

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85. ██████████ is an orthopaedic surgeon who examined the applicant at the request of the respondent on 13 July 2005. He provided a report (T12, p28) dated 25 July 2005. Having regard to the date of his examination, ██████████ was principally asked to comment upon the effects of the workplace incident of 2002. In his report, and in evidence, he said that the applicant did have a pre-existing degenerative spinal disease that was aggravated by the 2002 episode but the effects of the aggravation had settled or returned to the pre 2002 state by August 2003. That is to say, in his opinion the effects of the temporary aggravation occurring at 2002 were temporary and had settled by August 2003.

86. ██████████ was not prepared to support the opinions expressed by ██████████ ██████████ that work involving lifting, bending and twisting contributes to facet joint degeneration and ultimate stenosis *until there was something measurable*. He regarded that opinion of ██████████ as being a *hypothesis* and said that he would need to have *concrete evidence* to support it.

87. ██████████ considered the report of the radiologists who conducted a CT scan of March 2002 and MRI examinations in August 2005 and May 2006. It was his opinion based on the descriptions recorded by the radiologists that there had been little change in the applicant's spine over the period of four years. ██████████ also rejected the opinion of ██████████ that an underlying degenerative condition will progressively deteriorate by microscopic effects and he would not accept an association between work activity involving lifting without observing *something visual*. If the radiology upon which he commented earlier had shown advanced degenerative changes in the facet joints, he would have been prepared to accept that there had been an increase in the rate of degeneration. It was his opinion that the extent of degenerative disease present in the applicant could be explained by his age.

88. When ██████████ became aware that the applicant undertakes Yoga and had demonstrated bending or stretching forward whilst in a seated position with his legs crossed, it was his opinion that that degree of mobility indicates a person without a

*badly diseased spine*. He was also of the opinion having examined the applicant in July 2005 that the level of symptoms then demonstrated would not justify surgery by laminectomy. He regarded that procedure as being *major surgery*.

89. In cross-examination [REDACTED] agreed that a decision as to whether a laminectomy should be performed was a matter for the clinical judgement of the treating orthopaedic surgeon. He also agreed that the three radiology reports that he referred to earlier did indicate some degree of degeneration and also agreed that the results of radiology did not necessarily correlate with a patient's symptoms. He agreed that a sub-articular injection of steroid may give relief and might also be a diagnostic tool to determine or indicate nerve root impingement.
90. [REDACTED] also agreed that a person with degenerative spinal disease would generally be expected to have symptoms that would wax and wane and a person engaged in manual labour would be expected to have more pain than a person not engaged in that type of activity because physical movement during manual labour places pressure on the spinal structures.
91. [REDACTED] described the process of spinal canal stenosis as bony growth encroaching into the spinal canal impinging the freedom of movement of the nerve and nerve roots. In those circumstances the spine is vulnerable to physical stress where a temporary flare up or temporary inflammation occurs which will subside. That is, the process is reversible.
92. [REDACTED] agreed that if the applicant had been lifting 16kg mail bags and performing work requiring him to bend forward and lift and also perform work involving twisting and turning motions, that stress would be placed on his arthritic spine. If those tasks were also undertaken in rotation and repetitively, they could be distinguished from ordinary day to day functions of getting into and out of a motor car or bending over to tie shoelaces.
93. [REDACTED] acknowledged that some medical practitioners hold the opinion that undertaking work as described places stress on the spine that would not only cause an irritation or a flare up but damage to spinal structures. When it was

suggested to him that upon spinal pathology changing or becoming damaged that it does not repair itself, [REDACTED] responded *it never goes backwards*.

94. In re-examination [REDACTED] agreed that the lasting absence of leg pain following the CT guided injection would be a reasonable basis to believe that the applicant does suffer nerve root irritation but he would prefer to be *sure* that the applicant would benefit by laminectomy and he doubted that he would contemplate laminectomy where the only symptoms were leg pain. He said that he would prefer to observe the absence of reflex or muscle weakening or wasting *to back up the patient's complaints*. He did agree that when obtaining a clinical history he would need to take account of not only the results of the epidural injection but of the applicant's capacity to function during work or normal activities at home or at leisure. That is to say, he was prepared to agree that he could not make an assessment of the merits of laminectomy by one assessment only.

[REDACTED]

95. [REDACTED] is a consultant occupational physician who assessed the applicant at the request of the respondent on 24 May 2006. He provided a report dated 25 May 2006.

96. On examination [REDACTED] took a history from the applicant of pain extending into his left buttock, the back of the left leg and into the left foot. [REDACTED] queried whether those symptoms were sciatic in nature or whether they were referred back pain. He said both conditions would produce similar physical manifestations. On examination of the applicant he noted that straight leg raising was limited to only a few degrees on the left leg and 20° on the right but he observed the applicant to rise to a seated position from a prone position and have his back at 90° to his legs. That posture he said was inconsistent with an inability to raise his legs to a greater degree than was demonstrated.

97. [REDACTED] had only observed the CT scan and the first MRI scan (refer earlier) but observed the second MRI scan whilst giving evidence. He concluded, having read the reports of the radiologist of the CT scan and the MRI scans, that there was



no *significant facet joint problem* at L4 / 5, that changes at that level were *mild* and there was no nerve root compression.

98. [REDACTED] thought that it was possible that the pain reported by the applicant in his left leg could be referred from the L4 / 5 facet joint but he would prefer to have that opinion supported by other findings on examination, being muscle weakness, reflex changes and sensory loss. On balance he said that he would be hesitant to find that the referred leg pain indicated an L4 / 5 facet joint problem. Additionally he thought that if the applicant had suffered leg pain as a result of facet joint changes that he would have expected to find objective evidence of pressure on the nerve.

99. [REDACTED] acknowledged the opinion expressed by [REDACTED] that each exposure to lifting of weights causes microscopic changes to the cartilage surface of a facet joint and whilst indicating that that opinion *sounds straightforward* it was not, in his understanding, well supported by medical literature.

100. [REDACTED] had attended the DMC on a number of occasions at the request of the respondent in his capacity as a consultant and was familiar with the work that had been undertaken by the applicant. He said that there had been occasions where he had lifted trays of mail from stackers. Whilst acknowledging that those activities involved bending and twisting, he did not think that *it's the sort of level that is going to cause any particular significant changes in facet joints* . . .

101. With respect to the opinion of [REDACTED] that a laminectomy was warranted, it was the opinion of [REDACTED] that there would need to be *good findings and good X-rays* and there would need to be a *good history* before that procedure is undertaken. He would also want to be sure that there is an absence of any functional overlay and inconsistencies in the history. He thought the applicant did demonstrate a significant functional overlay and he would be concerned about undertaking a laminectomy on behalf of the applicant. However when he learnt that the applicant had been injected with steroid by a CT guided procedure with pain relief for some weeks following but then a return of the pre-existing pain, he concluded *that puts a bit of argument on the other side of the debate that if there were some resolution of – he would be looking for mainly leg symptoms with that sort*

*of injection then that would point you towards thinking that may be the cause. Whilst also acknowledging that that CT guided injection was a test of itself which is not absolute you'd have to accept that there is some argument for the procedure if that was the case following an epidural at the right location. But on balance, when all issues were considered, namely, his interpretation of the radiology, his clinical assessment of the applicant, the history obtained and the presentation on examination, he remained concerned about recommending the applicant undertake a laminectomy. In his opinion, the applicant suffered a functional overlay, despite the return of pain following the CT injection,*

102. When he learnt that the applicant had demonstrated a yoga technique during evidence and that he had also practised yoga, he thought the evidence of the applicant being able to sit and stretch forward was of little consequence. He acknowledged that leaning forward whilst in a squatting position permits the nerve to be stretched and greater stress is placed on the facet nerve when leaning backwards.

103. In cross-examination [REDACTED] agreed that he was not an orthopaedic surgeon nor a neurosurgeon nor a psychiatrist, but when assessing whether work contributed to a spinal problem, he was of the opinion that he held *far greater expertise than an orthopaedic surgeon*. He said that he held the capacity to make a diagnosis of an orthopaedic condition and for eight years had been a member of a medical panel which had assessed more than 2000 cases where assessments were made in conjunction with neurosurgeons and orthopaedic surgeons with respect to work related injuries.

104. [REDACTED] said that he would agree with the opinions expressed by [REDACTED] and [REDACTED] that the applicant did suffer a degenerative condition of the spine but said that the opinions of [REDACTED] of the applicant having an L4 / 5 lumbar canal stenosis on an arthritic degeneration was inconsistent with the opinions of the other two doctors. He said the opinions of [REDACTED] were referable to a specific and small part of the lumbar spine only. Nonetheless he was content to concede that the opinion of [REDACTED] *fits under the subset of the generalised diagnoses they made.*

105. [REDACTED] agreed with a number of propositions put to him by [REDACTED] namely, that the diagnosed condition of the applicant is likely to cause it to wax and wane, that irritation to a nerve may not necessarily produce clinical signs, that mobility and flexibility of the spine should be maintained and stretching the spine whether from a position of being seated on the floor or elsewhere may alleviate discomfort.
106. When he was asked to comment upon the opinions expressed earlier concerning the appearances on the CT scan and the two MRI reports, [REDACTED] said that comparing the findings between those procedures was *fraught with danger*. He said a CT scan looks at joints and bone structures whereas the MRI by different process looks at other structures. He said he would question whether it was appropriate to compare the findings between the different radiology procedures and then to make inferences.
107. With respect to his attendances at the DMC [REDACTED] agreed that he had not attended during nightshift and his observations had occurred during the day only. He agreed that postal workers could work on a number of different machines and for differing periods of time in an area known as the bullring manoeuvring and lifting bags of mail weighing up to 16kg and sometimes more and moving tubs of mail. He also agreed that rising from a bent position carrying an object of weight puts extra stress or load on the lumbar spine and that some of the activity at the DMC involved that sort of movement. He agreed that the work essentially was manual in nature and persons would be required to bend especially into the lower level of the stackers and would have to work at speed to keep up with the machines. He also agreed that in addition to the degenerative disease suffered by the applicant he suffers from a mild annular disc bulge at L4 / 5 and that level is a *load bearing area*. It follows that articular surface damage would have a further load placed on it by work which involved repetitive twisting and bending. He also agreed that arthropathy of a facet joint or joints is not reversible and the acceleration of underlying degeneration of an arthritic spine would not be reversible.

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108. ██████████ is a facility doctor nominated by the respondent and who assessed the applicant on 7, 10 and 24 March 2006. He obtained a history of the applicant having been struck by a ULD in the workplace. On the first occasion he recorded that the applicant was struck but was not specific. On the second occasion he recorded that the applicant had told him that he was struck on the right side and on the third occasion he reported that the applicant had told him that he was struck on the left side. He therefore recorded that the applicant had *changed (his) story*. He also recorded that he was *not really sure what is the injury*.

109. In cross-examination ██████████ agreed that he had attended the applicant in June 2005 where he then recorded a history of lower back pain since 2002 and *wear/tear in your back*. He also recorded *legs pain, both legs and feet*.

110. ██████████ agreed that he did issue certificates on the three occasions that he consulted with the applicant in March 2006 imposing restrictions on work. He said the restrictions then were appropriate. He also agreed with the conclusions of Mr de la Harpe that the applicant has an arthritic spine with nerve root impingement and in those circumstances it would not be unusual for him to present with variations in his symptoms over a period of a week or more. Dr Soliman also said that he was in no doubt that the applicant was in pain and exhibiting other clinical signs and symptoms during his attendances in March 2006.

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111. ██████████ is a neurosurgeon practising in Brisbane who previously held appointments as the Director of Neurosurgery at the Royal Brisbane Hospital and the Royal Children's Hospital in Brisbane. He retired from operative practice in 2001 or 2002 but continues to assist his colleagues in spinal surgery.

112. ██████████ provided three reports of 9 November 2006, 30 July 2007, 6 December 2007, having examined the applicant on each occasion prior to completing his reports.

113. During his first assessment on 30 October 2006 he received complaints from the applicant of a numb sensation in his back, the side of his neck and his right foot. [REDACTED] thought that the sensation in the right foot could be related to the S1 dermatome but the numb sensation in the neck and back would not be related to lumbo sacral disease. He said he observed the applicant being able to climb onto and from his examination couch and to take off his shoes and socks without difficulty. In those circumstances it was the opinion of [REDACTED] that there was *no evidence of true sciatica*. When he observed the applicant being able to reach his ankles when he was asked to touch his toes, he concluded that the applicant had a normal range of back motion. He also thought that there was no evidence of nerve root compression because the applicant was able to undertake a straight leg raising assessment at 70 degrees and 60 degrees on the right and left legs respectively when lying and 90 degrees in each leg when seated.

114. [REDACTED] concluded that the incident at work where the applicant was struck by the ULD resulted in soft tissue injury only and he held the expectation that there would not be any significant skeletal injury. In his experience, injuries of that type *resolve or recover within weeks or three to six months at the outside*. He was of the opinion that the applicant suffered from a pre-existing constitutional degeneration of his spine that was related to the ageing process and was not work related. He acknowledged that some persons of an equivalent age to the applicant suffer back pain and some do not however he was unable to offer any scientific explanation for that phenomena.

115. Having regard to the applicant's presentation at first consultation and to his observation of the radiology reports, [REDACTED] concluded that there was no evidence of compression of the nerve roots at L5 and the leg pain suffered by the applicant was *non specific or non dermatomal*. He agreed that there was no correlation between the features observed in radiology films and symptomology and said that the conclusions he reached were based by a combination of features of the applicant's spine depicted in the films, his clinical observations of the applicant and the history given to him of pain and symptoms. When he learnt that the applicant had given evidence of pain radiating into the left leg through the left buttock with the symptoms waxing and waning, he thought that was an indication of a fluctuation in

symptoms which he would normally expect and which frequently occurs with degenerative disease.

116. [REDACTED] said that the CT guided injection undertaken by the applicant was of no diagnostic value because he would have expected the effects of the anaesthetic to have worn off within two or three hours. He added that he did not think that steroids *do very much* when he learnt later that the applicant had also been injected with steroid. He thought the evidence of the applicant having relief from pain for a few weeks following the injection was *a bit long*. [REDACTED] was also of the opinion that undertaking a laminectomy would not be recommended by him and he thought that the prospect of success was minimal. In his view, the applicant is capable of continuing to work, he is physically active and he is able to exercise. He would encourage the applicant to continue that regime and from time to time undertake rehabilitation when needed. He thought that a laminectomy was a major procedure involving the administration of anaesthetic with *significant risks* of infection, blood loss and nerve root damage. He thought the applicant should continue to be treated conservatively. He was reinforced in the above opinion because the applicant was exhibiting non organic features, an absence of neurological deficit, minimal findings on radiology and was engaged in litigation. Those factors, he said, concerned him about the likelihood of a successful outcome from laminectomy.

117. [REDACTED] said he was unaware of any authority that supported the proposition of a pre-existing degenerative spine being able to suffer a permanent aggravation. It was his opinion that degenerative disease is a naturally occurring process which may be temporarily affected only, either by work or other activity. He referred to AMA Guidelines which recorded that an aggravation may be characterised by an increase in symptoms *and radiology* by three percent. He said that he did not know of any literature which supported the opinions expressed by [REDACTED]

118. In cross-examination, [REDACTED] said that a combination of anaesthetic and steroid would prolong the effect of a CT guided L4 / 5 sub-articular injection. When asked to assume that the applicant was injected at L4 resulting in pain relief for a few weeks, [REDACTED] said that it would possibly indicate nerve root impingement at the L4 / 5 level.

119. [REDACTED] agreed that a decision to undertake laminectomy would be influenced by the judgement and expertise of a treating specialist applying his or her professional judgement and knowledge. He also agreed that one of the factors that should be taken into account in deciding whether to perform a laminectomy is the extent of pain that a patient suffers whether at work or elsewhere. When asked to assume that the applicant had from time to time suffered a flare up of pain, [REDACTED] said that would indicate a progression of symptoms rather than a progression of the disease. He said there was no evidence from the radiology of a progressive disease but when challenged that a valid comparison could not be made between a CT finding and an MRI finding, he said that the comparison *is of no assistance at all*.

120. [REDACTED] acknowledged that there is a difference between ordinary activities of daily living compared to the activity of a person undertaking manual work at speed and repetitively but in his opinion there was no evidence that the cumulative effect of heavy repetitive work would permanently aggravate or accelerate an underlying condition. He did however agree that the permanent effects of a disease process is not reversible.

#### CONCLUSION AND REASONS FOR DECISION

121. The applicant initially was employed by the respondent at the Nunawading and Melbourne Mail Centres but since 2002 he has worked at the DMC. It is a purpose built facility where it is apparent that considerable thought was given to the construction of the workplace, the placement of machinery within it, the systems and processes devised and implemented to process mail and the manner in which employees would undertake their duties. I have reached these conclusions having regard to the benefit of being permitting to attend the DMC, with the representatives of both parties during these proceedings in order to comprehend the nature of the respondent's operations and the activities required to be undertaken by the applicant within his employment. The attendance at the workplace occurred during the day but what has become apparent having regard to the evidence heard in these proceedings and the documents read is:

- (i) The workplace observed and the activities undertaken by those employees who were then present during the view would be significantly different during the evening shifts which were undertaken by the applicant. On the day of the view the workplace was relatively quiet and few persons were working. It has been learnt that the overwhelming majority of mail processed by the respondent occurs during evening shift. Work is undertaken at a constant and steady pace in order to meet the respondent's targets of delivery; and
- (ii) Having observed some employees at the view, having heard the evidence in these proceedings and having observed the described duties in the respondent's booklet at exhibit A3, and despite the respondent's policy of rotation and limitations on weights being lifted, the duties of the applicant would have exposed him to frequent and repetitive movement involving bending, twisting, turning and lifting from a posture of either standing or being seated. It was the evidence of the applicant that he worked a regular six hour shift commencing at 6pm daily between Monday and Friday. It was his evidence, and it was not contradicted by the respondent, that such a shift permitted him to have one only 15 minute break. He said that he had applied for full time work, which was declined, because it would have permitted him to have two 15 minute tea breaks and a 35 minute meal break.

122. The applicant first experienced back pain in 2002 and said that his back and leg pain has become progressively worse. He also acknowledged that from time to time there were occasions when the pain was not as severe. On those occasions he had greater mobility and did not suffer restrictions and limitation of some movements. That evidence was consistent also with the evidence of Mr de la Harpe who said that a feature of degenerative spinal disease was of a person having symptoms that *wax and wane*.

123. The employer's expectations especially of persons working on the Toshiba, the MCLOR or the BCR were of the processing of significant quantities of mail which required the persons to work at a fast rate. Whilst it is understood that the person



who was delegated as the operator of the MLOCR and the BCR would not have been exposed to the degree of turning, twisting, bending or lifting as those persons who were feeding or taking off, those machines operated by teams of persons who rotated between those functions during an ordinary shift. Some bending was required to relatively low levels more often than not whilst carrying a tray of mail which was variously estimated to be between 6 and 10kg. On other occasions the applicant would be working in the bullring lifting or manoeuvring bags of mail or tubs of mail which would weigh up to and sometimes greater than 16kg or he would be working at the Toshiba which again required him to lift tubs of mail but also bend and twist.

124. In recent years the applicant has been restricted from some of the above functions and to the extent that he has worked on the MCLOR and the BCR he has been operating and feeding only and more recently he has worked on the Toshiba. But that work would have continued to expose him to having to twist and turn and, when working on the Toshiba, to bend. Those duties of course are considerably lesser than the full range of duties that he previously would have been undertaking but on the evidence of Mr de la Harpe, the progressive effects of degenerative disease are *cumulative*.

125. Additionally, the applicant has also worked for many years under restrictions imposed either by his treating doctors and or by persons within the DMC but it would appear from the evidence heard that the restrictions have principally been confined to the duration of each activity within a cycle of rotation and limits upon weights being lifted. During the years where the above restrictions were imposed, the applicant was still having to twist, turn, bend and lift whilst either standing or being seated. The applicant, more recently, has worked on the Spectrum in a seated position only recording postcodes onto non standard mail items. Whilst undertaking those duties, he would not have been exposed to the physical movements described earlier but on the evidence of [REDACTED] intra discal pressure is increased by 20 percent whilst being seated compared to standing which in turn will aggravate degenerative disease.

126. Having regard also to the speed at which the applicant was required to work before the imposition of recent restrictions, the opportunity to bend, particularly to lower levels, from the knees rather than the waist, was unrealistic. The applicant said that he and other persons especially when working on the MCLOR and the BCR, would not have been able to keep up with the speed of the machine, because bending from the knees takes longer than bending from the waist.

127. [REDACTED] was of the opinion that the applicant suffered from an L4 / 5 lumbar canal stenosis otherwise known as arthritic degeneration which was causing pressure on his L5 nerve roots. That condition he said causes back and leg pain. That diagnosis, being a broad pathology, incorporates a wearing of the cartilage coating of the facet joints with the consequent development of bony spurs which encroach into the spinal canal. Adjacent nerves rub against the spurs, they become inflamed and cause pain. That condition and the consequent pain was a significant feature of the applicant's presentation to [REDACTED]. It is a condition in his experience that will wax and wane consistent with the evolution or development of the degenerative disease. Whilst there can be occasions where the applicant would be relatively asymptomatic, there would be many other occasions when pain would increase and progression of the degeneration, in his opinion, was inevitable.

128. [REDACTED] said that movement and exercise would be expected in normal circumstances to nourish the facet joint cartilage but excessive strain will damage it even if that strain is undertaken for limited periods because the effects of cartilage damage in his opinion were cumulative and progressive. That was an opinion not shared by [REDACTED]. [REDACTED] were both of the opinion that there were minimal features evident by the radiology, [REDACTED] was also of the opinion that there was no evidence of L5 nerve compression. [REDACTED] thought that degeneration was more than likely caused by advancing age. It was his view that advanced degenerative changes in the facet joints would need to be present to support a connection between employment and an acceleration of the disease process. [REDACTED] was unconcerned about the opinions expressed by [REDACTED] in his report because he took the view, unlike [REDACTED] that the applicant's complaints of pain were organic in nature.

129. The applicant had undertaken one CT scan and two MRI scans. All the doctors shared the same opinion that correlation between those radiology processes would be fraught with danger because CT gave images of bony structures whereas MRI gave images of tissue structures. It was true that the MRIs as reported by the radiologist did demonstrate minimal changes in the lumbar spine and to compare those reports with the radiology report from the CT conducted some years earlier (in order to determine whether there was any advancing of degenerative changes) would have been impossible because a comparison was not valid. But faced with the applicant's persisting complaints of pain, his history and his presentation to [REDACTED] it was decided to undertake a CT guided injection. The respondent gave its consent to that procedure and the relief of pain enjoyed by the applicant subsequently (although for a limited period) reassured [REDACTED] that the applicant did suffer from leg pain because the L5 nerve roots were trapped or compromised by the bony spurs on the surface of the facet joints. It was by reason of the predominant complaint of the applicant being leg pain, that [REDACTED] was also reassured that a laminectomy was warranted. That is to say if the applicant's chief complaint was back pain, laminectomy would have been of no advantage.

130. The procedure of laminectomy would involve the removal of the bony spurs from the facet joint and free the nerves which have been compromised. In so doing it would be expected that the applicant would suffer significant relief from leg pain. [REDACTED] was of the opinion that a laminectomy was only warranted if there was nerve damage evident on radiology and thought the procedure itself involved risk. [REDACTED] said that there was no evidence of nerve root compression evident by CT or MRI and in those circumstances there was no significant problem associated with the facet joints. Those opinions were also held by [REDACTED]

131. [REDACTED] was of the opinion that the work undertaken by the applicant involving bending, twisting, turning, lifting, sitting and standing frequently and repetitively exposed the applicant to hyper extension of his lumbar spine placing an excessive load upon it and the facet joints especially. In turn the facet joint surface became damaged by a degenerative process which also worsened by the continuing activity of work. It was his opinion that the facet joint surface does not repair itself

and will continue to deteriorate. He acknowledged that deterioration would normally be expected to occur by age but it was his opinion that physical work especially that being undertaken by the applicant will increase, and in this case did increase the rate of deterioration. Additionally, he said the mechanism of bending and lifting will hasten the progression of the spinal disease, especially when loads are lifted or carried away from the body. That type of undertaken was described by [REDACTED] as a *loading force* being placed upon spinal joints which have existing damage. [REDACTED] had attended the DMC on a number of occasions at the respondent's request and was familiar with the work undertaken by the applicant. He thought the activities involving bending and twisting would cause *significant changes in the facet joints*.

132. Having read the medical reports lodged in these proceedings and having heard evidence from the doctors referred to earlier, I am satisfied that the opinions expressed by [REDACTED] are to be preferred. I was impressed with his explanations and his description of the relevant pathology. He had made concessions were appropriate and did not attempt to advocate the applicant's application.

133. [REDACTED] was of the opinion that the radiology demonstrated minimal degeneration but conceded that a sub-articular injection of steroid might give relief and might be a valuable diagnostic tool in order to determine whether there was nerve root impingement. He also agreed a person with degenerative spinal disease would have symptoms which waxed and waned and if engaged in manual labour there would also be an expectation of a greater degree of pain by reason of excessive movement and load placed upon the spine. Activity of repeated lifting involving bending and twisting is to be distinguished from ordinary day to day activity. He also agreed that damage to spinal pathology does not repair itself.

134. When [REDACTED] learnt of the results of the CT guided injection he did make some concessions and also acknowledged that a CT guided injection was an appropriate diagnostic tool. [REDACTED] acknowledged that the relief from pain experienced by the applicant following the CT guided injection would possibly indicate nerve root impingement at the L4 / 5 level. He also agreed that a decision to

undertake laminectomy would be influenced by the judgement of the treating surgeon and also agreed that the level of pain experienced by the patient would be an indicator of whether a laminectomy was warranted.

135. Despite the conservatism of the opinions expressed by some of the doctors, the optimism expressed by [REDACTED] having regard to his extensive experience in having performed laminectomies and his description of the procedure, reassures me that the risk although present is not as great as expressed by [REDACTED] and the long term benefit to the applicant of becoming pain free together with the recommendation of [REDACTED] that the procedure be undertaken, satisfies me that the procedure would be, in the circumstances, a reasonable medical undertaking.

136. Applications in the compensation division of this tribunal very frequently involve disputes as to whether spinal disease has been temporarily or permanently aggravated or accelerated by the effects of employment. In my experience disputes involving that issue frequently do not excite the level of disputation nor the breadth of evidence that featured in this review. [REDACTED] dismissed the opinions of [REDACTED] because it was his view that degenerative spinal disease occurs naturally and was unsupported by literature. He agreed that there could be temporary aggravations but eventually the spine settles and returns to its pre aggravated state. He disagreed with the opinions of [REDACTED] that microscopic damage would occur to facet joint surfaces when a lumbar spine is exposed to excessive or heavy load or strain. [REDACTED] thought the opinions of [REDACTED] were a *hypothesis* which he would only support if there was *concrete* evidence (refer paragraph 86 earlier).

137. For the reasons expressed earlier I am satisfied on the balance of probabilities that the opinions of [REDACTED] are consistent with the mechanism of injury in the present case namely, surface damage of the facet joints becoming damaged either microscopically or by some other measurable degree causing the development of bony spurs which in turn encroached into the spinal canal and compromised nerve roots. I thought the opinions of [REDACTED] were rigid and [REDACTED] despite some concessions seemed to guided by a

medical/scientific standard (refer his use of *concrete*), it being a standard far in excess of the basis required to satisfy the balance of probabilities.

138. The activities undertaken by the applicant in the employment does satisfy me that it was the employment which did cause a material contribution to the injury which is the subject of these proceedings and which was described by [REDACTED] as being a *significant contribution*.

139. The attempts made to equate the activities of bending, twisting, lifting and turning at work with day to day activities of daily living were fanciful. Persons usually only tie their shoe laces, or get into or out of a car (being the examples suggested as activities of daily living) on one or two occasions per day. The applicant - despite limitations placed on him and the ability to rotate between tasks - performed lifting, bending, twisting and turning motions very frequently, often repetitively. The requirement of the spine to cope with such an abnormal load supports a finding in this case, consistent with the conclusions of [REDACTED] that there has been a permanent aggravation of degenerative spinal disease by the work. The extent of the disease exceeds that which would likely be found by ordinary daily activities.

140. There is no dispute in the present application that the applicant has suffered *injury* nor that he has suffered an *aggravation*. The respondent concedes that the applicant does suffer from aggravation of degenerative spinal disease but it asserts that from time to time the applicant has suffered a temporary aggravation of a pre-existing degenerative condition which has not caused any lasting or permanent effects.

141. In *Federal Broom Company Pty Limited v Semlitch* (1965) 110 CLR 626, Kitto J decided that an injury is aggravated when the experiencing by the patient of the injury is *increased or intensified by an increase or intensifying of symptoms*. The word is directed to the individual and the effect of the (injury) upon him rather than being concerned with the underlying mechanism.

142. The principal issues to be considered in this review are whether the employment contributed in a material degree to the aggravation and whether the aggravation of the pre-existing disease has had a permanent affect.

143. In *Comcare v Canute* [2005] FCAFC 262 (*Canute*) at [68] the Full Court decided:

*... the changes brought about by the enactment of the SRC Act were intended to require that the contribution be 'more than a mere contributing factor' and, as such, the comments of the Court in Treloar must be assessed in this light. Content must be given to the word 'material' contained in the definition of 'disease' in the legislation as it presently stands. The inclusion of this term imposes an evaluative threshold below which a causal connection may be disregarded.*

144. In *Comcare v Sahu-Khan* [2007] FCA 15 (*Sahu-Khan*), Finn J had regard to the above passage from *Canute* and concluded at [16]:

*16 Bearing in mind that the course of statutory construction is often not aided by substituting for the word used in an enactment, another word which is not so used, probably the best that can ultimately be said is that the s 4 definition:*

*(i) requires a stronger causal relationship between the employment and the ailment, etc suffered than that exacted by the 1971 Act;*

*(ii) "in a material degree" requires an evaluation of all relevant contributing factors for the purpose of asking whether the employee's employment did or did not contribute materially to the suffering of the ailment, etc, in question ("the threshold evaluation");*

*(iii) whether this will be so in a given case will be a matter of fact and degree.*

145. His Honour thought that the decision in *Treloar v Australian Telecommunications Commission* (1990) 26 FCR 316 should not be followed (refer [14] and [17]). One reason for that conclusion was that *Treloar* was decided under the 1971 compensation legislation which required the connection between employment and injury to be a *contributing factor* only. In *Repatriation Commission v Bendy* (1989) 10 AAR 323 (*Bendy*), Davies J examined the expression *contributed in a material degree* which was found in the definition of *disease* in the 1988 SRC Act, s 9(1)(e) of the *Veterans' Entitlements Act 1986* and the *Workers' Compensation Act 1958* (*Vict*). His Honour concluded that a contribution which was *de minimis* and which did not influence the course of events or which was so tenuous as to be immaterial is to be ignored. His Honour decided – applying the Macquarie dictionary

definition – that the word *material* did not mean *substantial import or much consequence* but rather *pertinent or likely to influence*.

146. Having regard to the above decisions I am satisfied that the employment of the applicant with the respondent contributed in a material degree to the aggravation of a pre-existing degenerative disease causing a permanent affect for which the respondent has a continuing liability.

147. For the reasons expressed earlier, an examination of the duties of the applicant and the evidence especially of [REDACTED] satisfies me that the case of the applicant has risen above the *evaluative threshold* (refer *Canute and Sahu-Khan*) of materiality. It could not be said that the employment was a *mere contributing factor* but rather on the balance of probabilities the employment, when thoroughly examined – as it was by these proceedings – can be found to have been *likely to influence* (*Bendy*) the disease process to cause it to have a permanent affect upon the applicant.

148. It is for these reasons that I am satisfied that the decisions under review in so far as they concerned entitlements to compensation for incapacity and reasonable and medical like expenses arising out of treatment should be set aside and decisions in substitution imposing liability upon the respondent should be made.

149. With respect to the application concerning the claim for compensation being the cost of laminectomy and consequent incapacity, I am satisfied upon the evidence of [REDACTED] – he being the applicant's treating specialist – that the procedure as contemplated is *reasonable* within the meaning of s 16(1) (refer *Comcare v Holt* (2007) 94 ALD 576. Accordingly the decision under review denying liability will be set aside and a decision in substitution, finding liability will be made.

150. The applicant is entitled to have his legal costs and disbursements paid pursuant to paragraph 6.8 of the Tribunal's *Guide to the Workers' Compensation Jurisdiction* published by the President in March 2007.



I certify that the 150 preceding paragraphs are a true copy of  
the reasons for the decision herein of:  
Mr John Handley, Senior Member

Signed: Grace Carney, Personal Assistant

Dates of Hearing	5, 25 and 27 February, 16, 17 and 18 April, 3 and 29 September 2008
Date of Decision	23 December 2008
Counsel for the Applicant	Ms Judith Bornstein
Solicitor for the Applicant	Maurice Blackburn
Counsel for the Respondent	Mr J Lenczner
Solicitor for the Respondent	Australian Government Solicitor