

IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
SERIOUS INJURY LIST

Revised
(Not) Restricted
Suitable for Publication

Case No. CI-18-02674

RYAN STONE

Plaintiff

v

VICTORIAN WORKCOVER AUTHORITY

Defendant

JUDGE: HER HONOUR JUDGE TSALAMANDRIS
WHERE HELD: Melbourne
DATE OF HEARING: 29 April 2019
DATE OF JUDGMENT: 9 May 2019
CASE MAY BE CITED AS: Ryan v Victorian WorkCover Authority
MEDIUM NEUTRAL CITATION: [2019] VCC 595

REASONS FOR JUDGMENT

Subject: ACCIDENT COMPENSATION
Catchwords: Serious injury – injury to spine – pain and suffering conceded by defendant – loss of earning capacity – suitable employment
Legislation Cited: *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic)
Cases Cited: *Peak Engineering & Anor v McKenzie* [2014] VSCA 67; *Acir v Frosster Pty Ltd* [2009] VSC 454; *Yirga-Denbu v Victorian WorkCover Authority* [2018] VSCA 35; *Barwon Spinners Pty Ltd & Ors v Podolak* [2005] VSCA 33; *Harris v DJD Earthmoving Pty Ltd* [2016] VSCA 188
Judgment: Application successful

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr D Masel SC with Ms J Zhu	Slater and Gordon Lawyers
For the Defendant	Ms C Spitaleri	Lander & Rogers

HER HONOUR:

Preliminary

- 1 Mr Stone worked as a pick-packer for the defendant from 2004, where he put together orders for grocery items to be delivered to IGA supermarkets. During the course of this employment, Mr Stone experienced neck and lower back pain. Mr Stone was ultimately diagnosed as suffering a disc prolapse at C6-7, for which he underwent cervical fusion in June 2016. Approximately six weeks post-surgery, Mr Stone returned to work on modified duties and reduced hours. However, in May 2017 his employment was terminated on the basis that there were no alternative duties available for him. Since then, Mr Stone has undertaken a number of jobs in suitable employment, on a casual basis. Mr Stone claims that, due to his spinal impairment, he cannot consistently work full-time hours in such employment and that he suffers permanent pecuniary disadvantage as a consequence.
- 2 At the commencement of the hearing, the defendant conceded that Mr Stone suffers serious pain and suffering consequences as a result of his spinal impairment. However, it contends that he can work full-time hours in suitable employment.
- 3 In order for Mr Stone to be entitled to claim pecuniary loss damages at common law, he must satisfy the requirements contained within s325(2)(e) of the *Workplace Injury Rehabilitation Act 2013* ("WIRC Act"). That is, based upon his pre-injury earning capacity, Mr Stone must establish that he presently suffers a loss of earning capacity of at least 40 per cent, and that such a loss will continue on a permanent basis.
- 4 Mr Stone was called to give evidence and was cross-examined. Medical reports and other material were also tendered. I have read these tendered documents, together with the transcript of the proceedings. I shall not refer to all of that material in the course of this judgment, but rather to those parts of the evidence

and reports which I consider necessary to give context to and explain the conclusions reached in this judgment.

- 5 For the reasons which follow, I am satisfied that as a consequence of his spinal impairment, Mr Stone cannot work full-time, and that he suffers a permanent loss of earning capacity of at least 40 per cent, such that he should be granted leave to commence common law proceedings for both pain and suffering and pecuniary loss damages.

Mr Stone's working life prior to suffering his spinal impairment

- 6 Mr Stone left school at the end of Year 11, following which he attempted a basic electronics course and later a hospitality course. Mr Stone said that he struggled with both courses and did not complete either.
- 7 Over the years Mr Stone worked in numerous jobs, including as a forklift driver, labourer, production-line worker and vehicle detailer.
- 8 In 2001, Mr Stone commenced his first period of employment with the defendant as a pick-packer. In 2003, he left such employment to travel, before returning to work for the defendant in 2004.
- 9 In the three financial years prior to suffering his spinal impairment, Mr Stone earned the following gross income in his employment with the defendant:

Financial Year Ending	
Year	Gross Income
30 June 2013	\$56,402.00
30 June 2014	\$53,962.00
30 June 2015	\$66,325.00

Mr Stone's spinal impairment, treatment received and the consequences to him

- 10 Whilst working as a pick-packer, Mr Stone was required to move a large volume of boxes every day. Mr Stone said that this required him to bend down to reach under shelves, to crouch to reach items at the back of shelves and to sometimes reach up and lift items onto pellets. Mr Stone claims that as a result of his work duties, his neck and lower back were frequently in an awkward position.
- 11 In March 2008, Mr Stone suffered lower back pain when he bent down to lift a box. He was placed on light duties for a period of time, and received some physiotherapy treatment, following which he continued to experience fluctuating lower back pain from time to time. Mr Stone also said that from 2008, he experienced some cramping and weakness in his legs from time to time.
- 12 In approximately 2011, Mr Stone noticed some increasing lower back pain. He was again put on light duties for a period of time and sent for physiotherapy treatment.
- 13 At some point in 2013, Mr Stone stated that he began to experience a period of shoulder discomfort and sensory disturbance in the fingers of his left hand. At the time, he received some physiotherapy treatment, after which he said that things settled down.
- 14 In the middle of 2015, Mr Stone again began to experience discomfort in his shoulders and upper arms, as well as sensory disturbance in the first and second fingers of his left hand.
- 15 On 16 July 2015, an MRI of Mr Stone's cervical spine was performed. It was reported as demonstrating degenerative changes at C6-7, with likely compression irritation of the right C7 nerve root.
- 16 In August 2015, Mr Stone consulted general practitioner, Dr Kah Heng Lee. At that time, Dr Lee noted that Mr Stone had difficulty sleeping due to pain and that he was restricted in the chores he could perform around his home, due to his symptoms.

- 17 On 28 September 2015, Mr Stone was referred to neurosurgeon, Mr Paul Smith. On Mr Smith's recommendation, Mr Stone received a right-sided steroid injection into his C7 nerve sheath. As he obtained a benefit from this injection, Mr Smith subsequently arranged for a left-sided C7 injection.
- 18 In March 2016, Mr Smith arranged for a further MRI scan to be performed, as Mr Stone continued to struggle with ongoing pain. This scan was taken on 26 April 2016, and was reported as demonstrating severe bilateral C6-7 foraminal stenosis with a small disc component on the left, with compression of the C7 nerves bilaterally.
- 19 On 7 June 2016, Mr Smith performed a C6-7 anterior cervical discectomy, partial vertebrectomy, fusion and rhizolysis.
- 20 At his six-week post-operative review of Mr Stone, Mr Smith noted that Mr Stone was still troubled by some sensory disturbance in his hands and some discomfort across his shoulders. Mr Smith considered this to be a "normal phenomenon" which would generally improve with time. Mr Smith recommended that Mr Stone commence walking and that he try to return to light duties. Mr Smith advised Mr Stone not to perform duties which involved the use of his arms above shoulder height for any significant period of time, or to engage in duties which involved repetitive significant neck rotation.
- 21 At about this time, Mr Stone said that he returned to work on restricted duties and reduced hours, and that he attempted to increase his hours over time. Mr Stone said that he was working seven hours per day at one stage, but that he found it too painful, such that he dropped back to five hours per day, four days per week. Mr Stone said that he struggled even with those hours.
- 22 In a report dated 18 January 2017, Mr Smith wrote to Mr Stone's solicitors, noting that Mr Stone was still troubled by some neck and intrascapular discomfort. Mr Smith noted that Mr Stone was still undertaking repetitive work with the

defendant, and described him as "...a stoic chap" who "really just wants to get on with things."

- 23 In January 2017, Mr Stone commenced treatment with physiotherapist, Mr Darren Rose. At that time, Mr Stone reported ongoing neck and left shoulder pain, with some numbness in his left arm. For a period of time thereafter, Mr Stone consulted Mr Rose on a weekly basis.
- 24 On 24 April 2017, Mr Stone was reviewed by Mr Smith. Mr Smith noted that Mr Stone was still troubled by ongoing neck pain and bilateral shoulder pain. He expressed concern in relation to the work Mr Stone was performing, as it involved prolonged neck flexion. He noted that while the loads Mr Stone was lifting were light, his need to adopt a flexed neck position throughout the course of his day was causing him problems. At that stage, Mr Smith recommended that alternative duties were needed, to avoid Mr Stone having a prolonged flexed neck posture.
- 25 On 8 May 2017, Mr Stone was informed that the defendant no longer had suitable duties available for him and his employment was terminated.
- 26 In June 2017, Mr Stone was referred to occupational medicine specialist, Dr Kilner Brasier. At about the same time, Mr Stone was also referred to pain specialist, Dr Symon McCallum. Mr Stone has continued to consult Dr McCallum on an as needed basis.
- 27 On 3 December 2017, an MRI scan was taken of Mr Stone's cervical spine, as he continued to experience neck pain. It did not note any disc protrusion or neural compromise.
- 28 Mr Stone continued to be reviewed by Mr Smith on an occasional basis. At his most recent review in November 2018, Mr Smith noted that Mr Stone was troubled by lower back pain. He arranged an MRI scan of the lumbar spine, which

was reported as demonstrating mild disc protrusions at L4-5 and L5-S1, with some mild thecal sac compression.

29 Since ceasing his employment with the defendant, Mr Stone has undertaken several jobs, in casual employment, with different employers. He said that he initially worked as a pizza delivery driver for approximately three days, but that he had to stop as he found sitting to be too painful.

30 Mr Stone said that he also trialled delivering pamphlets, but that he also found this work difficult due to the bending and prolonged walking involved.

31 Mr Stone has since obtained casual employment with MA Services Group, where he performs customer service work at sporting events. He said that this role involves tasks such as checking tickets and car registrations, and giving people wrist bands.

32 Mr Stone said that this work is very sporadic and is only available when events are on. In the second half of October 2018, Mr Stone worked approximately 87 hours over a two-week period. Mr Stone said that he was able to cope with this work, as it enabled him to move between sitting and standing. However, he said that he spoke to his boss after the first week of full-time hours, but then simply pushed himself on, as he did not want to let his employer down. It is on this basis that Mr Stone emphatically stated that he does not believe himself to be capable of working consistently on a full-time basis.

33 Mr Stone has recently completed a security course, which has enabled him to undertake security work that does not involve the physical apprehension of people. In this role, Mr Stone recently worked at a food and wine festival, as well as at Moomba. He said that by the third night of the food and wine festival, he experienced increased pain.

34 Mr Stone has also obtained work as a school crossing supervisor. He undertakes this work on a casual basis and fills in for employees who are unable to attend

regular shifts. Mr Stone said that this work is sporadic and that he has not worked more than 8.5 hours in any given week.

35 In late-November 2018, Mr Stone also obtained employment working as a Santa Clause at the Watergardens Shopping Centre. He said that he found this work to be difficult due to the prolonged sitting and the need to flex his neck forward when posing for photographs. Mr Stone said that "the longer the day goes on, the more pain you'll have." Mr Stone said that by the end of the period he needed to take three days off and reduce his hours, due to his increased pain.

36 Mr Stone is currently in receipt of Centrelink benefits and is permitted to work between 15 and 23 hours per week. He said that he has pushed through in order to work 46 hours a fortnight. Mr Stone said that the amount he receives from Centrelink is dependent upon the amount he and his partner earn in a given period.

37 Mr Stone said that he is very keen to work, as he is bored when at home and does not like to rely upon Centrelink benefits. However, he was firm in stating that he does not believe himself to be capable of working full-time hours on a consistent basis. In explaining his situation in re-examination, Mr Stone said:

"A: Consistent basis would be 40 hours a week, 52 weeks a year. It's - I've got a - I've had a pain threshold I think that's been pretty unbelievable; I've pushed through probably pain that people couldn't, and I think I still do at times, I've been advised not to, but it's just probably old school stupidity, mentality. But I think I'm a bloke that will do that, and there's probably times not beneficial to me. But consistent basis, that's a scary thing for me, I just - it's consistency I'm worried about."

Q: Have there been times when you've worked and you've paid the price afterwards?-

A: Yeah, yes.

Q: Can you give Her Honour some examples?

A: Security I done it with the food and wine festival and it's probably the hours. And what - there would have been - I'm trying to move more and I've probably stood in the one spot for too long. I done six hours I think on the first night, and then eight and nine, and it was just - it was way too much. The longer the few days went, my last day I didn't really wanna go, but I went."

38 From the period 1 July 2018 to 31 December 2018, Mr Stone stated that he earned gross income from personal exertion in the sum of \$8,322. This equates to an average income of \$320 per week.

39 In his most recent report dated 2 March 2019, Mr Smith was of the opinion that Mr Stone will continue to be troubled by ongoing neck pain. He did not consider Mr Stone capable of returning to his pre-injury duties. As at November 2018, Mr Smith considered Mr Stone's capacity for work "probably quite limited". He stated that Mr Stone was:

"troubled by a lot of ongoing neck pain and I think the kind of work that he would be qualified for would be pretty difficult to participate in, but it is not inconceivable that light and alternative duties could be arrived at."

40 Since August 2016, Mr Stone has consulted general practitioner, Dr Seyed Movahedian, in respect of his ongoing neck pain, as well as right shoulder pain.

41 In a report dated 27 March 2019, Dr Movahedian stated that he was informed Mr Stone had not yet returned to work, but that he was of the opinion Mr Stone had the capacity to undertake some alternate duties. Dr Movahedian was of the opinion that Mr Stone could:

"gradually go back to do some alternative duties with maximum 16 hours a week and if he can tolerate it than he can gradually do his normal hours after a few weeks."

42 In respect of work restrictions, Dr Movahedian stated that Mr Stone could not raise his arms above shoulder level repeatedly, could not lift objects heavier than 4 kilograms above shoulder level and could not flex or turn his head repeatedly.

43 On the day of the hearing, Dr Movahedian provided a very short supplementary report to Mr Stone's solicitors, in which he sought to amend the previous aspect of his report regarding Mr Stone's working situation. Dr Movahedian simply noted that he had been informed that Mr Stone was currently working part-time in customer service at footy games, working up to 23 hours per week.

- 44 In this supplementary report, Dr Movahedian did not explain the manner in which he had come to be informed of Mr Stone's working hours, and did not offer an opinion as to whether or not he considered Mr Stone to be working at his maximum capacity. Given his apparent lack of insight into such matters, I gain little assistance from Dr Movahedian's reports.
- 45 In a report dated 8 March 2019, Dr Brasier referred to Mr Stone suffering lower back pain, together with a burning pain bilaterally in his lower leg and complaints of right shoulder pain. He noted that Mr Stone complained of being unable to sit for long periods of time, and of his need to sit and walk at will in any work that he performs. Dr Brasier was of the opinion that Mr Stone would be able to undertake some alternate duties, and considered him specifically suitable to work part-time in a security role.
- 46 Mr Stone said that whilst he had previously taken Lyrica for his pain, he currently only takes anti-inflammatory medication. In his first affidavit, Mr Stone stated that he suffers ongoing pain in his neck and back, but that the pain was worse in his neck at that time. He said that he experiences pain around the base of his neck which extends to both shoulder blades and that his arms often feel weak and heavy and tender to touch. Mr Stone said that he experiences numbness and tingling in his hands, especially his left hand. He acknowledged that whilst he has good and bad days, he is never pain free.
- 47 Mr Stone stated that, as a consequence of his spinal impairment, he has difficulty with the following:
- Heavy lifting;
 - Repetitive lifting;
 - Driving for long periods;
 - Performing any task where his head is facing down for long periods, including working on a computer or looking at an iPad or iPhone;
 - Performing tasks above shoulder height, particularly repetitive tasks.

- 48 Mr Stone stated that his sleep is affected, and said that he often wakes at night due to pain, which then causes him to feel lethargic during the day as a result.
- 49 Mr Stone said that he completes home exercises each day, and that he has been encouraged to walk. He said that he tries to do 10,000 steps a day, and that he sometimes walks up to 10 kilometres. However, if he walks for more than one hour, Mr Stone suffers increased neck and back pain. He said that there are some days where he cannot manage to walk as far due to his pain and restrictions.
- 50 Save for some questions in cross-examination as to Mr Stone's walking capacity, these claimed consequences were not otherwise challenged by the defendant.
- 51 Separate to his spinal impairment and the referred pain into his shoulders, Mr Stone suffers a separate organic condition in his right shoulder.
- 52 On 2 September 2016, Dr Movahedian arranged for an x-ray and ultrasound to be performed on Mr Stone's right shoulder. It was reported as demonstrating bursitis, which was treated with a steroid injection.
- 53 On 3 December 2017, an MRI scan was taken of Mr Stone's right shoulder. It was reported as demonstrating AC joint osteoarthritis and subacromial bursitis.
- 54 Mr Stone said that he has been referred to an orthopaedic surgeon in relation to his persistent right shoulder pain. He said that surgery has been recommended and that he is now on a waiting list for this procedure to be performed in the public system.
- 55 Mr Stone said that some days his right shoulder pain is worse than his neck pain. Mr Stone acknowledged that this right shoulder pain also restricts him in the work he can perform at this time.
- 56 In addition, Mr Stone has suffered increasing heaviness and cramping in his calves in the last year. He said that the cramping in his legs makes it hard for him to walk at times, and that he gets inflammation in his ankles if he stands or

walks for long periods. Mr Stone has been referred to vascular surgeon, Dr Michael Wu, and orthopaedic surgeon, Mr Greg Etherington, in relation to such complaints. Mr Stone said that the cause of these symptoms is still being investigated.

Medico-legal evidence

57 Mr Stone's solicitors arranged for him to be examined by orthopaedic surgeon, Mr John O'Brien, in April 2018. In his report dated 23 April 2018, Mr O'Brien detailed the history he obtained from Mr Stone and his current complaints of pain. At that time, Mr O'Brien noted that Mr Stone complained of constant neck pain which was aggravated when his neck was flexed, when driving, using a computer, performing an exercise or when walking. Mr O'Brien also noted that the pain extended into Mr Stone's shoulders, the right being worse than the left, and that such shoulder pain was aggravated when using his arms.

58 At the time of this report, Mr O'Brien noted that Mr Stone had attempted work as a delivery driver, but as the "driving killed him" he only worked three nights. At that time, Mr Stone was not working at all.

59 Mr O'Brien diagnosed Mr Stone as suffering Chronic Post-Operative Cervical Pain which, in his opinion, appeared to radiate to both shoulders and upper arms. Mr O'Brien considered the recent MRI findings of the shoulder, and considered the shoulder pain was most likely related to radiating pain from his neck. In the circumstances, Mr O'Brien was of the opinion that Mr Stone would have extreme difficulty obtaining any form of suitable employment given the nature and severity of his continuing symptoms. He therefore considered Mr Stone to be totally incapacitated for work.

60 In May 2018, Mr Stone's solicitors arranged for him to be examined by occupational physician, Dr Robyn Horsley. In her report dated 18 May 2018, Dr Horsley detailed Mr Stone's educational history, his occupational history and the duties he was performing for the defendant when he suffered his lower back pain, and later neck pain. At that time, Dr Horsley noted that Mr Stone had

ongoing neck disability, with pain radiating into his bilateral shoulder blades. Dr Horsley noted that Mr Stone avoided activities such as repetitive overreaching, pushing, pulling and above-shoulder activities, as well as repetitive lifting and static postures involving his neck and lateral shoulder girdles. Dr Horsley also noted that, at that time, Mr Stone experienced back pain which “comes and goes”.

61 Dr Horsley noted that Mr Stone had a sitting tolerance of a few hours, but that if he sat for that long, he experienced increasing neck and back pain. She noted that he preferred to change posture after an hour. Dr Horsley noted that Mr Stone had a static standing tolerance of about 15 minutes before he then needed to move. She noted that his dynamic standing tolerance was several hours and that he is better when moving as opposed to sitting. She noted that his driving tolerance with respect to his cervical spine was limited to an hour, and to two hours in respect of his lower back. She also noted that Mr Stone had a walking tolerance of about an hour before which he experiences back and neck pain. Dr Horsley also noted that Mr Stone related his neck pain to repetitive movements of his arms.

62 Dr Horsley was of the opinion that, due to a spinal impairment, Mr Stone should be subject to the following work restrictions:

- Avoidance of repetitive overreaching;
- Avoidance of repetitive pushing and pulling;
- Avoidance of working in awkward and confined spaces;
- Avoidance of static postures involving the lumbar spine and/or cervical spine;
- Avoidance of repetitive bending and lifting;

- Avoidance of lifting items greater than 10 to 12 kilograms, except on an occasional basis;
- Avoidance of lifting items up to 8 to 10 kilograms on a repetitive basis;
- Avoidance of repetitive neck flexion, extension and rotation;
- Avoidance of static postures involving bilateral shoulder girdles, particularly the right side.

- 63 Dr Horsley considered Mr Stone to have a capacity for work. She noted that he was working casually at that time, collecting tickets at the football and that he had applied for work as a school crossing supervisor. Dr Horsley also noted that Mr Stone was interested in security work.
- 64 Dr Horsley then concluded that Mr Stone had the capacity to work in the vicinity of 15 to 20 hours per week, provided he was able to work within those restrictions. Dr Horsley specifically referred to Mr Stone's inability to cope with working seven hours per day five days per week with the defendant in alternative duties. She also considered it inappropriate for Mr Stone to be driving for 9.5 hours per day. In considering all of these matters, and given his history and current level of chronic pain, Dr Horsley ultimately concluded that Mr Stone was limited to working 15 to 20 hours per week.
- 65 The defendant's solicitors arranged for Mr Stone to be examined by orthopaedic surgeon, Mr Michael Dooley, in November 2018. In his report dated 21 November 2018, Mr Dooley detailed Mr Stone's past history before noting that, following his neck surgery, Mr Stone has continued to complain of pain in his neck and shoulder-blade region. Mr Dooley acknowledged that whilst the aim of the surgery had been to relieve Mr Stone of neck and upper-limb pain, a patient may still suffer some ongoing intermittent neck and shoulder-girdle pain after the surgery.

- 66 Mr Dooley was of the opinion that Mr Stone was unfit to return to his pre-injury duties, but that he did have a physical capacity to undertake an occupation such as security work and customer-service-type work with sporting facilities. Mr Dooley also specifically stated that he considered Mr Stone had the physical capacity to carry out the duties of a metre reader, parking inspector, sales assistant, customer service assistant and warehouse administrator.
- 67 In a supplementary report dated 15 March 2019, Mr Dooley was asked to express an opinion as to the number of hours he believed Mr Stone could work in such alternate duties. Mr Dooley stated that he believed Mr Stone had a physical capacity to carry out those duties on a part-time basis, with a view to increasing to full-time hours.
- 68 The defendant's solicitors also arranged for Mr Stone to be examined by occupational physician, Dr Dominic Yong, in March 2019. In his report dated 21 March 2019, Dr Yong detailed Mr Stone's occupational history, his presenting complaint and current symptoms. At that time, Dr Yong noted that Mr Stone had a functional capacity of sitting for more than two hours, standing for over an hour, walking for 15 minutes and driving for 45 minutes.
- 69 Dr Yong then stated that, in his opinion, Mr Stone had the capacity to perform tasks with the following restrictions:
- Avoidance of repetitive neck movements;
 - Avoidance of repeated awkward neck postures;
 - Avoidance of repeated firm pushing and pulling tasks;
 - Avoidance of lifting more than eight kilograms on a repeated basis;
 - Initial reduction in working hours.
- 70 Dr Yong then expressly considered numerous job positions which had been previously identified by IPAR, following a vocational assessment of Mr Stone in

June 2017 and CoWork, following an assessment in November 2018. Dr Yong expressly considered the jobs of meter reader, parking inspector, sales assistant, customer service assistant, warehouse administrator, vehicle inspector, security officer, and mental health support worker to be consistent with those work restrictions. In relation to the hours he could work in such jobs, Dr Yong felt that Mr Stone would need to participate in a structured, graduated return-to-work program which initially involved working reduced hours, such as approximately half of the working hours per week. Dr Yong recommended that Mr Stone could then “aim to return back to the pre-injury hours over a three month period”.

Mr Stone’s credibility

- 71 Mr Stone was an impressive witness who gave straightforward answers.
- 72 The defendant did not challenge Mr Stone’s claimed consequences in respect of the pain and restrictions they cause him. The defendant solely challenged Mr Stone’s evidence that he cannot work full-time hours in suitable employment.
- 73 Mr Smith described Mr Stone as a stoic individual, which I consider an accurate description. Mr Stone remained at work until the time of the surgery and then returned six weeks later. Mr Stone then increased his hours whilst on light duties, so that he worked up to 30 hours per week. He then had to reduce his hours due to increased pain. After the defendant terminated his employment, Mr Stone undertook a short course in computers, and later completed a security course.
- 74 Over the last 12 months, Mr Stone has demonstrated a motivation and desire to work as best he can, in spite of the ongoing pain he suffers. There is no suggestion that Mr Stone is exaggerating his pain. I accept him as a genuine witness and have no hesitation in accepting his evidence in its entirety.

Unrelated impairments

- 75 In assessing this application, I can only have regard to Mr Stone’s spinal impairment.

- 76 Mr Stone has leg cramping, the cause of which is still being investigated. As there is no evidence that the leg cramping is related to Mr Stone's spinal impairment, I must disregard any impairment or consequences arising from this condition.
- 77 Mr Stone also suffers right shoulder bursitis, which is proposed to be treated surgically. I consider there is some overlay between this injury and the bilateral shoulder pain which has existed since the surgery.
- 78 It is impermissible for me to have regard to these unrelated impairments when I come to consider Mr Stone's application in respect of his spinal impairment.¹ Such matters may well be relevant in a damages claim.² However, ss325(2)(g) of the Act, "is a gateway provision, which does not require an assessment of loss of earning capacity as in a claim for damages."³

Loss of earning capacity

- 79 The key issue in dispute in this case is whether or not Mr Stone's accepted spinal impairment prevents him from working full-time hours in suitable employment.
- 80 To succeed in his application, Mr Stone has the onus of satisfying me that as at the date of hearing, as a consequence of his spinal impairment, he has sustained a loss of earning capacity of 40 per cent or more, and that he will continue permanently to have a loss of earning capacity which produces a financial loss of 40 per cent or more.
- 81 In determining Mr Stone's claim for loss of earning capacity, I must compare what he is currently earning, or capable of earning in suitable employment, with his without injury earning capacity. To determine his without injury earning capacity, I must decide which of the following scenarios most fairly reflects Mr Stone's earning capacity, had he not suffered the injury:

¹ *Peak Engineering & Anor v McKenzie* [2014] VSCA 67

² *Acir v Frosster Pty Ltd* [2009] VSC 454

³ *Yirga-Denbu v Victorian WorkCover Authority* [2018] VSCA 35 at [78]

- “(a) the gross income that Mr Stone earned (or was capable of earning) from personal exertion in the three years before the injury;
- (b) the gross income that Mr Stone would have earned (or would have been capable of earning) from personal exertion in the three years after the injury, if the injury did not occur.”⁴

82 In the 2014-2015 financial year, the last financial year before he ceased work to undergo surgery, Mr Stone earned \$66,325. The defendant submitted that this is the figure which most fairly reflected Mr Stone’s without injury earning capacity. If I were to accept this figure, then provided I am satisfied Mr Stone is incapable of earning more than \$765 per week on a permanent basis, he would establish the requisite 40 per cent loss.

83 At the request of Mr Stone’s solicitors, the defendant provided group certificates reflecting what it considered to be a comparable employee in the three years prior to and subsequent to Mr Stone suffering his injury. However, Mr Masel submitted that this employee was not a true “comparable”, as this employee only earned \$55,829 in the 2014-2015 financial year, which was substantially less than the amount Mr Stone had earned in the same period.

84 In the year ended 30 June 2018, this comparable employee earned \$70,579. Of this gross income, \$12,432 was derived from sick leave, and \$58,147 was from personal exertion.

85 Mr Masel submitted that one basis for assessing Mr Stone’s without injury earning capacity was to accept this comparable employee’s earnings of \$70,579 in 2018, as Mr Stone’s without injury earning capacity. Mr Masel suggested that, given this comparable employee earned less than Mr Stone at the time of his injury, it follows that Mr Stone would have been earning at least this amount three years after his injury. If I were to accept this figure, then, provided I am satisfied Mr Stone is incapable of earning more than \$814 per week on a permanent basis, he would establish the requisite 40 per cent loss.

⁴ s134AB(38)(f) of the ACA and s325(2)(f) of the WIRC Act

- 86 However, the defendant submitted that, under the statutory test, only income from personal exertion is relevant when assessing earning capacity, and thus, when looking at this comparable employee, I must only consider income earned from personal exertion and must disregard the income paid for sick leave.
- 87 Mr Masel put forward a final calculation for Mr Stone's without injury earning capacity, based upon the comparable employee earning 19 per cent less than Mr Stone in 2015. It was submitted that, as the comparable employee's income had increased to \$70,579 by 2018, I should apply a like increment to Mr Stone over that same period. In those circumstances, provided I am satisfied that Mr Stone is incapable of earning more than \$960.10 per week on a permanent basis, he would establish the requisite 40 per cent loss.
- 88 What constitutes "suitable employment" is an objective test, which looks at the worker's current suitability for work, taking into account matters such as the plaintiff's age, education, experience, and whether the work is a reasonable distance from the plaintiff's place of residence.⁵ In *Barwon Spinners Pty Ltd & Ors v Podolak*,⁶ the Court of Appeal stated that such an assessment is concerned with a plaintiff's physical capacity for work, and is not concerned with whether employment will or will not be obtained.⁷
- 89 In the Court of Appeal decision of *Harris v DJD Earthmoving Pty Ltd*,⁸ it was noted that, under s134AB of the *Accident Compensation Act 1985*,⁹ the court must consider what work the plaintiff might, in the foreseeable future, be able to do on a regular and consistent basis.¹⁰
- 90 The defendant accepted that Mr Stone is incapable of returning to his pre-injury duties as a pick-packer. Instead, it relied upon vocational assessments by IPAR

5 *Barwon Spinners Pty Ltd & Ors v Podolak* [2005] VSCA 33 at [25] and [28]

6 *Ibid*

7 *Ibid* at [27]

8 [2016] VSCA 188

9 The equivalent provision to that being considered in this case under s325 of the WIRC Act

10 *Harris*, at [49]

and CoWork, both of whom proposed numerous jobs as constituting suitable employment. These included:

- Meter Reader;
- Parking Inspector;
- Sales Assistant (sports store);
- Customer Service Assistant/Enquiry clerk;
- Warehouse Administrator;
- Vehicle Inspector (Product Examiner);
- Security Officer (e.g. Courthouse, Mobile Patrol, Gatehouse);
- Parking Enforcement Officer;
- Mental Health Support Worker.

91 Dr Yong affirmed that each of these jobs were suitable and within Mr Stone's restrictions.

92 In closing submissions, Mr Masel submitted that the roles of parking enforcement officer and vehicle inspector were unsuitable for Mr Stone, due to the requirement of a flexed neck position. Mr Masel did not take issue with any other of the proposed jobs. Instead, the dispute related to the number of hours Mr Stone could perform in such suitable employment.

93 This is not a situation in which the plaintiff's work capacity in suitable employment has not been tested. To the contrary, Mr Stone has made impressive efforts to retrain and to undertake a number of jobs, to test his capacity and their suitability.

94 Pizza delivery work was not suitable for Mr Stone, as he found the prolonged sitting too painful.

95 Customer service work at the football, non-physical security work and school crossing supervisor work, are all jobs Mr Stone has been able to perform as

they are consistent with his restrictions. However, Mr Stone said that his pain increases after he has worked too many hours.

96 In his return to work in the post-operative period, Mr Stone was able to increase his hours to 30 hours per week at one stage, before he had to then decrease due to increased pain.

97 In the second half of October 2018, Mr Stone worked full-time hours in the lead up to the spring racing carnival at Moonee Valley. That work involved Mr Stone checking registration plates on cars that arrived at the racecourse. Mr Stone said that the role allowed him to sit and stand as needed. Mr Stone said that after attempting such hours, he was confident in saying that he could not consistently perform such work on a full-time basis.

98 In the month prior to Christmas 2018, Mr Stone worked as a Santa, but even that job was too painful for him, due to his need to flex his neck for prolonged periods. He said that he needed three days off at one stage, and that he requested lesser hours due to his increased pain.

99 I am satisfied that, in order for Mr Stone to work on a reliable and consistent basis, due to his spinal impairment, his hours in suitable employment must be limited. I accept that such a restriction is necessary to ensure that Mr Stone has time to rest and recover from the increased pain associated with holding his neck in a flexed position, and/or walking and/or standing and/or sitting.

100 Dr Horsley was of the opinion that Mr Stone could perform a maximum of 20 hours per week on a consistent basis. The defendant submitted that I should reject Dr Horsley's opinion, as she had not analysed the suitability of the proposed jobs in the manner in which Dr Yong had, nor explained the basis of her opinion as to why Mr Stone's hours should be limited. I do not accept this submission. I consider Dr Horsley's report detailed the symptoms and complaints Mr Stone suffers, as well as his functional tolerances. Dr Horsley noted that Mr Stone had previously reduced his working hours with the

defendant, and considered 20 hours per week to be realistic given his chronic pain and limitations.

101 In contrast, I consider Mr Dooley and Dr Yong to be unrealistically optimistic in relation to Mr Stone's capacity to work full-time in suitable employment. I note that neither doctor referred to the recent occasions in which Mr Stone actually worked full-time hours, pushing through despite his pain. I consider these weeks in which Mr Stone tested his actual capacity for full-time work to be critical in my ultimate determination of this claim. In circumstances where I accept Mr Stone's evidence that he suffered increased pain, which thereby informed his belief that he could not perform these hours on a reliable basis, I gain little assistance from the reports of either Mr Dooley or Dr Yong, both of whom offered no comment on this point.

102 As Dr Movahedian did not appear to be aware that Mr Stone was actually working, nor the extent to which he was coping with such work, I gain no assistance from his reports regarding Mr Stone's work capacity.

103 I accept Mr Stone's evidence that he has to push himself to work 23 hours per week. I am satisfied that his neck and back pain is constant and that it fluctuates in severity. I am also satisfied that his sitting, standing and walking tolerances are limited by his spinal pain, and that his sleep is interfered with. Having considered all of the evidence, I am satisfied that, as a consequence of his spinal impairment, Mr Stone can work a maximum of 23 hours per week, on a permanent basis, in suitable employment.

104 As I have concluded that Mr Stone is incapable of working more than 23 hours per week on a permanent basis in suitable employment, in considering the hourly rates for the jobs proposed by the defendant as suitable employment, on the defendant's proposed without injury earnings figure of \$1,275 per week, Mr Stone suffers the requisite 40 per cent loss. Therefore, it is not necessary for

me to decide whether the higher alternative without injury figures proposed by Mr Masel are more appropriate.

105 I am satisfied that this pecuniary loss to Mr Stone is permanent and that it will continue through the foreseeable future.

106 Once the threshold of 40 per cent reduction in the earning capacity test has been met, it is still necessary for me to consider whether the consequences to Mr Stone meet the “very considerable” test.¹¹ Given my acceptance that Mr Stone’s spinal impairment restricts him to working, at best, a maximum of 23 hours per week in suitable employment, the pecuniary disadvantage to him is so great that I consider his loss of earning capacity can be described as very considerable.

107 I am therefore satisfied that Mr Stone suffers a serious injury to his spine, arising as a consequence of his employment with the defendant, and that the consequences are such that he should be granted leave to commence common law proceedings for pain and suffering and loss of earning capacity damages.

108 I will make the consequent orders.

¹¹ s325(2)(c) of the Act

