

CITATION: *Barrett v Newmont Mining Services [2020] NTLC007*

PARTIES: ADAM BARRETT

V

NEWMONT MINING SERVICES PTY LTD  
(ACN 008087778)

TITLE OF COURT: WORK HEALTH COURT

JURISDICTION: WORK HEALTH

FILE NO(s): 21830927 and 21933143

DELIVERED ON: 5 May 2020

DELIVERED AT: DARWIN

HEARING DATE(s): 11 – 15 November 2019

JUDGMENT OF: Judge Huntingford

**CATCHWORDS:**

WORKERS COMPENSATION – partial incapacity – capacity to earn – evidential burden – most profitable employment – experience, training and existing skills

*Return to Work Act 1986 - s 65, s 68*

*Hicks v Bridgestone Australia Ltd [1997] NTCA 65*

*Rupe v Beta Frozen Products [2000] NTSC 71*

*Quality Plumbing & Building Contractors Pty Ltd v. Schloss [2015] NTSC 56*

**REPRESENTATION:**

*Counsel:*

Worker: Ms K Sibley

Employer: Mr W Roper

*Solicitors:*

Worker: Hall Payne Lawyers

Defendant: Minter Ellison

Judgment category classification: B

Judgment ID number: 007

Number of paragraphs: 120

IN THE WORK HEALTH COURT  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

Claim Nos. 21830927 and 21933143

BETWEEN

ADAM BARRETT

Worker

AND

NEWMONT MINING SERVICES PTY LTD

(ACN 008087778)

Employer

REASONS FOR DECISION

(Delivered 5 May 2020)

JUDGE MEREDITH HUNTINGFORD

**Introduction**

1. Adam Barrett (the Worker) was born on 13 December 1979 and he is currently aged 40 years.
2. Newmont Mining Services Pty Ltd (the Employer) was in August 2015 a company engaged in providing services to the mining industry, including at the Tanami mine about five flying hours from Perth.
3. The Worker suffered an injury to his low back (the injury) caused by or arising out of his employment with the Employer on or about 27 August 2015.
4. A claim for compensation under the *Return to Work Act 1986* (the Act) was made on or about 28 October 2015. Liability for the claim was accepted by the Employer.
5. The Employer paid weekly benefits under the Act as for loss of earning capacity consequent upon total incapacity for work until 14 days after a Notice of

Decision under s 69 of the Act dated 1 May 2018 by which the Employer claimed that the Worker was partially incapacitated and reduced weekly payments to \$192.67 per week. The Employer then ceased weekly payments altogether 14 days after a further Notice dated 14 May 2019.

## **Pleadings**

6. The Worker issued proceedings, which were strict appeals, by filing Statements of Claim on 18 September 2018 (21830927) and 16 September 2019 (21933143) (the Claims) by which he sought that each of the Notices described above be set aside and that weekly payments be reinstated, together with an order for costs.
7. By its Consolidated Defence and Counterclaim filed 11 November 2019 (the Counterclaim) the Employer:
  - a. Withdrew its opposition to the relief sought in the Claims vis a vis the setting aside of the Notices;
  - b. Consolidated and further particularised its Counterclaims, advanced in its earlier pleadings, seeking declarations that the Worker has since 15 May 2018, and/or 28 May 2019, and/or such other date as the Court determines, a reduced entitlement to s 65 benefits on the basis of the most profitable employment which may be undertaken by him in accordance with s 65(2)(b)(ii) and s 68 of the Act which was particularised as:
    - i. Logistics Coordinator
    - ii. Mobile Plant Operator (specifically Heavy Rigid Truck Driver and Water Craft Operation); and
    - iii. Warehouse Supervisorand in the alternative:
    - iv. Purchasing and Supply Logistics Clerk;
    - v. Warehouse Administrator;
    - vi. Delivery Driver; or
    - vii. Forklift Driver.

on either a full time, half time or 32 hours per week basis.

8. In its Counterclaim the Employer also introduced;
  - i. A pleading that the 104 weeks provided for under s 65(2)(b)(ii) of the Act expired on or about 27 August 2017; and
  - ii. A pleading and corresponding prayer for relief in respect of an income protection payment the Worker received from his superannuation Trustee although, in its submissions filed 20 December 2019 the Employer stated that it no longer sought to pursue this relief.<sup>1</sup>
  
9. The Worker in his Defence to the Counterclaim:
  - a. Did not admit that the 104 week period in s 65(2)(b)(ii) expired on 27 August 2017;
  - b. Pleaded that he remains incapacitated for work as a consequence of the injury and in particular:
    - i. He is permanently unfit to return to work as a storeman;
    - ii. He has restricted skills, training, qualifications and/or experience other than as a storeman;
    - iii. He has physical limitations which are:
      1. An inability or limited ability to lift or carry weights in excess of 10kgs;
      2. An inability or limited ability to sit or stand for prolonged periods;
      3. An inability or limited ability to enter or exit a vehicle and/or operate a motor vehicle;
      4. Inability or limited ability to bend or reach forward;
      5. Constant and sometimes severe back pain which interferes with function and concentration;
      6. An inability or limited ability to push or pull weights or objects;
      7. An inability to walk without pain for prolonged periods;

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<sup>1</sup> Employer's Submissions, p 3 at [4]

8. An inability to limited ability to walk or drive over rough terrain;
  9. An inability or limited ability for work which involves vibrations or jarring.
- iv. He is restricted in the hours that he can perform any work at all as a consequence of the injury; and
- v. As a consequence, he does not have the capacity to perform the duties of
1. Logistics coordinator;
  2. Mobile plant operator;
  3. Warehouse supervisor;
  4. Purchasing and supply logistics clerk;
  5. Warehouse administrator;
  6. Delivery driver; or
  7. Forklift driver
- on either a full or part time basis.

c. Objected to the s54 claim on the part of the Employer.

10. The Worker also pleaded in his original Claims that he had suffered an injury to his right hip on or about 27 August 2015. The hip injury was disputed by the Employer on the pleadings. However, in the course of the hearing the Worker abandoned this allegation of injury and therefore it is not an issue requiring resolution.<sup>2</sup>
11. At the hearing the parties agreed that the Worker's Normal Weekly Earnings were \$1938.12 and a declaration was made to that effect by consent on 12 November 2019.
12. Because of the Employer's abandonment of its opposition to the Worker's Statements of Claim I am obliged to find for the Worker in relation to that part of the proceeding. However, I must also consider the Counterclaim.

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<sup>2</sup> Transcript, 321

## Applicable law

13. A partially incapacitated worker is entitled under the Act, after the first 26 weeks of incapacity, to payment equivalent to 75% of his loss of earning capacity. Loss of earning capacity, because incapacity (at each of the dates relied upon by the Employer) has endured for more than 104 weeks, is defined in accordance with section 65(2)(b)(ii) of the Act in these terms

*For the purposes of this section, loss of earning capacity in relation to a worker is the difference between:*

*(a) His or her normal weekly earnings indexed in accordance with subsection (3); and*

*(b) The amount, if any, he or she is from time to time reasonably capable of earning in a week in work he or she is capable of undertaking if:*

*i. ...*

*ii. in respect of the period after the first 104 weeks of total or partial incapacity – he or she were to engage in the most profitable employment that could be undertaken by that worker, whether or not such employment is available to him or her,*

*and having regard to the matters referred to in section 68.*

14. Factors to be considered in assessing most profitable employment are defined in section 68

*In assessing what is the most profitable employment available to a worker for the purposes of section 65 or reasonably possible for a worker for the purposes of section 75B(3), regard shall be had to:*

*(a) his or her age;*

*(b) his or her experience, training and other existing skills;*

*(c) his or her potential for rehabilitation training;*

*(d) his or her language skills;*

*(e) in respect of the period referred to in section 65(2)(b)(i) – the potential availability of such employment;*

(f) *the impairments suffered by the worker; and*

(g) *any other relevant factor.*

15. The Employer bears the legal and evidentiary onus of proving the matters asserted in the Counterclaim. The relevant standard of proof is the usual civil standard.

### **Issues for resolution**

16. The issues for resolution are:
- a. Does any injury suffered by the Worker result in or materially contribute to an incapacity, that is an inability or limited ability to undertake paid work, on the part of the Worker as at and from 1 May 2018, 14 May 2019, or any other subsequent date; and
  - b. If the worker has an inability or limited ability to undertake paid work, as at the relevant dates stated above, what is his loss of earning capacity as at those dates?
17. In order for the Employer to succeed in this case it must show that the Worker is capable of undertaking any of the seven jobs set out in paragraph [7b] above. This includes not only a consideration of the Worker's medical fitness to perform the duties involved in those jobs arising from his injury but also his experience, training and existing skills, potential for rehabilitation training, and other relevant factors.
18. An Employer who seeks to show that a Worker can engage in profitable employment must be able to identify a 'real job' that actually exists.<sup>3</sup> It is not sufficient for an Employer to identify a broad category or heading under which a range of jobs might be described.

### **The Injury**

19. The Worker gave evidence that on about 26 August 2015 he was working at the Employer's Granites Tanami mine as a storeman. He was a fly in fly out worker based in Perth. On that day he worked his usual 12-hour shift. In the course of his work the Worker was required to move vent bags, each weighing between 10-30kg, onto new pallets. There was no particular point at which the Worker noticed an injury while moving the vent bags, but the next day when he woke up he describes that he could not move his left leg ('frozen') and suffered pain

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<sup>3</sup> *Quality Plumbing & Building Contractors Pty Ltd v. Schloss* [2015] NTSC 56, [46]



throughout his back. He describes his mobility as severely limited by pain, including walking with a severe limp.<sup>4</sup>

20. Returning to Perth, the worker consulted Dr Ngyuen and was prescribed pain medication. After a week's delay, the Worker returned to the Tanami and was placed on light duties. The back pain did not resolve, however, and he was unable to continue to work. The Worker submitted the claim for compensation for his injury in October 2015.
21. The Worker gave evidence that he had not experienced any problems with his back prior to 27 August 2015.<sup>5</sup> I accept this evidence, which is consistent with the history given to all of the medical experts and rehabilitation providers, and noting that none of the experts pointed to concerns as to malingering, deliberate exaggeration of symptoms or suggested that the Worker was other than a truthful historian.
22. Although there are differences of opinion between the various medical experts who gave evidence as to the exact location in the lower back of the cause of the Worker's current symptoms, all medical experts agree that the Worker sustained an injury to his lower back in the course of his employment and that the injury remains symptomatic.<sup>6</sup> The evidence points to the Worker having pre-existing degenerative changes at various levels in his lower back, which were made symptomatic by the injury he suffered at work. Whether the current symptoms are a result of damage at different levels occurring at the time of the original injury<sup>7</sup> or came on later as a result of the stress on the back resulting from the L3/4 surgery<sup>8</sup> does not alter the fact that the Worker suffered an injury as defined in the Act.<sup>9</sup>

### **What work can be undertaken by the Worker?**

23. Between February 2016 and July 2018 the Employer provided considerable rehabilitation services to the Worker. Four rehabilitation providers provided reports and gave oral evidence in this proceeding and another two providers, who were not required for cross-examination, provided reports which were received into evidence.

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<sup>4</sup> Transcript, 211

<sup>5</sup> Transcript, 217

<sup>6</sup> Dr Wong L3/4; Dr Hardcastle L3/4 and acknowledging stress at other levels; Dr Holthouse – likely other levels involved especially below L3/4, (E1, 89);

<sup>7</sup> Dr Stokes describes an injury at L4/5 and disc bulge at L5/S1 as well as L3/4 with the primary issue at the time he saw him as coming from L4/5. Stokes report 20/9/2018, E1, 93 and 10/10/2019, E1, 99; transcript 25

<sup>8</sup> Dr Hardcastle, E1, 94

<sup>9</sup> *Hicks v. Bridgestone Australia Ltd* [1997] NTCA 65

24. Ms Sutherland, occupational therapist, was employed by rehabilitation consultant firm People Sense when she provided rehabilitation services to the Worker between February 2016 and March 2017. In her report to the insurer of 23 February 2016,<sup>10</sup> the rehabilitation goal was noted as returning the Worker to his pre-injury role and hours as a storeman with the Employer. However, within a few months the goal changed to focus instead upon finding new employment for the Worker.<sup>11</sup>
25. Potential alternative jobs for the Worker of logistics coordinator, mobile plant operator (heavy rigid truck driver or water cart operation), and warehouse supervisor were initially identified in a vocational assessment report prepared by Ms Luisa Padilla, a registered psychologist employed by People Sense, on 12 May 2016.<sup>12</sup> Ms Padilla explained in cross examination that the role of a vocational assessment was to look at a person's individual skill set and experience and identify options for jobs which are potentially medically suitable commensurate with those skills and experience.<sup>13</sup> The process involved identifying potential areas of employment through internet searches on relevant websites and considering the typical duties described on those sites.<sup>14</sup> The detailed duties required in an actual job, including the level of physical handling required, may vary depending upon the exact role and the employer, while still coming within the particular category of employment described on the website.<sup>15</sup>

### **Mobile Plant Operator (Heavy Rigid Truck or Water Cart)**

26. The options identified by Ms Padilla were put to Dr Connolly, the Worker's general practitioner, on 23 May 2016 to determine which might be appropriate to pursue as alternative work. Dr Connolly considered only logistics coordinator and warehouse supervisor could be medically suitable.<sup>16</sup> In cross-examination, Ms Padilla agreed that the Worker did not have the requisite qualifications for the mobile plant operator roles at the time she met with him.<sup>17</sup> Even assuming all necessary 'tickets' could be obtained, given the contemporaneous view of Dr Connolly, the opinions of the other medical experts as to the Worker's limitations generally, and the view of Ms Zeman (who considered this option in particular

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<sup>10</sup> E1, 265

<sup>11</sup> Transcript, 148

<sup>12</sup> E1, 277

<sup>13</sup> Transcript, 159

<sup>14</sup> Transcript, 159-160

<sup>15</sup> Transcript, 160

<sup>16</sup> E7, 1

<sup>17</sup> Transcript, 161

and found it unsuitable)<sup>18</sup> I find that the Worker did not at the date of hearing or any previous relevant date have the capacity to undertake this employment.

### **Super Cheap Trial**

27. Ms Sutherland arranged a work trial, which the Worker commenced around 29 April 2016, performing restricted store person and customer service duties at Super Cheap Auto in Rockingham. By August 2016 he had achieved around 11 hours per week spread over three days.<sup>19</sup> Dr Connolly approved a plan on 31 August 2016 which would have seen the Worker increase his hours on the work trial to 16 hours per week<sup>20</sup> but this was never carried out. The Worker gave evidence that he continued to experience pain during the work trial and that from time to time he needed to take breaks.<sup>21</sup> The Peel Connolly Medical Centre notes indicate that in October 2016 the Worker complained of increased pain in his back and was referred to Dr Salmon, pain specialist.<sup>22</sup> In oral evidence Ms Sutherland said that the Worker was directed to cease this work trial in October 2016 because it was determined that his rehabilitation needs would be better met by undertaking a certificate III in logistics at TAFE, which he commenced in November 2016.<sup>23</sup> The Super Cheap trial therefore provides no evidence upon which I can make any findings as to the Worker's fitness for work at any of the relevant dates.

### **Logistics Coordinator and Warehouse Supervisor/Coordinator**

28. Option one in Ms Padilla's report was a logistics coordinator. She noted this came under the vocational category of purchasing and supply logistics clerks on the Job Outlook website. The role is described as preparing and processing orders, monitoring stock and supply sources, maintaining stock and inventory levels, recording and coordinating flow of materials, preparing production schedules, administering and coordinating storage and distribution operations within organisations. Typical duties may include: requisitioning supplies from stock and sending orders; confirming completion of orders; receiving and checking purchase requests against inventory records and stock on hand; examining orders and compiling data for production schedules; checking inventories and preparing delivery schedules, examining containers to ensure that they are filled and recording quantities; investigating and preparing supply sourcing and preparing and processing orders; providing price and other

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<sup>18</sup> E1, 236

<sup>19</sup> Transcript, 136

<sup>20</sup> W6, 35-36

<sup>21</sup> Transcript, 221

<sup>22</sup> W6, 39-44

<sup>23</sup> Transcript, 137

information; and counting incoming stock and reconciling it with requisitions and updating inventory and stock location records.

29. Ms Padilla agreed in cross-examination that she was not familiar with logistics duties generally and had received this information only from the internet searches.<sup>24</sup> She also agreed that the statement of duties was unlikely to be all of the duties a logistics coordinator might do.<sup>25</sup>
30. Ms Padilla's report also recommends, at option three, warehouse supervisor but the annexure describes the role of a warehouse coordinator. It is not clear whether there is a difference. A warehouse coordinator is classified under the vocational category of supply and distribution managers on the Job Outlook website.<sup>26</sup> A warehouse coordinator provides support to a warehouse manager with administrative and logistical processes. The typical duties were described as including: determining, planning and implementing strategies and policies for purchasing, distributing and storage; preparing and implementing plans to maintain required stock at minimum cost; negotiating contracts; monitoring and reviewing storage and inventory systems; operating recording systems to track movements of supplies and goods; liaising with other departments and customers; overseeing the recording of transactions; and directing staff and monitoring their performance.<sup>27</sup> Ms Padilla agreed in cross-examination that these were not all of the duties which a person employed as a warehouse coordinator might do.<sup>28</sup>
31. From her oral evidence it was clear that Ms Padilla's conclusion, after preparing her report, was that the Worker was actually best suited to forklift operator/storeman (the role in which he was injured).<sup>29</sup> Which he was, and remains, not medically fit to undertake.
32. Ms Padilla's investigations were in the nature of general or preliminary enquiries focused upon identifying vocational areas which might be appropriate to direct the Worker to in future as part of his rehabilitation. Based on Ms Padilla's evidence, they were not, and were not intended to be, examples of real jobs.
33. From the vocational assessment report of Ms Padilla, together with a resume from the Worker and a medical certificate, Ms Alana Liddell, registered psychologist employed by People Sense, prepared a labour market research report dated 12 August 2016 in order to examine in more detail whether there

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<sup>24</sup> Transcript, 159

<sup>25</sup> Transcript, 160

<sup>26</sup> E1, 284

<sup>27</sup> Transcript, 161-162

<sup>28</sup> Transcript, 161

<sup>29</sup> Transcript, 162

were particular logistics coordinator and warehouse supervisor jobs which might be suitable for the Worker.<sup>30</sup> The report was compiled using research which involved an employment consultant (not Ms Liddell) contacting employers to confirm details as to duties and remuneration of actual jobs, together with information obtained from internet searches, including from job advertisement website “Seek”.

34. In her report, Ms Liddell set out the duties required of a warehouse supervisor based upon the information from three employers contacted.<sup>31</sup> These duties differed from the duties described in Ms Padilla’s report for a warehouse coordinator. The main additional duties described were: loading and unloading vehicles; operate forklift truck; assemble hoses and fittings; attend to customers vehicles and equipment; using a pallet jack, packing and unpacking boxes from 5-25kg in weight; managing a team of up to 30 staff; and reporting to a Board of Directors.
35. Based on the research with employers Ms Liddell reported that a medium to significant degree of fitness was required for a warehouse supervisor as the role predominantly involved physical duties. She also noted that one employer said that high degree of physical fitness was required due to heavy lifting.<sup>32</sup> The variation in duties and the different levels of fitness required reflects the divergence of work within the broad category of warehouse supervisor. I also note the evidence of Professor Stokes who considered Ms Liddell’s report prior to providing advice recorded in the memo of 22 November 2018.<sup>33</sup> In this memo Professor Stokes stated that a warehouse supervisor position would be unsuitable because of the requirement for loading and unloading of vehicles, and this evidence was confirmed in cross-examination.<sup>34</sup> Further, Dr Holthouse, treating neurosurgeon, gave evidence that operating a forklift is not suitable for the Worker.<sup>35</sup>
36. In addition, taking into account the Worker’s skills and experience, the evidence shows that he would need significant retraining to undertake this work because he has no experience in management or administration and, in particular, no experience in staff management or contract negotiation which was a key requirement of the job, both on the typical duties described by Ms Padilla and the more detailed description obtained from employers as reported by Ms Liddell. Ms Liddell agreed in cross-examination that she did not have any information

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<sup>30</sup> E1, 291

<sup>31</sup> E1, 292

<sup>32</sup> E1, 292

<sup>33</sup> E1, 99

<sup>34</sup> Transcript, 27

<sup>35</sup> Transcript, 57

from which she could draw a conclusion that the Worker has the skills and experience to manage staff, report to a board of directors or negotiate contracts for freight rates. She did think that his previous experience operating warehouse software packages might suggest he has some logistic skills in ensuring a warehouse runs efficiently and cost effectively.<sup>36</sup> Ms Liddell also agreed that the overall job was quite physical.<sup>37</sup>

37. Therefore, I find that the Worker would not be able to undertake the job of warehouse supervisor/coordinator as described by Ms Padilla and Ms Liddell either physically or taking into account his experience, training and skills. The evidence in relation to this proposed job relates to the period 2016 to 2018. However, there is nothing in the evidence as to the Worker's capacity after that date that suggests that his physical or other abilities have significantly changed so that the conclusion would be different as at the date of hearing.
38. Ms Liddell also considered in her report of 12 August 2016 the job of logistics coordinator as previously identified by Ms Padilla. A sample of three employers were also contacted in relation to this role and a list of duties compiled from that research.<sup>38</sup> The main difference between the duties gleaned from the actual employers and the duties compiled from the internet search by Ms Padilla is the emphasis upon planning and problem solving which is explicit or implied in several of the duties listed in Ms Liddell's report but was not mentioned in Ms Padilla's summary. This likely reflects the difference between the actual jobs that particular employers have, and the generalised web site descriptions.
39. Ms Liddell reported that two of the three employers surveyed stated that a medium degree of fitness was required because the role predominantly involves physical duties, but the third said that it was sedentary in nature with office-based tasks.<sup>39</sup> It is difficult to understand this comment by reference only to the list of duties provided, most of which appear to be sedentary. However, among the education requirements was a requirement for a forklift license and Ms Liddell agreed in cross-examination that forklift operation would sometimes be required.<sup>40</sup> Although it is not entirely clear, it appears from the evidence that a logistics coordinator type role is likely to be more sedentary than a warehouse coordinator/supervisor. Certainly, that was the view of Professor Stokes who considered Ms Liddell's report and said that the role would be suitable for the Worker on a full time basis.<sup>41</sup> In cross-examination, Professor Stokes said that

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<sup>36</sup> Transcript, 166-167

<sup>37</sup> E1, 166

<sup>38</sup> E1, 294

<sup>39</sup> E1, 295

<sup>40</sup> Transcript, 168

<sup>41</sup> E1, 99

the Worker could do a logistics coordinator job if he was retrained appropriately; he also agreed that forklift operation was not suitable for the Worker.<sup>42</sup>

40. Ms Liddell described the education requirements required for a logistics coordinator and concluded that the Worker met the minimum requirements described by two out of the three employers surveyed. One employer required tertiary qualifications to degree level in logistics or a related field<sup>43</sup> but two employers specified a Certificate IV at TAFE level as desirable, although not strictly required. Ms Liddell's conclusion in relation to a job as a logistics coordinator for the Worker was that, although he met the minimum requirements, he lacked the required level of training to be competitive in the role. Completion of a further certificate in logistics was recommended.<sup>44</sup>
41. The Worker enrolled in a Certificate III in Logistics at TAFE WA in late 2016 and completed it in 2017. Given that the Worker already had a Certificate III in Transport and Logistics from 2009, and that two employers surveyed for Ms Liddell's report had specified a Certificate IV, it is not entirely clear why the Certificate III was chosen. The jobs for which the course is said to prepare a student on the TAFE website do not specifically include a logistics coordinator.<sup>45</sup> The list of modules completed as part of the Certificate III in Logistics by the Worker do not, based on their titles, appear to include any units which cover planning and problem solving or related skills.<sup>46</sup> The Worker's evidence in cross-examination as to the content of the modules he completed confirmed this.<sup>47</sup> Ms Liddell also recommended a work trial following the completion of training in order to increase the Worker's chances of securing a job.<sup>48</sup> No such work trial took place.
42. Based on this evidence I do not think that the completion of the Certificate III in Logistics significantly increased the likelihood that the job of a logistics coordinator as described by Ms Padilla and Ms Liddell could be undertaken by the Worker. His education and experience to the date of the injury were in unskilled and semi-skilled roles as set out in his various job applications and resumes to 2015<sup>49</sup> and described in his oral evidence.<sup>50</sup> The training that he undertook did not address his skill deficits based upon the duties described and the job required a higher degree of experience and/or training than the Worker

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<sup>42</sup> Transcript, 27

<sup>43</sup> E1, 295

<sup>44</sup> E1, 297

<sup>45</sup> W2, 4

<sup>46</sup> E5, 13. See also summary in Ms Zeman's report at E1, 123-124

<sup>47</sup> Transcript, 271

<sup>48</sup> E1, 297

<sup>49</sup> E6, 1-23

<sup>50</sup> Transcript, 194-210

had. This was the situation in 2017 and remains unchanged having considered the evidence as to what has occurred since.

### **Involvement of Fresh Start**

43. Ms Stewart, occupational therapist, was employed as an injury management consultant with Fresh Start, a rehabilitation provider, when she provided rehabilitation services to the Worker from April 2017 to July 2018. Fresh Start took over provision of rehabilitation services to the Worker from People Sense at the Worker's request. Several of Ms Stewart's reports prepared in the course of her work were tendered and she gave oral evidence.
44. Ms Stewart made it clear that as a rehabilitation consultant she relied upon medical clearances as to the worker's functional capacity.<sup>51</sup> She also relied upon others to prepare vocational assessments as to the jobs for which the Worker might be suited. Her role, she said, was that of a coordinator. Nonetheless, Ms Stewart's reports are a useful chronicle of what occurred from a rehabilitation point of view during the period in which she was involved. From those reports the following appears:
- a. After Ms Stewart first met the Worker in April 2017 she was concerned about his psychological presentation and the tests she administered indicated severe levels of both anxiety and depression;<sup>52</sup>
  - b. At that time the Worker was certified by his general practitioner as totally unfit for work until June 2017, but the Worker told Ms Stewart he would be interested in a new role in logistics but that he wanted a work trial to learn the job;<sup>53</sup>
  - c. The rehabilitation goal at this stage was "new employer/new duties";<sup>54</sup>
  - d. The rehabilitation plan involved work trial canvassing to locate a suitable work trial in logistics and warehousing within the Worker's functional capacities but noting that if that is not achievable reassessment of the identified vocational options may be required.<sup>55</sup> An important purpose of the proposed work trial was to determine whether future employment as a warehouse/supervisor/logistics coordinator was a viable option.<sup>56</sup>

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<sup>51</sup> Transcript, 285

<sup>52</sup> W5, 3

<sup>53</sup> W5, 4

<sup>54</sup> W5, 6

<sup>55</sup> W5, 4-5

<sup>56</sup> W6, 13



- e. At the end of May 2017, physiotherapists “Enhance” had reported to Ms Stewart a negative change in the Worker’s presentation since they first started working with him, which was in early 2016, and Dr Sidhu had advised that a work trial would help to assist the Worker’s mood;<sup>57</sup>
- f. In about mid 2017 the Worker was referred by his then general practitioner, Dr Sidhu, to a clinical psychologist for support based upon his presentation and suicidal ideation. Dr Sidhu expressed reservations about the Worker returning to work in the warehouse industry because the work may not be physically appropriate given ongoing symptoms. Exercise rehabilitation started around this time also;<sup>58</sup>
- g. A work trial with Camtech in a warehouse supervisor/warehouse coordinator role, with potential onward employment, was proposed in late June 2017 but the Worker refused to participate on the basis that he was not psychologically ready to commence, and also because the trial was too far from his home. The Worker was angry with the insurer at this time;<sup>59</sup>
- h. The Worker was ultimately not medically cleared for the work trial with Camtech. Dr Sidhu certified him totally unfit for any work from 30 May 2017 to 30 June 2017, and then from 10 July 2017 to 21 August 2017; noting in those certificates that a psychological assessment was required.<sup>60</sup> Dr Sidhu recorded on 10 July 2017 in his clinical notes that the Worker was not yet medically and psychologically fit for vocational rehabilitation.<sup>61</sup>
- i. After the Worker declined to participate, vocational rehabilitation was put on hold. The Worker attended three sessions of psychological counselling funded by the Employer in late 2017, but further funding for that counselling was declined.<sup>62</sup>
- j. Dr Bassett, psychiatrist, examined the Worker for the Employer in August 2017 and advised that the Worker had developed Major depressive Disorder as a direct result of the workers’ compensation injury and that he had a good prognosis for recovery if a suitable occupation was located providing him with satisfaction and identity. Dr Bassett said his psychological state was not of itself preventing him from working but that his “psychological rigidity with respect to employment, and the role that this plays in his

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<sup>57</sup> W5, 12

<sup>58</sup> W5, 9, Transcript, 290, 293

<sup>59</sup> W5, 16-17. Transcript, 278 (Worker) 294 (Stewart). As to the second issue noted that the insurer later agreed to fund travel.

<sup>60</sup> W7, 37-40

<sup>61</sup> W6, 96

<sup>62</sup> W5, 19

psychological health, is a major obstacle to his successful rehabilitation.”<sup>63</sup> Dr Bassett also said that, while it was difficult to know, it might take approximately 12 months for the Worker to obtain new employment and further psychological therapy of around 10 sessions was recommended.<sup>64</sup> Dr Bassett’s report was referred to in the report of Ms Csendes<sup>65</sup> and later experts.<sup>66</sup>

- k. In November 2017 Ms Stewart suggested further vocational counselling for the Worker. This occurred with Ms Csendes in November 2017. Ms Csendes recommended other occupations, namely customs officer, garbage collection, street sweeper operator and purchasing officer. At that time the Worker could not achieve the police clearances necessary for a customs officer<sup>67</sup> and there were limited employment prospects for garbage collectors and street sweepers. Therefore, purchasing officer was identified as the most suitable role. The role was regarded as largely sedentary and likely to utilise some of the Worker’s past training and experience. It was again noted that in order to be competitive he would benefit from work experience.<sup>68</sup>
- l. The Worker advised Ms Stewart at a case conference on 27 November 2017, which his general practitioner Dr Connolly also attended, that he was willing to trial a purchasing officer role, preferably in a mining setting. Dr Connolly is recorded by Ms Stewart as having supported this while expressing concern about ability to return to work due to nature of the injury and ongoing high pain levels;<sup>69</sup>
- m. At around this time the Worker self-funded a gym membership and commenced an exercise program with a personal trainer.
- n. Ms Stewart was of the view that the Worker already possessed sufficient qualifications and experience to obtain a purchasing officer role and recommended canvassing for that role in November 2017.<sup>70</sup> In her oral evidence Ms Stewart said that she thought that the Worker had basic

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<sup>63</sup> W6, 108

<sup>64</sup> W5, 19; see also Dr Bassett report 17/08/2017 at W6, 103 - 108

<sup>65</sup> E1, 309, 322, 323

<sup>66</sup> Ms Zeman, E1 111-112; Ms Alarcon E1 159

<sup>67</sup> Transcript, 279

<sup>68</sup> W5, 20

<sup>69</sup> W5, 21 and 23. Dr Connolly’s note of this conference does not record this; W6, 130. In addition, Dr Connolly certified the Worker as totally unfit for work from 22/11/2017 to 21/02/2017 on 27/11/2017; W7, 47. However Ms Stewart may have regarded this as a medical clearance for the purchasing officer role, see W5, 29

<sup>70</sup> W5,21

computer skills but that a short course of training, 6-10 hours, could build proficiency in programs frequently used in an office environment;<sup>71</sup>

- o. Ms Stewart referred the Worker to Ms Formato for interview skills training and resume development on 28 November 2017. This was undertaken by the Worker;<sup>72</sup>
- p. Ms Stewart also referred the Worker to Ms Wink, employment consultant, for work trial canvassing in late 2017. Ms Wink had difficulty locating a placement for the Worker due to his inability to obtain both a police clearance and clean driving record;<sup>73</sup>
- q. In December 2017 the insurer requested that Fresh Start complete a vocational assessment for the Worker but Ms Stewart advised that this would be difficult as the Worker was currently certified totally unfit for work and was receiving no treatment. Ms Stewart suggested a functional capacity evaluation.<sup>74</sup> No functional capacity evaluation was undertaken, but a vocational assessment was completed by Ms Csendes on 22 January 2018.<sup>75</sup>
- r. Work trial canvassing did not proceed in late 2017 because of the Worker's capacity for work.<sup>76</sup> In addition, vocational rehabilitation was placed on hold after Ms Stewart's January 2018 report while Freshstart awaited a response from the insurer.<sup>77</sup> Freshstart ceased to provide services to the Worker after the insurer advised on 30 July 2018 that no further vocational rehabilitation would be funded and, as a result, the recommendations in Ms Csendes' report were not actioned.<sup>78</sup>

45. The report of Ms Csendes, registered psychologist dated 22 January 2018 was in evidence.<sup>79</sup> She was not required for cross-examination. Ms Csendes' key findings were as follows:

- a. The Worker has always worked in unskilled (industrial utility) or semi-skilled (storeman, security officer) roles;<sup>80</sup>

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<sup>71</sup> Transcript, 291-292

<sup>72</sup> W5, 28

<sup>73</sup> W5, 28-29

<sup>74</sup> W5, 29

<sup>75</sup> E1, 309. No functional capacity assessment was completed at this time.

<sup>76</sup> W5, 31

<sup>77</sup> W5, 30-31

<sup>78</sup> Transcript, 292

<sup>79</sup> E1, 309

<sup>80</sup> E1, 316

- b. The Worker has limited work history outside of a stores role;<sup>81</sup>
- c. Based upon the Worker's physical restrictions as described by Dr Hardcastle and the Worker's skills, training and past experience, roles of purchasing officer, park ranger and fisheries officer were identified as possible vocational options;<sup>82</sup>
- d. Previous attempts to gain work experience as a logistics coordinator and warehouse supervisor have been unsuccessful as the Worker has no specific work experience in either role and is thus not competitive for even supernumerary roles;<sup>83</sup>
- e. A purchasing officer is a specialisation of warehouse supervisor working primarily with data entry and inventory of stock. They may need to assist with general duties within a warehouse. Knowledge skills and attributes include a good level of computer literacy and strong data entry skills. People in these roles spend a lot of time using computers and need to be very familiar with Excel, Word and data entry programs as well as specialist warehouse management software programs.<sup>84</sup>
- f. The Worker has never previously worked in the role and locating a work trial was difficult given limited labour market demand and his lack of experience.<sup>85</sup> However a purchasing officer role would be vocationally suitable and fit medical restrictions as the role is mainly sedentary;<sup>86</sup>
- g. Purchasing and supply logistics clerks can expect to earn between \$1000 and \$1249 per week depending upon the role and their experience. Average full-time weekly earnings were approximately \$1150.<sup>87</sup> Earning potential increases with experience;<sup>88</sup>
- h. The Worker has no experience as either a fisheries officer or a park ranger and would not be competitive for either role without considerable training;<sup>89</sup>
- i. The Worker requires psychological counselling, on the job or formal training and a work trial, resume development and interview training to

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<sup>81</sup> E1, 315

<sup>82</sup> E1, 315

<sup>83</sup> E1, 322

<sup>84</sup> E1, 316-317

<sup>85</sup> E1, 322

<sup>86</sup> E1, 317

<sup>87</sup> E1, 317. Earnings figures as at January 2018.

<sup>88</sup> E1, 318

<sup>89</sup> E1, 319 and 321.

assist him to secure new employment. He also requires training in computer skills in order to be competitive in an office environment, particularly as a purchasing officer.<sup>90</sup>

46. Ms Juliette Ta, rehabilitation consultant from Konect, prepared a Labour Market Analysis dated 4 April 2018.<sup>91</sup> Ms Ta was not required for cross-examination. Ms Ta's labour market analysis considered the three potential occupations Ms Csendes had identified.
47. Ms Ta's findings were as follows:
- a. The list of physical and cognitive demands for a purchasing officer include possible bending, squatting or crouching for lifting tasks and inspection of goods and occasional to frequent repetitive movements;<sup>92</sup>
  - b. Formal qualifications in warehousing operations are usually required and relevant experience is highly valued;<sup>93</sup>
  - c. Forklift operation may be required;<sup>94</sup>
  - d. Of the three potential employers Ms Ta contacted, all three indicated that a person with the Worker's background would be suitable for a role which they had available;<sup>95</sup>
  - e. The average wage for a purchasing and supply logistics clerk is \$1000 to \$1303.86 per week based on their experience and the organisation they work for and earning potential increases with experience;<sup>96</sup>
  - f. The Worker would be suitable for a purchasing officer role given his experience and transferrable skills. However he would require basic level training in computer programs such as Microsoft Office suite and other areas to be competitive as a job seeker;<sup>97</sup>
  - g. Based upon the medical certificate of Dr Connolly dated 30 January 2018<sup>98</sup> which certified the Worker totally unfit for work, the purchasing officer role was considered medically unsuitable for the Worker at that time;

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<sup>90</sup> E1, 323

<sup>91</sup> E1, 325

<sup>92</sup> E1, 327

<sup>93</sup> E1, 327

<sup>94</sup> E1, 327-328

<sup>95</sup> E1, 329 - 331

<sup>96</sup> E1, 333

<sup>97</sup> E1, 332 - 333

<sup>98</sup> W7, 49

- h. A role as a fisheries officer requires occasional stretching and reaching, occasional bending, squatting, crouching and kneeling, and twisting and medium lifting, carrying and pulling.<sup>99</sup> Ability to drive over rough ground and to be on boats in the open sea and adopt static position for up to 8 hours is also required;<sup>100</sup>
- i. Based on his experience, transferrable skills and medical capacity the Worker is not suitable for a job as a fisheries officer;<sup>101</sup>
- j. A park ranger has a medium to heavy physical demand with occasional requirement for lifting, carrying or pulling such as removal of fallen trees and involves frequent driving, sometimes over rough terrain;<sup>102</sup>
- k. The Worker would not be suitable for a park ranger role based on his experience, relevant transferrable skills and current medical capacity.

### **Ms Zeman's Evidence as to the Suitable Jobs**

48. Ms Sanja Zeman, occupational therapist, examined the Worker for the purpose of these proceedings and produced four reports dated 30 March 2019, 13 April 2019, 24 July 2019 and 21 October 2019. Ms Zeman was cross-examined. Her ultimate findings can be summarised as:
- a. The Worker is fit for full time work up to 38 hours per week in alternative duties as either a purchasing and supply logistics clerk, warehouse administrator (including warehouse supervisor), delivery driver or forklift driver;
  - b. Notwithstanding her view that the worker was fit for full time work as above, Ms Zeman recommended in her report of 30 March 2019 that he be returned to work over a six-week period.<sup>103</sup> However, in her supplementary report of 21 October 2019 Ms Zeman amended this opinion and considered that the Worker

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<sup>99</sup> E1, 335

<sup>100</sup> E1,

<sup>101</sup> E1, 339

<sup>102</sup> E1, 342

<sup>103</sup> E1, 102

*would benefit from a graduated return to work and/or a work conditioning program (coupled with cognitive behavioural therapy) over a 12 week period to assist him with gradually increasing his work hours and endurance.*<sup>104</sup>

Ms Zeman's reasons for her changed view were:<sup>105</sup>

- i. Dr Holthouse's opinion in his report of 14 August 2018 that pain is the overriding issue stopping the Worker returning to work and that a pain psychologist's involvement is desirable;
  - ii. Ms Alarcon's opinion in her report of 20 June 2019 that personal training and general fitness training at a gym was beneficial and that a graduated return to work of at least three months in an unpaid trial was necessary in order for the Worker to work towards 32 hours per week in suitable work;
  - iii. Dr Holthouse's opinion in his report of 14 August 2018 that the Worker would have difficulty performing the roles he considered full time but that half time work could be considered subject to possible exacerbation of symptoms caused by prolonged sitting and standing.
- c. The average weekly wage for a purchasing and logistics clerk is \$1461, for a warehouse administrator \$1360, a delivery driver \$1026 and a forklift driver \$1001.
49. Ms Zeman assessed the Worker over a four-hour period on one day in March 2019 at her offices in Melbourne. She conducted a number of assessments ranging from questionnaires to various movement and functional tests and supervised task observations. Ms Zeman also investigated suitable jobs via internet searches and matched physical capability to those jobs. As part of her review Ms Zeman considered all of the available medical and rehabilitation reports.<sup>106</sup> In many respects the questionnaire style tests administered by Ms Zeman repeated and confirmed results obtained by others on the same or similar tests, or by observation.
50. Ms Zeman was the only expert to conduct a functional capacity evaluation. As a result of that evaluation Ms Zeman concluded that the Worker had no postural or balance deficits, a normal range of motion and normal muscle strength in the

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<sup>104</sup> E1, 241

<sup>105</sup> E1, 241-242

<sup>106</sup> E1, 110-113

upper and lower body. He was found to have unlimited tolerance for standing, sitting, reaching overhead and kneeling with reduced tolerance for squatting and limited tolerance for reaching forward. His tolerances for walking, transferring, and stair climbing were assessed as unlimited, with some reduction in manual handling (up to 12kg).<sup>107</sup>

51. Ms Zeman also included a table summarising the Worker's employment history from 2002 to 2015.<sup>108</sup> This table shows that, with the exception of a period of two and a half years as a security guard from December 2006 to July 2009, the Worker has been employed primarily as a storeman and labourer.
52. Ms Zeman analysed the Worker's transferrable skills as she discerned them from a review of his employment history and education.<sup>109</sup> She then considered four post injury vocational options: purchasing and supply logistics clerk; warehouse administrator (including supervisor); delivery driver; and forklift driver. Based on a review of the Job Markets Australia database for 2018-2019 she then attributed wage figures to each of those roles.

### **Purchasing and Supply Logistics Clerk**

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<sup>107</sup> E1, 116-119

<sup>108</sup> E1, 123-124

<sup>109</sup> E1, 125



53. In relation to the Purchasing and Supply Logistics Clerk role, Ms Zeman found that the work is classified as sedentary and that it is within the Worker's functional capacity as assessed by her. She then considered his training and vocational skills and found that the role was suitable from that point of view.
54. Ms Zeman noted in her report that this role was also recommended by rehabilitation providers working with the Worker since 2016,<sup>110</sup> which I take as a reference to the logistics coordinator position recommended by Ms Padilla and Ms Liddell in 2016 and the purchasing and supply logistics clerk considered by Ms Csendes and Ms Ta in 2018. I note that the duties set out in Ms Zeman's report were taken from the Job Markets Australia website<sup>111</sup> and are almost identical to the typical duties taken from that website and described by Ms Padilla in 2016. However, it is clear, as described above, that Ms Padilla's report should be read with Ms Liddell's report. On its own, Ms Padilla's survey described a broad area of employment rather than a specific job and when Ms Liddell's findings were factored in a different picture emerged as to what real jobs in the category might look like.
55. Ms Zeman said in cross-examination that the role she considered, a purchasing and supply logistics clerk, is different, and at a lower level, than a logistics coordinator, which is the role, described by Ms Liddell.<sup>112</sup> This was notwithstanding the fact that Ms Padilla had described the role as "Logistics Coordinator (classified under the vocational category of Purchasing and Supply Logistics Clerks on the Job Outlook website)".<sup>113</sup> In her report of 21 October 2019 Ms Zeman had described the role Ms Padilla suggested as "Logistics Coordinator Purchasing and Supply Logistics Clerks",<sup>114</sup> suggesting that it was the same as the role she herself said was suitable. Given this, coupled with her oral evidence, it seems to me that Ms Zeman is not completely clear about the exact duties which comprise the job of a purchasing and supply logistics clerk beyond the typical duties set out on the website.
56. Ms Zeman undertook her own labour market analysis.<sup>115</sup> As part of that process, instead of speaking to particular employers as Ms Liddell and Ms Ta had done to obtain information about real jobs, Ms Zeman considered a specific advertisement for an accounts receivable assistant/officer/clerk with Truck Centre WA as an example of a job within the category. The duties and attributes

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<sup>110</sup> E1, 128

<sup>111</sup> E1, 127

<sup>112</sup> Transcript, 82.

<sup>113</sup> E1, 280

<sup>114</sup> E1, 236

<sup>115</sup> E1,

required were set out in the advertisement.<sup>116</sup> Although clearly administrative in nature, and almost certainly in the category of light or sedentary work, the Truck Centre advertisement appears to describe an accounts or finance role, not a logistics role. In cross-examination, Ms Zeman said that the fact that the Worker had done a Certificate III in Logistics and because he had experience with some warehousing founded her view that he would be suitable for the Truck Centre job.<sup>117</sup> I do not accept Ms Zeman's opinion on that aspect. There is no obvious requirement for any of the elements of stores requisitioning, supply and stock control, which are the key transferrable elements of skills and knowledge previously identified in the Worker's experience as a storeman and his formal training. The Truck Centre job requires working in the payments and finance area of the business. With the exception of the fact that both roles have an administrative component, comparison of the typical duties of a logistics clerk and the specific requirements shows that they are quite different roles. The fact that the Truck Centre advertisement requires experience in administration and/or accounts and intermediate to advanced proficiency in Excel and Word is further evidence of this.

57. The Worker clearly does not have the transferrable skills to move into a finance or accounts role. He has no experience or training for such a job and almost no general administrative experience in an employment setting. He has computer skills of a basic to standard level with some experience in some MS Office or similar programs as indicated by his ability to produce a resume, send an email and the like. This experience could not be described as intermediate or advanced.<sup>118</sup> He also has some experience using specific warehouse programs relating to stock control, requisitioning and other activities reasonably ancillary to the job of a storeman in a warehouse. These programs are not finance or general administrative programs and ability to use them as a storeman does not indicate an advanced level of administrative knowledge or experience transferrable to a general administrative role, let alone a specialised job such as accounts. Ms Zeman admitted in cross-examination that the Worker did not have advanced computer skills but said that because he had used warehousing programs, which she admitted she was not familiar with, that he would have the capacity to learn the necessary programs for the accounts receivable job.<sup>119</sup> While the Worker may well have the ability to learn new computer programs, that is not to the point; if he has not had the opportunity to acquire the specific skills required for the job then he does not have the capacity to undertake it.

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<sup>116</sup> E1, 129-130

<sup>117</sup> Transcript, 96

<sup>118</sup> Ms Zeman agreed in cross examination that the Worker's skills were not advanced and suggested he could do a course to 'skill up'. Transcript, 96-98

<sup>119</sup> Transcript, 96-98

58. Therefore, leaving aside any issue of physical capacity, I am not satisfied that the Worker has the training or experience to be able to undertake the specific job of accounts receivable assistant/officer/clerk described by Ms Zeman as an example of a purchasing and supply logistics clerk at any of the relevant dates.
59. In her reports of 13 April and 24 July 2019, Ms Zeman stated that the Worker was suitable for the job of Supply Officer (Logistics Coordinator) with the Employer at a mine site. The duties for this job are described in the 24 July 2019 report as: utilise the appropriate materials handling equipment and processes best suited to perform unloading and lift(s) of loose and break-bulk cargo; operate general warehouse materials handling equipment to move, store and issue inventory; perform physical cyclic stocktaking at all warehouse and laydown locations and investigate variances; required to operate heavy machinery (e.g. Forklift, IT).<sup>120</sup> It is immediately apparent that the job described here is quite different from the job under the same category earlier suggested by Ms Zeman and discussed above. The obvious difference is the stated need for goods handling of various types, including forklift operation. Professor Stokes considered this job in his report of 31 July 2019 and stated that it was not suitable.<sup>121</sup> He confirmed this view in cross-examination.<sup>122</sup> I prefer the evidence of Professor Stokes to that of Ms Zeman as to the Worker's medical capacity, given his greater expertise and experience in medical matters and because his view as to the Worker's limitations in relation to manual handling and in forklift operation is more consistent with that of other medical experts.
60. In her final report of 21 October 2019 Ms Zeman considered the roles she had recommended from a part-time perspective. In doing this she reviewed part-time positions advertised on the Seek website under a search for "Logistics Clerk".<sup>123</sup> The first advertisement is for a workshop administrator with Buswest, 25 hours per week. Comparison of the listed tasks indicates some correlation with the typical duties, for example "initiating and monitoring the purchasing and logistics process to ensure parts, equipment, resources and tooling are available when required". It also appears that most of the duties are of a relatively light nature, and Dr Holthouse said in his evidence that many of the duties appeared to be within the Worker's physical capacity with the notable exception of the requirement to "maintain workshop supplies and stores in good order, including first aid and safety stations and fire equipment" due to the need to handle heavy fire equipment.<sup>124</sup> However, this job is said to require previous experience in

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<sup>120</sup> E1, 199

<sup>121</sup> E1, 210

<sup>122</sup> Transcript, 28

<sup>123</sup> E1, 243

<sup>124</sup> Transcript, 57

purchasing, familiarity with workshop administration operations and advanced computer skills. I have already found that while the Worker has some computer skills, they could not be described as advanced. Further, there is no evidence that the Worker has experience in purchasing, as in negotiating contracts, or in workshop administration, (which I am not prepared to accept without evidence is the same as warehouse administration). Therefore, I find that it is very unlikely that the Worker would be capable of undertaking this job based on his experience, training and existing skills, at the date of hearing or any earlier date, even if it is wholly within his physical capacity, which is not certain.

61. The second job advertisement considered by Ms Zeman under this heading in her report of 21 October 2019 was for a logistics administrator.<sup>125</sup> The advertisement reproduced in the report does not give any indication of duties although it referred to experience or knowledge in either transport, logistics, import/export or the shipping industry. Without further details it is impossible to decide whether this job would be something the Worker could undertake, from either a physical or experience, training and skills perspective.
62. In so far as the Worker might be able to undertake other roles within the broad category of purchasing and supply logistics clerk, given the very large differences between real jobs under the category, as illustrated by the examples in the reports of Ms Liddell and Ms Zeman,<sup>126</sup> the statements of typical duties are not helpful. That is not to say that any general description of a job role will necessarily always be insufficient. Some jobs have reasonably confined duties, which make it possible to consider them in relation to a worker's physical and other capabilities fairly easily. It is a matter for the evidence. However the evidence in this case shows that the particular duties required in jobs under the broad heading of purchasing and supply logistics clerk are so divergent that it is not possible to be satisfied that the Worker is capable of undertaking a real job under that heading relying solely upon consideration of the typical duties as reproduced in various internet databases in circumstances where I have found that he is not capable of undertaking those jobs for which more detailed duties statements were available. The website database descriptions may be useful as a general guide as to vocational options, but they are not a substitute for a detailed description of an actual job which a worker can do.
63. Ms Zeman also considered (as did other rehabilitation experts) the market availability and employment prospects of the particular roles she reported on. However, I have disregarded that part of the evidence of all relevant experts entirely because whether or not a particular job is reasonably available to the

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<sup>125</sup> E1, 244

<sup>126</sup> And noting Ms Zeman's own evidence about the divergence of jobs within a category at Transcript, 77

Worker is irrelevant to consideration of his loss of earning capacity given that all relevant dates are well past the first 104 weeks of incapacity.

### **Warehouse Administrator**

64. Ms Zeman found in her report of 30 March 2019 that the Worker was capable of undertaking the duties of a warehouse administrator. The general description of duties, taken from the Jobs and Skills WA website, were as follows: “Oversee the management of stock within an organisation. This includes receiving, issuing and dispatching stock, and handling communication between freight companies and warehouse customers. Warehouse administrators are responsible for the data entry and inventory of all stock. This involves processing receipts, taking records and documenting the details of all orders. They also organise staff inductions, manage occupational health and safety procedures and took times for incoming deliveries. They may also have to assist with general duties within the warehouse. These are described as the main possible duties the role could undertake”.<sup>127</sup>
65. Ms Zeman determined that the role is classified as light work and therefore within the Worker’s functional capacity. She referred to an advertisement by Toll as a maintenance administration assistance as an example of a job within the role classification.<sup>128</sup> That job’s main purpose was to provide efficient and effective administration duties including processing workshop documentation. The duties included various administrative activities and participation in investigations, toolbox meetings and health, safety and environmental initiatives, assisting with invoicing, receipting and invoicing of purchase orders, payroll and timesheet allocation. The duties appear to be light and Dr Stokes and Dr Holthouse agreed that the Worker could perform them from a medical perspective.
66. However, the first requirement for selection of the successful candidate was “previous and proven administration experience”. On the evidence in this case, as described above, this is something which the Worker does not have. Ms Zeman again relied upon his completion of the Certificate III in Logistics and his previous work experience to come to the conclusion that the Worker had the transferrable skills.<sup>129</sup> I do not agree. The Worker has never held an administrative job and cannot on any assessment be said to have “previous and proven” experience in that domain. I think it is very unlikely that the Worker would be capable of undertaking this role at the date of hearing or an earlier date based on the evidence of his previous work history and training. The Worker’s

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<sup>127</sup> E1, 131

<sup>128</sup> E1, 133

<sup>129</sup> E1, 134

evidence was that he wanted to work his way up from storeman to a purchasing officer or logistics officer, but he has never had any experience in purchasing or warehouse administration.<sup>130</sup> It may be that he could undertake such a role in future if he were appropriately trained and subject to a graduated return to work program (discussed below) but that does not provide any evidence that he can do it as at date of hearing or previously.

67. The same conclusion must be drawn in relation to the warehouse coordinator job with Newmont described in Ms Zeman’s supplementary reports of 13 April and 24 July 2019. Ms Zeman’s assessment of the Worker’s suitability for this job based upon the essential criteria as set out in her report of 24 July 2019 can only be described as generous. I very much doubt that any actual employer would take such an approach. In relation to the essential requirement to lead and instruct small teams Ms Zeman said

*Mr Barrett has a certificate III in Warehousing and Logistics as well as extensive industry experience hence has been assessed to have the potential to undertake more leadership/supervisory tasks if given the opportunity.<sup>131</sup>*

This is too speculative. There is no evidence that the Worker has any experience in leadership roles. In cross-examination Ms Zeman conceded that there was no evidence that he had experience in leadership to “any substantial degree” and said “I thought that that was something he could have known”.<sup>132</sup> Further on in her evidence she said

*He would definitely need some more skilling up and exposure, without a doubt. He doesn’t have the leadership supervisory management experience and I’ve made that abundantly clear in all of my reports.<sup>133</sup>*

68. Ms Zeman has used the exact same form of words, and therefore justification, as for the leadership criterion to find that the Worker “likely” meets other essential criteria namely “developing ability to coach and mentor supply officers” and “ability to plan, prioritize and delegate work to others”. I do not find Ms Zeman’s opinion that the Worker likely meets these essential criteria persuasive either. It appears from her report, and from the transcript, that Ms Zeman may have

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<sup>130</sup> Transcript 254

<sup>131</sup> E1, 201

<sup>132</sup> Transcript, 110

<sup>133</sup> Transcript, 111

thought that the Worker's Certificate III in Logistics covered some management training. However, a review of the unit names of the course he completed in 2017 suggests that that is not the case<sup>134</sup> and this accords with the Worker's oral evidence as to the topics he studied.

69. In her report of 21 October 2019 Ms Zeman considered part time job advertisements from the "Seek" website under the warehouse administrator category. The first position was described as administrator – warehouse operations. It was with the ThyssenKrupp elevator company in Sydney.<sup>135</sup> The key responsibilities are generally within the light work range. However, the qualifications and experience specify two years minimum experience in office or spare part facility, administration or customer service. The Worker does not have this experience. His experience as a storeman is of a different character. The job also required, "better than average Excel skills", which the worker also does not have. The second advertisement related to a warehouse administration position with A1 First Aid Supplies. The role was said to involve picking and packing stock, building first aid kits as well as date entry in MYOB and using Office programs.<sup>136</sup> The description of the duties is too brief to be able to make any finding as to the suitability of the Worker for the role, although I note that there is no evidence that the Worker has been trained in MYOB. Therefore I find that the Worker would not have the capacity to undertake either of these jobs, whether at the date of hearing or an earlier date.

### **Delivery Driver**

70. Ms Zeman stated in her report of 30 March 2019 that the Worker was capable of undertaking a job as a delivery driver (van or car) – light items. The general duties involved included: determining the destinations of goods and most appropriate delivery routes; manoeuvring vehicles into position for loading and unloading; assisting with loading to ensure goods are arranged for ease of delivery and safely secured to avoid damage; verifying loading documents; arranging and performing unloading operations and obtaining certification of deliveries; reporting vehicle maintenance needs; may receive payments for deliveries and arrange accounts.<sup>137</sup>
71. Dr Holthouse gave evidence that the manoeuvring of vehicles would be physically difficult for the Worker due to his back injury because of the need to constantly twist and look around.<sup>138</sup> Dr Holthouse pointed out that continuously

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<sup>134</sup> E5, 4

<sup>135</sup> E1, 244

<sup>136</sup> E1, 246

<sup>137</sup> E1, 135

<sup>138</sup> E1, 56

performing a task, as is the case when in a work situation, is much more likely to cause problems than just driving occasionally, such as from home to work.<sup>139</sup> Dr Pers was also of the opinion that delivery driver was not a suitable role for the Worker.<sup>140</sup>

72. Ms Zeman found that the Worker had the functional ability for the role of a delivery driver based upon the functional capacity assessment she conducted as described above. In so far as Ms Zeman's assessment of the Worker's pain relied upon readings from a heart monitor, Dr Holthouse said that use of a heart monitor is not as useful as observations in assessing pain and that he had, over a long period of treating the Worker, never found any indication that the Worker had more ability than was evident on examination.<sup>141</sup> I also note the Worker's evidence, which I accept, that following Ms Zeman's assessment he experienced increased pain in his back.<sup>142</sup>
73. Considering the evidence of Ms Zeman and the evidence of Dr Holthouse, I prefer the Dr Holthouse's evidence as to the Worker's physical abilities. This is because of Dr Holthouse's greater experience and expertise and because he is a treating doctor who is well positioned to provide an opinion as to the Worker's condition having had the benefit of attending upon him on a number of occasions, whereas Ms Zeman saw him once only. Dr Holthouse's view is also supported by that of Dr Pers.<sup>143</sup>

### **Forklift Driver**

74. The final job which Ms Zeman said that the Worker could do was as a forklift driver.<sup>144</sup> Again this was based on her functional capacity assessment as well as vocational considerations. Doctors Holthouse and Pers and Professor Stokes all gave evidence that this job was medically unsuitable for the worker. Due to their greater expertise and experience, and in the case of Dr Holthouse because he is a treating doctor, I prefer their opinion to that of Ms Zeman.

### **The Worker's Physical Capacity and the Need for a Graduated Return to Work**

75. There is, as Dr Holthouse pointed out, a difference between having the capacity to perform a movement and having the ability to do it repetitively over hours or days in a real job. In addition to considerations arising on the evidence related to

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<sup>139</sup> E1, 56-57

<sup>140</sup> E1, 224

<sup>141</sup> Transcript, 49

<sup>142</sup> Transcript, 257

<sup>143</sup> Transcript, 187

<sup>144</sup> E1, 140



the particular jobs advanced by the Employer as described above, there is very little evidence about what the Worker can currently, or at relevant earlier dates, do in an employment setting and for how long each week.

76. The overwhelming conclusion from the medical evidence was that the Worker is likely to be fit for light duties from a medical perspective (including, for example, some of the typical duties described in the reports of Ms Zeman) at some time in the future. However, given that the majority of opinions were qualified by evidence that the Worker requires a graduated return to work (or other conditioning) program, until he has done that it is not possible to know what work he is actually capable of performing. There were different views as to whether the Worker was ultimately likely to achieve full time or part time work hours. Given the qualified nature of the majority of opinions as to the Worker's capacity for work, any assumption that the Worker is fit for particular duties or for a particular number of hours per week, is speculative.<sup>145</sup>
77. Dr Hardcastle, Consultant Orthopaedic Surgeon, reviewed the Worker at the request of the Employer on 17 August 2017 and 7 March 2018 and provided four reports.<sup>146</sup> Dr Hardcastle's evidence was that the Worker is permanently unfit for work as a storeman.
78. Dr Hardcastle's opinion as to the Worker's physical limitations can be summarised as:
- a. no lifting weights more than 5-10kg between knee and chest height;
  - b. avoid driving over rough terrain on a regular basis;
  - c. restrict activities involving repetitive forward bending;
  - d. must have capacity to change from sitting to standing position.
79. In his report of 18 August 2017 Dr Hardcastle recommended a graduated return to work over three months starting with 15 hours a week spread over three days with a view to "hopefully getting back to full-time light duties".<sup>147</sup> On 5 October 2017, having had the benefit of an additional MRI scan but without reviewing the Worker, Dr Hardcastle signed a medical certificate clearing the Worker to return to work for restricted hours, four hours per day up to 20 hours per week with the limitations described above.<sup>148</sup> In his report of 12 October 2017 Dr Hardcastle

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<sup>145</sup> *Rupe v Beta Frozen Products* [2000] NTSC 71, [11]

<sup>146</sup> 18/8/2018; 19/9/2017; 12/10/2017; 8/3/2018

<sup>147</sup> E1, 63

<sup>148</sup> E1, 76

said that he had not done a final certificate because the Worker still required restrictions and a graduated report to work program.<sup>149</sup>

80. Dr Hardcastle last examined the Worker on 7 March 2018. In cross-examination, Dr Hardcastle agreed that there was no significant change in the Worker's limitations, based upon his symptoms, between 17 August 2017 and 7 March 2018.<sup>150</sup> Dr Hardcastle found no evidence of symptom exaggeration or malingering on the part of the Worker.<sup>151</sup> In his report of 8 March 2018 Dr Hardcastle stated that the Worker could perform the duties set out in the roles of purchasing officer, fisheries officer, park ranger, logistics co-ordinator and warehouse supervisor, from a medical perspective,<sup>152</sup> on a "trial basis" with restrictions.<sup>153</sup> The fact that this is described as a trial indicates that the Worker's final capacity was not yet determined.
81. Professor Stokes, Consultant Neurosurgeon, reviewed the Worker at the request of the Employer on one occasion on 19 September 2018 and subsequently provided three reports. Professor Stokes found that the Worker was partially incapacitated for work as a result of the back injury. His opinion was that the Worker could be retrained into lighter work, namely clerical work, but that he could not continue to work as a storeman.<sup>154</sup>
82. In his report of 10 October 2018 Professor Stokes said that the role of warehouse supervisor<sup>155</sup> would not be suitable for the Worker from a medical point of view, due to the risk to his back from manual handling involved in loading and unloading vehicles, but that he could do a job as a logistics co-ordinator<sup>156</sup> on a full-time basis.<sup>157</sup> In cross-examination Professor Stokes was taken to some of the information in Ms Liddell's report which referred to a need to be able to perform physical duties and hold a fork lift licence, and confirmed that the Worker was fit for the clerical aspects of the logistics coordinator role but not any physical aspects involving stock moving and not for operating a forklift.<sup>158</sup>
83. In his report of 31 July 2019 Professor Stokes said that the worker would not be suited to a position as a supply officer but would be suitable in the roles of

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<sup>149</sup> E1, 75

<sup>150</sup> Transcript, 125

<sup>151</sup> E1, 63; Transcript, 124

<sup>152</sup> E1, 84

<sup>153</sup> E1, 84

<sup>154</sup> E1, 94; Transcript, 25-26

<sup>155</sup> As described in the Labour Market Research Report prepared by Ms Liddell of People Sense on 12/8/2016; E1, 291

<sup>156</sup> As also described by Ms Liddell in the same report.

<sup>157</sup> E1, 99

<sup>158</sup> Transcript, 27

supervisor or warehouse coordinator provided that no heavy back lifting was required.<sup>159</sup> In cross-examination Professor Stokes said

*...in my experience of warehouses, because I've been and seen a few of them over the years, that people even in a clerical capacity often have to do manual work to help out, as it were. So I think that probably anything in a warehouse where there's a risk of him hurting himself, he would not be able to do.<sup>160</sup>*

84. Professor Stokes also agreed in cross-examination that due to the long period since the Worker was employed he would have become deconditioned and would require a graduated return to work program. Further, the Professor agreed that it is not possible to determine exactly how many hours a person in the Worker's situation can work until the graduated return to work program has been completed.<sup>161</sup> He also said in oral evidence that the Worker could have commenced a graduated return to work into a clerical role from the time he saw him in September 2018.
85. Professor Stokes also referred to concerns about the Worker's mental state and willingness to return to work due to his fear of injuring himself and his view that the Worker needed assistance from a psychiatrist, while agreeing that the Worker had told him that he was keen to get back to work provided that his back wasn't stressed.<sup>162</sup> Professor Stokes referred to the report of Dr Bassett, psychiatrist, of 17 August 2017, which was part of the documents sent to him by the Employer in order to prepare his report, and upon which he said that he relied in forming the view that the Worker required psychiatric assistance.
86. Dr Bassett, whose report is discussed above in the context of the Worker's rehabilitation progress in 2017, was not called for cross-examination and his report was not separately tendered. It was however included in the bundle of documents which are exhibit W6, records from Peel Connelly Medical Centre.<sup>163</sup> The Worker has not pleaded and does not rely upon any psychiatric injury related to his employment. However, it was conceded by the Employer in its submissions that the Worker was diagnosed by Dr Bassett in 2017 as suffering from a major depressive disorder, albeit one which is not of itself causative of incapacity for work.<sup>164</sup> As noted above, Dr Bassett recommended in his report

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<sup>159</sup> Stopes, 31/7/2019, E1, 210

<sup>160</sup> Transcript, 28

<sup>161</sup> Transcript, 29-30

<sup>162</sup> Transcript, 30-31

<sup>163</sup> Report Dr Bassett 17/08/2017; W6, 98

<sup>164</sup> Employer's submissions, 44, referring to evidence of Ms Stewart, W5, 19

that the Worker have clinical psychology counselling during the rehabilitation process.<sup>165</sup>

87. Dr Holthouse, neurosurgeon, has provided treatment for the Worker on referral from the Worker's general practitioner, Dr Connelly, since July 2018. He last saw the Worker on 15 October 2019.<sup>166</sup> In his report of 14 August 2018 Dr Holthouse stated that the Worker is unfit for his usual work tasks, or any manual work.<sup>167</sup> In addition to a limitation on lifting over 10kg, Dr Holthouse said that the Worker could not sit or stand for prolonged periods.
88. In cross-examination Dr Holthouse agreed that the Worker was fit for clerical duties from a medical point of view, at his pain baseline and absent any 'flare-ups', and that the typical duties described in Ms Zeman's report referred to above as required by a purchasing and supply logistics clerk,<sup>168</sup> as well as those under the specific jobs of Accounts Receivable Assistant/Officer/Clerk<sup>169</sup> and maintenance administration assistant<sup>170</sup> would be suitable as long as there was no heavy lifting, long distance driving, lifting more than 9.1kg or stooping or bending.<sup>171</sup> Dr Holthouse also gave evidence that the typical tasks described under the heading Purchasing and Supply Logistics Clerk in Ms Zeman's report of 21 October 2019 could be undertaken by the worker subject to restrictions upon lifting more than 10kg and avoiding prolonged sitting.<sup>172</sup>
89. In his report of 14 August 2018 Dr Holthouse said that he thought that the Worker was partially incapacitated for employment and that this was likely to be ongoing. He said that the Worker was unlikely to be able to return to work on a full-time basis but half-time basis could be considered.<sup>173</sup> In his report of 1 August 2019, Dr Holthouse concluded that the Worker's prognosis for returning to the workforce was "relatively poor". He said that he thought that the Worker would be unlikely to benefit from a graded return to work program "on the basis of his previous employment type activities".<sup>174</sup>
90. Dr Holthouse considers that the Worker has persistent and ongoing back pain as a result of the damaged nerves in his back and that he requires further treatment

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<sup>165</sup> W6, 107-108

<sup>166</sup> Transcript, 47

<sup>167</sup> E1, 89

<sup>168</sup> E1, 127

<sup>169</sup> E1, 130

<sup>170</sup> E1, 133

<sup>171</sup> Transcript, 53-55

<sup>172</sup> Transcript, 57-59

<sup>173</sup> This opinion pre-dates Ms Zeman's report of 30/3/2019, which was covered in oral evidence, and relates to the positions described by Ms Padilla and Ms Liddell.

<sup>174</sup> E1, 213

to manage this, possibly including a neurostimulator.<sup>175</sup> In relation to the psychological aspects of the Worker's overall condition Dr Holthouse said in cross-examination

*I do not believe that this chap has what we consider necessarily abnormal illness behaviour. I believe that he does need to be seen by a pain psychologist to further evaluate this. And certainly this is something that I would require before making the final deliberation before being the final selection process for a stimulator.*<sup>176</sup>

91. Dr Salmon, pain management specialist, treated the Worker on a number of occasions between August 2015 and October 2017. In his report addressed to the Worker's general practitioner, dated 26 October 2016, Dr Salmon stated that the Worker required multi-disciplinary pain management treatment which involved, amongst other things, physiotherapy, psychological counselling, medication, graduated re-activation, optimisation and self-management, together with medical interventions such as epidural and nerve sleeve injections.<sup>177</sup> Dr Salmon also commented on the Worker's scores on the DASS-21 scale, which he described as markedly raised for anxiety and depression, a low pain self-efficacy score and moderately raised for pain catastrophizing, and with an Orebro score of 71 which correlated with a high risk of a patient remaining disabled after injury, more so than the severity of the injury itself.<sup>178</sup>
92. A further report from Dr Salmon of 2 October 2017 reported benefit of 30% reduction in symptoms after L4/5 epidural and L5/S1 sleeve injection and pulsed radiofrequency treatment, noting that although greater initial benefit was achieved this was not sustained. Dr Salmon foreshadowed a need to trial a spinal cord stimulator if further interventions and more conservative management did not assist. Dr Salmon has not seen the Worker since 2 October 2017 and did not give an opinion as to the Worker's capacity for work as at May 2018 or any subsequent date. In his report of 2 October 2017 Dr Salmon described the Worker's rehabilitation and activity capacity in general as "severely restricted".<sup>179</sup>

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<sup>175</sup> Transcript 50-51 and E1, 213

<sup>176</sup> Transcript, 61

<sup>177</sup> Dr Salmon report 26/10/2016; E1, 52.

<sup>178</sup> Transcript, 242-243; Orebo Musculoskeletal Pain Questionnaire also explained in Dr Pers' report 20/8/2019, E1, 219

<sup>179</sup> E1, 73

93. Dr Pers, occupational health consultant, saw the Worker on one occasion for the purpose of providing the Worker with a medico-legal report dated 20 August 2019. Dr Pers' opinion as to the Worker's capacity for work was

*...the worker has a limited capacity to work fulltime and to perform heavy manual work as a result of ongoing back pain*

...<sup>180</sup>

94. Dr Pers' view as to the Worker's level of incapacity resulting from the injury is therefore broadly consistent with the opinions of Dr Hardcastle, Dr Holthouse, and Professor Stokes discussed above in that he confirmed that the worker is partially incapacitated.
95. Dr Pers also commented on the jobs suggested as suitable for the Worker in Ms Zeman's reports of 30 March 2019 and 13 April 2019. It was submitted on behalf of the Employer<sup>181</sup> that Dr Pers was not a credible medical expert. I reject that submission. My assessment of Dr Pers in the witness box was that he was an objective and unbiased expert doing his best to answer the questions put to him. There was a misunderstanding at one stage between the doctor and counsel, but when that was resolved<sup>182</sup> Dr Pers answered all questions reasonably and made appropriate concessions. However, to the extent that Dr Pers' report or other evidence comments on the Worker's vocational suitability for particular jobs I would prefer the evidence of other experts with greater expertise in that area such as Ms Liddell, Ms Stewart, Ms Sutherland, and Ms Padilla, Ms Csendes and Ms Ta in the event of any conflict.
96. In relation to the administrative duties set out in Ms Zeman's report<sup>183</sup> Dr Pers expressed the opinion in his report that they would not be suitable if they involved frequent lifting and bending, which he thought it was likely to do.<sup>184</sup> However, he accepted in cross-examination that jobs involving light or clerical duties, with lifting of weights restricted to 9.1kg maximum and frequent lifting of 4.5kg could be undertaken by the Worker.<sup>185</sup>
97. Dr Pers made it clear that his opinion that the Worker was fit for light duties was contingent upon him first undergoing a "proper, contemporary movement physiotherapy, and strength and conditioning program".<sup>186</sup> This opinion is

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<sup>180</sup> E1, 222

<sup>181</sup> Employer's submissions p 25 at [123] – [125]

<sup>182</sup> Transcript, 187-188

<sup>183</sup> See at E1, 127

<sup>184</sup> E1, 224

<sup>185</sup> Transcript, 184-189

<sup>186</sup> Transcript, 184

broadly consistent with the view of Dr Hardcastle, Dr Stokes, Ms Alarcon and Ms Zeman that a work trial or graduated return to work program was necessary. Dr Pers also gave evidence that such a program is successful in 40-60% of people who are well motivated, such as the Worker.<sup>187</sup> Dr Pers also recommended a focused clinical psychology program of five to six consultations, to complete an assessment and develop a management plan.<sup>188</sup> His recommendation as to the need for psychological counselling is consistent with that of Ms Zeman, and Dr Bassett. This evidence again highlights the uncertainty involved in the Worker's current situation and supports the conclusion that the Worker's actual capacity to work too uncertain to be determined based on the available evidence.

98. Ms Alarcon, occupational therapist, conducted an occupational therapy assessment of the Worker for the purpose of these proceedings and produced a report dated 29 June 2019.<sup>189</sup> Ms Alarcon assessed the Worker at his home using the Personal Environment Occupational Performance Model which, she explained, aims to look at the person as a whole including in relation to their management of life outside an occupational context.<sup>190</sup>
99. Ms Alarcon stated that the Worker's return to work would be impacted by:
- a. Pain;<sup>191</sup>
  - b. Psychological issues including anxiety, depression and stress;<sup>192</sup>
  - c. Sleep disturbance;
  - d. Constant fatigue;<sup>193</sup> and
  - e. Reduced mobility due to pain.<sup>194</sup>
100. Ms Alarcon opined that pain is likely to be an ongoing feature of the Worker's life and he that needs support to manage it. She considered that his ongoing pain significantly restricts his future vocational options.<sup>195</sup> She also considered that the Worker required ongoing support from an occupational therapist with

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<sup>187</sup> Transcript, 189

<sup>188</sup> E1, 226

<sup>189</sup> E1, 159

<sup>190</sup> E1, 162; Transcript, 303 - 304

<sup>191</sup> E1, 167

<sup>192</sup> E1, 168

<sup>193</sup> E1, 169

<sup>194</sup> E1, 170

<sup>195</sup> E1, 166 - 167

experience in managing chronic pain in order to manage his pain and increase activity, including vocational tasks and fatigue.<sup>196</sup>

101. Ms Alarcon stated that the Worker would require training and work experience in order to fulfil the roles of purchasing and supply logistics clerk or warehouse administrator, with modifications, on a part time basis. Ms Alarcon's conclusion was that part time employment up to 32 hours per week in a suitable role, working two days and then having a day off, would be appropriate.<sup>197</sup> She considered that delivery driver was not suitable due to physical restrictions, nor forklift driver.<sup>198</sup> In cross-examination, Ms Alarcon clarified that with respect to training she was referring to job specific requirements.<sup>199</sup>
102. Given his time out of the workforce and ongoing symptoms, Ms Alarcon recommended intensive vocational rehabilitation over a period of three months,<sup>200</sup> including targeted work trial opportunities to afford the Worker experience in the identified suitable roles and to assist him to manage his psychological needs, pain management and fatigue.<sup>201</sup>
103. Ms Alarcon was cross-examined in relation to her findings. It was suggested to her that her findings were not objective because the tests she administered were completed by the Worker and were in that sense subjective. It was also suggested that her ultimate findings were unreliable because her conclusions were based in part on the Worker's self-reporting. There is no doubt that the facts upon which Ms Alarcon's report was based included information relayed to her by the Worker, including by completing questionnaire style tests. However, Ms Alarcon made it clear that she also relied upon a large number of reports, including medical reports as listed (essentially the same reports relied upon by Ms Zeman) and upon her own objective observations of the Worker.<sup>202</sup>
104. An opinion based upon information provided by the Worker, is only unreliable if it is also shown that the Worker has provided information which is important to the findings and which is likely to be wrong. I accept that the Worker has given a generally accurate account of his symptoms at the hearing and to the various medical experts based on my own assessment of his evidence and upon the accounts of the medical experts, none of whom considered that the Worker was exaggerating or given other than an honest account.

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<sup>196</sup> E1, 168 - 169

<sup>197</sup> Transcript, 304

<sup>198</sup> E1, 174-175

<sup>199</sup> Transcript, 317

<sup>200</sup> E1, 175

<sup>201</sup> E1, 178

<sup>202</sup> Transcript, 317



105. Ms Alarcon was specifically cross-examined on the basis that the information in her report about the benefit the Worker received from the initial injection of Dr Salmon in November 2016, which was recorded as being told to her by the Worker, was at odds with the report of Dr Salmon of 2 October 2017,<sup>203</sup> as well as the history recorded by Dr Hardcastle in his report of 18 August 2017<sup>204</sup> and by Professor Stokes in his report of 29 September 2018.<sup>205</sup> Ms Sutherland, who was working with the Worker at the relevant time, also noted in her report of 20 January 2017 that following the treatment by Dr Salmon the Worker had reported an improvement in his symptoms and that he was no longer walking with a limp.
106. The Worker gave evidence in relation to the benefit he received from the treatment by Dr Salmon in 2016. He said that as a result of that treatment the severe limp that he had went away and that it ‘knocked the edge off’ his pain. He went on to describe this as ‘halving’ the pain in his hip. The Worker also said that, despite this improvement, his back pain and the pain in his left leg never completely disappeared.<sup>206</sup> In cross-examination, the Worker said that he had a 30% reduction in symptoms for some months.<sup>207</sup> I accept the Worker’s evidence in this regard. It is broadly consistent with the accounts that he has given all of the various medical and rehabilitation providers he has seen since 2016, with the exception of Ms Alarcon. It is therefore more likely that either the Worker or Ms Alarcon made a simple error when the history was taken than that the Worker lied.
107. In any event, when the discrepancy was put to Ms Alarcon in cross-examination she said that, irrespective of the error, it did not make a difference to her opinion because the event in 2016 happened a long time before the date of her assessment in 2019 and because her conclusions as to functional capacity were based upon her occupational therapy assessment, not upon what the Worker told her.<sup>208</sup> I accept this.
108. Ms Alarcon’s evidence was also challenged on the basis that she had recorded that in the Supercheap Auto work trial the worker had only increased his hours to eight per week, when in fact the maximum hours he worked were about 11 per week. Ms Alarcon agreed that this error might have an effect upon her findings. However, she was not asked how it might affect her findings. The work trial was approximately three years before the date of her report and it is difficult to know how relevant it might have been, given that it was ceased at the direction of the

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<sup>203</sup> E1, 72

<sup>204</sup> E1, 57

<sup>205</sup> E1, 91

<sup>206</sup> Transcript 225-226

<sup>207</sup> Transcript, 272

<sup>208</sup> Transcript 314

Employer in favour of retraining at TAFE and that Ms Alarcon herself says that the Worker has potential, subject to rehabilitation support, for part time hours well in excess of the hours he worked at Supercheap. I therefore consider that given the time that has elapsed, the relatively small discrepancy (3 hours per week), and the availability of more relevant recent evidence, including observations, this error is unlikely to have had any significant impact upon Ms Alarcon's conclusions.

109. The attack on Ms Alarcon's evidence on the basis that she identified a lifting limit of 5kg when medical clearance was 10kg misrepresents which she said. Ms Alarcon's report actually said "No regular lifting more than 5kg".<sup>209</sup> This is broadly consistent with the evidence in cross-examination of Dr Holthouse<sup>210</sup> and Dr Pers<sup>211</sup> in relation to the question of the definition of light work, which distinguishes regular or repetitive lifting from maximum lift capacity.
110. Finally, Ms Alarcon's evidence was impugned on the basis that she did not observe the Worker undertake all of the activities of daily living upon which she reported. She said in evidence that those activities of daily living which the Worker agreed he could do she did not observe.<sup>212</sup> The evidence shows that the matters which the Worker says he can, and can't, do, have remained fairly consistent throughout his various reports to medical and rehabilitation providers over a long period of time and there is no dispute in any of the medical evidence about those issues.<sup>213</sup> Therefore this matter does not affect my assessment of Ms Alarcon's opinion.
111. There is considerable evidence to support the Worker's contention that he has not been pain free since the injury, largely in the form of contemporaneous reports to various doctors. Dr Wong was the first specialist the Worker consulted. In his report of 25 November 2015,<sup>214</sup> Dr Wong refers to the Worker complaining of "severe low back pain and pain going down the left hip." Dr Wong diagnosed the problem as relating to "a large disc herniation at L3/4 a bit more towards the left side causing a significant discogenic stenosis at L3/4 level." Dr Wong performed a left L3/4 Hemilaminectomy, a left L3/4 Microdiscectomy and a left and right L4 Rhizolysis on 12 December 2015.<sup>215</sup> Despite this surgery, the Worker

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<sup>209</sup> E1, 174

<sup>210</sup> E1, 55

<sup>211</sup> Transcript 187-189

<sup>212</sup> Transcript, 318

<sup>213</sup> For example report of People Sense of 23/2/2016 notes, at E1 266, that the Worker is independent in self care and can drive a manual car.

<sup>214</sup> E1, 39

<sup>215</sup> E1, 43, Report Dr Wong, 23/12/2015

continued to experience pain in his back and left leg and Dr Wong noted this in his report of 26 February 2016.<sup>216</sup>

112. As noted at [48] above, while Ms Zeman’s evidence was that the Worker could work full time in the roles she identified she also qualified this by saying that a graduated return to work over three months, including cognitive behaviour therapy, was required. In re-examination Ms Zeman said that if a person did not have access to a graduated return to work the same result could be achieved through a gym based program or exercise program with cognitive behavioural therapy.<sup>217</sup> Therefore, it is clear that that Ms Zeman’s evidence was that her opinion that the Worker was fit for full time work was subject to him undergoing some form of “work hardening” program. The fact that such a program is required (as also supported by the other medical experts discussed above) points to the fact that the Worker’s capacity to undertake employment remains undetermined.
113. It was submitted on behalf of the Employer that the fact that the Worker was “deconditioned” and required a return to work program in 2019 should be disregarded because, had the Worker been in employment or proceeded with the Camtech trial in 2017, he would not have been deconditioned for work in 2018.<sup>218</sup> This submission cannot be accepted because
- a. Dr Hardcastle said that a graduated return to work (or a work trial) was needed when he saw the Worker in August 2017 and again in March 2018;
  - b. Professor Stokes said that a graduated return to work program was needed in September 2018;
  - c. Dr Bassett said in 2017 that the Worker should be receiving psychotherapy from a clinical psychologist focused upon psychological and vocational rehabilitation;<sup>219</sup>
  - d. The purpose of the Camtech trial, as discussed above, was to determine whether the Worker did have the capacity to work in the lighter duties identified. The failure do engage in it does not therefore prove anything in relation to the Worker’s capacity for employment at that time;
  - e. As also discussed above, the Worker was never medically cleared to participate in the Camtech work trial, including on psychological grounds;

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<sup>216</sup> E1, 45, Report Dr Wong, 22/2/2016

<sup>217</sup> Transcript, 113

<sup>218</sup> Employer’s submissions, p 36-37 at [182] to 187] and p44 at [211]

<sup>219</sup> W6,107-108. The Worker has undertaken some sessions, including some which he self-funded, but not at the level suggested by Dr Bassett. Worker’s evidence Transcript, 227

- f. Ms Zeman, Ms Alarcon and Dr Pers all said in 2019 that a graduated return to work program with psychological counselling over a period of three months was required; and
- g. Therefore, any opinion as to what the Worker might be able to achieve in employment after a graduated return to work program or exercise conditioning program including psychological counselling or cognitive behaviour therapy is purely speculative while such a program has not taken place.
114. As I have noted above, the Worker does not rely upon any psychiatric injury and I have not based my reasons on any finding that he has suffered such an injury arising out of his employment. Nor have I found that any psychiatric condition he suffers prevents him from working as such. However, when considering, in accordance with section 68 of the Act, all of the factors which are relevant to the Worker's capacity for employment his psychological ability to engage in rehabilitation from time to time cannot be ignored. This is the case whether it is a work-related "injury", or not, or simply the Worker's underlying psychological constitution. There is evidence that the Worker's psychological constitution, while not a barrier to returning him to work, was likely to make it more difficult.<sup>220</sup>
115. The evidence points to the lack of psychological support in 2017 as the most likely reason that the Worker did not engage in the Camtech trial. Ms Stewart's reports detailing what happened in the Worker's rehabilitation between June 2017 and July 2018, discussed above, support this.<sup>221</sup>
116. The Employer submits that if the Worker had an earning capacity as at 2018 then the fact that he had chosen not to exercise it would not change the fact that he had it as at 2019. While that might be true, it is not the situation here. Firstly, as explained at some length above, I have found that the Employer has not proven that the Worker did have an earning capacity as at May 2018. Secondly, the Employer seems by this submission to be asserting that the Worker has failed to mitigate his loss.<sup>222</sup> Noting my factual findings as to what likely happened with the Camtech trial, the Employer has not in any event pleaded any failure to mitigate on behalf of the Worker and therefore, irrespective of the facts, cannot rely in this proceeding upon an argument that the Worker should be taken as

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<sup>220</sup> W6, 108

<sup>221</sup> W5, 30-31

<sup>222</sup> There is a reference in the submission at [187] to s 76(2) of the Act. This section can have nothing to do with any failure on the part of the Worker as it is about determining the cost of reasonable and necessary rehabilitation training etc. however, in context, I have taken this to be an error and assumed it was meant to be a reference to s75B(2).

having any particular capacity for employment as a result of his non-participation in the Camtech trial.

### **Conclusion**

117. On the basis of all of the medical and rehabilitation evidence referred to above there is no doubt that the Worker continues to be incapacitated for employment by reason of the injury he suffered in employment with the Employer on or about 27 August 2015.
118. For the reasons set out above, I find that the Employer has failed to prove on the balance of probabilities that at either 15 May 2018 or 28 May 2019 or at any other later time the Worker is capable of undertaking work as a logistics coordinator, mobile plant operator (specifically heavy rigid truck driver and water cart operation), warehouse supervisor, purchasing and supply logistics clerk, warehouse administrator (including warehouse supervisor), delivery driver or forklift driver, either on a full time or part time basis.

## Orders

119. I make the following orders

- a. The Employer's Notices of Decision dated 1 May 2018 and 14 May 2019 are set aside;
- b. The Employer pay weekly compensation to the Worker in accordance with the Act as for total incapacity from 14 May 2018 and ongoing;
- c. The Employer's Counterclaim is dismissed.

120. I will hear the parties as to costs and interest.

Dated this 5th day of May 2020

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Meredith Huntingford  
WORK HEALTH COURT JUDGE