

IN THE COUNTY COURT OF VICTORIA

Unrevised
Not Restricted

AT MELBOURNE
CIVIL DIVISION
SERIOUS INJURY

Case No. CI-08-00352

ROBERT PITZER

Plaintiff

v

ALFASI STEEL CONSTRUCTIONS PTY LTD

Defendant

JUDGE: HER HONOUR JUDGE K L BOURKE
WHERE HELD: Melbourne
DATE OF HEARING: 24 and 25 November 2008
DATE OF JUDGMENT: 2 December 2008
CASE MAY BE CITED AS: Pitzer v Alfasi Steel Constructions Pty Ltd
MEDIUM NEUTRAL CITATION: [2008] VCC

REASONS FOR JUDGMENT

Catchwords: ACCIDENT COMPENSATION – *Accident Compensation Act 1985* – injury to the lumbar spine – pain and suffering only.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Ms F Ryan	Holding Redlich
For the Defendant	Mr J Carmody	Minter Ellison

HER HONOUR:

- 1 This is an application for leave to bring proceedings for damages pursuant to s.134AB(16)(b) of the *Accident Compensation Act* 1985 ("the *Act*") for injury suffered by the plaintiff in the course of his employment with the defendant from November 2002.
- 2 The plaintiff seeks leave to bring proceedings for damages in relation to pain and suffering only.
- 3 The plaintiff brings this application pursuant to clause (a) of the definition of serious injury to be found in s.134AB(37) of the *Act*. There, "serious" is defined relevantly as meaning:
 "(a) permanent serious impairment or loss of a body function."
- 4 The impairment of body function relied upon in this case is the low back.
- 5 The plaintiff relied upon two affidavits and he was cross examined. His wife was also required to attend for cross examination.
- 6 In addition, both parties relied on medical reports and other medical material which was tendered in evidence. I have read all the tendered material.

The Plaintiff's Evidence

- 7 The plaintiff is currently aged forty eight, having been born on 24 January 1960. Having finished Year 10, he then completed a boilermaker apprenticeship. Over the next fifteen years he worked consistently as a boilermaker and foreman for various companies.
- 8 In February 1997, the plaintiff commenced working for the defendant, a structural steel company. His work included all aspects of steel work and he was often required to work in awkward positions. He had to lift heavy chains and other components used to fabricate steel. When a crane was being used

to lift a piece of equipment, he and other workers lifted whatever they could in order to keep the job flowing.

9 The plaintiff deposed he first noticed some back pain in 1999 when bending over a bench welding small components. He told the foreman that he was having a bit of back trouble and he was given other work that did not require that posture. From that time he had intermittent back pain but never enough to require him to see a doctor.

10 In November 2002, the niggling pain in his back increased. The plaintiff thought he would let it settle over Christmas but when he returned to work on 6 January 2003 the pain redeveloped and he again reported it to the defendant.

11 The plaintiff attended the company doctor, Dr Feben, who told him he had strained a muscle and gave him a week off work and suggested he start swimming.

12 The plaintiff returned to work a week later on light duties following Dr Feben's instructions. However, after the first hour back at work the plaintiff developed constant severe lower back pain and he sought further treatment from Dr Feben.

13 The plaintiff was then given the job of picking up steel plates from trestles with a crane and marking the plates for stud welding. This job was better for a short time but after a few hours the plaintiff was struggling again with back pain. He continued that work for a couple of days but could not cope and again advised the defendant of his difficulties.

14 For the next two or three weeks the plaintiff sat in the lunchroom reading the paper. He was then told by defendant that it was not worth coming in as there were no light duties available.

- 15 The plaintiff continued to see Dr Feben weekly and was referred to physiotherapist Mr Toh, however, he did not find that treatment very beneficial. Having been frustrated with the lack of progress under Dr Feben, the plaintiff attended his own doctor, Dr Downe, who referred him for a CT scan on 7 March 2003. He then had physiotherapy treatment at Berwick Physiotherapy Centre.
- 16 Dr Downe referred the plaintiff to Mr Roy Carey, orthopaedic surgeon, on 6 May 2003. At that time the plaintiff's back pain was very bad, radiating into his left leg. He was referred for an MRI scan.
- 17 In August 2003, the plaintiff commenced physiotherapy with Jodie Coster, at Berwick, which helped for a short while. He then saw her at Sports Spinal Health from 2 February 2004 until 20 April 2006, but stopped treatment because of his lack of progress and continual relapses.
- 18 The plaintiff also saw Dr Wood, sports physician, in March 2005, who arranged for cortisone injections. The plaintiff found they helped to relieve his back pain but only for a short time.
- 19 Dr Wood referred the plaintiff to Dr Verrills, who performed a medial spinal block in August 2005, which the plaintiff found helpful and produced significant pain relief. However, a second block a couple of weeks later was not as successful and gave the plaintiff relief for only a day. A month later the plaintiff underwent a radiofrequency denervation which gave him some temporary pain relief.
- 20 In September 2003, the plaintiff obtained a job at Arthur Engineering as a factory foreman. At that time he was on WorkCover payments. He returned to work as he could not stand staying home doing nothing.
- 21 The plaintiff's job at Arthur Engineering involved supervising up to twelve boilermakers and welders. He commenced work at 7.00 am and worked until

4.00, 5.00 or 6.00 pm. Saturday was not always an eight-hour day. With working Saturdays he could not participate in his children's activities.

- 22 The plaintiff organised the work, gave directions and worked closely with the company owner. His only hands on operation was the overhead crane. Not long after starting this job, the plaintiff had difficulties because he was on his feet so much.
- 23 The plaintiff realised within two months or so of starting work that there were serious problems with the company as it was behind on a lot of orders. He could not afford to help with any physical work because he was struggling too much. He steered clear of any welding or lifting duties.
- 24 Arthur Engineering went into liquidation at the start of 2004. By that stage the plaintiff was having a lot of difficulty with his job. After the first hour at work his back would get so bad he would have to go to the office to sit down. He would have to sit to explain drawings to workers on the shop floor, and he was not able to focus on his job very well.
- 25 The plaintiff commenced study early in 2004 at Chisholm TAFE in Dandenong, enrolling in a Certificate IV Business Management course. It was a two and a half year course with lectures at night. When he was two years into that course he started a Human Resources diploma course. Whilst he was doing both courses he was required to attend lectures two nights per week for three to four hours. He finished the HR course at the end of 2006. He then completed a Diploma in Business Management early in 2008.
- 26 After leaving Arthur Engineering in early 2004, the plaintiff had difficulty finding another job for six months because no one wanted to employ him with his injury. With the assistance of Recovre, he finally obtained work with GVP Fabricators. He commenced work as a production manager in October 2004. He agreed that this was a career improvement.

- 27 The plaintiff commenced work at 7.00 am and finished at 5.00 pm five days a week. He worked on Saturdays from 6.00 am till 2.00 pm until July 2007, and then from 6.00 am to 12.00 pm until November 2007. He took painkillers to help him move around the factory floor through the day. He had to go up and down one flight of stairs many times a day, which placed a strain on his back.
- 28 The plaintiff left GVP Fabricators because he had no quality of life on the weekends. He advised the company he was leaving because of his back condition.
- 29 In September 2007, two months before he left that job, the plaintiff described his pain as like a big knot in the middle of his back. He felt a burning sensation across the top of his hips running down both sides of his back. The pain was constant by lunchtime, and if he did not take painkillers he could not concentrate on his work. When he got home at night his back was really tight and stiff, and he showered to relieve the pain.
- 30 The plaintiff deposed he did not do much after work. He sat and watched television in an armchair with a portable back support. He went to bed at 9.30 pm, and found it difficult to sleep because he could not get comfortable, and he woke during the night due to pain.
- 31 The plaintiff's sleeping problems have worsened recently. He regularly wakes in the middle of the night with back pain and cannot get back to sleep. This happens at least three times a week and makes him very tired during the day. He feels as though he has been in a constant state of fatigue for the last two years, and he never feels fresh and alert.
- 32 The plaintiff can sit for approximately half an hour before he has to stand up and walk around and he can stand for twenty minutes before having to sit down. He can only walk for short distances for ten to fifteen minutes before his back pain increases. He avoids running.

- 33 The back injury has caused a dramatic change in his lifestyle and he is now much less active. He used to kick the football around with the children but he can no longer do so because of his problems twisting and turning.
- 34 Gardening is pretty much non-existent for him anymore, save for the odd bit of weeding or pruning and using a brush cutter. He cannot squat or bend repetitively. He cannot mow the lawn or do any garden maintenance at home, and finds the pushing motion of the lawnmower excruciating. His wife mows the lawn and maintains the garden.
- 35 Prior to the injury the plaintiff did all the landscaping and maintenance at home. He now takes four or five weekends working on something that he used to be able to do in one weekend. He can no longer do any landscaping.
- 36 When a pipe had to be installed in early 2006, his wife dug the hole, and the assistance of a plumber was required, whereas prior to his work injury the plaintiff would have done that job himself.
- 37 The plaintiff and his wife bought bicycles about six years ago. He has been able to ride sometimes on a flat area. He struggles when the children want to go to more interesting places.
- 38 The plaintiff used to help his wife with vacuuming and mopping, but he cannot do it now because of the bending required. He cannot carry heavy shopping and he has to use a trolley. The plaintiff and his wife go shopping together very rarely. He does not go out too much because it is just too difficult and it is a bit of a challenge. When they do go shopping he spends a fair bit of time sitting down while his wife shops.
- 39 The family got a dog on Mother's Day last year. The plaintiff does not walk it, but he might play with it inside the house.

40 Whilst he still goes camping with his family, the plaintiff finds it difficult. He can pitch the tent and unpack the car but he does things more slowly and carefully with assistance.

41 The plaintiff used to fish and walk for miles up the Goulburn River. He last went a couple of years ago and he found it very difficult to walk. Offshore fishing in his boat is now too hard on his back.

42 He goes kayaking with his daughter and family on Sunday. He does the father role making sure his children are all right with equipment. Occasionally he gives them a bit of help with the kayak to make sure it is ready. When he has held the kayak in the water he has had to be on his knees.

43 His children generally carried the kayak down to the river. He has carried it, but not by himself, as it is a two person job. After they race, most of the time the children take the kayak themselves. Other times they will lift it and then he might grab it and take the other end. He has carried a single kayak from the water to the car "against his better judgment".

44 The kayak is transported on the roof rack. The plaintiff generally does not put it there himself and he has one of his children give him a hand. The kayak is very light, weighing about 12 kilograms it is awkward to carry. The plaintiff thought he had put it on the roof rack by himself twice, probably, in the last six months. When tying the kayak to the roof he stands on the side step of the car door. He said he had probably tied the rope at both ends. He agreed the winch in the garage at home was a convenient way of lifting the kayaks.

45 The injury has put a lot of pressure on his wife, and she has to do a lot more around the house and take the children to sporting activities. It has also had a big effect on their sex life. They have sex infrequently because he finds it awkward and painful.

46 The plaintiff deposed his back injury has destroyed his day to day life and he thought he had aged before his time. He feels like someone in his sixties rather than in his forties. He tries to carry on with normal activities, but finds he is continually restricted with increased high levels of pain.

47 The plaintiff commenced work at Monks Harper, a metal and steel business, in November 2007 as a production manager working five days per week. He left there in June 2008 because of difficulties he encountered making changes to what he described as quite a regimented work environment.

48 After leaving Monks Harper, he obtained his current job with Major Furnace as a manufacturing manager. He is able to sit and stand when required and does not work on Saturdays. He starts work at 7.15 am, and works Monday to Wednesday to 5.45 pm, and to 4.45 pm on Thursdays and Fridays. He agreed the attraction of his present job is that it gives him weekends off.

49 The job involves planning and organising the workers, materials and the work. He is not involved in any actual physical work and he does visual checks. He does not actually demonstrate how to do the work himself in a hands on way. There is no lifting involved. It is an office bound role, and generally he does not have to move anything around the factory floor. He said he might have moved a welding screen. He said he did not have to use a trolley truck or any machinery to move things around.

50 He finds it very frustrating to see men at work who are fifteen years older than him still working in the trade, and he would much prefer to work on tools than in management. He would prefer to be on the tools where he can control the amount of time he works. He gets stressed in management and cannot leave the problems at work.

51 The plaintiff continues to suffer from constant mid lower back pain which varies in intensity. He is never free of pain, and on bad days the pain is very severe.

It gets bad particularly towards the end of the week, and by Friday he is suffering from constant severe pain and his back "has had it".

52 The plaintiff can perform his present work with some difficulty. He has not had any physical treatment since March 2006 when he last had cortisone injections and physiotherapy. He no longer does the exercises recommended by the physiotherapist, as they aggravated his back too much.

53 In October 2007, the plaintiff attended Casey Aquatic Centre for physiotherapy to his neck and shoulder. He received some light treatment for his back but he found it too painful to continue.

54 The plaintiff presently takes Voltaren 50 twice a day and Panadeine up to five times a week, although he tries to avoid painkillers. He has to take medication if he is going to a barbeque or a social event, and if he does not he cannot stand for more than ten minutes. At work he can sit down, which makes things a lot easier. He used to take Panadeine Forte but said it was annoying getting constant prescriptions, so he now takes a strong over the counter pharmacy brand daily.

Video Surveillance

55 Video footage taken on 5 July 2008 showed the plaintiff attending a dog obedience school in Berwick. For some time he was sitting on a table watching what was going on, and a number of times he patted the dog. At one stage he was walking with dogs in a group of people along a track. He was also shown in a squatting position. The plaintiff agreed he could perform all these activities, and he explained that he squatted to take pressure off his back.

56 On 6 July 2008, the plaintiff was shown attending an antique shop at 1.00 pm and returning to that same shop at 4.28 pm. He was carrying one bag. He

was shown leaning into the car. Later that day he was shown filling his car with petrol.

57 On 16 September 2008, the plaintiff was filmed at work pushing a hand trolley loaded with a couple of cardboard boxes. He said he would have put the boxes on the trolley himself, having dragged them on. The boxes would not be heavy, otherwise he would not have even attempted to move them. He said he appeared to be taking something to the main office in the factory next door. He said he did not consider this to be using a trolley truck. He said if he pushed even a 5 kilogram weight on the trolley for 60 to 70 metres it would be "starting to get really difficult". He would not have used the trolley very often, maybe a couple of times. Even if he had been asked about whether he used a hand trolley, he said that he would not have remembered this occasion.

58 The plaintiff was filmed at a kayaking event on 27 September 2008. He was seated for some time in a camping type chair and then retrieved a towel from the back of the car. The plaintiff agreed he appeared to move very freely and said most of the time. He said that when he attended similar events he would take Panadeine in the morning because he knew there was going to be a certain amount of activity moving around.

59 The plaintiff and his daughter were then shown carrying the kayak to the car. The plaintiff then attached the kayak to the roof with ties at both ends, standing on the frame of the open car door. He said whilst it was not something that happened all the time, it was not usual that he would do this job by himself.

60 The plaintiff was shown on 28 September 2008 shopping with his wife at a garden supplier in Narre Warren. The plaintiff thought he had ordered some bark and some stones. He went there very rarely for supplies, and that was the first time he had been there in a while.

61 Later that day the plaintiff was shown at his own property leaning over the side of the ute and putting tan bark in a bucket and handing it to his wife. He thought the buckets weighed maybe 2 to 3 kilograms and he was able to lift them. He was then shown on his knees in the back tray of the ute scooping up the tan bark. He agreed it probably appeared he was able to move freely. He was then shown using a broom with which he said he was sweeping it gently in, sweeping up little bits and pieces of bark. He was then shown using a vacuum cleaner which he had lifted up onto the tailgate of the ute. He said it had only weighed about 2 or 3 kilograms. He was then shown moving around the ute, cleaning out the back and reaching in. He agreed that for light work it was fairly free movement. He did not have any real problems doing it because he was standing up straight.

Evidence of the Plaintiff's Wife

62 The plaintiff's wife, Helga, swore an affidavit on 13 November 2008. She married the plaintiff in 1985. She deposed that she and her family have had to cope with the plaintiff's back pain and disability for the last five years and things are now so different.

63 Before the plaintiff's injury she and the plaintiff were a sporting active couple. In 1990 they built their house as owner/builders and the plaintiff took care of improvements and maintenance. Now they have to pay people to do those jobs, such as recently installing a water tank.

64 They both used to enjoy gardening together, and now the only thing the plaintiff can do without real pain is use a brush cutter. Occasionally he will just potter around to keep her company. She does 95 per cent of the work in the garden, which is an 800 square metre block where there is a high maintenance garden they put in before his work injury. The roses require a lot of work and she now always mows the lawn because the plaintiff cannot.

- 65 Their children, aged fifteen and thirteen, have had to adjust their lives because of the plaintiff's injury. They used to go boogie boarding at Smiths Beach at Phillip Island, but they hardly ever go there anymore because the plaintiff cannot cope with even medium sized waves.
- 66 They used to do a lot of bike riding around Berwick but this is too much for the plaintiff's back. He has become a spectator in most things and cannot even kick a ball anymore. She and the plaintiff try to go on slow walks occasionally but he can no longer do the long walks they previously enjoyed.
- 67 The plaintiff continues to be involved with her in the children's kayaking as some sort of support team, but when he attends kayaking he alternates between standing and sitting and squatting. She noted that after a two day school kayaking competition at Bendigo the plaintiff was very sore. He took some painkillers and woke up the following day in a lot of pain.
- 68 She explained that the winch was set up in the garage to lift the kayaks on and off the roof of the car so the plaintiff would not have to do it. When they went to competitions the plaintiff made an effort to help lift the kayaks on and off the car, but she deposed it was difficult for him and he was in pain afterwards.
- 69 The plaintiff cannot help around the house without significant pain. Before the incident he used to do whatever she asked him, but he can no longer vacuum or mop and cannot do anything that requires lower back strength and repetitive bending. He can bring in the washing from the line and fold it. She does the great majority of grocery shopping.
- 70 Mrs Pitzer was unable to accept a promotion at QBE Insurance because the plaintiff is unable to assist her with the domestic load due to his back and his study regime.

71 The plaintiff's injury has robbed them of spontaneity because they have to plan around his limitations. The plaintiff is usually asleep by 9.00 pm on a Saturday night and he is no longer active and energetic. Their sex life has suffered because of the plaintiff's pain. He constantly tosses and turns in bed.

72 She was worried about how they would cope as they got older as she had had three knee operations and had to get family assistance to do cooking and cleaning when she was incapacitated. The partnership nature of their relationship had gone.

Investigations

73 A CT scan of the lumbar spine carried out on 7 March 2003 showed a small left posterior protrusion of the L4-5 disc. Disc degenerative changes were worse at the L4-5 and the L5-S1 levels.

74 A lumbar spine x-ray carried out on 6 June 2003 was normal. An MRI of that date showed a central canal stenosis at L4-5, and there was a moderate posterior and left posterolateral disc bulge with effacement of both L5 nerve roots.

75 An MRI of the lumbar spine taken on 25 August 2006 showed mild to moderate degenerative changes of the lumbar spine and no evidence of neural compression. There was a bilateral recess narrowing at L4-5, however, there was no compromise of the traversing L5 nerve root. The exiting L5 nerve root was contacted but not compressed in the neural exit foramen by a mild broad based disc bulge.

Medical Evidence

76 Dr Downe first consulted the plaintiff in relation to his back injury on 6 March 2003. He noted that for the following two years the plaintiff had continued to be troubled intermittently by his non specific mechanical back pain. He reported after difficulty he had obtained two supervisor jobs and was coping

with the physical demands in December 2004. When seen on 6 February 2006, intermittent back pain was still a regular event.

- 77 The plaintiff saw Dr Downe on seven occasions between early 2006 and February 2008 and most recently on 2 July 2008. He noted that the plaintiff reported to suffer back discomfort on a daily basis together with intermittent sleep disturbance. He noted the plaintiff had expressed frustration at the impact on needing avoidance of activities at home in the garden which he would like to do but cannot because of escalation of back pain. He also noted the plaintiff's anxiety about his back complaint.
- 78 Dr Downe thought the plaintiff had a non specific mechanical back complaint which was unlikely to either improve or markedly deteriorate in the long term. He thought it was unlikely the plaintiff would progress to a crippling situation. While not clearly able to accurately predict, he tried to allay the plaintiff's fear of major progression of his back complaint and expected some mild deterioration could be expected with ageing. He did not believe surgery or any other major intervention had a current role for the plaintiff. He thought the plaintiff would be unable to do jobs that required any significant increase in back load to his current position, and he thought this was a permanent situation.
- 79 Mr Roy Carey examined the plaintiff on 6 May 2003. The plaintiff told him over the two to three years before that time in the normal course of work he had an occasional sore lower back which would settle in two or three days. He often had weeks or months between incidents.
- 80 On examination, the plaintiff complained of bilateral back pain. He told Mr Carey that he had only suffered any leg discomfort after a physiotherapy manipulation. Mr Carey found a good range of movement. The plaintiff could nearly touch his toes and extension was good, albeit slow. There were no non

organic signs. There was no evidence of nerve root irritation or conduction deficit in either low limb.

81 In Mr Carey's view, the plaintiff had non specific back pain associated with long term disc degeneration likely associated with his work. Mr Carey did not see any place for invasive or operative treatment and suggested a core stabilising clinical Pilates program. As of September 2006, the plaintiff's prognosis was for continued discomfort and disability, although with a tendency to improvement given an appropriate exercise program and the lifting of anxiety associated with litigation. In his view, the plaintiff was patently not fit for his pre injury duties. He was looking at retraining.

82 On re examination on 11 November 2008, the plaintiff told Mr Carey the pain generally felt "not a heck of a lot different". He had pain "24/7" which varied in severity but was always on his mind. He noted standing was the worst. He said his wife took a lot of the load at home, and socially he got out and about as much as possible. He described his job as a manufacturing manager and told Mr Carey he would still prefer to be fabricating.

83 On examination, the plaintiff could flex to a little past his knees. Extension was markedly restricted by increased pain. There was absolutely no evidence of neurological irritation or conduction.

84 Having seen the various investigations, Mr Carey diagnosed chronic lower back pain associated with marked multi level degenerative changes. He thought the plaintiff's current situation was attributable to the nature of his work.

85 Mr Carey thought there would be radiological deterioration. On the other hand, he would be confident, given appropriate compliance with the pain management and rehabilitation program and a change to managerial work, the plaintiff's condition was unlikely to deteriorate clinically. His prognosis was for much the same discomfort and disability into the foreseeable future.

- 86 Dr Wood, sports physician, first saw the plaintiff on 1 March 2005. The plaintiff told him his original injury occurred in 1993 when he was working as a boiler maker. The pain appeared to come on gradually over a period of time, associated with heavy lifting.
- 87 On examination, the plaintiff's main complaint was of lower back pain that was easily stirred up without any significant activity levels and would then take a couple of days to settle. He gave the plaintiff injections of the L4-5 and L5-S1 facet joints on 10 March 2005, after which the plaintiff reported a significant benefit, however, he still had a feeling of tightness and discomfort. When seen on 11 July 2005 he referred the plaintiff to Dr Verrills to carry out diagnostic medial branch blocks which were undertaken on 8 and 18 August 2005.
- 88 The plaintiff was then referred to have radiofrequency denervation of the four joints which was carried out on 6 September 2005. Dr Verrills was advised by the plaintiff on 9 October 2005 that his lower back pain had changed. It was troubling him again. Further physiotherapy was suggested. He noted that the plaintiff did not appear to have benefited from the radio frequency denervation. A further injection of the plaintiff's facet joints was carried out on 14 March 2006, after which the plaintiff reported a 50 to 60 per cent improvement, but then his back pain recurred.
- 89 Dr Verrills noted that the plaintiff had been troubled by thirteen years of lower back pain. No pathoanatomical diagnosis had been found. Neither the positive branch blocks, nor the radiofrequency denervation, had improved his situation.
- 90 The plaintiff attended Jodie Coster at Berwick Physiotherapy in August 2003. She subsequently treated him at Sports Spinal Health in Hawthorn until 17 March 2006 when it was noted that the plaintiff had not had any significant improvement in his pain levels.

91 Mr Peter Wilde, orthopaedic surgeon, examined the plaintiff on 26 September 2008. The plaintiff told him that in 1999 he developed lumbar back pain through the course of his normal work without actual incident. From then on the pain was intermittent and would settle with rest. Over time the episodes of pain became more frequent and more severe and difficult to manage until 2003 when he could no longer continue working.

92 On examination, the plaintiff complained of back pain with referral into both buttocks and hips without radiation into his leg. The plaintiff rated his pain on the visual scale at four out of a ten on a good day and seven to eight out of ten on a bad day. His pain ached all day and did not go away.

93 Mr Wilde noted that physical examination revealed a genuine man with good spinal posture and no deformity. Lumbar spinal movements were well preserved.

94 Mr Wilde diagnosed an aggravation of degenerative lumbar spondylosis without radiculopathy. He thought the plaintiff's work was a contributing factor. He thought the plaintiff's prognosis was guarded. He expected that the plaintiff would always suffer with low grade symptoms of chronic lumbar pain and stiffness. Further, the plaintiff would have to modify his activities to accommodate those symptoms to avoid further aggravation.

95 He thought the plaintiff's condition was stable and that his back injury had had a significant effect on his ability to engage in employment, social, recreational and domestic activities.

The Defendant's Medical Evidence

96 The plaintiff was examined by Mr Troy in April 2003. The plaintiff told him for about three or four years he had had back pain and that he may be sore for a couple of days. At that time Mr Troy diagnosed a two level degenerative disc change at L4-5 at L5-S1. He noted there had been a 50 per cent

improvement from the nature of symptoms he described when he went off work.

97 Mr Troy re examined the plaintiff in November 2007. The plaintiff told him that he could sit for 20 minutes but needed to fidget as the pain was across his lower back. He could stand for 20 minutes and then needed to move and sit down. He told him he was able to use a brush cutter, he did not play any sport, and that he found it difficult getting in and out of a vehicle.

98 Mr Troy concluded the plaintiff had degenerative changes in lumbar spine which dated to 1999 and continued to persist as a combination of age and work related aggravation. He considered it was multifactorial, being a combination of the discs degenerating plus the fact the plaintiff had facet joint arthropathy right sided at L4-5 and L5-S1. He thought the condition was totally organic, in spite of the fact the plaintiff had not done any physical work since January 2003. In his view the symptoms would persist as degenerative changes progressed, and the control of the plaintiff's symptoms would be readily addressed by having further radiofrequency denervation and also the use of a TENS machine.

99 Mr Brian Davie examined the plaintiff on 5 December 2007. The plaintiff told him his back problems started about 1999 when he started to get some lower back pain and he was generally careful but there was no specific injury. He continued on and the back pain was intermittent and gradually worsened, becoming quite severe about November 2002.

100 On examination, the plaintiff complained of constant lower back pain but no leg pain. On examination, there was restriction of movement and no spinal tenderness.

101 In Mr Davie's view, the plaintiff suffered from degenerative lower lumbar disc disease which had been aggravated by his occupation since 1999. He thought the aggravation was from employment in general. He did not think it

related to a period between October 1999 and February 2002 and any incident on 30 January 2003, but was related to the plaintiff's employment after 1999. He concluded there was a moderate effect from a physical cause to the plaintiff's pain and restricted movement. He thought the plaintiff's prognosis was quite good and he did not think the plaintiff could undertake any heavy manual lifting but that he should be able to continue his present job. Self management was the best treatment. He thought the plaintiff was likely to suffer some continuing back pain in the future.

Findings

- 102 Whilst Dr Downe reported that the plaintiff had previous lower back pain episodes on 24 November 1989 and 1 August 1997, Dr Downe noted that the plaintiff had been untroubled by back complaint in the intervening time interval despite heavy physical work. He considered the plaintiff's presentation in March 2003 was a new event and a cause considerably directly related to his employment.
- 103 The plaintiff said he may have told Dr Wood about the original injury occurring in 1993 when he was working as a boilermaker, but he did not know. He did not think he had any time off from work around 1993.
- 104 I accept that the plaintiff did not experience any back problems in the years leading up to the commencement of his employment with the defendant in 1997. Further, he was able to engage in full time heavy work as a boiler maker until suffering injury in the employ of the defendant.
- 105 It is not in dispute that the plaintiff suffered a compensable injury to his back during the course of his employment with the defendant.
- 106 Further, there is no dispute as to the nature of the plaintiff's medical condition which has been diagnosed by both treating doctors and medico-legal

examiners for both parties as degenerative lower lumbar disc disease aggravated by his employment with the defendant.

107 The issue therefore is whether the plaintiff's impairment from the work injury is serious; namely, whether the consequences to the plaintiff of the lower back injury when judged by comparison with other cases in the range of possible impairments or losses of body function may be fairly described as being more than "significant" or "marked" and at least as being "very considerable" – s.134AB(38)(c).

108 The term "serious" requires the impairment and its consequences to be reviewed objectively and also judged on an external comparative basis against other possible impairments not necessarily in the same category: see *Humphries v Poljak* (1992) 2 VR 129, at 170, accepted by the Court of Appeal in *Barlow v Hollis* (2000) 30 MVR 441; see in particular Chernov JA at para 29.

109 Whilst counsel for the defendant submitted the plaintiff's ability to work full time was a matter which weighed against the existence of a serious injury in relation to pain and suffering, I am of the view that the plaintiff's inability to return to his hands on trade is a serious consequence to him.

110 The plaintiff completed an apprenticeship and worked in his trade for fifteen years. Whilst in cross examination the plaintiff said that when working on the tools he would have liked a management role, I accept that after four years in such a position, the plaintiff would prefer to be on the tools again. As he explained, doing the hands on work meant that he had a completely different way of life with more freedom. Once he had finished his shift he could go home with no worries – a different situation to working in management where the stress is constant. He now works longer hours and takes his worries home, causing him considerable stress. He does not have the spare time he used to enjoy with his children when he was employed as a tradesman.

Further, he does not think that he is receiving a greater income working in management.

111 The plaintiff decided to enrol in various management courses after having a good hard look at where he was going, having injured his back. He wanted to do something totally different so he would not be in the same situation with his back again. The study involved was onerous and caused the plaintiff difficulties when sitting, as described by his wife.

112 As the plaintiff agreed, the career change could be seen as improvement but he would still prefer to be on the tools.

113 I accept the plaintiff can do his present job with some difficulties.

114 He continues to suffer from constant mid lower back pain which varies in severity. He is never free from pain and he takes Voltaren daily, together with painkilling medication when required.

115 The plaintiff has undergone cortisone injections and a medial branch bloc. Neither procedure has given him significant relief. Physiotherapy has been of little assistance in the long term.

116 The plaintiff continues to experience sleeping problems which have worsened recently.

117 The plaintiff was an active participant in activities at home whether in the house or working outside before his back injury. He is now significantly restricted in the majority of housework he can do and also as to his ability to work in the garden and undertake general household maintenance. He had previously made a significant contribution to the family in these areas and also in the building of the family home in 1990.

118 The plaintiff's involvement in sporting activities has been significantly restricted as a result of his back injury. He is no longer able to kick the

football with his children. He has difficulty riding his bike on hilly or rough terrain. He no longer enjoys long walks and he cannot engage in off shore and river fishing which he previously enjoyed.

119 The plaintiff's level of activity shown on the film is not inconsistent with his evidence generally.

120 I accept that the plaintiff has only been to Dog Obedience School once and was not shown participating in any physical activities. He merely sat around and watched and sometimes squatted to take pressure off his back.

121 Whilst shown shopping with his wife, the plaintiff was not seen to carry anything of significance. I accept Mrs Pitzer's evidence that she and the plaintiff no longer go out shopping for the day.

122 Moving a small trolley at work with a light load does not equate to hands on physical work. The gardening shown was carried out mainly by Mrs Pitzer, and, as the plaintiff explained, he could do light tasks when he was standing up straight.

123 Whilst the plaintiff was seen briefly carrying the kayak by himself and then tying it to the top of the car, and Mrs Pitzer's evidence about the plaintiff's kayaking activities was somewhat vague initially, I do not believe the tasks performed by the plaintiff were particularly onerous.

124 I accept that the consequences to the plaintiff of his lower back injury when judged by comparison with other cases in the range of possible impairments or losses of body function may be fairly described as being more than "significant" or "marked" and at least as being "very considerable".

125 Accordingly, I grant leave to the plaintiff to bring proceedings for damages for pain and suffering.
