

IN THE COUNTY COURT OF VICTORIA

Unrevised
Not Restricted

AT MELBOURNE
CIVIL DIVISION
SERIOUS INJURY

Case No. CI-08-01367

MICHAEL DAVIES

Plaintiff

v

RAIL TECHNICAL SUPPORT GROUP AUSTRALIA PTY LTD
(ACN 068 081 550)

Defendant

JUDGE: HIS HONOUR JUDGE SACCARDO
WHERE HELD: Melbourne
DATE OF HEARING: 4 and 5 March 2009
DATE OF JUDGMENT: 20 April 2009
CASE MAY BE CITED AS: Davies v Rail Technical Support Group Australia Pty Ltd
MEDIUM NEUTRAL CITATION: [2009] VCC

REASONS FOR JUDGMENT

Catchwords: ACCIDENT COMPENSATION – Serious injury application – s.134AB
Accident Compensation Act 1985 – pain and suffering – pecuniary loss – identification of
effect of injury and impairment associated with injury.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr T P Tobin SC with Mr M T Schulze	Holding Redlich
For the Defendant	Mr M R Titshall QC with Dr C A Holland	Herbert Geer

HIS HONOUR:

- 1 In this proceeding, the plaintiff applies for leave pursuant to s.134AB(16)(b) of the *Accident Compensation Act 1985* ("the *Act*") to bring proceedings to recover damages for pain and suffering and economic loss suffered by him arising out of the course of his employment with the defendant between 20 October 1999 and March 2001.
- 2 The body function which the plaintiff relies upon in making this application is the left upper limb.¹
- 3 The following evidence was adduced during the hearing:
 - (i) The plaintiff:
 - gave evidence and was cross-examined
 - tendered his Court Book ("PCB") pages 12-67
 - obtained an admission from the defendant that he was under surveillance on 30 April 2007 for 16 hours; 22 June 2007 for 15 hours, and that one hour of film was taken on that date; on 22 September 2007 for 13 hours, and that 22 minutes of film was taken on that date.
 - (ii) The defendant tendered its Court Book ("DCB"), pages 8-9; pages 14-27; pages 38-41; pages 51-53; pages 90-95D; pages 76-78; and pages 103-210.

The Statutory Scheme

- 4 The application is governed by the provisions of s.134AB of the *Act*.

¹ Transcript ("T") 4

- 5 The application is brought under the definition of “serious injury” contained in subsection (37)(a) which requires the plaintiff to prove that he has suffered a “permanent serious impairment or loss of a body function” or, alternatively, under the provisions of subsection (37)(c), which requires the plaintiff to establish that he has suffered a permanent severe mental or permanent severe behavioural disturbance or disorder.
- 6 The relevant considerations which apply to such an application are as follows:
- (a) The plaintiff must prove that he has suffered a compensable injury; that is, an injury arising out of the course of his employment on or after 20 October 1999.²
 - (b) The injury and the impairment must be permanent; that is, permanent in the sense that it is “likely to last for the foreseeable future”.³
 - (c) The plaintiff bears the burden of proof to be determined upon the balance of probabilities, and in addition to the general burden imposed by subsection (19)(a), subsection (19)(b) and subsection (38)(e), impose a specific burden on the plaintiff in relation to a claim for loss of earning capacity.
 - (d) Subsection (38)(c) provides that the impairment must have consequences in relation to pain and suffering and loss of earning capacity which, when judged by comparison with other cases in the range of possible impairments or losses of a body function, may fairly be described as being more than “significant” or “marked”, and as being at least “very considerable”.
 - (e) Subsection (38)(h) provides that the psychological or psychiatric consequences of a physical injury are to be taken into account only for

² S.134AB(1), and *Barwon Spinners Pty Ltd & Ors v Podolak* (2005) 14 VR 622, at paragraph 11

³ *Barwon Spinners*, at paragraph 33

the purpose of paragraph (c) of the definition of “serious injury” and not otherwise.

- (f) Subsection (38)(e) provides that in a claim for loss of earning capacity, that such loss must be to the extent of 40 per cent or more both at the date of hearing and permanently.
- (g) Subsections (38)(f) and (g) provide the formula to be applied by which a claim for loss of earning capacity is to be determined.
- (h) Subsection (38)(j) provides that the assessment of serious injury is to be made at the time of the hearing of the application.
- (i) Subsection (38)(b) provides that the consequences of an injury and impairment in terms of pain and suffering and loss of earning capacity are to be considered separately. Furthermore, if a plaintiff is successful in proving loss of earning capacity it follows that without the necessity to determine the consequences to that plaintiff in terms of pain and suffering, the plaintiff is entitled to leave to bring a proceeding for pain and suffering in any event,⁴ an approach which I intend to follow in the present case.
- (j) In conformity with *Barwon Spinners*, I must identify the injury and the impairment said to be produced in consequence of the injury; whether the impairment is permanent, that is, likely to last for the foreseeable future; and whether the consequences for the plaintiff are such as to satisfy the “very considerable” test contained in subsection (38)(c). I have applied the principles set forth therein in reaching my conclusions in this application.

⁴ A consistent approach of Judges of the County Court – see, for example, *De Pasquale v AW Dark Pty Ltd* [2005] VCC 158, per Judge Higgins; *Talevski v Fulop Trading Australia Pty Ltd* [2007] VCC 833, per Judge Strong; and *Patterson v Burbank Plumbing and Maintenance Services* [2007] VCC 1527, per Judge Ross.

- 7 I am required by s.134AE to give detailed reasons which are as extensive and complete as the Court would give on the trial of an action, and in doing so to disclose my pathway of reasoning in dealing with the evidence and the issues raised by the application.

Issues to be Decided

- 8 The issues to be decided in this application are as follows:
- (i) The extent of the impairment to the plaintiff's left arm, and whether the consequences to the plaintiff are such as to entitle the plaintiff to be granted leave to commence proceedings to claim damages for both pain and suffering and economic loss;
 - (ii) Whether the evidence is such that the plaintiff has isolated and appropriately identified the effect of the injury to his left arm for the purpose of allowing the analysis required pursuant to the provisions of the *Act* to be undertaken;
 - (iii) Whether in bringing this application there has been an unacceptable aggregation by the plaintiff of the injuries relied upon.

The Plaintiff's Affidavit Evidence

- 9 The plaintiff was born on 14 October 1948 in England, and migrated to Australia in 1957. He was educated at the Footscray Technical School until Year 9, and thereafter commenced an apprenticeship as a boilermaker. Having qualified as a boilermaker, he was employed in that industry for twelve years, by which time he had attained the position of a workshop foreman. During the course of his working life, the plaintiff has held positions as a truck driver, a maintenance boilermaker, an assistant manager (working onsite with Luna Park), and a site supervisor with the Western Metropolitan College of TAFE where he was employed in both teaching and training.

10 The plaintiff suffered the injury the subject of the present application on 1 February 2002, when in the course of his employment with the defendant he was pinned and crushed between the brake-head of a brake lever and the end of a wagon upon which he was working. In his affidavit of 7 November 2007, the plaintiff described his injuries and their sequelae as follows:

- On being discharged from the Western Hospital some five or so hours after the accident he was experiencing pain in the whole of his left side, particularly in his left arm, left shoulder and left hip, as well as his lower back and left leg.
- On 8 April 2002, the plaintiff returned to light duties but ceased work in July 2002 when no further light duties were available for him. Subsequently the plaintiff returned to work performing light duties in February 2003, which he describes as involving general cleaning work and the like. The plaintiff deposes that although he was only performing these activities for approximately eleven hours a week, he suffered "a lot of pain in my left arm/shoulder and hip".
- The plaintiff continues to suffer from pain on most days in his left shoulder, left arm, the left side of his neck and his left hip. His main difficulties at the present time stem from his left shoulder, arm and left hip.
- The plaintiff is left handed. He has a lot of trouble writing, and activities such as reaching down and tying shoelaces or pulling on boots or putting on his socks exacerbate his symptoms.
- The plaintiff has trouble performing any activity involving lifting or reaching with his left arm. He states that activities of this type cause a lot of pain.
- The plaintiff obtained employment in March 2005 for two months within the security control department of the Melbourne Airport. He deposed that

although these duties were light, his left shoulder, arm, neck and hip became increasingly painful.

- In July 2005, the plaintiff commenced work for Qualified Constructions undertaking heavy steel fabrication work. He deposed that these activities caused the pain in his left shoulder to increase considerably to the point where he was unable to do overhead work. He also experienced considerable pain on the left side of his neck and arm, and he kept dropping tools from his left hand, which became increasingly numb.
- The plaintiff deposed that he resigned from Qualified Constructions as he could not keep up his work, and thereafter attempted on a number of occasions to return to work with Qualified Constructions. He eventually abandoned his attempt to work with that employer:

“Because I was not able to cope. I was in too much pain in my left arm and shoulder.”⁵

- The plaintiff deposed that he commenced a gym program in 2006 but abandoned that program by reason of increasing symptoms of pain in his left arm and shoulder as well as his left hip and left leg.
- The plaintiff experiences pain in his left upper extremity or neck on a daily basis.
- The plaintiff’s symptoms are exacerbated if he tries to do too much with his left arm which causes his pain to increase considerably. The same also applies with respect to his left leg and hip. He deposed that if he remained inactive for too long his arm/shoulder and leg/hip stiffen up which results in an increase in his symptoms of pain, stiffness and soreness.

11 In a further affidavit dated 25 February 2009, the plaintiff described his ongoing symptoms in the following terms:

⁵ PCB 28

- He experiences pain on a daily basis, which is like a dull grab, and feels like someone is pinching the skin across the back of his left shoulder. When his symptoms are severe the plaintiff feels pain in his neck and the left side of his head.
- The use of the plaintiff's left arm aggravates his shoulder pain. The plaintiff is left handed and although he attempts to favour the use of his right arm, he does not possess sufficient dexterity to do so.
- In November 2008, the plaintiff commenced what were described as light duties as a boilermaker. In the course of performance of those duties, the plaintiff developed symptoms of pain in his left shoulder which radiated into his neck and down his left arm. The plaintiff describes these symptoms as being a typical pattern when he employed his left arm for "periods of time",⁶ and that the presence of these symptoms resulted in the plaintiff having to seek alternate duties.
- In November 2008, the plaintiff was employed during the Melbourne Cup Carnival directing traffic which, by reason of the variation in the duties he was required to perform meant that he could generally cope with this work.
- Following the Melbourne Cup Carnival, the plaintiff attempted to again work with Qualified Constructions. He describes an event on 19 November 2008 when he developed symptoms of difficulty breathing and a grabbing muscular pain on his left side, his back and chest which required him to be treated initially at the Sunshine Hospital and thereafter at the Bacchus Marsh Hospital. The plaintiff deposes that he was discharged from the Bacchus Marsh Hospital in the early hours of 20 November 2008, at which time the pain in his chest had significantly subsided, however he was still suffering from symptoms of pain in his left shoulder. The plaintiff has not worked since that time.

⁶ PCB 33

- The plaintiff makes use of Panadol, together with Panadeine Forte, which he uses when his symptoms are particularly bad, for example, when he has aggravated his symptoms by straining his arm. He describes his need for Panadeine Forte as occurring “a couple of times a week”.⁷
- Whilst the plaintiff deposed that he was able to perform most light housework, he stated that activities which he undertook around his house which involved reaching up with his arms, such as hanging out the washing, caused him pain in his shoulder.

12 It was submitted to me on behalf of the defendant that the affidavit by the plaintiff in support of this application did not describe the symptoms suffered by the plaintiff in his left arm with sufficient particularity to enable me to make a finding as to the level of impairment associated with that injury when compared with the various other injuries suffered by the plaintiff as a result of the crushing injury he sustained.

13 I have set out with reasonable particularity the complaints made by the plaintiff in his affidavits as to symptoms which are present in his left arm and shoulder. Whilst I accept that the plaintiff's two affidavits repeatedly describe the effect upon the plaintiff of injuries other than the injury which is the subject of the present application, the affidavits in my view give a clear picture of the ongoing problems the plaintiff is experiencing with his left arm which involve pain exacerbated by any repetitive forceful or extreme movement of the arm.

14 In an affidavit dated 8 August 2008, Mr David Kington a friend of the plaintiff, deposed as to a simple welding job performed for him by the plaintiff and described the weight of materials involved as ranging from between 4.5 kilograms to 13 kilograms.

⁷ PCB 35

15 An affidavit dated 26 February 2009 was filed on behalf of Gregory Laheney, the director of Qualified Constructions Pty Ltd. He deposed that he had employed the plaintiff on approximately four occasions since the accident to perform light work which did not involve lifting. He described the plaintiff as having an excellent work ethic, but stated that the plaintiff could not work for long periods, and could only undertake light forms of work. He further deposed that the plaintiff would not be fit to work within the metal-fabrication trade.

The Plaintiff's *Viva Voce* Evidence

16 In the course of cross-examination, the plaintiff stated that he had attended a physiotherapist once a fortnight, and that the treatment he received varied and involved treatment mainly for his shoulder and neck, and sometimes the left side of his body and the left arm.⁸ He conceded that he suffered from intermittent left-sided neck and thoracic pain, together with pain at the back of his left shoulder and his left side.

17 He stated that during the last six months he had had no treatment other than physiotherapy, and that he currently took medication in the form of Panadol and, when his pain was at its worst, Panadeine Forte. With respect to other conditions not related to the injury the subject of the application, the plaintiff conceded that he took medication for reflux and for high blood pressure and that he had attended the Sunshine Hospital on a number of occasions for chest pain. He accepted that the maximum amount of Panadeine Forte which he had taken during the period between the incident and the present date was three Panadeine Forte tablets per week.⁹

18 The plaintiff conceded that he had a capacity to drive,¹⁰ that he could perform activities such as taking rubbish to the tip¹¹ and that since the accident he had

⁸ T 18

⁹ T 20-24

¹⁰ T 27

constructed a cellar-door frame and a cat cage using the extensive range of specialist equipment accumulated by him in the course of the practice of his trade.¹²

19 The plaintiff conceded that since his injury he had been employed controlling traffic at Flemington racecourse, and that he had applied for extra work with that organisation, but that his application had not been accepted.¹³

20 The plaintiff accepted that following his injury his initial complaints involved a complaint of pain in his left chest, his back, his arm and his head.¹⁴ He denied that he did not start complaining of left arm pain until September 2002 and said that he had made the complaints of the presence of left arm pain “right from the start”¹⁵ but that at that time he was also complaining of pain in the abdomen, the chest, the neck, the shoulder, the back and also of headaches.

21 He described his present condition in the following terms:

“Mainly is (sic) I suffer in the shoulder, the arm, the neck, a little bit down the side and the right groin is under medication.”¹⁶

22 The plaintiff was shown a video which he agreed depicted him emptying plastic bags from the rear of a utility into a hopper at a tip and on another occasion delivering and unloading the frame referred to in the affidavit of Mr Kington. Whilst the plaintiff accepted that the video taken of him whilst at the tip depicted him as moving freely, he said that the activity involved him in unloading plastic bags of rubbish, and that he did not throw anything over his shoulder.

23 I am of the opinion that:

(i) The video did not reveal the plaintiff as engaging in any activity or

11 T 28
12 T 30
13 T 32
14 T38
15 T 39
16 T 40

movement inconsistent with the evidence he had given both in his affidavits and during cross-examination;

- (ii) The content of the video did not in any way discredited the plaintiff or assist the position put by the defendant that the plaintiff's symptoms were not as he had described them.

24 In re-examination, the plaintiff stated that following his discharge from the Sunshine Hospital immediately after the accident he attended his general practitioner, who referred him to the Bacchus Marsh Hospital, where he was treated with injections, and that on his discharge from hospital he was very sore in the area of his left shoulder and his back. The plaintiff described his present symptoms in the following terms:

"If I'm not doing anything I can pretty well do most stuff. I still get a bit in the back and the back of the shoulder there and up the neck but if I'm not doing a great deal of anything that is sort of out of the ordinary I'm pretty right.

Q: Are you pain-free?---

A: No.

Q: If you do something what happens?---

A: If I do something it all depends on what I do. If I go to pull something it will hurt. If I lift up it will start to hurt but that's – stop and it will go down again."¹⁷

25 The plaintiff further stated that on the occasions since the accident when he has attempted heavy work the pain in his arm and shoulder gradually increased and extended to his neck, and that his symptoms continued to increase in intensity until he would lose feeling in his arm and drop his tools.¹⁸ He stated that he had not been able to identify any job which he was capable of undertaking on a regular basis without having to take time off by reason of his symptoms.¹⁹

¹⁷ T 58. The plaintiff's evidence on this point was clearly a reference to the symptoms in his shoulder and arm.

¹⁸ T 61

¹⁹ T 62

The Plaintiff's Medical Evidence

- 26 On the day of the accident the plaintiff presented at the Western Hospital where he gave a history of having been struck on the left side by a large weight. In the course of that attendance, the plaintiff complained of his left arm feeling numb, and described feeling a tingling sensation when the weight hit.
- 27 Subsequently the plaintiff presented at the Emergency Department of the Western Hospital on 12 February 2002 complaining of left pleuritic pain after coughing. He gave a history of using Digesic for pain. Examination revealed tenderness over the left lateral ribcage and around the lumbar area on the left side. A chest x-ray is described as revealing the presence of two fractured ribs.²⁰
- 28 Dr S G Bronchinetti, a general practitioner, provided an undated report²¹ in which he describes the plaintiff as presenting on 5 February 2002, having been crushed at work on the previous Friday. At that time Dr Bronchinetti described the plaintiff's main problem as being tenderness over the lateral ribs, with a slightly tender left upper quadrant of the abdomen. He describes the plaintiff also complaining of a painful left side of the neck at the site of the insertion of the biceps muscle.
- 29 In December 2002, Dr Bronchinetti describes the plaintiff as presenting with pain in the groin, at the site of his rib fracture, and improving neck pain. In February 2003, he described the plaintiff as suffering from significant psychological stress related to his work injury, and associated headaches. In May 2003, he reports the plaintiff presenting for treatment for a small left inguinal hernia, and in September 2003, he noted:

²⁰ PCB 54

²¹ PCB 62

“Still having left shoulder neck pain trying physiotherapy treatment for this, an x-ray of the cervical spine showed some degenerative change.”²²

30 At the time of providing his report, which is undated but does not refer to any examination undertaken after September 2003, Dr Bronchinetti expressed the opinion that:

“Mr Davies’ injuries have largely settled. He is having some pain on neck, left shoulder and left ribs after physical activity but this is not severe now.”

31 He continued:

“Mr Davies is no longer fit for duties requiring heavy or repetitive lifting, or other heavy physical work. He is fit for light work, i.e., office type work.”²³

32 In a report dated 12 September 2004, Mr Russell Miller, orthopaedic surgeon, stated that the plaintiff was referred to him by his general practitioner on 6 May 2002. He reported that he had reviewed the plaintiff on multiple further occasions since that time, and that when he last reviewed the plaintiff on 5 May 2003, the plaintiff reported the presence of ongoing left-sided chest pain and tenderness, but no other significant symptoms. The plaintiff was reported by Mr Miller as stating that his neck, shoulder and arm pain had largely resolved.

33 When this history was put to the plaintiff in cross-examination, he said that he did not believe he had told Mr Miller that his symptoms of neck, shoulder and arm pain had largely resolved. He conceded that he might have been getting better at that stage, and stated that he would not have used the term “resolved” but would have said that it had “gone down. It wasn’t as painful”.²⁴

²² PCB 62
²³ PCB 63
²⁴ T 42

34 In a report dated 14 August 2008, Dr Miller expressed the opinion that the plaintiff suffered:

“A significant injury to his left shoulder and arm”

and that he had diffuse symptoms:

“and probably has rotator-cuff pathology and symptomatic arthritis in the acromioclavicular joint. He has symptoms of chronic pain syndrome. The prognosis is only fair.”

35 Dr Miller opined further:

“I note that Mr Davies has problems with the left shoulder and may well have rotator-cuff pathology and may benefit in the longer term from surgery of the shoulder in the form of arthroscopic or rotator-cuff repair and excision of the AC joint.”²⁵

36 He concluded:

“Mr Davies has not been able to return to significant physical work on an ongoing basis. He has established disease in his neck, probably his shoulder, lower back and left hip, and I do not anticipate a return to significant physical work involving repetitive arm actions, repetitive bending or lifting, and a limited return to part-time or casual work, for example, as he does now at the racecourse as a traffic supervisor would be appropriate. He could not return to work as a boilermaker.”²⁶

37 Mr Martin Spitzcek, a physiotherapist, has provided two reports dated 21 November 2007 and 26 February 2009. In those reports he describes the plaintiff’s complaint in 2007 as being left-sided neck and thoracic pain, intermittent left-sided neck pain, headaches, and left-arm pins and needles when aggravated. He noted that the plaintiff’s symptoms were easily aggravated with repeated lifting, reaching, gripping and sustained neck postures. It was Mr Spitzcek’s opinion that the plaintiff had suffered a serious crush injury, and that whilst he had recovered well, he was likely to be permanently unfit to perform his pre-injury duties for long periods of time.

38 In his second report, Mr Spitzcek reported the presence of intermittent left-sided and thoracic pain which was aggravated by lifting, reaching, gripping

²⁵ PCB 52
²⁶ PCB 52

and sustained neck postures. The opinion expressed by Mr Spitzeck at that time was essentially the same as that expressed in his earlier report.

39 Dr N Madhanpall, general practitioner, in a report dated 3 June 2008, stated that he first consulted with the plaintiff on 3 March 2008, at which time he noted complaints of left chest, shoulder, hip and arm pain, left lower back pain and neck pain as well as pain in the right groin. He opined that the plaintiff was not capable of performing unrestricted work and that he was restricted in his abilities to perform work involving repetitive movements of bending, pulling, pushing or any other repetitive actions. He stated that the plaintiff was also restricted in the amount of time for which he was able to sit or stand.

The Defendant's Medical Evidence

40 In an opinion dated 4 July 2007,²⁷ a Medical Panel convened pursuant to s.56(6) of the *Act* expressed the opinion that the plaintiff had suffered a soft-tissue injury to his neck and left iliac crest, but that his employment was not in fact a significant contributing factor to any injury to his back or left arm.

41 On 31 March 2003, Dr Chris Baker, occupational physician, examined the plaintiff and obtained from him a history of left-sided rib pain, left-hip pain and pain over the left side of the neck. On examination, Dr Baker noted that lateral flexion of the neck to the right caused increasing pain in the neck region, the presence of the full range of movement in the right arm, and the presence of a full range of movement in the left arm. He noted, however, that in the upper ranges of the movement of the left arm there was pain caused in the left side of the ribcage. Dr Baker opined that the plaintiff had suffered fractures of the tenth and eleventh ribs on the left side, a paralytic ileus of the abdomen, and bruising of the left iliac crest of the pelvis. He did not opine as to the presence of any injury of the left upper limb.

²⁷ DCB 11

42 In January 2004, Dr Baker again assessed the plaintiff for the purpose of determining his current medical condition and work capacity. On that occasion he obtained a history that the plaintiff was suffering from left-sided neck and shoulder symptoms, pain in the right groin and the oesophagus. He reported the plaintiff as stating that physiotherapy had helped the left side of his neck and his left arm had recovered.²⁸ In contrast to that history, Dr Baker describes the plaintiff as complaining at that time of the presence of left-sided neck and shoulder symptoms. Further, he describes an examination of the plaintiff's left arm as revealing discomfort in the upper ranges of movement. In expressing his opinion, whilst Dr Baker concluded that the plaintiff suffered an injury as defined under the *Act*, he expressed no opinion as to the extent of the injury to the plaintiff's left upper arm.

43 In a report dated 11 January 2004, Mr Douglas Ritchie, orthopaedic surgeon, noted the plaintiff was attending a chiropractor for treatment for his low-back, neck, left arm and left shoulder. He reports an examination of the plaintiff's neck and shoulder as revealing no abnormality, and expressed the opinion that the plaintiff's recovery was almost complete, and that he was largely fit for normal duties.²⁹

44 In a report dated 11 October 2006, Dr Afif Hadj, surgeon, expressed the following opinion:

"You asked me to opine on the left shoulder, left arm, neck, left hip, diabetes, as well as right groin. The left shoulder pain radiates into the left side of the neck and into the left arm. Therefore those three may be considered together, and I am of the view that that accident did cause the injury, and I would suggest that liability be accepted for that."³⁰

²⁸ DCB 25

²⁹ The discrepancy between the finding on examination by Dr Baker of the presence of symptoms in the left shoulder and that by Mr Ritchie of no abnormality calls into question the thoroughness of Mr Ritchie's examination given the coincidence in timing between the two examinations. In the circumstances I do not find Mr Ritchie's conclusions persuasive.

³⁰ DCB 72

45 Whilst in the body of his opinion Mr Hadj commented further as to other symptoms with which the plaintiff presented, those comments are of no relevance to the present application.

46 Mr Michael Shannon, orthopaedic surgeon, examined the plaintiff on 26 April 2007, in the course of which he noted the history that the plaintiff, in 2005, “started to drop things”, and it seems that the major problem was his left arm and hand.³¹ At the time of his examination, Mr Shannon expressed the opinion that there was a possibility that the plaintiff’s left-arm symptoms were radicular in origin, but he noted the presence of near normal function in his neck and shoulder, and the absence of any evidence of radiculopathy objectively. Mr Shannon opined as to the plaintiff’s fitness for suitable employment, commenting:

“I note that a vocational assessment has been performed and suitable occupations have been identified which include product assembler, general plastic production, machine operator, delivery driver, meter reader, product examiner and rental salesperson.

I believe that he is capable of all these occupations provided that there is a restriction on heavy lifting or strenuous repetitive use of the left arm.”

47 In a further report dated 4 February 2009, Mr Shannon obtained a history of ongoing pain in the left side of the neck radiating to the left trapezius muscle, which pain increased with the use of the left arm and radiated to the elbow, resulting in the hand becoming weak with associated loss of grip strength.

Mr Shannon opined:

“He describes ongoing pain including left-sided headaches, left-sided neck pain, left-shoulder and arm pain, left-back pain and left-hip pain, but physical examination in all of these areas is virtually normal and the investigations available are also normal.

It is of interest that he had previously essentially unexplained back and hip pain.

I am unable to comment on his hernia.

Mr Davies does not show any evidence of exaggerated physical signs, and seems quite genuine in his complaints of ongoing pain, but a

³¹ DCB 92

number of specialists have seen him, and a number of investigations have been performed, and indeed physical examination is essentially normal."³²

48 He concluded his opinion as follows:

- "(1) He sustained fractured left ribs and may have sustained soft-tissue injuries down the left side of his body.
- (2) The crushing injury could have precipitated all of these injuries, but I cannot find evidence of ongoing significant injury.
- (3) He describes significant restriction of work capacity and daily activities.
- (4) He complains of an inability to sustain employment as a boilermaker, although no specific reason for this is identified by either examination or investigation.
- (5) I certainly think that he is capable of full-time employment and at worst he would need to avoid strenuous repetitive use of the left arm, heavy lifting and work above shoulder level. However, there is no specific clear diagnosis to justify these restrictions.
- (6) There is no evidence that he is particularly active."³³

49 It is clear that in expressing his opinion, Mr Shannon accepted the plaintiff as a genuine historian who was not exaggerating his physical symptoms and that he considered, as the result of the physical incapacity suffered by the plaintiff to his left arm, he was not fit to engage in heavy lifting or strenuous repetitive use of that limb.

50 Mr Peter Kudelka, orthopaedic surgeon, examined the plaintiff on 19 May 2006. His report includes an observation that the plaintiff complained of weakness and of dropping objects in his right hand. This history appears to be completely at odds with other histories provided by the plaintiff in which he has consistently complained of the presence of weakness in his left hand. In the circumstances, I have difficulty accepting the accuracy of the history reported by Mr Kudelka, and accordingly I am reluctant to, and do not, place any weight upon the opinion expressed by him.

³² DCB 95C

³³ DCB 95D

Findings

51 It was submitted on behalf of the defendant that the plaintiff made no consistent complaint of injury to his left arm until September 2002 and that his WorkCover certificates prior to that time were limited to an incapacity associated with fractured ribs.³⁴ It was further submitted that the plaintiff presented to his medical practitioners as “a package” and was reported upon as such, and that in these circumstances I cannot be satisfied to the requisite degree of the nature and extent of the injury to the plaintiff’s left arm.

52 Whilst there is some force in the submission made on behalf of the defendant, ultimately I am satisfied that the combined effect of:

- the evidence given by the plaintiff; and
- the medical evidence to which I have referred;

is such that it establishes the subject accident as the cause of the injury to the plaintiff’s left arm and identifies with sufficient particularity the effect of the injury to the plaintiff’s left arm for the following reasons:

- I consider it unsurprising that, in the presence of a crush injury which fractured a number of the plaintiff’s ribs, the presence of symptoms in the plaintiff’s left arm may not have assumed significance until the plaintiff’s rib fractures settled.
- A report by the plaintiff of numbness and tingling in the left arm when he presented at the Western Hospital immediately following the accident provides some, albeit limited, evidence of an injury to the left arm, as does the plaintiff’s description of the mechanism of the injury.³⁵
- Dr Hadj describes the plaintiff’s left shoulder pain as radiating into the left side of his neck and left arm and accepts the accident, the subject of this application, as being causative of those symptoms;

³⁴

T 78

³⁵

PCB 23

- Having had the opportunity of assessing the plaintiff in the course of his evidence. I formed the impression that the plaintiff did not seek to exaggerate his symptoms, made appropriate concessions and was ready to concede, to his potential detriment, the presence of a number of co-existing problems to those which were present in his left arm.³⁶ I have already commented that the video surveillance which was shown in the course of the application did nothing to influence my view that the plaintiff was other than a truthful witness. In the circumstances I am satisfied that the plaintiff was a reliable witness and I accept his evidence as to the symptoms and incapacity associated with the injury to his left arm.
- Although I accept the submission on behalf of the defendant that some of the medical reports tendered in the case do not identify the plaintiff's incapacity with sufficient particularity to allow me to form an opinion as to the consequences to the plaintiff of the injury to his left arm, the medical opinions of
 - (i) Mr Shannon who identifies the injury to the plaintiff's left arm as precluding him from engaging in heavy lifting work, work above shoulder level and work involving strenuous or repetitive use of the left arm;
 - (ii) Mr Miller, who first saw the plaintiff in May 2002 and most recently opined as to the plaintiff's condition in August 2008, and who describes the plaintiff as having suffered a significant injury to his left shoulder and arm.

are consistent in identifying the plaintiff's left arm as giving rise to a significant problem and are persuasive when considered in the context of the plaintiff's evidence as to his incapacity which I accept.³⁷

³⁶ See in particular the evidence at T 16 and T 17

³⁷ Mr Miller suggested that the plaintiff may in the future require surgery in the form of a rotator cuff repair and excision of the AC joint. I interpret his conclusion that the plaintiff would not be fit to return to physical work involving repetitive arm actions, repetitive bending or lifting as identifying the

- Although Mr Miller, in his report dated 14 August 2008, commented that the plaintiff “has symptoms of a chronic pain syndrome”, the medical evidence to which I have referred in detail does not suggest the presence of a significant emotional condition which influences the plaintiff’s presentation. Indeed the psychiatric opinions which have been tendered support the proposition that any symptoms of depression from which he suffers are secondary to his incapacity for work.³⁸
- Largely there is a consistent theme in the medical reports from the examiners who have assessed the plaintiff that he presents as a truthful historian and that the injury to his left arm has resulted in the plaintiff being precluded from heavy physical work and being restricted to light duties.
- Although when attending medical examinations the plaintiff has made repeated complaints of the presence of symptoms in areas other than the left upper limb (which constitutes the injury and incapacity relied upon in this application), I am of the view that the plaintiff could not be reasonably criticised for providing such a history. If the plaintiff is a truthful historian (as I find him to be), he would be expected to describe to doctors examining him or treating him, all the symptoms from which he suffers. Whilst this may make the task of identifying the effect of the injury to his left upper limb more difficult in an application of this type, the description by the plaintiff in his affidavit as to the symptoms from which he suffers in his left upper limb are largely consistent with the complaints made by the plaintiff to the various medical practitioners as to the problems that he experiences in his left upper arm.

53 The question which I am required to consider is whether or not the impairment of the plaintiff’s left upper limb is such as to constitute an impairment which is

³⁸ plaintiff’s left arm symptoms as being a significant factor in the plaintiff’s incapacity for work. See the report of Dr Chong dated 5 June 2006; Dr Kenny dated 2 September 2005; Dr Duke dated 9 December 2003 and Dr Shan dated 16 April 2007

more than significant or marked and is at least very considerable. Whilst it is clear that the plaintiff suffers from symptoms in various areas of his body which are independent to those which are present in his left upper limb, I am satisfied that the evidence establishes that the symptoms from which the plaintiff is suffering in his left upper limb are exacerbated by repetitive movement, movement involving strenuous activity and movements which involve stretching or reaching. I am further satisfied that the symptoms which the plaintiff suffers in his left arm have had the effect, when considered in isolation from any other symptoms from which he suffers, of precluding the plaintiff from working in his trade as a boilermaker and from working in the metal fabrication trade, and this represents a significant loss to the plaintiff both with respect to his enjoyment of life and his self-esteem. Having regard to my acceptance of the plaintiff's evidence as to the ongoing nature of the symptoms which are present in his left arm and the incapacity in the plaintiff's ability to engage in the activities of day-to-day life associated with those symptoms, I am satisfied that by reason of the incident of 1 February 2002, the plaintiff has suffered an impairment of body function which satisfies the definition of "serious injury" as laid down by the *Act*.

54 In making this finding, I am satisfied that the plaintiff's injury has largely stabilised, and that there is no real prospect of significant improvement in the plaintiff's condition having regard to the period of time which has now elapsed since the accident and the stability of the plaintiff's symptoms. In this regard, I am particularly cognisant of the repeated comments made by various medical practitioners that the plaintiff is permanently incapacitated from performing unrestricted work which provides further support for the fact that the plaintiff's injury has stabilised.

The Plaintiff's Claim with respect to Pecuniary Loss

- 55 I am satisfied on the basis of the medical evidence to which I have referred, when considered in the context of the evidence given by the plaintiff, that the plaintiff's injuries are such that they preclude him from work as a boilermaker.
- 56 Whilst the plaintiff gave evidence that he had not been able to identify any work which he could do on a regular basis having regard to his symptoms, the plaintiff's history of employment prior to his injury was diverse and included activities such as employment as an assistant manager at Luna Park, in which he was in charge of all maintenance requirements and also dealt generally with the public, and undertaking teaching and training at the Western Metropolitan College of TAFE.³⁹
- 57 Whilst I accept that the plaintiff has been precluded from heavy physical work by reason of his injury, I do not accept that the effect of the injury has been to totally incapacitate the plaintiff. Rather, I accept the opinion of Mr Shannon which is consistent with the general tenor of the medical assessments in this case that the plaintiff is fit for employment which avoids heavy lifting or strenuous repetitive use of his left arm.
- 58 The rehabilitation reports commissioned by the defendant⁴⁰ make repeated mention of employment fields in which the plaintiff would be fit to work, which included a structural steel or welding supervisor,⁴¹ a car park attendant,⁴² customer service,⁴³ warehouse supervisor,⁴⁴ product examiner⁴⁵ and meter reader,⁴⁶ all of which I am satisfied the plaintiff would, on the balance of probabilities, be likely to be able to perform, notwithstanding the impairment which he suffers in his left upper limb.

³⁹ PCB 21
⁴⁰ DCB 103–210
⁴¹ DCB 199
⁴² DCB 202
⁴³ DCB 153
⁴⁴ DCB 161
⁴⁵ DCB 166
⁴⁶ DCB 177

61 I will hear counsel as to the orders sought and as to the question of costs.

60 I propose to make an order that the plaintiff have leave to commence a proceeding to claim damages limited to compensation for pain and suffering arising out of the injury suffered by the plaintiff in the course of his employment on 1 February 2002.

Conclusion

59 Given the many examples of "suitable employment" which I am satisfied the plaintiff is fit to perform, I am not satisfied that the plaintiff has established that by reason of the impairment of the function of his left upper limb he has suffered a loss of earning capacity of sufficient magnitude to satisfy the test that is laid down by the provisions of the Act.