SUPREME COURT OF QUEENSLAND

CITATION:	*Klein v SBD Services Pty Ltd* [2013] QSC 134
PARTIES:	**TIMOTHY JAMES KLEIN** Plaintiff **And** **SBD SERVICES PTY LTD** Defendant
FILE NO/S:	S271 of 2011
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Rockhampton
DELIVERED ON:	30 May 2013
DELIVERED AT:	Supreme Court Rockhampton
HEARING DATE:	29-30 April, 1-2 May 2013 Final submissions received: 9 May 2013 (Defence), 15 May 2013 (Plaintiff)
JUDGE:	McMeekin J
ORDER:	Judgment for the plaintiff in the sum of $289,502.13.
CATCHWORDS:	TORTS – NEGLIGENCE – LIABILITY – whether the alleged incident occurred – where the identification of the object is in issue – where the defendant accepts liability if the object is found to be over 100kg TORTS – NEGLIGENCE – LIABILITY – where both parties submit a *Blatch v Archer* inference should be drawn TORTS – NEGLIGENCE – LIABILITY – CREDIT – where plaintiff knowingly deceived medical practitioners – where the plaintiff claims a conspiracy theory on the part of the defendant TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – where the defendant claims contributory negligence on the part of the plaintiff

TORT – QUANTUM – where the true extent of the injuries claimed are in issue – to what extent should post accident employment be considered

Coal Mining Safety and Health Act 1999

Workers Compensation and Rehabilitation Act 2003

ASIC v Hellicar [2012] HCA 17

Bankstown Foundry Pty Ltd v Braistina (1986) 160 CLR 301

Blatch v Archer (1774) 1 Cowp 63

Hopkins v WorkCover Queensland [2004] QCA 155

Koven v Hail Creek Coal Pty Ltd [2011] QSC 51

Kondis v State Transport Authority (1984) 154 CLR 672

Malec v J C Hutton Pty Ltd (1990) 169 CLR 638

Negric v Albion Scrap Steel Pty Ltd [1978] Qd R 362

Phillips v MCG Group Pty Ltd [2013] QCA 83

Purkess v Crittenden (1965) 114 CLR 164

Seltsam Pty Ltd v Ghaleb [2005] NSWCA 208

Smith v Topp [2003] QCA 397

*Watts v Rake*1960) 108 CLR 158

COUNSEL	Mr G Crow SC with Mr S Deaves for the plaintiff
	Mr G O'Driscoll for the defendant
SOLICITORS:	Macrossan & Amiet for the Plaintiff
	Roberts Nehmer McKee for the Defendant

[1] **McMeekin J**: The plaintiff, Timothy James Klein, claims over $1.9M in damages for a back injury with, at most, a 6% permanent impairment which he alleges was suffered on 1 February 2009 in an incident at his workplace. He was then employed by the defendant, SBD Services Pty Ltd, as an underground coal miner.

[2] Liability and quantum of damages are in issue.

[3] This judgment is far longer than is typical of a claim for damages for a back injury arising from a single incident. I have felt constrained to address the many arguments advanced. The judgment has been arranged as follows:

1. The Liability Issue – [5]
2. The Defendant's Arguments – [9]
3. Assessment of the Plaintiff – [10]
4. Common Ground - [22]
5. The Plaintiff's Version of Events – [27]
6. The Plaintiff's Case on the Identity of the Object – [59]
7. The Plaintiff's Difficulties – [66]
8. Rejection of the Conspiracy Theory – [76]
9. The *Blatch v Archer* Point – [94]
10. Conclusion on the *Blatch v Archer* Point – [112]
11. An Incident Occurred on 1 February – [115]
12. The Weight Involved Exceeded 100Kgs – [121]
13. The Plaintiff Succeeds – [135]
14. Contributory Negligence – [136]
15. Quantum – the Issues – [162]
16. The Army Medical Records – [166]
17. The Plaintiff Recovers – [177]
18. The Significance of the Past History – [183]
19. Nature of Injury – [191]
20. The Plaintiff Seeks Employment – [199]
21. The Significance of the Kraus –Weber Tests – [206]
22. Statements of Fitness [215]
23. Continued Employment in the Mining Industry – [216]
24. The End of his Mining Career – [225]
25. Significance of the Post Injury Work and Attendance History – [231]
26. Conclusion as to the Effect of the Subject Incident – [246]
27. Pain & Suffering – [266]
28. Past Economic Loss [273]
29. Future Economic Loss – [290]
30. Loss of Work Benefits – [298]
31. Future Treatment Costs – [302]
32. Special Damages – [306]
33. Summary – [308]

[4] I am satisfied that the plaintiff should succeed to a modest judgment. On the balance of probabilities I am persuaded that:

(a) the plaintiff suffered some injury on 1 February 2009 in the course of his employment;
(b) the defendant should be held liable for the consequences of the injury;
(c) there should be an apportionment of 25% for contributory negligence;
(d) the consequences have not been as serious for the plaintiff as he claims; and
(e) damages should be assessed at $289,502.13 after allowance for apportionment and refund.

LIABILITY

1. Liability Issues

[5] The plaintiff's case as now pleaded is that on 1 February 2009 he suffered from "intense pain in his lumbar spine" when "required to assist in placing a heavy metal object, believed to be a block pin which weighed in excess of 180 kilograms or a shearer stop or a rack bar by pulling upon the heavy metal object with a stretch band in order to move the heavy metal object".[1]

[6] The defendant denies that the plaintiff was ever required to move a weight in the order of 180 kilograms. The defendant concedes that if a weight in excess of 100 kilograms was moved by the plaintiff on that date then it is liable for any injury thereby caused.

[7] The defendant also puts in issue that any injury was sustained as the plaintiff alleges.

[8] If it is found that the plaintiff did move such a weight and thereby suffered injury then the defendant contends the plaintiff should be held in part responsible for the damage caused.

2. The Defendant's Arguments

[9] The defendant submits that by reason of the combination of the following matters the plaintiff's claim should be rejected:

(a) No witness is called to support the plaintiff;

(b) The witnesses who were called who worked on that shift gave evidence that no such work was likely to take place. Those witnesses were unable to contradict the plaintiff as they were not, so far as they were aware, present at any time he suffered injury;

(c) No witness was called who had ever seen such a task performed;

(d) All the defendant's witnesses said that if an object of the weight claimed by the plaintiff was to be moved it would be moved by mechanical means and machinery was usually available;

(e) All miners are required to complete inductions in which they are taught safe manual handing techniques and principles. The weight limits advised are in the order of 20 to 25kgs and not remotely close to 180kgs. It was thus inherently unlikely that any supervisor would instruct a workman to attempt to move a 180kg weight;

(f) The confusion in the plaintiff's case as to the object that he moved – originally described as a "block pin" and pleaded to be such but now asserted to be a very different object, a shearer block;

(g) The improbability of a supervisor failing to record or report an event of the type that the plaintiff described, that is, of a man struck so seriously with back pain that he dropped to his knees, had difficulty standing for five minutes, and who then was required to spend approximately an hour resting in a drift runner and then only able to continue with extremely light work;

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[1] See para 4 of the Second Further Amended Statement of Claim

(h) The improbability of others in the crew failing to learn of such a dramatic event from either the plaintiff or the two witnesses who are alleged to have observed it when they next met up as they would normally have at the end of the shift; and

(i) The plaintiff was not a witness of credit in that:
    (i) He admitted to deliberately lying about his condition to a medical practitioner (Dr Maligat), and two employers;
    (ii) his claims of a conspiracy concerning the conduct of a manager, Mr Jones, involving an intention to conceal the occurrence of the incident, destroy records and avoid him going onto WorkCover benefits were highly improbable.

3. Assessment of the Plaintiff

[10] It is necessary to reach a view on the plaintiff's credit.

[11] The plaintiff was not an impressive witness in the sense that I felt I could derive some comfort from his manner in the witness box. He clearly came to court determined to argue his case. At times he could not be restricted to the questions asked of him. His intention was to persuade, not just to relate what may have happened. To an extent it seemed to me there was at least embellishment. And he has come to believe things that I am sure are not true, for example the conspiracy against him with a reconstruction of his conversation with Mr Jones, which I will address later.

[12] As well the plaintiff has been active in seeking out evidence to explain what it is he says he was moving. Hence his knowledge now is not the same as his knowledge at the time of the incident. There is the possibility, at least, that his testimony has been affected, consciously or unconsciously, as a result.

[13] There are other features of the evidence that are troubling.

[14] As will be seen I reject the conspiracy theory.

[15] The plaintiff told medical practitioners that he had had no prior episode of back pain. That was not accurate. Records that I will come to suggest a six to eight month history of back pain, albeit some years before.

[16] Moreover, the plaintiff said that he had no memory of approaching Mr Szepanowski at Tieri, a potential witness. When asked directly the plaintiff did not deny knowing who Mr Szepanowski was. His evidence suggested he knew very well who he was. On the plaintiff's account the person he recalled approaching at Tieri was "the other person apart from my supervisor, who was working with me that day. And I asked him about his brother, or the other supervisor who was working with me that day."[2]

[17] The reference to the "brother" is interesting. The time sheets show that there were brothers employed at the mine site. They were Matthew and Stephen Todd.[3] Neither worked on the shift on which the plaintiff was injured. The plaintiff's answer

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2 T2-23/5

3 See Ex 5

suggests that both did. At best for the plaintiff this is a complete and inaccurate reconstruction.

[18] Mr Szepanowski evidently had a lively memory of his meeting with the plaintiff. He recalled the plaintiff working with him on one shift at North Goonyella and meeting up during that shift. That seems to be the only shift on which they worked together. It is evident that he had no knowledge of any injury being sustained that day. He recollected the plaintiff approaching him subsequently. He was surprised to hear of an injury being suffered.[4]

[19] I have trouble accepting that the plaintiff could forget approaching a fellow miner and asking whether he could assist him in presenting his case. Mr Szepanowski was quite an imposing figure – of substantial build and height and I would have thought not easily forgotten. That the approach occurred I have no doubt. That indicates that the plaintiff assumed Mr Szepanowski was present at the time of performing the subject work. If he was, then the injury event simply could not have been as the plaintiff describes. Nor could the work have occurred. If he was not present then it is at least puzzling that the plaintiff thought that he was.

[20] There are other difficulties which I will mention in the course of these reasons.

[21] These difficulties cause me to be wary of accepting the plaintiff's account of things. I do not think that the plaintiff was actively dishonest. But he has come to believe things that are inaccurate and he came to argue his cause. This has led to embellishment and reconstruction. It seems to me wise to proceed on my perception of the probabilities, looking for support in the objective facts and the inferences that seem to me to be reasonable.

4. Common Ground

[22] The plaintiff was born on 30 October 1975 and so he is presently aged 37 years. He was 33 years at the time he alleges he was injured. He was not, by then, a novice miner having over three years experience, albeit on and off, in underground work.

[23] It is common ground that the plaintiff was working an overtime shift underground at the North Goonyella coalmine on 1 February 2009. It is common ground that at the time he was working with a group of men who were not his normal crew. It is common ground that the work on which he was engaged was assisting in a pan line construction.

[24] It is necessary to say something about the technique of underground mining. At North Goonyella Coal Mine the coal was won by means of a coal shearer. A coal shearer is a mechanical device that cuts the coal from the coal face. The shearer runs along a pan line. A series of "pans" forms the pan line. The pan line can be of a substantial length and the one in question was about 300 metres long. There is a "main gate" end where the coal is cut and a "tail gate" end to which the cut coal is taken. There were some 170 such pans on the pan line in question.

[25] Along the side of the pan line runs a series of rack bars. The rack bars are approximately 800 millimetres long, are made of metal and have what are called "receptive slots", at least in one of the descriptions, into which the shearer's drive

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4 T3-35/2-14

cog fits, thus providing a track along which the shearer drive moves. Estimates of the weight of a rack bar varied from 38.5kg to 100kg.

[26] In order to stop the shearer running off the track electrical stops were in place but in case of their failure a mechanical stop was put in place at each end of the pan line being a large metal object fixed to a rack bar. The object could be fixed to a rack bar by means of pins or by welding. Such an object might be considered to have an "L" shape. This was known as a shearer block.

5. The Plaintiff's Version of Events

[27] After going underground the plaintiff says that his crew split up into two groups, one heading to the tail gate end of the pan line and his group to the centre of the pan line. There were only three men in his group – a supervisor, himself and another man. One of their tasks was to move "an object, it looked like a rack bar, with a cube block on the end of it".

[28] The plaintiff did not know the name of the object or its purpose. The man the plaintiff identifies as the "supervisor" told the plaintiff that men on the previous shift had dragged the object from the tail gate end. The plaintiff said that the object had been left halfway along the panline. Their task was to drag it from there to "five panline". To do so a strap or sling was used. It had about "a good metre and a-half, maybe close to two metres in just excess length". Various methods were used to attempt to move the large object but eventually the supervisor adopted the following technique:

> "We're going to try and put that on the record. You're saying that he had the sling in both of his hands, he was facing away from the block pin?-- That is correct.
>
> He was leaning forward and he then used his arms to push the - or pull the sling from behind his head to above and forward of his head; is that what you're doing?-- That is correct, sir.
>
> Slow down and keep going with what you were saying?-- Okay. So he was facing towards five panline, looking, like, down the panline towards the main gate section. He actually moved it. He probably moved it about that far …
>
> How far is that?-- Maybe 20 centimetres, 25."[5]

[29] I have the benefit of a demonstration in the witness box. The description may not be so clear without it. The plaintiff says that he adopted the same technique with the following result:

> "So I took his advice and I also adopted that position and I went to pull up, and I was pulling it the wrong way initially, and I was pulling up like this … and it wasn't moving. And he stopped me and he said, "Tim, you've got to pull out and push out with your legs." So I readopted my position and I took his advice and I pulled with all of my heart, with all of my strength,

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5 T1-36/49- 37/6

> and I probably pulled an intensity for about maybe five, 10, 15 seconds, I wasn't going to give up, I just thought if I had the correct technique I also would be able to move it like he demonstrated prior to me. What occurred was I felt this - this disconnection, like - like that … and this just explosion of pain just ripped through the lower part of my back. And I lost my breath and I was in severe shock. I basically fell. Basically right where I was standing I fell. It was a raw - it was a raw pain. Out of 10 it was a 10. I hadn't received pain like that, yeah, in a long, long time."[6]

[30] Mr Klein says that, after the event, his "supervisor" told him that the weight of the object that they were endeavouring to move was 180 kilograms.

[31] There is no certainty as to who might be the "supervisor" that the plaintiff has in mind. The only identifying feature the plaintiff can offer is that the man had an "afro" style hair cut. A Mr Lane was called by the defendant. He seemed to have a good recollection of the men working at the time. He said that the only person who may have had hair that came close to fitting such a description was a Mr Brett Robinson but he had what he would call curly hair and more of a perm than an afro style. Mr Szepanowski identified Mr Robinson as having an afro style hair cut. Mr Robinson was not employed by the defendant but was a long haul fitter and worked as a subcontractor to the defendant. He was not considered by the defendant to be a supervisor and was not in charge of the men on any shift. The two men present who were considered supervisors, and when I say present I mean working on the shift in question, were Mr Dennis Dent and Mr Rod Sceiolka. Neither of those men was called by either party.

[32] The plaintiff asserts that after he fell down following the onset of the pain that he had described he was in a crouched position with his hands in front of him to support himself. He was in such a position for four or five minutes. His "supervisor" was talking to him. He was alarmed and the other worker present was "very concerned". The plaintiff was "in shock" and had "trouble breathing". After about five minutes the plaintiff tried to stand and thought his supervisor may have assisted him. As he straightened his back he had what he described as a "stabbing explosion of pain" which went up his spine and down his legs. He told the other workers that he could not stand and then he rested for a while. He sat on the edge of the pan line facing the coalface for upwards of thirty, forty minutes to forty-five minutes. He claimed that there was conversation between the three men as to their background in the mines. The plaintiff says that at the commencement of this conversation of some forty-five minutes one of the men asked whether anyone had done a "SLAM". He said that a "SLAM" is an acronym for "Stop, Look, Assess, Move".[7] Each man said that they had not done one and "he", presumably the supervisor, said "we need to do our SLAM straight away".

[33] The plaintiff says that the supervisor then "took out his SLAM (which would appear also to be a special notebook provided for the purpose as well as the process) and he led us through the SLAM, and we detailed the hazards and in the SLAM we put in

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6 T1-37/11-27

7 More accurately an acronym for "Stop, Look, Assess, Manage" not "Move": cf. T3-92/5; 4-30/10-30 and T1-44/45

controls in place outlining the injury and – and basically why that injury shouldn't have occurred."[8]

[34] The plaintiff claims that each man filled out a "SLAM" and they were given to the supervisor. He explained that the supervisor was required to hand the SLAM documents to the supervising manager, a Mr Philip Roache.

[35] After resting for forty minutes or so the plaintiff said that he "went back to reasserting some of the rack bars in place" with a sledgehammer. He said that his back was "unleashing its pain again" and he told his supervisor he couldn't do this anymore. The men he said then went to a "drift runner" – a vehicle – and they sat there for an hour. Other people were in the back of the drift runner. They had been with another work party. He believes that those men were permanent employees at the mine. He said that during this hour they did not talk about his injury.

[36] After the hour in the drift runner the plaintiff claimed that they then went back to work and he was given a light job with a spanner and a screwdriver. What tasks the other men did is not described.

[37] The plaintiff describes his back at this time as "very painful".

[38] The plaintiff was conscious of a need to report the incident. He says that he made arrangements with his "supervisor". He says that at the end of the shift they entered the drift runner and he was told to go up in the drift runner and to wait for the "supervisor" as the supervisor would report the matter to Mr Roache. He says they went up in this drift runner together. The "supervisor" got out first. The plaintiff does not know where he went and he spent some twenty-five minutes looking for him but could not find him.

[39] He says that he then went to the SBD Services office and attempted to find Mr Roache but he was not there. He said that there were no managers present. He then went to the bathhouse. He spent some twenty minutes under a hot shower endeavouring to relieve his pain. He then returned to the SBD office but no one was there. He then left the site. He says that that night he camped in the back of his campervan lying on the floor as he apparently had insufficient fuel to make it back to Proserpine where he lived at the Proserpine Hotel.

[40] A statement was tendered that had been prepared by Mr Klein's solicitors and on his instructions (Ex 7). In that statement Mr Klein says:

> "I was very concerned about the sustaining of my injury at that time as well because I knew that a lost time injury (LTI) could cost me my job. The defendant's managers had addressed us prior to my injury in blunt terms that there had been too many injuries and if there were any more, none of us would have a job and the defendant would lose its contract."[9]

[41] The statement relates that on the following morning when the plaintiff woke up he found it took him "about ten minutes to get out of bed due to the back pain having intensified to an unbearable degree". He then drove from the petrol station at Nebo Junction to Proserpine. He was on his normal days off at that stage. He rang Mr

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8 T1-44/45

9 See para 66

Dominic Jones, the defendant's project manager, and reported the injury. While the terms of the call are in issue the fact of the call is not.

[42] The plaintiff consulted Mr Josh Sanders, a chiropractor, on 2 February 2009 at which time he says he had severe back pain and had difficulties standing upright. Mr Sanders arranged for an x-ray which was performed that day. On the same day the plaintiff consulted Nicole Alexandrou, an acupuncturist and received treatment from her. Between 2 February and the 4 February the plaintiff also consulted a Mr Jim Stace, a chiropractor then resident near Proserpine, for further treatment. He again sought treatment on 4 February from Mr Sanders and further acupuncture treatment from Ms Alexandrou. The plaintiff tendered receipts evidencing his attendances on Mr Sanders[10] and Ms Alexandrou.[11]

[43] Mr Klein returned to work on the night of 4 February. He said that at that stage the intensity of his pain had subsided to a small degree. He presented his shift supervisor, Scott Myers, a Westoff employee, with a certificate of incapacity from Mr Sanders. He said that Mr Myers directed him to perform hosing work on the surface and to rest if needed.

[44] Mr Sanders's certificate of incapacity recorded that he had seen Mr Klein on 2 February 2009 and he was suffering from "an irritated disc at L5/S1 injured because of too much load with associated lumbar spine para spinals, stiffness and limited ROM[12]". He thought that further treatment would be required at that time, certified that Mr Klein was fit for light duties and said that he should be able to resume work in a "couple of weeks". The certificate was dated 4 February 2009.

[45] An incident report was eventually prepared. It was completed by, and in the handwriting of, Mr Craig Lane. The plaintiff spoke of the circumstances in which it was completed. He thought it was completed on his last shift on the night shift but was not sure of that. He says that he was asked questions by Mr Lane as to how the injury occurred and what they were doing and that they "went into details" and then Mr Lane filled out the form.

[46] The form shows the injury suffered as "irritated disc in back". The job number is identified as is Mr Roche as the supervisor, although it is common ground that he was not underground at the time. In the section headed "Describe What the Worker Was Doing at the Time and Personnel Involved" the form reads: "pulling block pin (L shape) from 170 to 5. Tim Klein and 2 others". In the section headed "How Did the Incident Occur" it reads: "struggly (sic) to pull with a stretch band tried pulling a different way and hurt back". Under "Basic Cause of Accident": "Job Factors – inadequate work standards/procedures". Under "Immediate Action Plan": "Change the way the crew pulled the block pins (use mechanical lifting techniques)". Under "Action Plan. Including Responsibilities, Timing and Review": "Review Manual handling techniques and procedures". The supervisor has not signed the report, as it requires, nor has the managing director. No date appears on it.

[47] On the plaintiff's account Mr Lane enquired as to the identity of the plaintiff's supervisor at the time and the plaintiff said that he wasn't clear on the name of the

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10 Ex 23 - dated 2/2, 4/2, 11/2, 9/2, 13/2, 20/2, 23/2, 2/3, 16/3 and 25/3

11 Ex 24 - dated 2/2, 4/2 and 20/2

12 Presumably "range of movement"

supervisor but, consistently with his evidence, identified him as the "guy with the afro hair".

[48] According to the plaintiff's statement the incident report was completed with Mr Lane "because of the slow recuperation" of his back injury. The plaintiff claims to have spoken to Mr Lane for about half an hour in order to provide the information for the completion of the incident report. His statement reads:

> "Craig Lane admitted that my injury should never have happened and that proper precautionary measures should have taken place to limit the physical attempt at moving the heavy metal object. He asked why the L shaped pin as I described it at the time to him wasn't originally moved by an Eimco machine to its required location. I replied that the pan line had already been constructed. We agreed that another crew on another shift had obviously not completed the job properly."[13]

[49] This alleged conversation was not put to Mr Lane nor did his evidence suggest that such comments were made.

[50] The plaintiff sought further chiropractic treatment from Mr Sanders on the 9th, 11th and 13th February 2009. He may also have seen a Mr Stace for chiropractic treatment. He says that when he returned to work for his next "tour", that is the next four day shift, he was still experiencing "a lot of discomfort and limited range of movement". The plaintiff says that he was directed by Mr Jones to take a "tour" off. After completing his next four days on he continued to receive chiropractic treatment from Mr Sanders and had a further acupuncture treatment from Ms Alexandrou. He also consulted Mr Stace. He says that Mr Lane "assured" him that the defendant would assist him with reimbursement of his out of pocket medical expenses "which were increasing". He subsequently took one tour off.

[51] After eight days he returned to work on the 24th February 2009 again on light duties and on the surface. He continued to have back pain.

[52] At some point the project manager, Mr Jones, said that he received a telephone call from the plaintiff's chiropractor who told him that the plaintiff was "getting better" and that the chiropractor thought that he should be driving loaders.[14]

[53] The plaintiff says that on 25 February 2009 one of the owners of the defendant, Steve Bizacca, took him and another surface worker aside and told them that there was "no more work for us". He mentioned his back injury to Mr Bizacca and claims that Mr Bizacca told him that "he did not think my back was up to driving machinery underground and as there was no more work on the surface he would have to let me go". His statement relates that Mr Bizacca told him that the present contract did not have long to go and that there was no more work available after the present contract. He says that he replied, and I assume that it was his belief at the time, that he "understood differently from his managers" and that he the plaintiff was aware that the defendant was advertising for experienced underground miners for future long term contracts in the Bowen basin. He says that he told Mr Bizacca that if he was dismissed it would be an unfair dismissal because of his back injury

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13 Ex 7 para 82

14 T3-89/55

despite he having tried to do the right thing in regard to keeping the incident "silent" so that he could keep his job.[15]

[54] Mr Bizacca was not called to deny this conversation. However Mr Jones gave evidence that the contract at North Goonyella came to an end at the end of February 2009 and 70 workers lost their employment. Presumably the defendant's records confirm this claim as Mr Jones was not challenged on the point.

[55] The plaintiff was informed that he had lost his employment with the defendant by Mr Jones on 28 February 2009. He had further chiropractic treatment from Mr Sanders on 2 March 2009 and he was referred to Dr Konrad Kangru, a general practitioner practising in Proserpine.

[56] The plaintiff consulted Dr Kangru and applied for workers compensation benefits on 3 March 2009.

[57] A medical certificate was supplied by Dr Kangru to WorkCover. It identifies the cause of injury as "pulling 180kg L pin along pan line on 01/02/2009".

[58] I have set out the plaintiff's account in great detail because the defendant disputes that anything like this incident occurred. The plaintiff did not call any witness to support his account of what occurred. No documents were produced which identified the task that he described as taking place. No witness was produced who had ever seen such a task performed. Every witness who was called who had some experience with underground mining indicated that the movement of such an object in terms of its dimensions and weight would be done by mechanical means.

6. The Plaintiff's Case on the Identity of the Object

[59] The defendant says that the plaintiff's case on the identity of the object he moved has varied and that an adverse inference should be drawn.

[60] In a sense it is right to say the case has changed. As originally pleaded the plaintiff's case was limited to a plea that he was injured when placing a "block pin" with the described weight with no reference to a shearer stop or a rack bar as now pleaded. I assume that was done to accord with the description in the incident report. But I do not think the variation in the case assists the defendant.

[61] It appears that the plaintiff had not worked on the installation of a pan line previously and so his unfamiliarity with the name and purpose of the object that he says that he was moving may be explicable. It is evident that his legal advisors had a deal of trouble understanding what the object might be that the plaintiff described. Hence to cover the possible bases the pleading has been amended. But that does not mean that the plaintiff has changed his account.

[62] While consistent reference was made in the opening and in questioning in chief of the plaintiff to a "block pin" it is clear that a block pin, at least as understood by the other miners called, was not the object meant by the plaintiff. No witness called accepted that a block pin could have anything like a weight of 180kgs. The weight of such objects is more in the nature of 8-10kgs. Nor are they an "L shape".

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15 See para 95 of ex 7

[63] The one more or less contemporaneous document that was tendered was the incident report. It was completed by Mr Lane probably on 6 February 2009, five days after the alleged incident. There the object is described as an "L shaped block pin".

[64] When handed two photographs, which became exhibits 25 and 26 the plaintiff was asked whether either of the photographs showed "the actual block pin that you were helping to haul … or … something vaguely similar."[16] The plaintiff identified the shearer stop at the tailgate end of a drive as "very similar" to the object that he was pulling but he thought the one that he was pulling on at the time he says he suffered his injury "was more in a cube, a very cubed block, a very even cubed block". He accepted the proposition that "the end rack bar with a block on the top of it" shown in exhibit 25 he understood to be a "tailgate block pin".[17]

[65] In closing submissions Mr Crow of Senior Counsel, who appeared with Mr Deaves for the plaintiff, conceded that the only object that would meet the weight and description that the plaintiff gave of the object that he alleges that he moved, and which does exist and was potentially present on the pan line, would be an object described as a "shearer stop" fixed, probably by welding, to a rack bar.

7. The Plaintiff's Difficulties

[66] That there are several difficulties facing the plaintiff going to both liability and quantum is clear. But they are not all of his making.

[67] That is so because the defendant inexplicably has lost all of its records of the work being performed at the time. So this is not a case of the defendant being able to prove through contemporaneous documents that the plaintiff was not doing the work, or ought not to have been doing the work, he claims. Nor is it a case where it would be safe to draw an inference against the plaintiff from the fact documents are missing that ordinarily should be available if the plaintiff's claims were true.

[68] That loss of documents is puzzling. The defendant is a contractor. To get paid it must produce to its employer (here the North Goonyella Coal Mine) documentary evidence of the work performed each week. Detailed records are normally kept. None can be found.

[69] As well it seems to be agreed[18], as the plaintiff asserted, that the workers are required to assess each task they are called on to perform, particularly, one would think, if they were out of the ordinary, and make a record of the assessment and then hand the record in to the supervisor. No "SLAM" is produced for the work done that night. That of course would be consistent with the work not being done. But no "SLAM"s at all are produced to suggest any other work was being done. As mentioned the plaintiff claims that each worker completed a SLAM in his presence but after the event.

[70] Further when a worker reports an incident a report is required to be prepared and an investigation carried out. It is common ground that the plaintiff did report the

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16 T1-42/5

17 T1-42/25

18 See Mr Roache's evidence: T4-30/20

incident. A report was prepared here (Ex 1), albeit some days later, but no investigation was carried out.

[71] Oddly no recording of the report was made in the defendant's injury statistics as it should have been. Mr Jones explained that once an incident report had been obtained by someone such as Mr Lane it was then given to the safety manager of the company who is located in Wollongong and that person then prepares the statistics for the company. This injury did not make the company's statistics. Mr Jones was unable to explain why that may have occurred but he personally had nothing to do with the system. It was not put to him that he had in any way intercepted the report from Mr Lane or prevented it reaching the safety manager in Wollongong.

[72] Because no investigation was carried out there was no gathering of the usual statements from witnesses. No eye witnesses have been identified.

[73] The defendant called evidence from two men who, according to wage records, worked on the shift that day with the plaintiff, Mr Inkson and Mr Szepanowski. Neither man observed any event of the type that the plaintiff described or had heard of any such event occurring. Neither man knew of any injury being sustained by the plaintiff (or anyone else) in the course of the shift. Neither man had ever seen a shearer block being moved manually along the pan line.

[74] Each side sought to draw inferences from the others evidential problems. On the plaintiff's side it was argued that the loss of documents, and the absence of any recording of the incident in the statistics, was part of a deliberate conspiracy to pretend the incident never occurred. The purpose was to hide from the defendant's employer, North Goonyella Coal Mine, that there was such a significant injury event and to avoid there being any record of lost time injuries.

[75] On the defendant's side it was sought to be argued that the lack of any supporting evidence along with many other improbabilities in the plaintiff's case, combined with the concession that the plaintiff had actively sought to mislead employers and doctors, justified dismissal of the case.

8. Rejection of the Conspiracy Theory

[76] There are many difficulties with the plaintiff's case. However I should immediately observe that given the plaintiff's unfamiliarity with the crew that he was working with on the day in question it is unsurprising that he cannot identify any witness. And as I have mentioned he was unfamiliar with the installation of a pan line.

[77] But substantial difficulties remain. The plaintiff's conspiracy theory requires that Mr Jones, the man to whom the plaintiff says he reported the incident the day after it occurred, immediately set about concealing the occurrence of the event. On the plaintiff's account the conversation that took place on 2 February in which he reported his injury plainly had that connotation.[19]

[78] Mr Jones denied that he said anything to the plaintiff to suggest that the incident or injury ought to be concealed.[20] I accept that denial. Quite apart from Mr Jones' demeanour, which was impressive, it seems to me highly improbable that he, a

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19 See T1-47/15-40

20 T3-81/20; and for the conversation see T3-78/8 – 79/12

senior manager, would behave in such a way. If discovered his subterfuge might conceivably put his own career at risk. I should record that Mr Jones was a quietly spoken man of mature years, plainly both experienced and intelligent, now not connected, apparently, with the defendant.

[79] There are two significant points of difference with the plaintiff's account. One is that on Mr Jones' recollection the plaintiff was not clear that the injury had been sustained at work. The other is that there is no suggestion of concealing the injury at all. Rather Mr Jones' recollection is that it was the plaintiff who was reluctant to report the matter in writing.

[80] There are other difficulties with the conspiracy theory quite apart from Mr Jones' direct testimony contradicting the plaintiff.

[81] One point is that Mr Jones' account has the advantage of plausibility. It is common ground that the plaintiff supplied a medical certificate from a chiropractor. Mr Jones says that he told the plaintiff to get "a proper certificate and get a proper analysis of what is wrong with your back by a WorkCover doctor" so that Mr Jones could obtain "the proper certification and what we can do with you".[21] That is what you would expect a responsible manager to say. That there was some form of discussion along these lines is common ground.

[82] The plaintiff drew the inference that he was being told not to go on WorkCover. I reject that as an accurate interpretation of what occurred. Mr Jones explained in his evidence that there were protocols and procedures that he was required to follow by his employer and that a chiropractor's certificate was not able to be acted on. He was not challenged on that.

[83] Conversely there are implausibilities in the plaintiff's version. Mr Jones must have realised the near impossibility of concealing the event of such an injury, particularly if it was serious. If the plaintiff did in fact tell him of the detail of the event, as the plaintiff claimed but Mr Jones denied, then he would have known that on the plaintiff's account there were at least two witnesses to the event – both of whom somehow had to be kept quiet. And one was a supervisor who presumably would potentially put his own career in jeopardy for not doing his duty in reporting, but hiding, the incident.

[84] Significantly Mr Jones did not act in a way consistent with a man who intended to conceal. His actions included telling the plaintiff to see a WorkCover doctor; telling Mr Lane to obtain from the plaintiff a report on the incident; taking the plaintiff out of normal work and placing him on the surface doing light work and in doing so putting the plaintiff under the supervision of a Mr Myers, an employee of another subcontractor. As Mr Jones said the whole site knew that the plaintiff had some sort of injury.[22]

[85] For Mr Jones to have intended to conceal the injury he must also have somehow intercepted the incident report prepared by Mr Lane, to whom he referred the plaintiff, to prevent it reaching the injury statistics. This scenario was not put to either man. And the incident report was not lost – it was disclosed by the defendant and put into evidence by the plaintiff. As Mr Jones said it was not his responsibility

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21 T3-79/25

22 T3-80/10

to have the reports put into the system. At the very least he and Mr Lane had to conspire together to prevent the report going into the system, and the unidentified supervisor had to be complicit in the cover up, or so Mr Jones would have had to assume. All this is highly improbable.

[86] The plaintiff contends all this was done to keep the defendant from having a lost time injury. It is common ground that it is helpful to the defendant to have a clean record in that regard.[23] But there is one significant problem. As at the date of the report on 2 February there is no suggestion that the plaintiff wanted to have time off. It is common ground that the plaintiff wanted to keep working and common ground that he had his chiropractor ring at some point to say that he was recovering and should be allowed to operate a loader underground. The certificate produced did not require time off. Thus, on the plaintiff's own account, there was no need for any concern by management, at this stage, that this was to be a lost time injury.

[87] The dismissal of 70 men at the same time as the plaintiff's employment came to an end undermines substantially the notion that the plaintiff was singled out for special discriminatory treatment because of management concerns that he was complaining of a back injury sustained at work.

[88] For these reasons I reject the plaintiff's account.

[89] Rejection of the plaintiff's account does not necessarily mean acceptance of Mr Jones' account, at least in its entirety. Nor does it follow that the plaintiff's credit is destroyed. That he has come to believe things over the years that are inaccurate reflects a reconstruction of events that is all too common and quite consistent with a genuine sense of grievance.

[90] As well it seems clear that in some respects the plaintiff was accurate in his evidence and in one respect, at least, Mr Jones' account was shown to be probably wrong. As to that latter point Mr Jones thought that the incident report was not completed for some weeks. His impression was that the plaintiff had been requested by our "safety guy", as well as Mr Jones, to supply such a report and had refused. The evidence does not support that. The plaintiff thought that the report was completed towards the end of his first tour back on duty. Consistently with that claim is a WorkCover record of a conversation between a WorkCover employee and Mr Lane (presumably "our safety guy") where Mr Lane seems to have told the employee that an incident report was completed on about 6 February.[24] Mr Lane did not assert that there was any reluctance by the plaintiff to give a report.

[91] It seems very likely that Mr Jones' recollection as to the timing of the giving of the report must be wrong. He may be relating when he first heard about the report. And there is no independent evidence to suggest any continuing reluctance on the part of the plaintiff, assuming some initial reluctance, to give a report, quite the opposite.

[92] Thus, like the plaintiff, Mr Jones too has come to believe things that are inaccurate yet the defendant advances him as a witness of credit. And I accept that Mr Jones was honest. But the relevant point is that the analysis does not require a finding of dishonesty on the part of the plaintiff.

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23 Ex 48 - where the defendant puts zero lost time injury frequency at the forefront of its "Critical Success factors"

24 Ex 49 – entry 6/3/09

[93] Hence there was a report of an injury to an appropriate manager on 2 February and a written report completed on 6 February. For reasons that are difficult to follow no investigation took place as there should have been.

9. The Blatch v Archer *Point*

[94] Both sides argue that an inference should be drawn from the failure by the other to call evidence.

[95] The defendant is able to produce wage records which show which men were working on the shift in question. On the plaintiff's account the group of workers broke into two sections, the other section moving some distance away to the tailgate end of the pan line.

[96] Obviously on the plaintiff's account there are at least two witnesses who, one would expect, are unlikely to have forgotten the dramatic injury event that he describes, if his account is accurate. Neither man was called and, on the plaintiff's case, he cannot identify them.

[97] A loss assessor was engaged by the defendant and called to give evidence, a Mr Drew Takken. He explained his efforts to track down those men that the wage records indicate were on the shift.

[98] Mr Takken agreed that of the eighteen people listed on the shift roster (Ex 6) six were located and statements were taken, two were found but on follow up to obtain statements could not be relocated, three witnesses can not be located at all and five were located but no statements were taken. There were two further witnesses who were found but not contacted.

[99] Of the three witnesses who could not be located one was Mr Rodney Ciesolka, one of the men that the defendant considered to be a supervisor.

[100] Of the six who were located and who provided statements two gave evidence in the defendants' case, Mr Conrad Inkson and Mr Lou Szepanowski. Mr Inkson gave evidence by telephone. He said that he had no recollection of the plaintiff, had not been given a photograph and so could not recall him but had no knowledge of any work of the type that the plaintiff described and in which he suffered his injury.

[101] Mr Szepanowski gave evidence in person. He said that he had been approached by the plaintiff in recent times when they had met casually and was asked to be a witness. He said that he had told the plaintiff that he had not witnessed any event. He confirmed that in his evidence, that is that he saw no work of the type described by the plaintiff being performed. His belief was that he had not worked with the plaintiff in the sense of having worked with him at the main gate end of the pan line. As I have mentioned he had normally worked in a different crew to the plaintiff. The plaintiff said that he had no recollection of approaching Mr Szepanowski. Mr Szepanowski was an impressive witness, and I thought a credible one.

[102] I observe that with the rather dramatic event that the plaintiff reports one might expect that there would have been talk of the injury amongst the men when they regathered at the end of the day. There appears to have been no such talk.

[103] I am at a loss to understand why it is that witnesses who potentially were relevant witnesses were not called. Each party has referred me to the High Court's decision in *ASIC v Hellicar*.[25]

[104] On the plaintiff's side it is asserted that he is a traffic controller earning $552.00 net per week whereas the defendant is a mining contractor indemnified by WorkCover with resources that are for practical purposes at least in the millions of dollars.

[105] With respect I struggle to see how that fact, although no doubt true, is relevant. No attempt was made to demonstrate what the cost might be of bringing to court the witnesses who had been located. There was no evidence to suggest that that cost was prohibitive. There was no evidence to suggest that the plaintiff did not have the funds, or more relevantly access to the necessary resources, to bring a witness to court if he wished to do so.

[106] The reality of modern day litigation in the personal injury field is that very few plaintiffs have the resources to mount an action. They are supported by solicitors who generally put their own resources behind the proceedings. For this the solicitors get little credit within the community but the reality is that few deserving litigants could bring proceedings at all if solicitors were not prepared to take this course. Generally the court is never privy to the financial arrangements that lay behind these proceedings but long years in practice leave me in no doubt that what I have described is the usual course. In the absence of evidence I am not prepared to draw an inference that the plaintiff was in anyway disadvantaged by the fact that his income and assets were inferior to those of the defendant.

[107] Nor is this a case where the plaintiff's side can explain any reluctance to call a witness on the ground that the defendant knew what the witnesses might say but the plaintiff did not. WorkCover is under an obligation under the *Workers Compensation and Rehabilitation Act* 2003 to disclose to the claimant the material that it obtains relevant to the issue of liability.[26] Such material includes witness statements.[27] The defendant has an obligation to co-operate with WorkCover.[28] The Court can enforce these obligations.[29] I raised these matters with the plaintiff's counsel in the course of the trial. No complaint was made that WorkCover or the defendant had breached its obligation here. The inference is that whatever statements were obtained by the loss investigator and provided to the defendant or WorkCover were also provided to the plaintiff.

[108] It seems to me that none of the potential witnesses would fall into a category of witness where I would think they were within the defendant's camp so to speak and so be a witness whom that party would be expected to call. People in the defendant's management one would think would fall into that category. But fellow workers do not. Indeed experience in these cases over three decades and more is that workers are far more likely to inconvenience themselves to support a fellow worker than to support an employer where they believe they can honestly assist the worker.

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25 [2012] HCA 17 specifically at [250]; (2012) 286 ALR 501

26 See *Workers Compensation and Rehabilitation Act* 2003 ss 279, 284

27 *Workers Compensation and Rehabilitation Act* 2003 ss 279(1)(a) and the definition of "relevant documents" in ss 279(6)

28 *Workers Compensation and Rehabilitation Act* 2003 s 280

29 *Workers Compensation and Rehabilitation Act* 2003 s 287

[109] Having said that I am at a loss to understand why the defendant did not call the witnesses that it had found if only to say that they knew and saw nothing. That is what the defendant claims that they would say. Indeed if the witnesses were to say that not only did they not see any such event but that they had never seen work of that type ever carried out as the plaintiff alleges was carried out then that would be of some assistance to the defendant. It would also be of assistance to the defendant if the witnesses had said that there was no talk of any person suffering an injury in the way the plaintiff so dramatically describes and then effectively have the balance of the shift off without doing any significant work. It is true that Mr Inkson and Mr Szepanowski each said precisely those things but I fail to see why it would not be in the defendant's interests to call every witness that it could if that is what they had to say.

[110] The witnesses of particular interest were those who might be thought to be supervisors. On the plaintiff's side that would suggest Mr Brett Robinson given his description of the man he thought was the supervisor. On the defendant's side that would include Mr Dennis Dent and Mr Rod Ciesolka. Mr Ciesolka was never found and hence no inference could be drawn either way. Mr Dent was found, and provided a statement but was not called. Mr Brett Robinson was found and no statement was taken and he was not called. The loss investigator said that Mr Robinson told him that he had no memory of any events and could not recall what he was doing. This evidence was not led as the truth of its contents but rather to explain why Mr Takken did not follow him up.

[111] I do not overlook that at the commencement of the trial the defendant assumed that the plaintiff was asserting that his supervisor was one Steven Michael Todd. That assumption was made because the plaintiff pleaded it to be so – see para 7 of his Amended Reply. It became an agreed fact that Mr Todd was not the supervisor on duty that day. The defendant had subpoenaed Mr Todd but it was eventually agreed that his presence would not be necessary as he did not work on the day in question. So, from the defendant's perspective, the need to call other witnesses who were not the missing supervisor on the plaintiff's case did not arise until the first day of trial. But still the forensic purpose in bringing witnesses forward was plainly there.

10. Conclusion on the Blatch v Archer point

[112] It seems to me that I can draw the inference that of those witnesses who provided statements their evidence would not assist the case of the plaintiff with some confidence. It would be a remarkable thing for the plaintiff not to call witnesses to support him, if they were available, in circumstances where he was unable to identify the object that he was moving, where the object that he was moving was of a weight that vastly exceeded any reasonable weight and so involved work that on its face was unlikely to be performed, and where he knew that no document could be located that supported the work that he claimed was being carried out. In short the plaintiff needed support and, if there was any, I am sure that the witnesses would be called.

[113] The second potential consequence that can flow from an unexplained failure of the party to call a witness that that party would be expected to call is that I might draw an inference unfavourable to the plaintiff with greater confidence. In my view that second potential consequence does not arise here. It is one thing to say that the potential witnesses that were located and who provided statements did not support

the plaintiff in the sense that they could not add to the evidence but it is another thing entirely to say that they provide any basis for making a finding against him. The plaintiff's evidence was that the men split into two groups that his group was only a small group and the others were not in a position to see what occurred. The members of his group might well have fallen in the category of witnesses who were either not found or found and refused to provide a statement.

[114] While I am puzzled at the defendants' failure to call the witnesses it seems to me again that I cannot draw an inference unfavourable to the defendant as it simply is the converse situation to that of the plaintiff, that is, I am sure the plaintiff would have called those witnesses if in fact they damaged the defendant's case. As well, I can draw the inference that the evidence of the absent witness would not have assisted the defendant and I do so.

11. An Incident Occurred on 1 February

[115] There seems to me to be only three possibilities. First, the plaintiff made up the whole event. Alternatively, an event of the type the plaintiff described happened but it did not involve a weight in excess of 100kgs – the weight that the defendant conceded would involve a breach of duty. Alternatively, he was asked to move a heavy weight as he said and it was of a weight in excess of 100kgs.

[116] Should I accept that some incident occurred on 1 February involving the movement of a weight on the pan line or has the plaintiff fabricated the whole story?

[117] That there was some onset of pain or discomfort on 1 February is consistent with the attendance on the chiropractor and acupuncturist on 2 February for treatment, the absence of any record of treatment for the like problem for many years prior to that date, the reference by the chiropractor in the certificate of 4 February to the disc being "injured because of too much load", and the plaintiff's readiness to report the incident the next day and again in writing a few days later. That seems to me sufficient to confirm the plaintiff's claim of the occurrence of an injury event.

[118] The possibility that the plaintiff injured his back in some other way at work or in sleeping in his car overnight, or in some incident at home, all cannot be excluded. The rejection of these possibilities depends upon acceptance of the plaintiff's account to some degree.

[119] The following factors persuade me to accept that account:

(a) The plaintiff has been consistent in his account at least in that he was moving a large L shaped object at the relevant time. The written report (Ex 1) refers to such an object and that was completed only five days after the event and before the plaintiff was to know the significance of his injury. The defendant argued that the account to Dr Cook was materially different and that should reflect on the plaintiff's bona fides.[30] It seemed evident to me that it was Dr Cook who had confused the history. Whose fault that might be is unprofitable to sort out but I am very confident that the plaintiff at no time pretended he was dragging the object along the rough and uneven ground of the mine floor;[31]

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30 T1-59/45-55

31 T1-86/3

(b) The plaintiff's misleading of the general practitioner and of the prospective mine employers, which I will detail later, is explicable in the context of his unchallenged claim to having had financial difficulties and wishing to maintain his employment in the well paid mining industry. It does not justify a general rejection of his evidence;

(c) The plaintiff was spoken well of by witnesses who themselves should be accepted as honest and reliable. So the deliberate setting out to make up a story would seem out of character. The witnesses who spoke well of the plaintiff included Mr Hedley and Mr Van Hecke both of whom were mature, experienced managers, as well as Mr Kenwright who worked with the plaintiff for about 16 months at Walter Mining and was his supervisor through that time. Even Mr Jones, the defendant's manager, thought well of the plaintiff;

(d) The defendant did not call any witness who contradicted the plaintiff's account;

(e) Mr Lane plainly did not find the report of the incident (now Ex 1) to be inherently unbelievable. There is no suggestion in the report or in his evidence that he was concerned by it. To the contrary, in the report he suggested taking action to prevent reoccurrence;

(f) The certificate of the chiropractor provides some support of a consistent history having been given to him with its reference to loading of the spine;

(g) If this is a fraudulent claim then the plaintiff has gone about it in a very odd way:

(i) He did not pick an object which he could precisely identify and which would be without doubt on the pan line and of an established weight – a rack bar for example - and claimed that he lifted it at the direction of the supervisor;

(ii) He reported the incident promptly to Mr Jones on the day following the incident when the events of the previous day could be easily checked with witnesses – he was not to know that no such check would be made;

(iii) He did not seek WorkCover benefits and did not seek to end his employment;

(iv) He persisted in seeking work in the mining industry in an effort to minimize any loss and maximise his income – precisely the opposite of what a dishonest claimant would do;

(v) He made no report to any medical practitioner until 3 March of the incident (I exclude chiropractors and acupuncturists from that description), it plainly being of assistance to a dishonest claimant to have an early report in place and it being common ground that he was urged to do so by Mr Jones;

(vi) He did not ensure that there was a trail of evidence with medical practitioners of continuing problems.

[120] It is the combination of these matters and particularly the last factor – that if this is a fraudulent claim the plaintiff has gone about it in a very odd way - that persuades me that the probabilities support a finding that there was an event on the day in question involving the movement of a weight at the workplace.

12. The Weight Involved Exceeded 100kgs

[121] Accepting that some incident occurred the next issue is whether the movement of the object involved the shifting of a very substantial weight, at least in excess of 100kgs, the weight conceded by the defendant as sufficient to establish breach of duty. That the movement of a lesser weight, say that involved with the movement of a rack bar, even though still heavy[32], does not necessarily involve such a breach is because the described movement is of steel on steel and the co-efficient of friction would substantially reduce the forces on the worker. Overcoming of inertia seems to be the significant force involved.[33]

[122] In approaching this question I am conscious of the defendant's submissions concerning the necessity of being satisfied that there is more than "conflicting inferences of equal degree of probability" and of not merely guessing between rival conjectures (citing the judgments of Dixon CJ and Kitto J in *Jones v Dunkel*[34]).

[123] Apart from the attack on the plaintiff's credit generally, an attack largely based on his misleading of Dr Malligat and the employers in order to maintain his employment in the mining industry, the only significant point made by the defendant is that no one had seen such work done manually and, given the weight involved, no supervisor was likely to ask for such work to be done.

[124] As I have said the criticism of the plaintiff for trying to maintain employment is not a compelling argument to treat him as entirely lacking in credit. The more usual attack made on injured plaintiffs is that they dishonestly or unreasonably fail to persist in employment.

[125] The other basis for the attack on the plaintiff's credit was the conflict in the accounts of his dealings with Mr Jones. The flavour that the plaintiff put on his conversation with Mr Jones suggests to me some reconstruction but not necessarily any deliberate misstatement.

[126] While the remaining arguments have some force they are not compelling. There is a simple explanation for an attempt at such work. The pan line had been built to such an extent that an Eimco could not get into that point and assist in the movement. That possibility was accepted by Mr Roache.[35] That the pan line had been installed accords with Mr Szepanowski's recollections.[36] It would not be the first time that a supervisor has made an error of judgment in organising work that might involve an unfamiliar task.

[127] So the arguments against the plaintiff are not compelling.

[128] In the plaintiff's favour is the fact that a large L shaped object does in fact form part of the pan line. It is the shearer block. On the DBT pan line, which was probably in place in the North Goonyella mine, the shearer block consists of a cube welded to a rack bar forming a large L shape which would more or less fit with the plaintiff's description. As Mr Crow conceded it was the only object on the pan line that could fit.

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32 The range seemed to be from 38.5kgs to 100kgs

33 See Mr Inkson's comment on moving a rack bar: T4 -38/40

34 (1959) 101 CLR 298 at 304-5

35 T4-32/1-5

36 T3-23/40

[129] Again in the plaintiff's favour is that there seems to be no other object that comes close to matching his description – a description given five days after the event and before the plaintiff was to know what the long term consequences of his injury might be. The next heaviest object identified as likely to be on the pan line was a rack bar. There are two relevant points. First, they are not "L" shaped. Second, the plaintiff knew what a rack bar was – he said that the principal work on the shift was to hammer rack bars into place. When he reported to Mr Lane he plainly did not have a rack bar in mind. Each of the men knew what a rack bar was and it is impossible to think that a rack bar would not have been identified in discussions if that was what the plaintiff had in mind.

[130] The plaintiff could not give evidence of the weight of the object save to say it was heavy. His claim that the supervisor said it was of a certain weight does not assist him. As the person the plaintiff claims was the supervisor cannot be identified it is not possible to be satisfied on the probabilities that the man who made the statement was in fact a supervisor. Statements by unidentified individuals of uncertain status cannot bind the defendant as admissions against interest, whatever be the effect of such statements by an employee designated a supervisor. If the statement was made it is merely hearsay.

[131] The earliest appearance of a claimed weight of 180kgs seems to be in a doctor's certificate obtained on 3 March 2009,[37] still only a month after the incident. There is no suggestion that the plaintiff's knowledge had been contaminated by his own researches at that early stage.

[132] It is possible that the plaintiff simply made up that weight. But if he did it is at least an interesting coincidence that a large object of about that weight does form part of the pan line. Given the plaintiff's own ignorance of the object or its weight the relating of so close a weight to an actual object on the pan line provides some support for the plaintiff's claim that he had been told by someone the probable weight of the object. The most likely person to have done so was someone who saw it, that is one of the men with him on the shift, as he says occurred.

[133] It is relevant too that a rack bar is certainly heavy. I have mentioned Mr Inkson's estimate of its weight but some estimates were twice as much[38] – the evidence indicates that they differ in size. The most reliable evidence was that of Mr Hyde who provided a range of 65kg to 70kg.[39] But for relevant purposes if the plaintiff's intention was to make a false claim all he needed was a heavy object - why not assert it was a rack bar? That he did not do so suggests that there is some credibility in his account.

[134] So there are several factors which weigh in the plaintiff's favour. Again on balance I accept the plaintiff's claim.

13. The Plaintiff Succeeds

[135] Because of the defendant's concession it follows that the plaintiff should succeed on liability.

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37 Ex 28

38 Mr Szepanowski - T3-36/8

39 T2-59/31

14. Contributory Negligence

[136] The defendant argues that there should be an apportionment. Paragraph 6 (f) of its Amended Defence pleads that the injury was:

> "caused or contributed to by the plaintiffs own negligence and breach of statutory duty particulars of which are as follows:
>
> (i) By pulling or attempting to pull an item weighing 180 kilograms with a stretch band, the plaintiff exposed himself to an unacceptable level of risk contrary to section 39 of the *Coal Mining Safety and Health Act* 1999;
>
> (ii) Failed to take reasonable care for his own safety in all of the circumstances of the case particularly when he knew that he suffered from the pre-existing conditions pleaded aforesaid.

[137] The "pre-existing conditions pleaded aforesaid" is a reference back to paragraph 4(e) of the Amended Defence where the defendant pleads:

> "The plaintiff had a symptomatic lumbar spine since he was kneed in the back as a child; had pre-existing disc degeneration in the lumbar spine and suffered from lumbosacral spondylosis that caused, and would cause, symptoms with heavy manual labour ……".

[138] The defendant's assertion that the responsibility of the plaintiff should be judged on the basis that the "pre-existing conditions" were relevant cannot be accepted. There is no evidence that the plaintiff had suffered from symptoms of pain emanating from his lumbar spine since he was kneed in the back as a child. There is no evidence that the plaintiff was aware that he had "lumbar sacral spondylosis" immediately prior to the subject incident. While there is evidence that the plaintiff suffered symptoms of pain in his lumbar spine 12 years before the subject incident there was no evidence that he did so in the interim when his unchallenged claim is that he did perform heavy manual labour.

[139] The plaintiff's evidence was that in the course of his mining work from August 2002 the bulk of his experience was in ventilation and that was "very heavy work"[40]. The plaintiff explained that with one employer he would be required to shift "close to upwards of nine, ten tonne of plastic bags per day, per shift"[41]. Even allowing for some hyperbole there is no doubt that mining work is very demanding work.[42] There is no suggestion that the plaintiff attended on any medical practitioner in the years prior to the subject incident whilst he was performing this mining work.

[140] Putting that issue to one side the factual basis upon which the defendant advances its argument requires the following findings:

> (a) The plaintiff knew or ought to have known the weight of the object;
> (b) The plaintiff knew or ought to have known of the difficulty that other workers had in shifting the object;

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40 T1-100/38
41 T1-101/10
42 See Dr Cook: T1-81/20-50

(c) The plaintiff was an experienced miner and had had training and inductions "directed to the very task that he was undertaking"; and
(d) There was no supervisor present.

[141] There are some difficulties with these allegations. The onus here of course is reversed and lies on the defendant.

[142] There is no evidence that the plaintiff knew the weight of the object prior to his injury or that he had any prior familiarity with it.

[143] It is a considerable over statement to say that the plaintiff had received "independent training" and inductions that were "directed to the very task that he was undertaking"[43]. There was no evidence that any training or any induction was directed to the task of dragging, not lifting, steel along steel.

[144] That objects much heavier than 20-25 kilograms might be moved in this way safely by a miner seems to be implicit in the approach that both parties took to the case. No engineering evidence was led to explain the forces involved but no attempt was made to prove that moving a weight of steel of less than 100 kilograms along the pan line necessarily involved a risk of injury. As Mr Inkson explained the difficulty was in getting the object moving but once moving it was like a "hockey puck".[44]

[145] The final allegation, now embraced by the defendant,[45] is that there was no supervisor.

[146] The defendant's project co-ordinator, Mr Philip Roache, gave evidence. He considered that when a crew of 50 or 60 men broke up into smaller groups that there would not necessarily be a team leader with each group but there would be a supervisor in the work area generally and that supervisor would be responsible for two or three teams. Within each group the more senior miners would guide the less senior miners.[46] He was speaking in a general sense, not of the day in question.

[147] That organisation might well explain the difficulty that the parties had in identifying a supervisor. But it does not really assist the defendant.

[148] First, assuming that Mr Roache's evidence was applicable to the day in question, it by no means follows that the plaintiff is shown to be wrong in his perception that one of the men present was directing activities that day and that the plaintiff reasonably believed him to be in charge of the work.

[149] Secondly, what the defendant seems to be working around to is an allegation that the plaintiff was responsible for the work system adopted. There are serious difficulties with that argument. The circumstances in which an employee would come under such a duty have been described as "marginal and rare": *The Law of Employers* (2nd edn) by Glass, McHugh and Douglas at p 25.

[150] The circumstances here do not justify the imposition of that duty on the plaintiff. The plaintiff claims, and he was not challenged, that this was the first occasion in

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43 See para 10.6 of the defendant's supplementary written submissions
44 T4 -38/40
45 Para 5.5 and 10.7 of the supplementary written submissions received 9 May 2013
46 T4-31/1-15

which he had been involved in the "install phase of a long wall".[47] He was on his account the junior employee present. He was following the directions of a more senior miner and indeed merely copying his actions. Further his belief was "that the previous shift had dragged it from the tailgate end …… all the way, they had actually reached half way along the pan line. And our job was to drag it from halfway down to 5 pan line".[48] So he assumed others had already performed the same task.

[151] Thus the defendants argument reduces to this – a junior employee carrying out his first installation on a pan line was required to protest, and indeed refuse to do a task, when more senior miners set about to move the object manually, he assuming that others had done the same before them. He should have perceived this risk to be sufficiently high to refuse to perform the task although having no accurate idea of the weight involved but being aware the task involved moving steel on steel.

[152] Neither counsel directed any submission to the significance and effect of s 39 of the *Coal Mining Safety and Health Act* 1999. Nor did I receive any submissions directed to the applicability of s 307 of the *Workers Compensation and Rehabilitation Act* 2003.

[153] Section 307 relevantly provides:

> "(1) A court may make a finding of contributory negligence if the worker relevantly—
>
> > (a) failed to comply, so far as was practicable, with instructions given by the worker's employer for the health and safety of the worker or other persons; …"

[154] It is common ground that it was the responsibility of each employee to undertake the "SLAM" process, not just the responsibility of the supervisor. It seems plain that the men were instructed to undertake the process for any task, let alone a task that was considerably out of the ordinary. It is common ground that the plaintiff did not carry out the process until after the injury event. Nor, on his account, did his fellow workers.

[155] There is then no issue that the plaintiff breached his instructions and those instructions were for his health and safety. Should an apportionment follow? Section 307 is not mandatory in its terms.

[156] The relevant principles to apply were explained in *Bankstown Foundry Pty Ltd v Braistina*[49] by Mason, Wilson and Dawson JJ:

> "The law is that the damages recoverable by the [worker] by reason of the fault of the [employer] "shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage": *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW) s 10(1).[50] A worker will be guilty of contributory negligence if he ought

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47 T1-40/30

48 T1-34/49

49 (1986) 160 CLR 301 at p310-311

50 See s 10(1)(b) of the *Law Reform Act* 1995 for the Queensland analogue.

reasonably to have foreseen that, if he did not act as a reasonable and prudent man, he would expose himself to risk of injury. But his conduct must be judged in the context of a finding that the employer had failed to use reasonable care to provide a safe system of work, thereby exposing him to unnecessary risks. The question will be whether, in the circumstances and under the conditions in which he was required to work, the conduct of the worker amounted to mere inadvertence, inattention or misjudgment, or to negligence rendering him responsible in part for the damage: see *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492 at 493–4; 59 ALR 529 at 532. In *Podrebersek* (ALJR) at p 494; (ALR) at pp 532–3, the court said:—

> 'The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man (*Pennington v Norris* (1956) 96 CLR 10 at 16) and of the relative importance of the acts of the parties in causing the damage: *Stapley v Gypsum Mines Ltd* [1953] AC 663 at 682; *Smith v McIntyre* [1958] Tas SR 36 at 42–9 and *Broadhurst v Millman* [1976] VR 208 at 219, and cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination.'"

[157] As those reasons explain in judging the plaintiff's conduct it is important to bring into account that it is the employer who has failed to use reasonable care to provide a safe system of work thereby exposing the plaintiff to an unnecessary risk of injury. In explaining why an employer owes an employee a non-delegable duty of care Mason J said in *Kondis v State Transport Authority*[51]:

> "The employer has the exclusive responsibility for the safety of the appliances, the premises and the system of work to which he subjects his employee and the employee has no choice but to accept and rely on the employer's provision and judgment in relation to these matters [with the] consequence … in these relevant respects the employee's safety is in the hands of the employer; … [i]f [the employer] requires his employee to work according to an unsafe system he should bear the consequences"

[158] The plaintiff contends effectively that it is expecting a great deal from an employee to find that they have behaved unreasonably in following the directions and examples of those they consider to be their superiors. I note that the defendant's own "Safety Health and Environmental Management Plan" requires that for a new task the defendant will "undertake a risk review… to manage significant hazards".[52] This was not done here. Unsurprisingly, it also requires that employees follow instructions.[53] That is what the plaintiff was doing.

[159] Giving full weight to those arguments in my judgement the plaintiff did fail to act as a "reasonable and prudent man" in following the lead of the senior miners present. The following matters seem to me to be relevant:

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51 (1984) 154 CLR 672 at 687–688

52 Ex 45 at p v (the tenth page of the exhibit)

53 Ex 45 – see "General Safety Rules" Attachment 7

(a) Several pieces of evidence show that the plaintiff knew the object to be extremely heavy before the injury event:
   (i) the plaintiff had observed two men, both bigger than him, struggle to move the object more than 20 to 25 cms. Mr Inkson's observations regarding a "hockey puck" clearly did not apply here;
   (ii) while not entirely clear the inference from the plaintiff's evidence was that he knew perfectly well what a rack bar was prior to performing this task – see his account of his anticipation of the work ahead on the day in question.[54] All the evidence suggests that those familiar with rack bars knew them to be heavy. On the plaintiff's case the object to be moved was heavier again - a rack bar with something added to it;
   (iii) he had tried to move it twice himself with limited success before the injury event;

(b) On the plaintiff's own account one of the group knew the weight of the object. Even a cursory assessment by the group should have resulted in that knowledge being revealed;

(c) The plaintiff had been employed in the mining industry for a number of years previously and was well aware of a need to be on the lookout for situations involving the potential for injury. While the generic inductions were quite general – as they needed to be – the training was clear. The worker was required to assess the risk of personal injury involved in each task. If it could not be reduced to an "acceptable" level they should not attempt the task but "wait for reassessment by supervisor": see the plaintiff's answer at Question 12 of Ex 36;

(d) If undertaken here, that reassessment should have resulted in some alternate method being adopted. It was an agreed fact in the case that no reasonable employer would ask a worker to drag a 180kg weight. Thus the methods of doing so were not explored. However there is no evidence that the only possible method of moving the 180kg object was manually and by one man. Mr Hedley recalled moving a shearer stop using an air winch and chain block.[55] Whether that method could work here was not explored. It is difficult to see why it would not. But there is no reason to assume that some alternative could not have been devised.

[160] The plaintiff might argue that this case was not pleaded, at least not expressly. The defendant might counter that it was encompassed in the pleading of a failure to take reasonable care – a catch all that fails to alert the plaintiff to the relevant issue. But I cannot see that the plaintiff's evidence, in the sense both of what he had to say and what else he might call, could have been any different.

[161] There should be an apportionment. A comparison both of culpability, that is of the degree of departure from the standard of care of the reasonable man, and of the relative importance of the acts of the parties in causing the damage suggests a

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54 T1-34
55 T2-37/40

substantial apportionment is required. I assess that an apportionment of 25% is appropriate.

QUANTUM

15. The Issues

[162] That the plaintiff now has difficulties with his back sufficient to keep him out of mining work is plain. The issue is what contribution the subject incident and its consequences have made to his present state.

[163] There are two competing theories. One is that the plaintiff has a long standing problem exacerbated by the subject incident. That hypothesis was advanced by Dr Shaw. The other is that the plaintiff's problems commenced with the subject incident and his past history is irrelevant. That hypothesis is advanced by Dr Cook. Drs Cook and Shaw are each experienced orthopaedic surgeons.

[164] Both surgeons considered that the plaintiff had suffered an internal disruption of the L5/S1 disc. They differed as to when that disruption first occurred. Dr Shaw related it back to the onset of back pain during the plaintiff's army career. Dr Cook related it to the subject incident.

[165] The experts differed principally because of the views they took of the significance of an episode of back pain suffered by the plaintiff in the course of military service in 1996-97 to which I now turn.

16. The Army Medical Records

[166] The plaintiff enlisted in the Australian Defence Force in May 1995. He completed a cooking apprenticeship in the catering corps over a four year period. He was honourably discharged in February 2000.

[167] The plaintiff's medical records pertaining to his military service were put into evidence. The records show attendances on medical practitioners or physiotherapists for complaints of pain related to the lower back on 16 October 1996, 23 October, 26 November (with a note of attendances on five occasions for physiotherapy), 13 February 1997, 17 February and 4 April (noting attendance on the physiotherapist on three occasions between 25 February and 7 March 1997).

[168] Dr Shaw assumed a past history of back pain over six to eight months. Mr Crow argued that the record was inconsistent with ongoing back pain over a period of six to eight months but rather of an episode of back pain with a need for physiotherapy, and another episode several months later. In my view that is entirely contrary to the record. The plaintiff did not give evidence to that effect - that is that his back pain subsided and then recurred. In my view the record is plain.

[169] The records show that on 16 October 1996 the plaintiff attended at the outpatient clinic complaining of lower back pain. He had fallen onto his sacrum whilst playing cricket. His range of movement was reduced by about 20% and the plaintiff was recorded as reporting pain radiating down his left leg. He was unable to do trunk rotations. The fall had occurred one week before the visit to the clinic. The pain was located, according to the record, at the L5/S1 area.

[170] The plaintiff attended at the clinic again a week later on 23 October with a continuation of his lower back pain and an x-ray was ordered. The x-ray was said to be within normal limits. The plaintiff was referred to physiotherapy. The physiotherapist reported on 26 November 1996 that he had attended for treatment for his back on five occasions and "on final examination [the plaintiff] reported marked improvement of back pain to more intermittent pain (minimal) but was still sore if stood too long".

[171] The plaintiff returned to the outpatients' clinic on 13 February 1997. The entry there reads:

> "C/O continuing back pain has had problems for 6-8 mths. Last had physio 5-11/96 with little effect. Work lately has required lifting. Now have problems doing daily tasks."

[172] The note goes on that the plaintiff appeared to look uncomfortable and in pain, that he located the pain in his lower lumbar region "with stabbing pain radiating down both legs". It is unclear who is responsible for the entry. The plaintiff was also seen on that date by one "J Huxtable" who appears to be a medical practitioner. He too records a complaint of "continuing back pain 7-8/12". Dr Huxtable's record reads "Now assoc c shooting pains in both thighs & upper legs. Pain exacerbated by fall on sacrum at cricket 4/12 ago." The doctor records that the plaintiff was "v distressed". He referred the plaintiff to Dr Ness an orthopaedic surgeon.

[173] Dr Ness recorded on 17 February 1997:

> "He started having problems with his lower back in about May 1996 and he puts this down to prolonged standing as is required with his position in the catering corps. His low back problem has been aggravated by a fall onto the buttocks while playing cricket and this occurred in October 1996. He saw a physiotherapist at this stage ….. in recent weeks his low back pain has got worse and he had been having some referred pain into both lower limbs. On examination of his lumbar spine I noted lower lumbar tenderness and considerable restriction of movement due to low back pain. There was not neurological deficit on examination of the lower limbs. X-rays of the lumbar spine performed 20.10.96 are normal.
>
> This young man has low back pain which is likely to be discogenic although this cannot be established with certainty….."

[174] The records also include a physiotherapist's note indicating an attendance on the physiotherapist on three occasions between 25 February and 7 March 1997 with a note that treatment "consisted of an exercise program to improve abdominal strength/control and back stability/flexibility". The record notes that the plaintiff failed to contact the physiotherapy department for further appointments[56].

[175] There are thus two entries, apparently made independently, recording ongoing back pain for over six months and no statement in any record of a cessation of pain during that period. As Dr Shaw explained the duration of pain is a significant matter

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[56] See the record of Mrs Janet Dohnalek dated 4 April 1997 – Ex 29

to medical practitioners. I am satisfied that Dr Shaw has correctly interpreted the records.

[176] The plaintiff had not told either Dr Shaw or Dr Cook of this history of low lumbar back pain. The plaintiff claimed that he had forgotten all about the problem. It is surprising, to say the least, that an onset of pain in the lower back, of some significance, in February 2009 did not bring to mind the fact of a previous onset of pain to the same area of the body which lasted six to eight months and required referral to a specialist, even if it was twelve years before.

17. The Plaintiff Recovers

[177] There is no further reference to any lower back problem in the medical records although an entry, made apparently on 2 February 2000, makes a reference to "back and foot pain". The entry is not plainly legible but I think refers to the use of "inner soles". It was noted that the plaintiff was not fit for reserve duty.

[178] A questionnaire completed by the plaintiff on 2 February 2000 he has ticked "yes" to question 54c "other back problems". In what seems to be an explanatory note to 54c the examining medical officer has written "Assoc long standing" – that is my best interpretation of what is not plainly legible writing. I interpret this entry as indicating that the plaintiff had back problems and that he associated them with standing for long periods of time.

[179] The plaintiff was examined on the 2 March 1998 with the examiner recording "nil" employment restrictions. There is a record there of a past history of low back pain in 1996 with a notation "no pain for 18/12" which cannot be accurate given Dr Ness' report and the clinical notes. It records that the plaintiff had passed his "BFA" in February 1998 and his "CFA" in November 1997.

[180] The plaintiff explained the meaning of these terms:

> "BFA is the basic fitness assessment. It involves a minimum of 60 push ups in two minutes, depending on the age group, 100 sit ups, and a 2.4 kilometre run under a certain particular time frame, and that occurs every three months."[57]
>
> ….
>
> "CFA is a combat fitness assessment. It involves an obstacle course trial, which is fairly rigorous. It also involves I think between a 10 or 15 kilometre pack march in full patrol order, which involves a 35 to 40 kilo backpack plus a fully loaded webbing, which is with water, 15 kilos, as well as a F88 Austeyr fully loaded, 5.1 kilo weapon. And that assessment is every six months."[58]

This accords closely enough with Dr Cook's evidence,[59] Dr Cook having personal knowledge of the army's fitness requirements.

[181] As Dr Cook observed: "For a solider to be combat fit means that he has to be incredibly fit."[60]

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57 T2-29/12
58 T2-29/18
59 T1-71/50

[182] The plaintiff's statement relates that just prior to his discharge he placed 10th out of 150 participants, including 3rd in the under thirties age bracket, in an inter-area triathlon sprint series. He was plainly extremely fit.

18. The Significance of the Past History

[183] Dr Shaw's view was that his history of back pain was significant. He described "significant back pain" as "lumbar back pain requiring investigation and/or treatment and lasting more than six months"[61]. The plaintiff's condition plainly satisfied those prerequisites.

[184] Dr Shaw explained:

> "The significance of pre-existing lumbar back pain in the presence of lumbar spondylosis is two fold. Firstly, it increases the risk of having future back pain with or without injury and secondly, it increases the risk of lumbar back injury. Lumbar spondylosis can also be associated with long term back syndromes, either recurrent back ache or chronic constant back pain."

[185] In his oral evidence Dr Shaw explained that where a patient had had a significant episode of lumbar back pain there was a 25% to 75% chance of a recurrence.

[186] Dr Cook disagreed. In his view the subsequent recovery meant this history could be disregarded. That there was such a recovery is plain.

[187] Dr Cook was emphatic in his views of the relevance of this recovery:

> "And in your view if someone had a - an active lumbar spondylosis back pain would they be able to be combat fit? --- Never[62]
>
> …
>
> Provided the history, as I understand it, is accurate and correct in that he had his injury in the Army, appeared to make a full recovery, went on serving even to the level of being combat fit, being discharged from the Army in 2000 and found to be fit with no back problems and apparently remained completely asymptomatic prior to his injury at work
>
> The date's 1 February 2009? --- On 1 February 2009. And in view of the X-ray and CT scan findings of no to minimal pre existing degenerative changes I felt that he would have been able to continue working indefinitely over the years ahead, even till the normal age of retirement."[63]

[188] It is important to note the first question asked – it pre supposed "active lumbar spondylosis back pain". That was not essential to Dr Shaw's views. A percentage of people never have problems again. But the conclusion that there was no damage to the disc and no potential for future difficulties does not follow.

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60 T1-71/50
61 Ex 44 at p3.
62 T1-72/1
63 T1-72/24-35

[189] The difficulty with Dr Cook's opinion is that it offers no explanation for the significant symptoms recorded by Dr Huxtable and Dr Ness. It is plain that the plaintiff had lower lumbar back pain for an extended period and that there was pain radiating into both legs. As Dr Cook said there would have needed to be a "lesion" to explain the symptoms.[64] He did not explain what that lesion might be. Dr Shaw's analysis supplies the diagnosis and it accords with the original diagnosis, albeit provisional, made by Dr Ness.

[190] In my view Dr Shaw's analysis provides the more persuasive interpretation of the plaintiff's history.

19. Nature of Injury

[191] As I have said I am satisfied that there was some injury event at work on 1 February 2009. However I am not at all persuaded that it was as dramatic an event, or as significant an event, as the plaintiff claims.

[192] The problem is that the only evidence of what happened at that time comes from the plaintiff and I have real difficulties accepting the plaintiff's dramatic account of that injury event.

[193] My concern here is that there is no objective fact in the case which seems to provide support for that dramatic account and that there are aspects of the case that tend to throw some doubt on it being accurate. I have in mind the following:

(a) On the plaintiff's version the fact that he had suddenly sustained a potentially very serious injury was obvious to his fellow workers as well as to himself. While I only heard from two workers who were on the shift that day, and I assume that neither were in the plaintiff's group, there plainly was no talk that they can recall of a significant injury being sustained by a worker. In the normal course the men would gather in the drift runner to be returned to the surface at the end of the day.[65] The plaintiff was careful to say that there was no talk in the drift runner of his injury, at least during the hour break. But that is puzzling. Why should there not have been? An injury event so serious as to prevent the worker continuing with normal work and with the obvious potential to end his career as an underground miner might have elicited some comment;

(b) Despite the immediate concern the plaintiff says the fellow workers expressed when underground, neither worker is said to have ever again approached the plaintiff to see how he got along. That is hardly compelling but again an odd feature;

(c) No report was ever made by the "supervisor" that the plaintiff says was present or at least none to the two men most likely to be the recipients of such a report, Mr Jones and Mr Roache. Perhaps that is explained by the possibility that there was no supervisor in charge of the gang of three. That of course is very different to the plaintiff's account. But on any view someone was in charge of the three men and that person could hardly have failed to notice that the plaintiff was not working effectively in the latter part of the shift. Presumably

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64 T1-77/15-20

65 T3-35/15-25

that person would be in serious trouble for failing to report an incident in which a worker had back pain at so serious a level that he was effectively unable to continue to do his duties for the remainder of his shift. The plaintiff conceded that there was a strong emphasis on reporting injury events – that's why he rang Mr Jones on his day off. If there was an onset of pain with no great outward manifestation and no, or no significant complaint, the supervisor's inexplicable failure to report becomes more understandable;

(d) Mr Jones' impression was that the plaintiff had some doubt about whether the injury occurred at work at all in the initial report he received. For him to form that impression he simply could not have received the dramatic account that the plaintiff gave in evidence. I do not overlook that there are conflicting factors at work. It could be said that Mr Jones had some interest in down playing any connection with the workplace, but I thought that he was doing his best to relay accurately his impressions and recollections. I am conscious of the plaintiff's concern about keeping his job but it is not clear why that risk is heightened by attribution of the workplace as the source of injury;

(e) The plaintiff's description was one that itself raised concerns as to its accuracy. The words used were redolent of exaggeration – "this disconnection", "explosion of pain just ripped through the lower part of my back", "severe shock", "it was a raw pain. Out of 10 it was a 10. I hadn't received pain like that, yeah, in a long, long time"[66] and "unleashing its pain again".[67]

[194] No single factor is conclusive.

[195] But I am left with at least two competing possibilities. One is the plaintiff's account. The other is that there was a less significant onset of pain at work with more serious pain the next day.[68] If this latter was closer to the true position then one could understand some care in attribution, the lack of any concern by the supervisor to report and the failure of any co-worker even to enquire.

[196] Thus the probabilities seem to me to favour the latter hypothesis.

[197] As well, the defendant advanced several cogent arguments about the significance of any injury. The arguments centred on the submission that essentially the plaintiff did not act as if he had a significant back injury for at least 18 months. They included:

(a) The lack of any substantial time off – four days on the plaintiff's case;

(b) The almost immediate return to mining work with Walter Mining;

(c) The ability to pass pre employment medical involving as it did explicit testing of back health;

(d) The maintenance of employment in the mining industry for the next 18 months without a day off work or an attendance for medical treatment for back pain or proof of a need for medication;

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66 T1-37/10-28

67 T1-45/45

68 Ex 7 p 8

(e) A willingness to pursue further employment in the mining industry with another company, Bounty Mining, particularly given that the plaintiff by then had a permanent position at Walter Mining.

[198] To understand the arguments I need to explain the plaintiff's subsequent history in more detail.

20. The Plaintiff Seeks Employment

[199] As mentioned earlier the plaintiff was informed that he had lost his employment with the defendant, along with 70 others, by Mr Jones on 28 February 2009. He had further chiropractic treatment from Mr Sanders on 2 March 2009. The plaintiff consulted Dr Kangru and applied for workers compensation benefits on 3 March 2009. Dr Kangru certified that the plaintiff was fit for suitable duties from 3 March to 3 April 2009. He thought that he would require treatment up until that latter date. The suitable duties he prescribed including a lifting weight limit of 15kg occasionally and no bending, twisting or squatting.[69]

[200] On 25 March 2009 the plaintiff applied for work with Walter Mining. He had a pre-placement health assessment with a general practitioner, Dr Maligat, at Mackay on 1 April 2009.

[201] In the period between seeing Dr Kangru on 3 March and seeing Dr Maligat on 1 April the plaintiff says that he consulted Mr Sanders and Mr Stace for chiropractic treatment and a friend, Katrina Champion, for osteopathic treatment. He also saw Dr Kangru to discuss the CT scan results. He claims that Mr Sanders told him that the CT scan showed that he had a disc protrusion, one that Mr Sanders admitted that he had originally "failed to pick up". He says that at the time of his consultation with the osteopath on 21 March he was experiencing a lot of back pain and that the treatment that she provided was some form of "shock therapy" involving the use of a needle inserted into his back. That treatment was not successful in reducing his symptoms.

[202] It is presumably in this condition, on the plaintiff's case, that he then is assessed by Dr Maligat to determine his fitness for work in the mining industry on 1 April.

[203] Dr Maligat gave evidence and the notes of his assessment and his recording of the plaintiff's performances were in evidence before me.

[204] Dr Maligat required the plaintiff to perform a number of tests which form the "Kraus-Weber test". The tests are designed to test back fitness. The plaintiff says that in course of performing these exercises he had difficulty in doing so and that difficulty was evident to Dr Maligat. He says that Dr Maligat asked him if he was having problems which he denied. He says that that statement to Dr Maligat was untrue as he was at that time affected by back pain and restriction. He says that he misled Dr Maligat because he was desperate to obtain a job with Walter Mining and that he believed that if he was truthful about his back condition he would not get a job there or in the mining industry at all.

[205] There was an attack on the doctor for a mistake that he made. There is nothing in this attack. The doctor performed other assessments as well the back assessment one

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69 See Ex 28

of which was a "knee assessment". In respect of the three exercises involved there the doctor recorded a score of three out of ten but a total score of twenty-seven, consistent with a score of nine out of ten for each exercise. When this discrepancy was brought to his attention the doctor said that the mistake was in the "3" not the "27" – he meant to record nine out of ten for each test. Given that he passed the plaintiff fit to recommence work in the mining industry it seems very likely that the mistake was as he explained - in the recording of the "3" rather than in the "27".

21. The Significance of the Kraus –Weber Tests

[206] The Kraus-Weber tests involve nine separate exercises. For each of the exercises Dr Maligat recorded a score of nine out of ten.

[207] In the file note of a conference between Dr Maligat and the defendant's legal advisors Dr Maligat opined that "the person would not be able to pass the tests if there was an active problem in the lumbar spine". He said that a number of the tests would " provoke pain in the back" including the bending forward test, the extending back test, the reaching the sides of the knees and twisting the trunk as well as the straight leg-raising test. He said in the file note that all of those activities would provoke a person with an active problem in the lumbar spine.[70]

[208] Both Drs Cook and Shaw, the two orthopaedic surgeons called, were asked to comment on the plaintiff's performance of the Kraus-Weber test. Dr Shaw said in a conference note following a discussion with the defendant's legal advisors that whilst he was not personally familiar with the Kraus-Weber testing he had read material on it and had looked at the file note and commented that "it would be pretty hard to fake the testing if the patient had an active lumbar problem".[71]

[209] Dr Cook was asked his views on that opinion and replied that, whilst the test was not normally used in orthopaedic examinations but rather by occupational therapists, "if a person has a significant back injury at the time it would be very difficult to, impossible to – to pass a test, but if the back condition is less severe or they've taken pain relief medication then it is not a problem to pass the test."

[210] Dr Cook pointed out when discussing the various tests involved in the Kraus-Weber testing that orthopaedic surgeons included many of those same tests including the flexion extension, lateral flexion, rotation, and straight leg-raising tests.

[211] In cross-examination Dr Cook also added that it was "certainly not impossible" for a person to pass the test and he gave as an example someone attending a chiropractor or physiotherapist and having good relief for several days and by timing their visit for their examination they could make it coincide with a period of time when their back was "good".[72]

[212] There was no evidence from the plaintiff that these possibilities applied to him on the day of the test. The plaintiff said that he had not taken pain relief medication at

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70 See Ex 30 at p 2

71 See Ex 34 at p 2

72 T1-80/55

the time.[73] He said his pain had improved but only "to a state where I could bear with [it]".[74]

[213] It is difficult to accept that the plaintiff could have passed the tests applied if he had an "an active lumbar problem". It is even more difficult to accept that he could demonstrate difficulty in performing the test to an obvious degree such that the medical practitioner observed the difficulty but still obtain a score of "9/10" as recorded. Dr Maligat's duty was to properly assess the plaintiff to see if he was fit to work in the mining situation – it was in the worker's interests as much as the employer's to ensure his fitness.

[214] The plaintiff sought to dismiss these tests as of any assistance on the ground that they apparently originally were developed for youngsters with poor core strength. That submission overlooks a number of matters. One is the orthopaedic evidence that I have referred to, particularly to the effect that several of the tests are of the type used in their specialty for the same purpose. Secondly, assuming without deciding that tests designed for young people including teenagers are irrelevant in the adult population, the tests as used are not the originals but have four additional tests.[75] Thirdly, it is evident that trained medical practitioners use the test, and have done so for some time, to carry out their professional duty to screen applicants seeking work in an arduous occupation. I would need a great deal more than merely inference to reach the view that those practitioners are incompetent to determine what tests might adequately screen for back trouble.

22. Statements of Fitness

[215] Evidence was led of a number of statements made by the plaintiff to prospective employers and Dr Maligat about the fitness of his back and asserting a recovery from his injury.[76] The plaintiff said that the answers that he gave indicating that his pain had ceased on 28 February and that he had no present trouble with his back were false. The fact that such statements were made is consistent with either theory of the case and does not assist in determining the probabilities.

23. Continued Employment in the Mining Industry

[216] The plaintiff obtained employment with Walter Mining and remained employed there from 5 April 2009 until 19 August 2010, a period of over 16 months.

[217] After commencing work the plaintiff lost no time as a result of any back problem. He says that throughout his employment at Walter Mining he continued to have pain and discomfort and he continued to consult Mr Jim Stace for chiropractic treatment.

[218] No documentary proof is proffered of the number of attendances on Mr Stace. Mr Stace is a retired chiropractor, now 77 years of age. A statement by him was tendered. He kept no records of any attendances by the plaintiff on him although he confirms that he has seen the plaintiff. Mr Stace was unable to say how many times he had seen the plaintiff. The plaintiff claims that he was seeing Mr Stace monthly

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73 See 1-102/50
74 T1-96/40
75 T3-49/25
76 E.g. see Exs 30 and 38

by September 2010[77] and estimated that overall he had paid Mr Stace for 50 attendances.[78] Mr Stace cannot, apparently, confirm either assertion.

[219] During the course of his employment with Walter Mining the plaintiff said that he worked "for the majority of [his] employment" in a crew supervised by Mr Kane Kenwright. He says that he told Mr Kenwright of his back problems at the time he started. Mr Kenwright was called and confirmed that and said that he endeavoured to ensure that the plaintiff had the lighter jobs that were available. He may well have, but it seems plain that the work still involved heavy lifting. The plaintiff said that it did.

[220] The plaintiff left Walter Mining voluntarily and took up a job offer with Bounty Mining as a miner operator/bolter on the development cutting face at Oakey North. Thus he continued his employment at the same mine. He said that he changed roles because the position involved higher remuneration and experiences in other roles in the development of an underground mine. He thought too that he would be trained to operate a miner bolter with hand controls which would enable him "to reduce the amount of heavy lifting" that he did.[79]

[221] The plaintiff says that at the time he commenced working for Bounty Mining he was still experiencing back pain. His employment with Bounty Mining lasted from 23 August to 24 September 2010. The reason given for the termination of his employment was lack of work. The plaintiff says that his work with Bounty Mining affected his back pain.

[222] In this period that the plaintiff worked with Walter Mining and Bounty Mining, a period of nearly 18 months, performing work which must have placed demands on his back, he did not miss a day from work through any back problem[80] and made no report to his general practitioner that he had any such problem although he saw his GP on at least three occasions during that time.

[223] The clinical records of his general practitioner, again Dr Maligat, are in evidence.[81] They show that the plaintiff attended at the practice on 26 May 2009, 3 June 2009, 3 August 2010 and 23 September 2010. The only attendances on Dr Maligat (or any medical practitioner[82]) in the two years following the subject incident with complaints of back pain occurred on 3 March 2009, three days after his employment at SBD Services was terminated, and 23 September 2010, the day before his employment at Bounty Mining was terminated through lack of work.

[224] The attendances in May and June relate to an injury suffered by the plaintiff when he was struck by a "windy borer". The plaintiff suffered a blow to his face on the 24 May 2009 which involved sufficient force to seriously injure three of his teeth and cause him painful jaw and neck pain. There is no reference to any lower back pain but reference to a tender neck. The defendant argues that while not necessarily so, one might expect that if he had a vulnerable back that his symptoms would be aggravated by so severe a blow. Apparently they were not.

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77 Ex 7 p 20 para 146

78 See Ex 7 p33 para 246(i)

79 See Ex 7 para 138

80 T2-16/10

81 Ex 31

82 In case of confusion I note that for present purposes I leave out chiropractors and acupuncturists

24. The End of his Mining Career

[225] The plaintiff consulted Dr Maligat on 23 September 2010 complaining of back pain. The attendance[83] reads:

> "Feb 2009 he had lower back pain L4/5 and S1; described as deep ache/stabbing/throbbing when lifting cables at work continuously for 15-20 mins at a time; relieved by sleeping on the hard floor and seep (*sic*) heating and chiro 1x/month now and doing stretching of hamstrings for full ROMs.
>
> O/E> non-tender on lower back; Schober's test = 5cm; hip extension and extension are normal".

There is a reference to a referral to an orthopaedic specialist.

[226] The plaintiff relates that he contacted an orthopaedic specialist on the Gold Coast and was advised that if WorkCover was involved he would need to consult a different doctor. He did not pursue an appointment with another specialist.

[227] The plaintiff obtained employment on the 2 November 2010 with RUS Mining Services as a temporary underground development miner on a permanent casual basis. He remained in their employment until 25 February 2011. He said that the work there aggravated his lower back and reached a point where he could no longer ignore it. He sought exemption from lifting vent tubes and large cables as that was aggravating his lower back pain. He says that within forty-five minutes he was asked to leave the site.

[228] A physiotherapy assessment was carried out on 22 February 2011 and, from its heading page, appears to have been forwarded to RUS Mining Services. According to the physiotherapist the plaintiff reported that "he frequently lifts cable (miner cable, DCB cable, HT cable) which he stated are more than 20kg in weight. He also reports that he moves gophers which weigh more than 20kg ... He finds lifting and twisting uncomfortable at work." In her testing the physiotherapist recorded that the plaintiff had no limitation with tasks of squatting, stooping, climbing, and overhead reach and reported "mild discomfort" with lifting a weight of 20kg from floor to bench height and from bench to shoulder.[84]

[229] The plaintiff consulted a general practitioner at Emerald and was advised that he should get out of the mining industry because of his back condition. He was given a medical certificate to provide to RUS Mining Services. That company terminated his employment stating that they had no suitable duties for him.

[230] I note the report of Dr Laura O'Connor, a general practitioner in Proserpine, of 6 May 2011 who reviewed the plaintiff that day. She suggested that he had a "chronic condition" and should not undertake "any physical work that puts strain on his back" for "at least the next two months".[85]

25. Significance of the Post Injury Work and Attendance History

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83 Ex 31

84 Ex 40

85 Ex 15

[231] That the plaintiff felt capable of coping with the mining work so soon after the injury event speaks volumes. It suggests quite strongly that his symptoms were not at a significant level. As Dr Cook said, the plaintiff's ability to return to mining work so quickly after the injury event is explicable despite a level of pain being present, but only if to a "mild degree".[86] That is not the picture that the plaintiff painted.

[232] As well, Dr Cook, who has great familiarity with mining work after a long career spent in Mackay, agreed that many tasks in the industry place "heavy mechanical loading" on the back. This is relevant in two ways.

[233] First, the plaintiff must have known that when he applied for the mining work. He had had years of prior experience and knew it to be extremely hard work. His willingness to apply for such work suggests a degree of confidence in his back inconsistent with a debilitating condition.

[234] Secondly, his capacity to maintain that employment must be seriously doubted, again if he had an "active problem in the lumbar spine". Dr Cook conceded that repetitive manual handling on a day-by-day basis of the weights typical in the industry was inconsistent with a person who had "significant symptoms emanating from a back injury" if done over "an extended work period of time".[87]

[235] I am conscious of the arguments that the plaintiff can advance. Mr Kenwright's evidence is of some significance. The inference to be drawn from his continued employment in the mining industry and without apparent difficulty is weakened to a degree. But it is still an astonishing feat to have worked so long in a demanding environment,[88] assuming there was a significant ongoing problem.

[236] The plaintiff further submits that, while there was no trail of medical evidence to support his claim of ongoing complaints, there was evidence independent of the plaintiff that supported his claim to have had some level of continuing problems:

(a) He continued to attend, to some extent, on Mr Stace, the chiropractor;

(b) Witnesses had observed him to carry out stretching when at work in a manner that would suggest an easing of any back strain or pain.

(c) The plaintiff lodged a Notice of Claim for damages in July 2010 when still working for Walter Mining and in a permanent position there – why do that if in fact he was not having continuing problems with back pain and which were sufficient enough to cause him concern that he was going to have long term problems?

(d) The information given to Mr Kenwright of continuing back problems gives some confirmation both that the plaintiff was aware that he had a back disability by the time he commenced at Walter Mining and that he deliberately deceived Dr Maligat;

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86 T1-82/28

87 T1-81/50

88 See the evidence of Dr Cook: T1-81/20-50

(e) Mr Kenwright confirms the plaintiff's account, to the extent that he could observe, that the plaintiff always appeared to sleep on the floor rather than on a bed and the plaintiff asserted that this was because of back pain. This claim is consistent with the osteopath's records of 21 March 2009 as well.[89]

[237] All this is consistent with the plaintiff having some back discomfort at least from time to time after February 2009. But it does not undermine the defendant's point that whatever the problem was it could hardly have been of major significance.

[238] The move from Walter Mining to Bounty Mining seems to me to add further force to this view.

[239] Plainly the plaintiff did not feel sufficiently concerned about his back problems to be satisfied with maintaining employment with Walter Mining, a company with which he had obtained a permanent position in November 2009. He was sufficiently confident to give up that employment nine or ten months later and obtain mining work with Bounty Mining, employment which was subject to a probationary period and which necessitated new and different work from that with which he was familiar.

[240] I am conscious of the plaintiff's claim that he hoped for less difficulty with his back problems at Bounty Mining because he was to be trained in using a miner bolter machine. But the claim is at least surprising. He does not assert that he received any promise that he was to be used only on that machine, quite to the contrary, nor that he had any experience with its operation to justify any confidence that the work would be appropriate for him.

[241] It is evident that Bounty Mining required its mine workers, unsurprisingly, to do a variety of activities typically associated with underground mining – the plaintiff mentions that he had difficulties with driving an Eimco on uneven ground, lifting objects in and out of an Eimco,[90] and "lifting and dragging … and mounting on hooks DCB as well as high tension and mining cables".[91] No claim is made that the plaintiff did not realise Bounty Mining employees did this sort of work or that he had the mistaken view that he would not be called on to do such work. And as it transpired, on the plaintiff's account, the mining borer work was not as easy as he said he thought it would be for him.

[242] This willingness to change employment from the known to the unknown and from a supervisor with some level of demonstrated sympathy for him to one who was unknown and probably unlikely to be as sympathetic, does not conclude the issue but it strongly suggests that whatever problem the plaintiff was having with his back was not at a significant level.

[243] It is difficult to avoid the conclusion that as at August 2010 the plaintiff believed that he would be able to cope with the range of duties expected of an underground miner.

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89 See Ex 18

90 Ex 7 para 144

91 Ex 7 para 145

[244] The attendance on Dr Maligat in September 2010 causes some further difficulty. The plaintiff claimed that in his discussion with Dr Maligat he related his problems back to the 2009 incident. But that is not what the doctor has noted. Plainly enough there was mention of a past history of back trouble in February 2009 but that is not the same as an ongoing history of significant problems from February 2009 onwards and an attribution of a cause. It can be said that cryptic and abbreviated medical notes are a poor source of reliable information but I would expect a different note to have been made if the doctor had been told the problem was an on-going one of 19 months duration. Plainly that is how the doctor too read his own note.[92]

[245] The picture seems to be one that the plaintiff was generally carrying out quite demanding duties but eventually finding it increasingly difficult. I am not persuaded that he was in significant pain.

26. Conclusion as to the Effect of the Subject Incident

[246] Dr Shaw's views were that the subject incident of 1 February 2009 was relevant in this way:

> "This mechanism of injury is consistent with a workplace injury aggravating pre-existing symptomatic lumbar spondylosis. There was sufficient recovery from this injury to allow a return to underground mining and the capacity to pass a Krause-Weber test subsequent to the event.
>
> Considering there was significant recovery from the injury on 1 February 2009, it would be reasonable to state that current levels of lumbar back pain are more significantly related to the pre-existing condition than the work injury. I would therefore allocated 3% whole person impairment to the pre-existing lumbar back condition and 2% whole person impairment to the injury on 1 February 2009.
>
> Mr Klein's current inability to perform heavy physical work due to the lumbar back condition is predominantly related to the pre-existing lumbar back condition."[93]

[247] I accept that analysis.

[248] A strong attack was made on Dr Shaw's opinions. It was submitted that he had the past medical history wrong and wrongly assumed there were degenerative changes present in an early CT scan. As I have explained I am satisfied that the doctor correctly interpreted the army medical records. That past history was *the* significant factor for Dr Shaw.

[249] And there was evidence of degenerative change albeit that Dr Cook was not so certain – see the report of the radiologist Dr Leibowitz' of a CT scan of 13 March 2009 as showing "minor facet joint degenerative changes".[94] The plaintiff tendered that report. Further the plaintiff pleaded that the injury he suffered was "a musculo ligamentous injury to his lumbo sacral spine *with aggravation of minimal pre-*

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92 T3-53/13

93 See Ex 44 at p3

94 Ex 14

existing degenerative changes"[95] (my italics). Dr Shaw assumed that any change was minimal. That you might have such changes after an injury such as occurred in 1996-7 and given the level of the plaintiff's activities in the army and in heavy manual work seems unsurprising.[96] It is odd, to say the least, that the plaintiff attacks Dr Shaw for adopting the plaintiff's own statement of facts as set out in his pleading and relying on evidence that the plaintiff has himself led.

[250] In summary it would appear that in 1996 the plaintiff had a significant episode of lumbar back pain as defined by Dr Shaw, this resulted in some internal disruption of his disc, he made a good recovery which enabled him to see out his army career and commence his mining career, but recurrent back ache was highly likely.

[251] Dr Cook's argument is that the plaintiff became pain free, and remained so for 12 years, and was demonstrably fit, demonstrated, *inter alia*, by his ability to carry out mining work, and so the 1996-97 event had resolved.

[252] If the argument that becoming pain free and being able to carry out heavy labouring work marks the cessation of any causal connection is right then the plaintiff has the difficulty of demonstrating that he had continuing symptoms from 1 February 2009 on. I am not persuaded that was so at all. There is no objective evidence to support a claim of continuous problems. Rather the analysis is the same here as after the 1996-97 episode. There is an impact on the disc with a consequent step down in condition and an increased vulnerability to the imposition of forces on the lumbar spine.

[253] There is further reason to reject Dr Cook's opinion. I am not at all convinced that the doctor understood the history accurately. His views on the mechanism of injury did not seem to accord with the plaintiff's account.[97] And I had difficulty determining what view he took of the continuation of symptoms after 1 February 2009.[98] His view seemed to be that Dr Maligat's recording of the plaintiff's performance of the Kraus-Weber tests meant either that the plaintiff had recovered from the 1 February event or that his back was "good" on the day.[99] There was no evidence to support the latter alternative.

[254] It seems to me that the evidence is consistent with the plaintiff being conscious that he ought to be careful with his back. Mr Kenwright's evidence really goes no further than that. And what seems plain is that whatever his symptoms were they were far from debilitating. At their highest the symptoms were no more than mild ache by the time of his return to work in March 2009. I am not persuaded that they were necessarily that high. I am sure that Dr Maligat's testing on 3 March 2009 would have disclosed any symptoms of significance. Evidence from both orthopaedic surgeons suggested that was likely.

[255] After the episode of 1 February 2009 I find the plaintiff again made a good recovery. At best it seems to me that the incident of 1 February 2009 has made a modest contribution to the present condition. In my view Dr Shaw has best analysed

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95 Para 5 of the Second Further Amended Statement of Claim

96 T3-70/1-5

97 T1-83/45 et al

98 For the significance of which see *Midwest Radio Ltd v Arnold* [1999] QCA 020 at [26] per McPherson JA and Williams J

99 T1-81/10

the situation. He thought that a 5% impairment rating applied but considered that there should be an attribution of 3% to the pre-existing problems and 2% to the subject incident. The plaintiff sought to make an issue of a slip of the tongue in Dr Shaw's evidence where the apportionment was transposed.[100] I adopt the effect of his considered written opinions but it hardly matters.

[256] The crucial issue is what impact the subject incident had on the plaintiff's prospects of maintaining employment in heavy manual work – such as pertains in the mining industry.

[257] I am here required to make a judgement on hypothetical possibilities – what might have happened had the subject injury not occurred. The applicable principles were explained in *Malec v J C Hutton Pty Ltd*.[101]

[258] Where the defendant alleges that a pre-existing condition would have brought the plaintiff to a particular state of health irrespective of the supervening injury an evidential burden is placed on the defendant to disentangle the causes: *Watts v Rake*[102]*; Purkess v Crittenden*[103]*; Hopkins v WorkCover Queensland*[104]*; Smith v Topp*[105]. However the exercise of "disentanglement" is more easily achieved where "the court is required to evaluate possibilities … not proof on a balance of probabilities": *Seltsam Pty Ltd v Ghaleb*.[106]

[259] Before reaching that point the plaintiff must first show that the present incapacity results from the defendant's negligence. *Purkess* is usually cited for the proposition that the defendant may not merely suggest but must show with "some reasonable measure of precision, what the pre-existing condition was and what its future effects, both as to their nature and their future development and progress, were likely to be". However the pre-requisite to that proposition is that the "plaintiff has, by direct or circumstantial evidence, made out a prima facie case that incapacity has resulted from the defendant's negligence" and the persuasive burden remains on the plaintiff "upon the whole of the evidence to satisfy the tribunal of fact of the extent of the injury caused by the defendant's negligence."[107]

[260] That prima facie burden is usually discharged by the plaintiff pointing to the difference in his condition before and after the injury event. Here the plaintiff was capable of working in arduous physical work both before and after the subject event and demonstrated that capacity for 18 months.

[261] The plaintiff set out to establish that he first disrupted his L5/S1 disc in the subject incident – I put to one side the lack of any pleading to that effect. He has failed to persuade me that occurred. I am satisfied on the balance of probabilities that the plaintiff first damaged his L5/S1 disc in 1996-97.

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100 T3-62/5

101 (1990) 169 CLR 638

102 (1960) 108 CLR 158

103 (1965) 114 CLR 164

104 [2004] QCA 155

105 [2003] QCA 397 at [38]

106 [2005] NSWCA 208 at [104] per Ipp JA with whom Mason P agreed. Quoted with approval by White JA in *Phillips v MCG Group Pty Ltd* [2013] QCA 83 at [57] (Fraser JA and Daubney J agreeing)

107 (1965) 114 CLR 164 at p168 per Barwick CJ, Kitto and Taylor JJ

[262] It is beyond medical science to say how long the plaintiff may have continued in heavy manual work with that condition. That depends on many imponderables. Taking the population as a whole, studies suggest a 25% to 75% chance of a recurrence of back pain.[108] For someone engaged in heavy manual work the prospects are increased.[109]

[263] This condition was aggravated by the incident of 1 February 2009. By 1 April the plaintiff had no or minimal symptoms. I do not assume a complete recovery, as Dr Cook's evidence might require, but I proceed on the assumption that there was a permanent step down in his condition represented by the 2% impairment apportioned by Dr Shaw.

[264] Given the heavy nature of the work and the presence of the symptomatic lumbar spondylosis the plaintiff's chances of maintaining employment in the mining industry for any extended length of time were virtually nil. That was Dr Cook's view,[110] assuming the internal disruption of the disc that both he and Dr Shaw diagnosed.

[265] I turn then to the heads of loss.

27. Pain & Suffering

[266] Even though I accept that the plaintiff has reasonably decided he cannot continue in the mining industry I do not accept that he is in significant pain. He has recurrent symptoms of discomfort aggravated by some activities.

[267] It is noteworthy that in 18 months - up and until his employment at Bounty Mining was coming to an end - the plaintiff had seen a general practitioner only twice. He has attended on general practitioners on only seven occasions to date, and none this year.[111] He has never seen a specialist for treatment purposes, being put off by the Gold Coast practitioner's attitude.

[268] As late as February 2011, a physiotherapist recorded only "mild discomfort" and that the plaintiff found lifting and twisting reasonably significant weights at work "uncomfortable".

[269] The plaintiff gave no sign of being in pain through an extended cross examination.

[270] The plaintiff complains that his present work of traffic controlling causes him to have back ache and that he may not persist with it. I note that Dr Shaw thought the plaintiff capable of work up to a moderate level. Long hours of standing seem to be the problem, as they were when he was in the Army. I note he is unhappy doing this work.

[271] Assuming a determination to persist in the mining industry the plaintiff would inevitably have ended up having recurrences of painful symptoms in his lower back irrespective of the subject incident. It is possible, and perhaps probable, that would have occurred by now.

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108 T3-75/30

109 See Dr Shaw at T3-75/55 – 76/1

110 T1-81/50

111 Ex 7 para 246 (v), (vii), (viii) and (ix)

[272] I assess damages at $25,000.

28. Past Economic Loss

[273] The plaintiff claims $288,302.21 – the underlying assumption being of full time employment in the mining industry at $2,218 per week net from 1 February 2009 until the day of trial. That in turn assumes that the plaintiff would not have had any problem with his lower back had the subject incident not occurred.

[274] The plaintiff's submission describes this claim as "unchallenged". Presumably the reference was to the arithmetic.

[275] Neither assumption is justified.

[276] The defendant's approach (scenario 2) was to argue that the plaintiff had recovered from the incident by the time he passed Dr Maligat's tests on 1 April 2009. That is not consistent with the medical evidence I accept. Accepting Dr Shaw's views the subject incident has a continuing part to play in the plaintiff's symptomatology. The defendant's fall back position (scenario 3) was to allow $75,000, presumably as a global sum.

[277] The plaintiff's employment history does not suggest the probability of continuous employment quite apart from any back trouble. The plaintiff's history was one of ever changing employment.

[278] After enlisting in the armed services in 1995 at age 20 the plaintiff spent nearly 5 years there, then worked as a cook for a "couple of months", then as a telecommunications salesman for about 5 months, then attended Bible College and worked as a chef for a year before travelling to China on a "mission trip". In 2001 he picked fruit in the Emerald area for about 6 months and then worked as a car detailer for an indeterminate period.

[279] The plaintiff's mining career commenced in August 2002. Between then and April 2006 – a period of three years and eight months – the plaintiff worked for some ten different employers, using the word in its loose sense as the plaintiff was employed by a labour hire company through much of this time working on short term contracts. There were periods of unemployment but I cannot determine the extent of them.

[280] The plaintiff then had about two years out of the work force "trying to re-assess [his] life to that point".[112]

[281] He then worked as a "yardy" in a sawmill for about five months and then as a trades assistant in a sugar mill for part of the 2008 crushing season. He then re-commenced work in the mining industry in December of that year. He had been working for only two months when the subject incident occurred.

[282] Against this background an assumption of continuous employment in the mining industry is not justified. And that is to put to one side the vagaries of the mining industry.

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112 Ex 7 at para 37

[283] SBD Services put off 70 workers, along with the plaintiff, on 28 February 2009. The plaintiff's claim assumes he obtained work the next day. His case assumes he was unfairly dismissed and that, but for his back injury, he would not have been dismissed. I reject that assumption. His employment with Bounty Mining was similarly brought to an end because of lack of work. I assume that the plaintiff does not accept that as the reason but he called no evidence to prove it was not so.

[284] One of the notable aspects of the evidence of each of the miners called was that they had not maintained full employment in the mining industry since February 2009. Indeed Mr Szepanowski said that "when the GFC hit … it was pretty hard to find work".[113] Mr Kenwright said that he was unemployed when he gave his evidence and in the middle of about ten weeks out of work.[114] His employment with Walter Mining had not continued. Mr Inkson had apparently left the mining industry and was employed by BIS Industries as a maintenance representative.

[285] Given my findings the subject incident had no impact on the plaintiff's employment at all until after his employment was terminated at RUS Mining on 25 February 2011. There is no evidence of missed opportunities for work between the cessation of employment with SBD Services in February 2009 and the end of the RUS Mining employment.

[286] Whether there was then some impact requires a finding about the availability of work, the likely determination of the plaintiff to pursue it, and the state of the plaintiff's back assuming the subject incident had not occurred.

[287] As to that last point it is plain that there was a significant flair up of symptoms because of the heavy lifting undertaken towards the latter part of the RUS Mining employment. It is at least possible that the work would have aggravated to a significant degree the plaintiff's symptoms, irrespective of the occurrence of the subject incident.

[288] The potential income foregone is about $223,000 ($255,070 ($2,218 x 115 wks) less actual earnings ($32,192)).

[289] I will allow $155,000, roughly a 30% discount.

29. Future Economic Loss

[290] The plaintiff claims $1,260,340 and the defendant allows between $50,000 and $250,000 depending on the findings.

[291] The issues relevant to the past assessment are again relevant here - the availability of work, the likely determination of the plaintiff to pursue it, and the state of the plaintiff's back assuming the subject incident had not occurred. There is also the issue of whether the plaintiff's present income maximises his residual earning capacity. As mentioned the plaintiff has obtained work as a traffic controller. He earns $552 net per week.[115]

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113 T3-34/53

114 T2-44/15

115 Taken from para 5.10 of the plaintiff's submission (Ex 54). The wage information provided does not marry up with that figure – see Ex 7 at p 30.

[292] As to the state of the plaintiff's back, irrespective of the subject injury I am confident that the plaintiff would have reached his present position sooner rather than later. It is possible, but not certain, he might have by now. With a deteriorating disc in his lower back he was bound to be caught out trying to perform the heavy manual labour inherent in the mining industry. He has come to the realisation that it is not in his interests to continue the demanding work.

[293] There needs to be some account taken of the unlikelihood of the plaintiff continuing in the mining industry irrespective of any back symptoms. He has not previously in his life lasted as long as five years in any one employment. I note that in the two years prior to the subject incident the plaintiff earned an average net wage of about $1,000 in 2009 and $221 in 2008.[116] The 2009 figure includes income from the defendant to 1 February. He averaged $643 net per week from 29 January 2008 to 21 November 2008 – a period which excludes the mining industry work. The relevant point is that if the plaintiff had decided to leave the mining industry his demonstrated earning capacity was not so different to his present level of wages.

[294] I note that the plaintiff asserts a continuing financial need which would have provided some motivation to persist, at least for a period.[117]

[295] The assumption underlying the plaintiff's assessment is that the present level of wages will continue in the mining industry for the next 28 years. That is an improbable assumption. Mr Hedley's evidence was that wages for mine deputies has reduced substantially in the recent past with a reduction in the hours of work available.[118]I assume a similar loss would result in other positions throughout the mining industry. And presumably I am permitted to have judicial knowledge of the fact, reported daily in the newspapers, that the fortunes of the mining companies are wholly dependent on the foreign demand for coal. In the past that demand, along with wages and levels of employment, has been very much less than today.[119] It may be so again.

[296] Finally it is clear that the plaintiff is intelligent and energetic. While I make no criticism of his efforts to date in maintaining employment I am far from convinced that continuing to work as traffic controller is the most that he can do with his talents.

[297] I can only assess a global sum. I will allow $150,000 for future impairment of earning capacity. Some might consider that assessment a generous one given that one possible future, and perhaps the probable one, is that the plaintiff could have been in much the same condition now irrespective of injury. *Malec* however requires that the assessment reflects the possibility that plaintiff's symptoms may not have worsened to a degree to prevent him working. And the plaintiff would not have needed to persist with the work a great deal longer to have earned the amount allowed.

30. Loss of Work Benefits

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116 See Ex 7 para 223

117 Ex 7 para 155

118 T2-37/15

119 See *Phillips v MCG Group Pty Ltd* [2013] QCA 83 at [68] per White JA and the reference to *Koven v Hail Creek Coal Pty Ltd* [2011] QSC 51 at [44]

[298] Some employment positions in the mining industry provide food, accommodation and travel allowances. The plaintiff claims $33,150 for past loss and $100,000 for future loss of such benefits based on a value of $150 per week.

[299] As best I can see there is no evidence on which I can base any finding that the plaintiff would have received such benefits had he not been injured or the value of them if he had. The plaintiff's schedule of damages refers me only to the plaintiff's claim in his statement (Ex 7) that he has suffered such a loss. An assertion of a claim is not evidence.

[300] Mr Hedley suggested that some benefits might be available but it obviously depended on the employment.[120] It is unclear to what extent any benefits that might be paid were simply a recovery of expenses incurred, such as travel to and from mine sites, or an addition to the wage, such as the provision of meals.

[301] I do not propose to make any allowance over the amounts already allowed for economic loss.

31. Future Treatment Costs

[302] The plaintiff claims $24,660. That assumes an ongoing need for an expenditure of $30 per week for the rest of his life on attendances on general practitioners, obtaining pharmaceuticals and attending on a chiropractor.

[303] As I have said the plaintiff seems to have a marked reluctance to attend on medical practitioners, nor does he indulge in significant medication. His symptoms are not particularly severe. His intention in the future is to endeavour to avoid heavy manual work likely to aggravate his symptoms. And there is no evidence that continued attendance on chiropractors provides any significant benefit. Plainly on my findings the defendant's reasonable responsibility for any treatment is much more limited than the plaintiff assumes.

[304] In my view again only a global sum is warranted and that a modest one. Dr Shaw spoke of a need for simple analgesia and maintaining a gym strengthening program.[121]

[305] I will allow $2,000.

32. Special Damages

[306] The plaintiff claims $8,465.51. The defendant does not contest the claim assuming the findings are along the lines I have made. In fact the defendant allows more than the plaintiff claims, which is unusual.

[307] Given the lack of any attack on the claim I will allow it.

33. Summary

[308] In summary, I assess the damages as follows:

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120 T2-37/20-30

121 E.g. see Ex 33 at p 7

Pain, suffering and loss of amenities of life	$25,000.00
Interest on past general damages[122]	$1,700.00
Past Economic Loss	$155,000.00
Interest on past economic loss[123]	$15,011.00
Future Economic Loss	$150,000.00
Loss of superannuation benefits[124]	$27,450.00
Special damages (paid by WorkCover)[125]	$1,139.00
Special damages (paid by the Plaintiff)	$8,465.51
Interest on special damages[126]	$1,756.00
Future medical expenses	$2,000.00
Total Damages	**$387,521.51**
Less 25% contribution[127]	$96,880.38
Less refund to WorkCover	$1,139.00
Net Damages	**$289,502.13**

[309] There will be judgment for the plaintiff in the sum of $289,502.13.

[310] I will hear from counsel as to costs.

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122 $20,000 x 2% x 4.25 yrs

123 ($155,000 less Centrelink benefits received of $19,147) x 5% x 2.21 yrs

124 At 9% of past and future loss

125 I include the amount the plaintiff asserts. The defendant allows $611. I do not understand the discrepancy but the item is an "in and out" item and so irrelevant to the damages allowed

126 As claimed

127 As to the point in the calculation where the apportionment is applied see *Negric v Albion Scrap Steel Pty Ltd* [1978] Qd R 362