

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

**Matter Number:** 2203/20  
**Applicant:** David Black  
**Respondent:** Inghams Enterprises Pty Ltd  
**Date of Determination:** 16 July 2020  
**Citation:** [2020] NSWCC 241

The Commission determines:

1. There is an award for the respondent with respect to the applicant's claims for compensation.

A brief statement is attached setting out the Commission's reasons for the determination.

Marshal Douglas  
**Arbitrator**

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF MARSHAL DOUGLAS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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Lucy Golic  
Acting Senior Dispute Services Officer  
**As delegate of the Registrar**



## STATEMENT OF REASONS

### BACKGROUND

1. Mr David Black commenced employment with Inghams Enterprises Pty Ltd on 16 November 2016 as a process worker and cleaner. He claims that the work he performed in his employment with Inghams up to and including an incident that occurred on 26 March 2019 resulted in his suffering an injury in the form of an aggravation, acceleration, exacerbation or deterioration of a pre-existing condition in his lumbar spine. He contends that he has had no capacity for work since 26 March 2019 as a result of the injury and that consequently Inghams is liable to pay him weekly payments of compensation from that date in accordance with the relevant provisions of the *Workers Compensation Act 1987* (the 1987 Act). He also contends that he will in future require treatment in the form of a back strengthening program as a result of the injury and he seeks Inghams pay him compensation for that treatment.
2. In a letter Inghams posted to Mr Black on 2 April 2020, Inghams notified Mr Black under s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) that it disputed it had any liability to pay Mr Black the compensation he claimed. It notified Mr Black that its reason for denying liability was that it disputed Mr Black had sustained “a work related injury during the course of your employment”. It further notified Mr Black that it disputed his employment with Inghams was a substantial contributing factor to the injury. Further, if it was the case that he had a work injury, it disputed he had an incapacity for work resulting from the injury or any need for treatment as a result of the injury.
3. Mr Black registered with the Commission an Application to Resolve a Dispute (ARD) seeking the Commission determine his disputed claims for compensation.

### PROCEDURE BEFORE THE COMMISSION

4. At a telephone conference on 21 May 2020 and at a conciliation conference on 2 July 2020, I used my best endeavours to attempt to bring the parties to a settlement of Mr Black’s claims for compensation. I am satisfied that the parties had sufficient opportunity to explore settlement. They were unable to reach an agreed resolution of Mr Black’s disputed claims and the matter proceeded to an arbitration hearing immediately following the conclusion of the conciliation on 2 July 2020.

### EVIDENCE

5. The following documents were in evidence before the Commission and taken into account in making this determination:
  - (a) ARD and attached documents;
  - (b) Reply and attached documents;
  - (c) Letter dated 29 April 2020 from Leigh Virtue & Associates to CBD Law;
  - (d) Letter dated 5 September 2018 from Dr Julian Scullin to Ms Linda Drake of Toukley Family Practice;
  - (e) Letter dated 15 May 2019 from Dr Chi Lau to Hunter Pain Clinic.
6. No witness was cross examined and no witnesses were called to give oral evidence.

7. I note that at the arbitration Mr Black applied to have a statement he signed on 1 July 2020 received into evidence. I refused his application and provided oral reasons. A sound recording of those oral reasons was made and, given that, I shall not recount my reasons now for refusing to receive Mr Black's statement of 1 July 2020 into evidence.

## **ISSUES FOR DETERMINATION**

8. The following issues are in dispute:
- (a) whether in the course of Mr Black's employment with Inghams he suffered an aggravation, acceleration, exacerbation or deterioration of a disease in his lumbar spine;
  - (b) if so, whether Mr Black's employment with Inghams was a major contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease;
  - (c) if yes to the above, whether Mr Black has an incapacity for work resulting from any injury he suffered; and
  - (d) whether treatment in the form of a back-strengthening programme for three years comprising hydrotherapy and physiotherapy once a week and a gym program three times a week is reasonably necessary as a result of any injury Mr Black suffered.

## **FINDINGS AND REASONS**

### **David Black's evidence**

9. Mr Black's evidence is contained in a letter he signed on 22 April 2019 addressed "to whom it may concern"<sup>1</sup> and a statement he signed on 22 April 2020<sup>2</sup>.
10. In his letter of 22 April 2019, Mr Black said that he had numerous injuries whilst he worked for Inghams and that he informed his team leaders and his supervisor, Mr Mark Ritter, of that. He said he also informed them that he was taking medications and had consulted doctors for those injuries.
11. He described working in a "VE room and red room" where he had to perform cleaning duties. He said that each time he did these duties he got "a sore back and body aches and pains". He described having to climb in and under machines in order to clean them.
12. He described hurting his "upper back" on a day shift when he was washing and stacking pallets. He described straining his "back again" when working in the VE room. That latter incident is an obvious reference to his cleaning a machine in the VE room during his shift on the evening of 25 March to 26 March 2019. He said that he told Mark Ritter on 25 March 2019 that was taking medication for a "sore upper back".
13. In his statement of 22 April 2020, Mr Black said he "passed Inghams' pre-employment medical check at Lisarow Medical Centre with flying colours". He commenced his employment with Inghams on 16 November 2016. He was employed on a casual basis working 35 hours a week.
14. He said his duties at Inghams required him to do heavy lifting and moving heavy equipment, undertake cleaning duties, handle chemicals, strip down heavy machines, push and pull waste bins, sweep, shovel, hose and use gurneys, lift and stack pallets, and undertake manual labour.

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<sup>1</sup> ARD 1

<sup>2</sup> ARD 3

15. He described suffering an injury to his lumbar spine in 2001 to 2002 in previous employment he held in a meat distribution factory. He said that that injury resolved after some sessions of physiotherapy and massage. He said that after that injury had resolved, it did not trouble him either at work or in his personal life. He said he had been able to run around and play with his kids without a problem before he commenced employment with Inghams.
16. He described that following his commencing work at Inghams and performing heavy and repetitious manual handling duties he got a sore back over a period of time. He said that he had complained of a sore back for months prior to 26 March 2019.
17. He recalled having an x-ray and CT scan on 6 September 2019. He said that he obtained a letter on 6 March 2019 from his GP, Dr Balaraman of the Entrance Medical Centre in which his GP suggested that suitable duties be found for him. He said that he gave that letter to "the leading hand".
18. He described hurting his back in an incident prior to 26 March 2019 when he was washing and stacking hundreds of pallets.
19. He said that on the evening shift on 25 March 2019 Mr Ritter requested that he clean the "VE room and red room". He said that on each prior occasion he had worked in that room he got a sore back and body aches and pains and that he had to climb in and under machines to clean them. He said that in order to clean the machine he had to climb onto a portable two step ladder that was not fixed to the machine. He said the ladder had a tendency to push away when he had to lean into the machine to clean it. He said that when cleaning the machine on the evening shift of 25 to 26 March 2019 the ladder did push away whilst he was bending over into the machine. He said that he did not fall but his "body got jerked" and that he "felt like it was going to snap in half". He said that he "felt instant pain in his lumbar spine" that shot "up my back and down my legs and in my hips". He described feeling pain with each step.
20. He said that he told fellow employees Wayne Kan and Wayne Dicker during a "smoko break" in the early hours of 26 March 2019 that his back was sore from work.
21. He attached to his statement, as "DB2", copies of text messages that he said were exchanged between him and Mr Ritter on 26 March 2019, following the completion of his shift. Those messages included this:

Mr Black:

"Hi Ritter I am gonna have to stay home my back is really sore it didn't go too well working on my own in the VE last night I am sorry I'm a bit embarrassed saying so but I'm just too sore I can't help it... I did ask for help last night but didn't receive any unfortunately... so I'm staying home and going up to physio shortly... sorry again"

Mr Ritter:

"Mate D Yeaman went over there so I can't accept that you didn't get help. And who did you ask for more help. As this isn't a work injury I can't keep on replacing you for your shifts as I am short staffed as it is. You need to get a full DR certificate clearance saying that you are fit to do rostered duties."

Mr Black:

"Yeah I don't know who done the bins... and this is the same sore back I'm getting pulling the pallets down technically it should be workers comp... I feel like this is the same as when I twisted my heel at work I had to seek medical help on my own trying to do the right thing by you... Yes I've explained my other back problem to you and asked if it was going to be a problem but it wasn't so I've tried to keep working and asked to go back to night shift to rest it a bit also."

22. Mr Black has not worked since his evening shift of 25 and 26 March 2018. He said that since then he can “barely walk, drive, do my household duties, even showering, going to the toilet”. He said he needs help with climbing stairs and getting in and out of vehicles. He described having incontinence.
23. He said that he had a L4/5 and L5/S1 spinal fusion on 24 November 2019 at the Royal North Shore Hospital that was done by neurosurgeon Dr Jonathon Ball.

### Clinical Records

24. In evidence are the clinical records from three general medical practices which Mr Black attended. One is the Entrance Medical Centre which is situated at 120 The Entrance Road, The Entrance, where Mr Black saw Dr Julian Scullin and Dr Sasi Balaraman. Another is Coastal Health Medical Service at 213-217 Main Road, Toukley where he saw Dr Mohammed Meeran. The third is Toukley Family Practice at 37-41 Canton Beach Road, Toukley, where he saw Dr Chi Lau.
25. The records of the Entrance Medical Centre reveal that Mr Black attended there on 21 June 2018 complaining of “chronic pain aggravated by fourth floor apartment, no lift”<sup>3</sup>. He was given a prescription for Panadeine Forte.
26. He next attended the Entrance Medical Centre on 30 August 2018, with the reason for his visit being recorded as “chronic pain, PTSD”. It was noted that he “has moved to Toukley – ground floor, better”. It was also noted that Mr Black works part time at Inghams. Under a heading “Management”, there was a note made “chase discharge letter & xr report from Wyong H – prob T5 rather than C5”.<sup>4</sup>
27. On 5 September 2018 Mr Black again attended the Entrance Medical Centre. He saw Dr Scullin. Dr Scullin noted in the clinical records that Mr Black’s reason for his visit was “mental health care plan, chronic pain”. Dr Scullin recorded “results of x-ray chest report given to patient. – clear, no mention of spine injury”. The x-ray to which Dr Scullin refers is not in evidence. I infer that Dr Scullin had obtained the x-ray report from Wyong Hospital, which he had noted was his plan in the record he made for Mr Black’s attendance on 30 August 2018.<sup>5</sup>
28. Dr Scullin examined Mr Black and his findings from that examination were recorded as including “diffuse mild tenderness mid thoracic to sacral spine”.<sup>6</sup> Dr Scullin wrote a letter to Ms Linda Drake of the Toukley Family Practice, seemingly because Mr Black had expressed an intention to transfer his care to that practice. The history that Dr Scullin set out in his letter included this:
 

“Chronic pain      Work related “slipped disc” 2002 with ongoing lower back, hip and groin pain. Work related shoulder injury 2012 (surgery by Burnekis, subsequent treatment by Rosso); thoracic spine injury secondary to fall 2018; low back pain.”<sup>7</sup>
29. Dr Scullin ordered an x-ray of Mr Black’s spine and a CT of his lumbar spine. That imaging was done on 6 September 2019. The history recorded in the report on the imaging reflected that which Dr Scullin had noted in the clinical records of the Entrance Medical Centre relating to Mr Black’s attendance on 5 September 2018, which was:

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<sup>3</sup> ARD 135-136

<sup>4</sup> ARD 136

<sup>5</sup> ARD 146

<sup>6</sup> ARD 146

<sup>7</sup> Application to admit late documents filed 1 July 2020 by Leigh Virtue & Assoc (AALD) p9

“Chronic pain since 2002 contributed to slip lumbar disc. Thoracic pain symptoms 4 February 2018. Dysaesthesia right leg. Asymmetric lower limb reflexes.”<sup>8</sup>

30. The radiologist who provided the report noted that the x-ray of Mr Black’s spine revealed, with respect to his lumbar spine, that there was a grade 1 anterolisthesis of L4 on L5 with associated past defect. The radiologist provided the following conclusion regarding the CT of Mr Black’s lumbar spine:
- “There is multilevel lumbar spondylosis with neural exit foraminal stenosis at multiple levels as described. There is contact of the descending S 1 nerve roots bilaterally at the level of the L5/S1 intervertebral disc. Multilevel anterior wedging of the thoracic vertebra without specific evidence of acute fracture. Given the recent onset of pain in this region, further characterisation with MRI or bone scan may be of use.”<sup>9</sup>
31. Mr Black returned to the Entrance Medical Centre on 10 September 2018. He was again issued with a prescription for Panadeine Forte.
32. Mr Black attended the surgery again on 3 October 2018, seeing Dr Scullin. Dr Scullin noted in the clinical records that Mr Black had “ongoing mid and low back pain”.<sup>10</sup> Mr Black was on that occasion issued with a prescription for Lyrica. Dr Scullin wrote a referral to “Physiophix” for Mr Black to receive exercise physiology. Dr Scullin said in that letter of referral that Mr Black had “chronic pain and spinal pathology at numerous levels”.<sup>11</sup>
33. On 22 January 2019, Mr Black went again to the Entrance Medical Centre. The notes made in the clinical records for that attendance included that Mr Black had chronic back pain and was having spasms and falling over at times. The records note that Mr Black said that he cannot walk long distances.<sup>12</sup>
34. Mr Black first consulted Dr Lau at the Toukley Family Practice on 4 February 2019. As indicated above, Dr Scullin from the Entrance Medical Centre had previously written to the Toukley Family Practice regarding Mr Black’s health, including the problems Mr Black was experiencing with pain in his back. The reason for Mr Black’s first attendance at the Toukley Family Practice and his second attendance there on 8 February 2019 related to issues other than his back. On 8 February 2019, Dr Lau issued a medical certificate advising that Mr Black would be unfit for work from 8 February 2019 to 11 February 2019, and it would seem that the reason for that had nothing to do with Mr Black’s back, but rather related to his other medical issue.
35. On 1 March 2019, Mr Black again saw Dr Lau. Dr Lau noted on that occasion that Mr Black had attended for “weight management”. He noted that Mr Black had gained 30 kilograms of body weight since a back injury from a fall in 2018. He noted that Mr Black had ongoing back pain.<sup>13</sup>
36. On 6 March 2019, Mr Black saw Dr Balaraman at the Entrance Medical Centre. Dr Balaraman noted in the clinical records that he had assessed Mr Black had “strained his back over the weekend” and that he “would like a letter from doctor for suitable duties”.<sup>14</sup> Dr Balaraman wrote a letter addressed to “whom it may concern” which read as follows:

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<sup>8</sup> ARD 44, 136

<sup>9</sup> ARD 44-45

<sup>10</sup> ARD 136-137

<sup>11</sup> ARD 45

<sup>12</sup> ARD 137

<sup>13</sup> ARD 94

<sup>14</sup> ARD 137

“This is to advise that David suffers from Lumbar spondylosis which is associated with chronic pain. He is on medication to help manage his pain. He should not be doing any heavy lifting, very minimal manual handling and should not be bending frequently from waist level. It would be appreciated if his job provider/employer could find him suitable duties- re: office duties or work that will not aggravate his back. It would benefit the patient if he could get retrained for suitable work.”<sup>15</sup>

37. Mr Black had also attended Dr Lau on 6 March 2019 at the Toukley Family Practice complaining of “ongoing low back pain since 2/2018”. Dr Lau noted in clinical records kept by the Toukley Family Practice that his findings from his examination of Mr Black on that occasion with respect to his lumbar spine revealed mild tenderness over L4/5 and mild reduced range of movement.<sup>16</sup> Dr Lau provided a diagnosis of chronic low back pain radiating down both legs the onset of which was “2/2018”.<sup>17</sup>
38. On 18 March 2019, Mr Black was admitted to the Gosford Hospital complaining of sacral back pain. Dr Thomas Stock wrote the discharge report the hospital issued to Dr Scullin dated 19 March 2019, wherein was recorded that Mr Black had a “significant history of trauma after falling down stairs one year ago”. Dr Stock also recorded that Mr Black had reported on his admission into the hospital that he was experiencing “intermittent symptoms of perineal parasthesia/numbness, urinary and faecal incontinence alongside bilateral sciatica”.<sup>18</sup>
39. On 26 March 2019, Mr Black saw Dr Ben Kostyrka at the Toukley Family Practice. Dr Kostyrka noted in the Practice’s clinical records that at 2am that morning Mr Black had lent into a mixer to clean it and developed “sudden pain mid back radiating to left back” that was “worse with arm movements, reaching, nil arm weakness”. The doctor also noted that Mr Black had had “recurrent back pain at mid and low back for past 18 months”. Dr Kostyrka examined Mr Black and found “some pain on thoracic rotation, left side only”.<sup>19</sup> Dr Kostyrka completed a “certificate of capacity/certificate of fitness” in the template provided by the State Insurance Regulatory Authority, in which Dr Kostyrka certified that he had diagnosed that Mr Black had a “work related injury/disease” of “thoracic back pain” that occurred on 26 March 2019.<sup>20</sup> Dr Kostyrka also wrote a referral to Physiophix advising that Mr Black had “injured his mid back with pain at area of T6-8 radiating to left”.<sup>21</sup> The referral was for physiotherapy.
40. Mr Black attended the Toukley Family Practice again on 3 April 2019, seeing Dr Lau. Dr Lau examined Mr Black’s lumbar spine and found there was mild tenderness over L4/L5 and mild restriction of movement in all directions.<sup>22</sup> Dr Lau completed a Centrelink medical certificate in which he certified he had diagnosed Mr Black as having lumbar spondylosis the onset of which was “2/2018” and the symptoms from which were “chronic low back pain, radiating down to both legs”.<sup>23</sup>
41. On 23 April 2019, Mr Black again saw Dr Lau. On that occasion Dr Lau noted in the clinical records that Mr Black had advised he had gone to Gosford Public Hospital one or two weeks ago and had an MRI of his lumbar spine and was told that there were “no new changes”. Dr Lau further noted that Mr Black advised of a pending appointment with a spinal surgeon in May 2019 and of Mr Black wanting a letter to certify that he has a permanent disability due to chronic low back pain. Dr Lau noted that he had explained that “we should wait for spinal

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<sup>15</sup> ARD 55

<sup>16</sup> ARD 95

<sup>17</sup> ARD 56

<sup>18</sup> ARD 58

<sup>19</sup> ARD 96

<sup>20</sup> ARD 61

<sup>21</sup> ARD 60

<sup>22</sup> ARD 97

<sup>23</sup> ARD 57

surgeon's opinion before declaring any permanent disability". Dr Lau noted that he examined Mr Black and had found Mr Black had mild tenderness over L4/L5 and had mild reduced restricted movement in all directions.<sup>24</sup> Dr Lau wrote a letter to Centrelink advising that "Mr Black has been suffering from ongoing low back pain due to multi-level lumbar spondylosis and probably nerve root irritation at S1 due to bulging of intervertebral disc at L5/S1 level".<sup>25</sup>

42. On 24 April 2019, Mr Black saw Mr Joshua Hall at Physiophix for exercise physiology. Mr Hall noted in Physiophix' clinical records that Mr Black had "ongoing low back issues for many years" and that it had always hurt Mr Black to walk "since 18". Mr Hall noted that Mr Black had worked at a factory on and off for many years and had always done manual roles. He noted that Mr Black had reported "nil workers comp input" and had reported "nil specific mode of injury".<sup>26</sup>
43. On 8 May 2019, Mr Black saw Dr Shinuo Liu, a neurosurgical registrar at Royal North Shore Hospital. Dr Liu wrote to Dr Scullin on that day noting that Mr Black "has had several years of lower back pain as well as bilateral lower limb pain". Dr Liu noted that Mr Black gets occasional parasthesia on the right side more than the left and that Mr Black had reported that his lower limb pain had worsened over the last few months and that he had intermittent incomplete emptying of his bladder. Dr Liu reported that Mr Black's urinary symptoms cannot be explained by the appearance on the MRI scan. Dr Liu organised a bone scan and a flexion and extension lumbar spine x-ray.<sup>27</sup>
44. Mr Black was reviewed by Dr Liu on 31 July 2019. Dr Lui noted that Mr Black's symptoms had remained unchanged notwithstanding that he had a CT guided interlaminar epidural injections which had provided some improvement in his lower back pain. Dr Liu noted that the flexion and extension lumbar x-rays did not demonstrate significant dynamic changes but the bone scan demonstrated evidence of bilateral sacroiliac tracer uptake. She recommended he be reviewed by a rheumatologist to exclude or otherwise diagnose ankylosing spondylitis.<sup>28</sup>
45. On 7 August 2019, Dr Meeran on the Coastal Health Medical Centre issued a Centrelink medical certificate for Mr Black in which Dr Meeran certified he had diagnosed Mr Black had "back pain lumbar spondylosis", the date of onset of which was 1 February 2018 and the symptoms from which were "back pain and stiffness".<sup>29</sup>
46. Dr Meeran referred Mr Black to rheumatologist Dr Robert Baume, whom Mr Black saw on 26 August 2019. Dr Baume wrote to Dr Meeran advising that Mr Black had diffuse back pain from the mid thoracic region to his lumbar spine to his hips, groins, thighs, and knees and had parasthesia of the lateral aspects of his feet and intermittent weakness of his legs. Dr Baume reported that an MRI of the lumbar spine on 10 July 2019 showed bilateral pars defects and that bone scans in May showed more or less the same. Dr Baume diagnosed that Mr Black had nonspecific diffused muscle pains probably mainly related to fibromyalgia and had chronic pain issues. Dr Baume said that the pars defects would not explain Mr Black's current symptoms.<sup>30</sup>
47. Mr Black was subsequently admitted into the Royal North Shore Hospital where he had a L4/5, L5/S1 posterior lumbar interbody fusion done by neurosurgeon Dr Jonathon Ball. He was discharged on the 27 November 2019.

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<sup>24</sup> ARD 97

<sup>25</sup> ARD 64

<sup>26</sup> ARD 139

<sup>27</sup> ARD 66

<sup>28</sup> ARD 68

<sup>29</sup> ARD 89

<sup>30</sup> ARD 72

48. On 26 November 2019, Dr Ball referred Mr Black for an x-ray of his lumbar sacral spine, which was done on 2 January 2020. Dr Sean Khoury provided a report of that x-ray concluding that it revealed:

“Post spinal fixation hardware with pedicular screws is noted extending from L4-S1. Vertebral cage device is present at L4-5 and L5-S1. The L4-5 anterolisthesis appears stable. No hardware complication is identified.”

## **IME Reports**

### ***Dr Casikar***

49. Mr Black was seen by Dr Vidyasagar Casikar, a neurosurgeon on 2 May 2019 at the request of Inghams. Dr Casikar provided a report to Inghams on 9 May 2019. Dr Casikar detailed a history in his report of Mr Black overstressing on the night of 25 March 2019 to clean an area of machinery, from which Mr Black “developed low back pain”. Dr Casikar noted that Mr Black “indicated that on the next day the pain increased” and that Mr Black “had pain in the chest and the mid back”. The history Dr Casikar obtained included Mr Black having previously consulted Dr Lau on 6 March 2019 for low back pain and Mr Black having had an MRI examination and evaluation at Gosford Hospital. Dr Casikar noted Mr Black had a history of low back pain in 2002 and had slipped and fell in 2018 injuring his back. Dr Casikar noted that in 2017 Mr Black also slipped and fell at his home while playing with his children injuring his right hand.
50. Dr Casikar noted in his report the findings from the imaging that was done on 6 September 2018 in the form of an x-ray and CT scan. Dr Casikar also examined Mr Black and found that Mr Black was unable to walk on heels and toes and that he could flex his back up to 10 degrees but lateral flexion was not possible. Dr Casikar noted that Mr Black complained of hyposthesia over the right L5 and S1 dermatome. He noted that Mr Black did not have any motor weakness and that his deep tendon reflexes were normal on both sides.
51. Dr Casikar expressed the view that his neurological examination of Mr Black was normal. Dr Casikar diagnosed that Mr Black had degenerative disease of the lumbar spine and pain focused issues.
52. In answer to a question Inghams posed, “are you of the view the worker has suffered an aggravation of pre-existing conditions?”, Dr Casikar responded “it is possible that Mr Black suffered an aggravation of a pre-existing degenerative disease and grade 1 spondylolisthesis”.
53. In answer to a further question Inghams posed, “if the worker has suffered an aggravation please provide the reasons as to how the worker sustained an aggravation and if you consider the aggravation to have ceased?”, Dr Casikar responded, “based on Mr Black’s description, he was trying to over reach and flex forward. It is possible that this could have aggravated his discogenic pain. In my opinion, this aggravation has now ceased”.
54. Dr Casikar expressed the view that Mr Black’s long term complaints of back pain related to weight gain and that unless that was addressed Mr Black would have complaints of back pain for a long time. Dr Casikar when asked to express his view on whether Mr Black’s employment was “a substantial contributing factor to the current injury, in the case of a disease, the main contributing factor” said:

“The employment is not a substantial contributing factor to the injury. The kind of injury he claims was a simple mechanical soft tissue injury which under normal circumstances should have recovered. Mr Black was complaining of back pain two weeks before the said injury; therefore, in my opinion, the workplace injury is not the main contributing factor to his present complaints.”

55. Inghams subsequently requested Dr Casikar review a report neurosurgeon Dr Peter Bentivoglio wrote on 28 February 2020 and to “confirm your decision remains unchanged and the worker’s employment with Inghams is not a substantial contributing factor”. Dr Bentivoglio had examined Mr Black at the request of Mr Black’s solicitors. I will discuss shortly the report Dr Bentivoglio provided to Mr Black’s solicitors. Dr Casikar, without further examining Mr Black, responded to Inghams request in the following terms:

“Mr Black has a well-established failed back syndrome. This is a permanent problem. Failed back syndrome normally occurs due to inappropriate selection of patients. His main problem was constitutional genetically determined degenerative disease. The indications for spinal fusion were not due to work-related issues.

Dr Bentivoglio seems to indicate that the work-related issue aggravated his pre-existing problem. The kind of aggravation that he had would have settled within 6-8 weeks. In my opinion, Mr Black’s spinal fusion and his current impairment are due failed back syndrome and this a permanent problem. His probability of getting back to his employment is very slim.

My opinion remains unchanged and employment with Inghams is not a substantial contributing factor.”

### ***Dr Bentivoglio***

56. As just mentioned, Dr Bentivoglio produced a report to Mr Black’s solicitors on 28 February 2020, following his examination of Mr Black on that day. Dr Bentivoglio in his report indicated that Mr Black’s solicitors had provided him with documentation, but nowhere within his report did he explicitly detail what that documentation comprised. Further, there is nothing in the evidence before, such as the letter that Mr Black’s solicitors sent to Dr Bentivoglio, that sets out what that documentation was.
57. Dr Bentivoglio noted in his report what the CT scan of 6 September 2018 revealed and also what the x-ray done subsequent to Mr Black’s operation revealed, which would be the x-ray done on 2 January 2020. I infer by virtue of the fact that Dr Bentivoglio refers to the findings from imaging procedures that he had the reports relating to them. But beyond that, it is not known what documents Dr Bentivoglio had and therefore what documents he utilised both to obtain a history relevant to Mr Black’s injury and to formulate the opinions he expressed in his report with respect to Mr Black’s injury. It would seem that Dr Bentivoglio, in terms of obtaining a history, has largely relied upon what Mr Black directly provided him.
58. Dr Bentivoglio noted that Mr Black “described a work injury on 26 March 2019, when he slipped as he was bending over cleaning a machine”. Dr Bentivoglio noted that Mr Black “developed low back pain” from that.
59. Dr Bentivoglio noted that Mr Black had a history of “low back pain on and off for many years”. Dr Bentivoglio further noted that Mr Black had “a prior back strain whilst working with Inghams which occurred before the designated work injury on 26 March 2019”. In response to a request from Mr Black’s solicitors to provide a “history of injury/injuries obtained from the worker and the enclosed documentation”, Dr Bentivoglio wrote that Mr Black had “pre-existing back pain prior to the work injury on 26 March 2019” and that Mr Black’s back pain “was exacerbated when he slipped whilst cleaning up a machine”.
60. Dr Bentivoglio set out in his report a summary of the treatment Mr Black had received after 29 March 2019, including the CT scan done on 6 September 2018, the results of which Dr Bentivoglio summarised in his report. Dr Bentivoglio noted that Mr Black had an L4/S1 posterior fusion on 24 November 2019, which was done by Dr Ball, whom Dr Bentivoglio noted Mr Black had only seen on the day of the operation. Dr Bentivoglio noted that prior to this surgery being done Mr Black had been complaining “of low back pain radiating up into his thoracic region, into both buttocks, into both hips and into both thighs”.

61. Dr Bentivoglio noted that following Mr Black's surgery Mr Black had "been left with bilateral hip pain, going into both groin and low back pain and left leg pain". Dr Bentivoglio noted that there had been no significant improvement in Mr Black's symptomology. Dr Bentivoglio noted that Mr Black had a dysaesthesia of his foot in the L5 distribution. Dr Bentivoglio noted that Mr Black could only walk slowly for 10 minutes and could sit for only 60 minutes before he has pain. He noted that Mr Black was not doing any domestic duties and was taking Endone, Lyrica and Panadeine Forte.
62. Dr Bentivoglio provided a "working diagnosis" of axial back pain, secondary to multilevel degenerative disease and a grade 1 spondylitic spondylolisthesis at L4/5, secondary to L4 bilateral pars defects".
63. Mr Black's solicitors asked Dr Bentivoglio whether Mr Black's employment with Inghams was a substantial contributing factor to his "injuries", to which Dr Bentivoglio responded, "undoubtedly the condition found on examination directly related to the work injury and I do believe that the work he does with Inghams is a substantial contributing factor to his injuries".
64. Dr Bentivoglio was asked, "whether you consider the nature and conditions of our client's employment duties with Inghams to be the [sic: be the] main contributing factor to his lumbar spine condition by way of aggravation, acceleration, exacerbation or deterioration of a pre-existing condition?". Dr Bentivoglio responded:

"I do believe his employment duties with Ingham's have been a substantial contributing factor to his underlying spondylitic spondylolisthesis at L4/5, so there has been an aggravation of this underlying condition, with the work he was doing with Ingham's. Undoubtedly, there was pre-existing degenerative disease in his lumbar spine as well, as he had a history of intermittent low back pain for some time."
65. Dr Bentivoglio was also asked whether there had been "any aggravation to any existing injury and if so to what degree?", to which Dr Bentivoglio responded, "I do believe the work injury is an aggravation of the pre-existing spondylitic spondylolisthesis at L4/5 level and is the main cause of this aggravation".
66. Dr Bentivoglio noted that "without the work injury" Mr Black had significant problems because of the spondylitic spondylolisthesis L4/5 and that Mr Black "was getting back symptoms prior to the work injury and was actually investigated with an MRI scan and a CT scan". Dr Bentivoglio said that undoubtedly Mr Black "had pre-existing back issues". Dr Bentivoglio expressed the view that the main factor impacting Mr Black's "ability to work as a process worker is the inherent weakness of his spine at the L4/5 level which was exacerbated by the work injury".
67. Dr Bentivoglio expressed the view that Mr Black's capacity for work is very poor. Dr Bentivoglio said he was very guarded about Mr Black returning to pre-injury duties as a process worker and said that Mr Black would not be able to do any heavy lifting or any repetitive bending or twisting. He said that Mr Black would not "get back to the heavy manual labour that he has done previously".

## **Consideration**

68. The claims Mr Black makes for compensation relate to an injury he says he suffered in the form of an aggravation, acceleration, exacerbation or deterioration of a disease of his lumbar spine which was due to the tasks he performed in his employment with Inghams until 26 March 2019, including an incident on 26 March 2019 when his body jerked whilst he was leaning and bending into a machine in the VE room to clean it. In other words, his claims for compensation relate to an injury falling within the definition of injury in s4(b)(ii) of the 1987 Act.

69. There is no controversy and the evidence in any event clearly establishes that Mr Black had multilevel degenerative disease in his lumbar spine including a grade 1 spondylitic spondylolisthesis at L4/5 secondary to an L4 bilateral pars defect.
70. Mr Black said in his statement of 22 April 2020 that the incident that occurred in the early hours of 26 March 2019, whilst he was bending over and leaning into a machine in the VE room caused him to suffer instant pain in his lumbar spine that shot up his back and down his legs and hips. I do not accept his evidence that this resulted in his experiencing pain in his lumbar spine. His evidence in his statement is inconsistent with what he reported to Dr Kostyrika when he consulted Dr Kostyrika later that day. It is inconsistent with the text he sent Mr Ritter at 3.16pm on that day in which he described the pain in his back as being “the same sore back I’m getting from pulling the pallets down”. In the letter he wrote on 22 April 2019 he described hurting his upper back, not lower back, when washing and stacking pallets. In other words, the pain he described as having experienced on 26 March 2018 in his text to Mr Ritter on 26 March 2019 was upper back pain, given that was the pain he had suffered when working with the pallets.
71. Caution must, of course, be exercised when weighing evidence in the form of clinical histories that have been recorded as part of the course of a patient’s treatment, particularly when the doctor who has made the record has not provided evidence in the form of a statement or has not been called to the proceedings to give oral evidence.<sup>31</sup> But the note that Dr Kostyrika made on 26 March 2019 when Mr Black consulted him regarding the incident on that day, which was that the incident triggered mid-back pain, and the actions Dr Kostyrika took, which were to examine Mr Black’s thoracic spine, issue a certificate of capacity in which Dr Kostyrika said he diagnosed Mr Black had thoracic back pain, and to refer Mr Black for exercise physiology with respect to Mr Black’s thoracic spine, are corroborated by the text message Mr Black sent Mr Ritter on 26 March 2019, which was to the effect that he suffered upper back pain. In my view, that provides compelling evidence that, in all likelihood, the incident on 26 March 2019 resulted only in Mr Black experiencing symptoms in his thoracic spine.
72. I find therefore that the incident on 26 March 2019 resulted in Mr Black experiencing thoracic spine pain and did not precipitate any immediate symptoms or result in an aggravation of Mr Black’s lumbar spine disease. The history Dr Bentivoglio obtained that Mr Black developed low back pain from that specific incident is therefore incorrect.
73. Dr Bentivoglio in my view draws a distinction between, on the one hand, what occurred on 26 March 2019 and, on the other, the effect that Mr Black’s work at Inghams over the course of time had on his underlying lumbar spine disease. Dr Bentivoglio referred to what occurred on 26 March 2018 as “the work injury” or “designated work injury”. Dr Bentivoglio consistently used the definitive article when referencing the injury that occurred on 26 March 2019. He noted Mr Black had pre-existing back problems and had had investigations of his back before “the work injury” on 26 March 2019. Dr Bentivoglio expressed an opinion that the work that Mr Black did for Inghams was a substantial contributing factor to Mr Black’s “injuries”, which seems to be a reference to the back pain that Mr Black experienced before 26 March 2019. Dr Bentivoglio also expressed an opinion that Mr Black’s employment duties were a substantial contributing factor to the degeneration he had in his spine. Because of that, Dr Bentivoglio opined that Mr Black’s employment duties were to be considered as “an aggravation of this underlying condition”.
74. As I have said, in my view Dr Bentivoglio’s reference to “the work injury” is a reference by him to what occurred on 26 March 2019. His opinion that “the work injury” was the main cause of an aggravation of Mr Black’s pre-existing spondylitic spondylolisthesis at L4/L5 is not persuasive and I do not accept it. This is because Dr Bentivoglio elicited an incorrect history from Mr Black, in that the history Dr Bentivoglio obtained was of Mr Black suffering low back pain from the “work injury on 26 March 2019”, whereas that was not the case. Mr Black suffered pain to his mid back or thoracic spine from that incident.

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<sup>31</sup> See *Mason v Demasi* [2009] NSWCA227 per Basen JA at [2]

75. Dr Casikar also obtained an incorrect history regarding Mr Black developing low back pain in the incident on 26 March 2019. Given that, I also do not accept his opinion that Mr Black suffered an aggravation of the underlying degeneration in his lumbar spine from that particular incident.
76. Mr Black described in his statement of 22 April 2020 at paragraph 12 the nature of the tasks he had to undertake in the work he did for Inghams. It is clear that his work was heavy, arduous and repetitive. It is also apparent from his statement that his work involved him climbing in and under machines and having to lean and bend over machines, and hence had to work at times while in a difficult or awkward posture. I accept his evidence that his back became sore when he worked in the VE room. It is plausible that his work would have made more grave for him the effect of his lumbar spine disease and thereby aggravated his disease.
77. Dr Casikar expressed an opinion in his report of 9 May 2019 that it was possible that the incident on 26 March 2019 in which Mr Black was bending over and leaning into a machine in the VE room could have resulted in Mr Black suffering an aggravation of his underlying lumbar spine disease. In other words, that type of activity was prone to aggravate the underlying disease. That is an activity that Mr Black indicates in his evidence he was called upon to do often. Hence it is likely, in my view, based upon the opinion Dr Casikar has expressed, that this particular activity, which is one of the many arduous activities that Mr Black undertook in his work, aggravated his underlying lumbar spine disease.
78. Dr Bentivoglio gave expert evidence that Mr Black's work aggravated Mr Black's underlying lumbar spine disease. I infer that Dr Bentivoglio was aware that Mr Black's employment with Inghams involved Mr Black doing heavy lifting and repetitive bending and twisting. This is because Dr Bentivoglio indicated that Mr Black in his present condition would not be able to perform those types of duties and, as a consequence, Dr Bentivoglio was guarded about providing a prognosis with respect to Mr Black being able to return to his pre-injury duties with Inghams. Dr Bentivoglio would only have been cautious on providing a prognosis if he was aware the nature of the work Mr Black did for Inghams.
79. Having regard to, firstly Mr Black's evidence with respect to the work Mr Black did and his evidence that his back became sore when working in the VE room, secondly, the report of Dr Bentivoglio and the reports of Dr Casikar dated 9 May 2019 and 1 April 2020 and, also thirdly, the letter Dr Balaraman wrote on 6 March 2019 addressed to whom it may concern, I am satisfied, and find, that the work Mr Black did for Inghams aggravated Mr Black's lumbar spine disease.
80. The critical issue in this case however, is whether Mr Black's work was the main contributing factor to the aggravation of that disease. That involves a consideration of whether there were concurrent non-work factors that contributed to the aggravation of the disease and, if so, evaluating all factors that aggravated Mr Black's diseased lumbar spine so as to determine whether or not it was his employment with Inghams that was the main contributing factor.<sup>32</sup>
81. Main is defined in the Macquarie Concise Dictionary as meaning, relevantly, chief, principal, leading. Hence, if there were non-work factors that aggravated Mr Black's diseased lumbar spine in addition to his work, in order to find that Mr Black has suffered an injury to his lumbar spine within the meaning of s 4(b)(ii), I must be satisfied from the evidence that Mr Black's work was the chief or principal or leading factor in the aggravation of the disease. There will have been an aggravation of his underlying disease if the effects from it, that is the symptoms he has from it, have been made more grave or grievous or serious for him.<sup>33</sup> Hence, the task required of me is to evaluate all the evidence so as to ascertain from all the

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<sup>32</sup> See *AV v AW* [2020] NSW WCCPD9 at [78]

<sup>33</sup> See *Federal Broom Co Pty Ltd v Semlitch* [1964] 110CLR626 per Windeyer J at 637 and 639

causes that made the effects of Mr Black's diseased lumbar spine more serious for him, whether his work with Inghams was the chief, principal or leading factor, that is the main factor.

82. It is apparent from Mr Black's evidence that throughout the period Mr Black worked for Inghams he also engaged in normal domestic and personal activities, such as walking, including walking up and down slopes and stairs, driving, shopping, domestic chores, parenting and playing with his children. This is apparent because he indicates in his evidence that he now either cannot do or has difficulty in doing these activities.
83. Mr Black also until around August 2018 lived in a fourth floor apartment which he could not access with a lift. He would therefore have had to ascend and descend numerous flights of stairs to get to and from his place of residence. He reported to his GP on 21 June 2018 that this activity was aggravating his pain. His GP prescribed him medication in the form of Panadeine Forte, no doubt with a view to alleviating the pain that ascending and descending stairs to a fourth floor apartment was then causing Mr Black.
84. Mr Black also experienced a significant fall in February 2018, and I find that in all likelihood that fall involved Mr Black falling down stairs. When Mr Black presented at Gosford Hospital on 18 March 2019 he provided "a significant history" of trauma from falling down stairs one year ago.
85. All the GPs at the various practices Mr Black attended obtained a history of Mr Black experiencing back pain from when he fell in February 2018.
86. Dr Scullin recorded a history on 5 September 2018 that Mr Black's fall in February resulted in Mr Black suffering thoracic back pain. It seems from the notes that Dr Scullin made in the clinical records kept by the Entrance Medical Centre with respect to Mr Black's consultations with him on 30 August 2018 and on 5 September 2018, that Mr Black had an x-ray done of his chest at Wyong Hospital following his fall in February 2018. I infer from that, that in all likelihood the fall Mr Black had in February 2018 resulted in his experiencing thoracic spine symptoms. However, having regard to the notes Dr Lau and Dr Kostyrka made in the clinical records of the Entrance Medical Centre with respect Mr Black's several consultations there in March and April 2019 and the note Mr Hall made on 24 April 2014 in the clinical records PhyioPhix kept and the Centrelink medical certificate Dr Meeran completed on 7 August 2019 for Mr Black, I am satisfied that Mr Black also suffered from symptoms in his lumbar spine from the time of his fall in February 2018 and that those symptoms were precipitated by his fall.
87. As said, in order that I can find Mr Black has suffered an injury to his lumbar spine within the meaning of s 4(b)(ii) I have to be satisfied that the work that Mr Black performed for Inghams between November 2016 and 26 March 2019 was the main contributing factor to the aggravation of his lumbar spine disease, that is the main factor to his symptoms from that disease being made more grave and serious for him.
88. In my view, it is likely other factors outside of Mr Black's employment contributed to the aggravation of his lumbar spine disease. Those factors are, firstly, his normal domestic activities, although the contribution of that factor was likely to have been negligible, relative to the heavy tasks he was doing in his employment with Inghams. There is no evidence to indicate that these activities triggered symptoms for Mr Black.
89. Secondly, is Mr Black falling down stairs in February 2018 and, thirdly, Mr Black walking up and down stairs until August 2018 to access a fourth floor apartment. Mr Black consulted GPs with respect to symptoms being precipitated in his lumbar spine with respect to both of these matters. They played a part in the development of his symptoms.

90. The evidence in my view does not enable me to evaluate precisely the extent to which those factors contributed to the aggravation of Mr Black's lumbar spine disease, other than that they had some significance because they prompted Mr Black to consult GPs. Dr Bentivoglio does not discuss whether these factors contributed to Mr Black developing symptoms in his lumbar spine. He consequently does not provide an opinion on the role these factors contributed to Mr Black developing symptoms in his lumbar spine and the extent to which they played a part. The opinions Dr Bentivoglio has expressed in his report simply do not assist me in my evaluation of the extent to which these factors contributed to the aggravation of Mr Black's lumbar spine disease.
91. It is the case that it is not "necessarily fatal" to a worker's case that there is no evidence from an appropriate medical expert explaining the role that non work factors contribute to the aggravation of a disease<sup>34</sup>. But it seems to me that in this case, where there is evidence that non work factors did result in the precipitation of symptoms in Mr Black's lumbar spine, the extent to which those non work factors contributed to the aggravation of his lumbar spine disease is a matter on which I ought to be informed and guided by expert opinion. The interplay of contributing factors in the aggravation of Mr Black's diseased lumbar spine is not, in my view, a matter within the realm of common knowledge. The fact that all these factors aggravated Mr Black's lumbar spine disease, in the sense of making his symptoms from his disease more grave for him, is something within common knowledge and is substantiated by the evidence in any event, but the extent or the degree to which each of the various factors contributed to the aggravation of Mr Black's lumbar spine disease is something that falls outside common knowledge, and it is a matter upon which an opinion, cogently reasoned, from an appropriately qualified expert ought to have been given as evidence.
92. Simply put I cannot on my evaluation of the evidence conclude that more probably than not the heavy and arduous work that Mr Black did for Inghams was the leading or chief, that is the main contributing factor to the aggravation of his lumbar spine disease. There is a likelihood that his fall in February 2018 and his ascending and descending stairs to a fourth floor apartment may have been significant contributors such that I cannot be satisfied that Mr Black's employment was the main contributing factor.
93. It follows that there must be an award for the respondent with respect to Mr Black's claims for compensation.
94. If it is the case that, contrary to the conclusion I have come to above, Dr Bentivoglio's opinion is to be interpreted that Mr Black's employment with Inghams from November 2016 to 26 March 2019 was the main contributing factor to the aggravation of Mr Black's lumbar spine disease, as distinct from Dr Bentivoglio's opinion being that it was the event of 26 March 2019 that was the main contributing factor (which is the conclusion I reached), then Dr Bentivoglio did not in any cogent way, in my view, explain his reasoning for how he reached that opinion. If it is Dr Bentivoglio's opinion that Mr Black's work overall was the main factor that aggravated Mr Black's lumbar spine disease then inherent in that opinion is that there were other factors that caused an aggravation. Dr Bentivoglio does not however, reveal what they are. As mentioned earlier, Dr Bentivoglio would have had before him the report on the x-ray and CT scan done on 6 September 2018 and the report on the x-ray done in January 2020, but it is not known what if any other documentation was before him. By having the report on the x-ray and CT scan done on 6 September 2018, Dr Bentivoglio would have been aware, from the history set out therein, that Mr Black had a fall in February 2018 that resulted in thoracic spine pain. It is not known whether Dr Bentivoglio had any of the other clinical records relating to Mr Black. Dr Bentivoglio does not indicate that he did, and it is not apparent from his report that he did. Dr Bentivoglio does not identify in his report what material he utilised to support his opinion, if it be his opinion, that Mr Black's work overall with Inghams was the main factor in the aggravation of Mr Black's lumbar spine disease (which I have I said I do not consider

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<sup>34</sup> See *AV v AW* at [78]

was the opinion Dr Bentivoglio expressed). Dr Bentivoglio does not indicate in his report that he was aware that Mr Black was having symptoms in his lumbar spine since the fall Mr Black experienced in February 2018 nor does Dr Bentivoglio say that he was aware that Mr Black experienced back symptoms from walking up and down stairs to a fourth floor apartment until August 2018. Even if it is the case that Dr Bentivoglio did have the clinical records before him, and hence was aware that the February 2018 fall and Mr Black walking up and down stairs had caused Mr Black to experience symptoms in his lower back, Dr Bentivoglio does not explain what part that played in the aggravation of Mr Black's lumbar spine disease and why, given that circumstance, he considered Mr Black's work was the main contributing factor to the aggravation of Mr Black's lumbar spine disease (it that be his opinion).

95. In any event, on my evaluation of the evidence I am not satisfied that more likely than not, Mr Black's employment was the main contributing factor to the aggravation of his lumbar spine disease.