IN THE MAGISTRATES COURT OF VICTORIA
AT MELBOURNE

WORKCOVER DIVISION

Case No.C10858703

MARK WHELAN Plaintiff

v

GAM STEEL PTY LTD Defendant

MAGISTRATE:	S GARNETT
WHERE HELD:	MELBOURNE
DATE OF HEARING:	15 -18 JULY 2013
DATE OF DECISION:	20 AUGUST 2013
CASE MAY BE CITED AS:	WHELAN v GAM STEEL

REASONS FOR DECISION

Catchwords: S 93C: termination of weekly payments on grounds that worker has a current work capacity – injuries sustained on 17 May 2006 and 16 March 2008 causing injuries to neck and right shoulder – temporary aggravation of underlying degenerative cervical spine condition as a consequence of first incident – further aggravation due to second incident – suggested suitable employment not realistic.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr Worth	Melbourne Injury Lawyers Pty Ltd
For the Defendant	Ms Ryan	Wisewould Mahony

HIS HONOUR:

1 Mr Whelan is 44 years of age and commenced employment with the defendant as a truck driver in 2005 on a casual basis and was then made a permanent employee in 2006. He sustained injuries to his neck and right shoulder as a consequence of two incidents which arose out of or in the course of his employment. The first incident occurred on 17 May 2006 when he slipped whilst pulling down on a dog bar. He lodged a workcover claim for payment of medical treatment expenses for which liability was accepted by QBE Workers Compensation Ltd. The second incident occurred on 16 March 2008 when he was throwing chains over a load on his truck. He lodged a further workcover claim for which liability was also accepted by QBE and after being incapacitated for a short period returned to work performing light office duties until he went overseas with his family in August 2008. Mr Whelan then returned to work for one week before his services were terminated by the defendant. He then began to receive weekly payments until they were terminated on 4 June 2011 as a result of a 130 week termination notice issued on 17 February 2011 whereby it was alleged that he had a current work capacity.

2 Mr Whelan alleges that he has no current work capacity which is likely to last indefinitely as a consequence of the injuries sustained in the second incident and is therefore entitled to weekly payments from 4 June 2011. In the alternative, he contends that if the court finds that he has a current work capacity as a result of the injuries sustained in the second incident, that nonetheless, he is entitled to weekly payments in accordance with S93 as a result of the injuries sustained in the first incident.

3 The defendant contends that Mr Whelan has a current work capacity and has extinguished his entitlement to weekly payments. It also contends that he does not have a separate entitlement to weekly payments as a result of the first incident.

4 Mr Whelan gave evidence and he called Dr Siddique, General Practitioner, Dr Jensen and Mr Lo, Neurosurgeon, to give evidence on his behalf. He also tendered numerous documents and medical reports for consideration by the court. The defendant called Dr Davison, Occupational Physician, to give evidence and also tendered numerous documents and medical reports in support of its case.

5 **Mr Whelan** gave evidence that after completing Year 11 schooling he worked as a trades assistant and then various manual employments until the age of 23 when he began truck driving for numerous employers. He told the court that his job with the defendant involved driving a truck delivering steel to various locations and on average he would work 60-65 hours each week. This necessarily involved using chains to hold down the load. He said that on 17 May 2006 he slipped whilst holding the “dog bar” when securing a load and felt pain in his right shoulder. He reported the incident to the defendant, lodged a workcover claim and sought physiotherapy treatment which was paid by workcover. He told the court that he did not have any time off work as he was allocated to yard duties not involving truck driving duties until he obtained a position as the defendant’s maintenance controller in July 2006. He told the court that this position involved him in scheduling servicing and repair work on the defendant’s trucks and trailers which was a lighter position than he was previously performing as a truck driver.

6 Mr Whelan gave evidence that although his new position was lighter in nature he still experienced ongoing right arm, shoulder and neck pain. He said that on occasions he was required to drive a truck but he had assistance when securing the load by use of chains. He said that over time he was required to perform more truck driving duties which at one stage required him to drive trucks 3 times per fortnight but apart from those duties he was able to cope with his job as the maintenance controller as it mainly involved office duties. He told the court that he continued to experience shoulder and neck pain

throughout this period.

7 Mr Whelan gave evidence that on 16 March 2008, he was required to throw chains over a load when his “shoulder let go”. He said it felt as though “a knife was stuck in the right side of his neck”. He told the court that he had a number of days off work, received physiotherapy treatment and lodged a further workcover claim which was accepted by QBE. He said that he returned to work performing his duties as a maintenance controller, was not required to deliver loads but did on occasions drive the trucks to locations for them to be serviced. He told the court that in August 2008 he went on a holiday with his family to Europe and that when he returned to work his services were terminated and he has not worked since. He said that he continues to experience pain in the neck and shoulder and has received physiotherapy and chiropractic treatment as well as taking pain relief medication including Tramadol, Elegron, Lyrica, Panadol and Nurofen. He told the court that he experiences regular sleep disturbance and that physical activity aggravates his neck pain. Mr Whelan gave evidence that he does not believe he is fit to return to work because he has “physically deteriorated”. He told the court that he has completed a Certificate IV in Occupational Health and Safety and has completed a basic computer course.

8 In cross examination, Mr Whelan agreed that he did not have any time off work as a result of the 17 May 2006 incident but disagreed with the suggestion that he sustained a minor injury as a consequence of it. He agreed that he told Dr Jensen in 2007 that his symptoms in his shoulder and neck had decreased and that his pain was minimal but told the court that after the first incident he never was able to return to pre-injury duties and was never symptom free and continued to receive physiotherapy treatment and take occasional panadol medication. He could not recall if his physiotherapist had cleared him for normal pre-injury duties in 2007. Mr Whelan agreed that he <u>almost had</u> a complete resolution of symptoms by mid to late 2007.

9 The defendant tendered a copy of a Resume prepared by Mr Whelan and he agreed that he has a large number of skills and has completed a number of tertiary courses in addition to having a work history and personal characteristics which would be of assistance in obtaining employment. However, he disputed that he would be able to work in the roles suggested by Loredana Pischettola from NES in March 2011, those being; an Occupational Health and Safety officer as he would need to obtain further qualifications; or a Maintenance Manager, as his medical condition would prevent him from performing the duties on a regular basis or for a sustained period. Mr Whelan told the court that he is not aware of any work that he believes he could perform because of the nature and extent of his condition. He said; *"I want to work, but I can't".* He also told the court that he had previously applied for work and to be re-trained, without success, but has not looked for any work in the last 12 months. Mr Whelan gave evidence that although he had previously completed a number of Tafe courses, his medical condition would prevent him from performing any work associated with those fields of study. He also gave evidence that he believes his medical condition is worsening.

Medical Evidence

10 The parties elected to call a number of medical witnesses to give viva voce evidence in addition to the tendering of numerous medical reports. **Dr Siddique** gave evidence and reports prepared by her dated 10 November 2009, 5 April 2011, 6 May 2011, 8 December 2011 and 7 February 2013 were tendered. Dr Siddique reported that Mr Whelan first attended the Point Cook Medical Centre on 22 June 2006 regarding injuries sustained to his right shoulder and arm with subsequent neck pain. She noted that he received physiotherapy and was able to continue working in a new position that only involved occasional truck driving duties. She reported that he re-injured himself in March 2008 and since then has been troubled by neck, right shoulder pain, right arm and right hand paraesthesia. Dr Siddique reported

that an MRI Scan revealed a right paracentral disc prolapse at C6-7 compromising the exiting C7 nerve root. She noted that she first saw Mr Whelan on 17 June 2009 as he had an ongoing problem with pain and weakness in the neck and right arm. In October 2009 she obtained a history from him that his neck and right arm pain was aggravated with work load. Dr Siddique reported that Mr Whelan was referred to Dr Poon, Neurologist, Mr Lo, Neurosurgeon and Professor Bittar for opinion. She noted that Professor Bittar recommended that he undergo a right C7 nerve sheath injection with local anaesthetic and steroids but Mr Whelan was not prepared to undergo same for fear of possible side effects. In April 2011, Dr Siddique was of the opinion that Mr Whelan should be re-trained or rehabilitated for suitable employment once his problems were fully diagnosed and treated. In February 2013, after specific questioning from Mr Whelan's lawyers, she opined that the first and second injuries were both contributing factors to his current level of incapacity/injury, that he was unable to return to pre-injury duties and given that he has no further qualifications and specific experiences, he is totally and permanently incapacitated. During her evidence, Dr Siddique told the court that Mr Whelan realistically cannot return to work including the suggested employments set out in the report from NES although she confirmed that she is providing him with modified duties certificates and is of the opinion that he can be retrained. In respect to the relationship between the 2006 injury and 2008 injury, Dr Siddique also told the court that in her opinion the 2006 and 2008 injuries were related and each still play a role in his current incapacity for employment.

11 **Dr Jensen** gave evidence and reports prepared by him and dated 13 February 2007, 8 March 2007, 14 May 2007, 25 May 2007, 5 February 2009, 23 March 2009, 5 August 2009, 1 December 2010, 20 January 2011, 4 May 2011, 16 March 2011, 16 June 2011, 10 August 2011, 22 September 2011 and 5 April 2013 were tendered. Mr Jensen first saw Mr Whelan on 5 February 2007 on referral from Dr Padayachee from the Point Cook Medical

Centre. He obtained a history of injury in May 2006 with Mr Whelan complaining of pain over the right shoulder joint and the anterior aspect of the chest without any neck symptoms at that stage. He reported that an x-ray and ultrasound of the right shoulder were normal and that by May 2007 his right arm pain was minimal but he was still experiencing some right shoulder pain but demonstrated a full range of motion of his neck and shoulder with minimal tenderness in the lower cervical spine. Dr Jensen recorded that he saw Mr Whelan on three occasions between February 2007 and May 2007 and he did not return until 3 February 2009 when he obtained a history from him that he did recover from the original injury to the point where he could undertake normal activities including playing golf and throwing balls and had ceased driving trucks and was working as a maintenance manager.

12 At review in February 2009 (after the 2nd incident), Dr Jensen reported that Mr Whelan's right shoulder and cervical spine problems were recurrent and persistent sine he undertook another truck driving task and had to throw some heavy chains over his load to secure it. He obtained a history from Mr Whelan that he again sought physiotherapy treatment with an improvement in symptoms but they did recur from time to time. Dr Jensen reported that an MRI Scan of the cervical spine performed on 4 March 2009 revealed multi level disc bulges the most significant being a right paracentral disc prolapse at C6-7 compromising the exiting C7 nerve root. Dr Jensen obtained a history from Mr Whelan that he had been made redundant in late 2008 at which time his pain level was 5/10 in intensity. Dr Jensen expressed an opinion in August 2009 that Mr Whelan did not have a specific right shoulder injury but a C6-7 prolapse causing referred pain into the right shoulder with radiculopathy since resolved. He reported that at that stage he was optimistic about Mr Whelan's prognosis but that he would continue to be limited in performing heavier manual tasks or activities requiring him to throw heavy objects, to reach above shoulder height or to reach out from his body.

13 Dr Jensen reported that in November 2010 Mr Whelan told him that his pain levels had improved and that it was mainly in his neck and right trapezius muscle without other right arm pain and he was taking 100mg of Tramadol at night to help him sleep. Dr Jensen reported that in March 2011 his condition had not changed and that he was receiving chiropractic treatment each fortnight which he said helped his arm pain, tingling in his hand, pain and movement in his neck and shoulder girdle. He noted that Associate Professor Bittar and Mr Kierce, whose reports were provided to him for comment, agreed with his clinical opinion, although stated that he did not agree with the need for Mr Whelan to have a nerve root sleeve injection as suggested by Associate Professor Bittar because Mr Whelan was not in undue distress and there were risks associated with that procedure. He also disagreed with the suggestion of Mr Kierce that Mr Whelan had an associated soft tissue injury to the right shoulder or carpal tunnel syndrome. In September 2011, Dr Jensen noted that Mr Whelan had recently studied an OHS course and opined that he could perform that role providing it did not involve anything other than very light physical work and light manual handling. In a report to Dr Siddique dated 8 February 2012, Dr Jensen noted that Mr Whelan was experiencing regular sleep disturbance for which he prescribed Allegron for its pain modulating effect and in the hope that it would have a positive impact on his sleep pattern.

14 In a report dated 5 April 2013, Dr Jensen opined that the first incident was a significant contributing factor to Mr Whelan's current symptoms on the basis that his pathology is situated in the cervical spine particularly the right C7 foraminal narrowing and on the basis that his condition had not changed significantly since the initial injury in 2006. During his evidence, Dr Jensen told the court that when a person suffers such an injury they are likely to experience recurrences, aggravations and exacerbations from time to time. In this case, he told the court that in his opinion the second incident in 2008 aggravated the first injury which occurred in 2006. He said that the underlying

pathology was still there from the initial injury and therefore it still played a role in his condition after the second incident occurred. Dr Jensen opined that as a consequence of his injury, Mr Whelan is restricted to work not involving heavy lifting, prolonged or fixed postures, that he must be able to sit, stand and walk around when needed, should limit driving and should not drive heavy vehicles or perform repetitive work. He suggested that Mr Whelan gradually return to work on a part time basis on suitable duties and agreed with the suggestion that his medication intake may make him drowsy as may any sleep disturbance that he experiences.

15 In cross examination, Dr Jensen agreed that he discharged Mr Whelan from his care in May 2007 because his symptoms had settled, his right arm pain had resolved, he had minimal pain in his shoulder and his radiculopathy had resolved. He also agreed that Mr Whelan had made a good recovery from the injury sustained on 17 May 2006. He also agreed that his radiculopathy symptoms had returned when he saw him again in February 2009 and that his ongoing symptoms from that time arise from the injury sustained in March 2008. He confirmed that he is of the opinion that Mr Whelan is fit for light duties without a significant manual component.

16 Mr Whelan tendered a medical report from **Mr Philipps**, Physiotherapist, dated 29 July 2009. He reported that he first saw Mr Whelan on 31 May 2006 and he complained of pain in his right shoulder and cervical spine following an incident at work on 17 May 2006. Mr Philipps reported that Mr Whelan was experiencing a constant ache into his right lateral and superior shoulder region with occasional pain into the lateral aspect of his arm with no peripheral symptoms into his forearm or hand. He noted that he treated Mr Whelan on 35 occasions between 31 May and 19 September 2007. On 16 May 2007, a shoulder pain disability index completed by Mr Whelan at his request indicated that Mr Whelan was continuing to experience symptoms on activity. In a Treating Health Professional Questionnaire completed by Mr Philipps

dated 21 June 2007, he noted Mr Whelan was working full time on restricted duties and should be fit to throw chains and tension using the dog bar within two weeks and pushing and pulling loads. By 19 September 2007, at his final consultation, Mr Whelan reported that he was experiencing an occasional ache in the lateral shoulder region with throwing chains over trucks and continued to experience tenderness into the right AC joint. At that time, Mr Philipps provided Mr Whelan with a workcover certificate to the effect that he was expected to be fit for normal duties as from 20 September 2007.

17 Mr Philipps reported that Mr Whelan returned for treatment on 28 March 2008 following a further incident at work when throwing chains over a high load. A further shoulder pain disability index revealed a marked increase in symptoms. Mr Philipps reported that he has continued to provide regular treatment since that date because of the ongoing right cervical and shoulder pain suffered by Mr Whelan. He is of the opinion that the ongoing pain is caused by multi level disc degeneration in his neck.

18 **Mr Lo**, Neurosurgeon, gave evidence and reports prepared by him and dated 21 January 2011, 5 May 2011, 11 December 2012, 29 January 2013 and June 2013 were tendered. Mr Lo reported that he first saw Mr Whelan on 7 January 2010 on referral from Dr Poon, Neurologist. He obtained a history from Mr Whelan of the two incidents and noted that an MRI Scan demonstrated a mild right sided C5/6 and C6/7 disc bulge. He also noted that a nerve conduction study performed on 26 November 2009 revealed chronic right mid cervical polyradiculopathies and vert mild right median nerve compression syndrome (carpal tunnel). In March 2010 he considered that Mr Whelan was unfit for pre-injury duties but may be fit for suitable employment not requiring him to bend or twist his neck, lift heavy weights, raise his arms constantly above his shoulder level or be left in a persistently flexed posture.

19 In his report dated 11 December 2012 to Dr Siddique, Mr Lo noted that Mr Whelan did not require surgery but that if his condition worsened he would

recommend a nerve sheath injection on the basis of the MRI which indicated multi level cervical disc bulges around the mid cervical region as well as the C3/4 level and evidence of foraminal narrowing secondary to degenerative changes. In evidence Mr Lo told the court that the procedure involves the injection of steroids to shrink the nerve allowing it to live in harmony with the narrowed tunnel. In his opinion, the benefits of an injection outweighs the risks associated with it. Mr Lo reported that Mr Whelan was continuing to experience neck and right arm pain and a further MRI Scan performed on 20 November 2012 once again revealed multi level cervical disc bulges in the mid cervical regions as well as a C3/4 disc bulge more towards the right side. He also noted that the foraminal narrowing had not worsened. He also opined that there was a relationship between the first and second incidents and his current symptoms and incapacity for work. He once again expressed an opinion that Mr Whelan was unfit for pre-injury duties but continued to have a capacity for suitable employment with restrictions as previously expressed and would need to be re-trained and rehabilitated.

20 In cross examination, Mr Lo disagreed with the proposition that even if Mr Whelan's symptoms had "essentially resolved" by mid 2007 flowing from the first incident and then the second incident occurred, the role of the first incident was insignificant in relation to his current symptoms and incapacity. He told the court that a person can have a resolution of symptoms but not the condition/injury and in this case the underlying pathology was still present from the 2006 injury. He did however agree that if there were no ongoing symptoms in May 2007, then the dominant cause of Mr Whelan's current symptoms and incapacity would be related to the 2008 incident.

21 Mr Whelan tendered medical reports from **Associate Professor Bittar**, Neurosurgeon, dated 30 June 2010 and 23 January 2011. He diagnosed that Mr Whelan had evidence of a right C7 radiculopathy secondary to the disc/osteophyte complex and foraminal stenosis at C6/7 and recommended

that he undergo a right C7 nerve sheath injection which may be of diagnostic and therapeutic value and if his symptoms responded favourably, he recommended that Mr Whelan be considered for a C6/7 anterior cervical decompression and fusion. He considered Mr Whelan to be unfit for all work as at June 2010.

22 Mr Whelan tendered medico-legal reports from **Mr Kierce**, Orthopaedic Surgeon, who assessed him on 3 March 2011 and 23 January 2013 and **Dr Sutcliffe**, Occupational Physician, who assessed him on 3 April 2013. At his first assessment with Mr Kierce, Mr Whelan complained of right sided neck and shoulder pain with intermittent tingling in his right thumb, index and middle fingers. He told Mr Kierce that he no longer had pain radiating down his right arm and that his neck and shoulder pain were aggravated by sitting, lying on his right side, lifting, sweeping, mopping, vacuuming, hanging out the washing, using his right arm above shoulder level and driving for longer than one hour. He also complained of sleep disturbance. After conducting an examination and viewing the ultra sound report, CT Scan and MRI Scan dated 4 March 2009, Mr Kierce diagnosed that Mr Whelan suffered a significant injury to his cervical spine in May 2006 with a possible soft tissue injury to his right shoulder. He expressed an opinion that the incident in March 2008 significantly aggravated that injury. Mr Kierce was of the opinion that Mr Whelan was fit for suitable employment not involving manual work with restrictions including not lifting more than 10 kg with his right arm, not throwing with his right arm, not using his right arm above shoulder level and not using any heavy jarring implements with his right arm.

23 At the second examination with Mr Kierce on 23 January 2013, Mr Whelan complained of significant symptoms of neck pain and limitation of movement and significant right arm pain and told Mr Kierce that he was worse than when he saw him in 2011. Mr Kierce expressed the opinion that realistically, Mr Whelan was fit for suitable employment which did not involve prolonged

travelling, lifting more than 3 kg with his right arm, not using his right arm above shoulder level, using it to push or pull or using heavy jarring implements. Mr Kierce noted that Mr Whelan was currently providing certificates that he was fit for work 3 days per week, 4 hours per day in a sedentary occupation not involving lifting. Mr Kierce reviewed the MRI Scan dated 20 November 2012 and concluded that Mr Whelan is suffering from multi level degenerative spondylosis, right shoulder rotator cuff degeneration and right carpal tunnel syndrome. He is also of the opinion that the first injury is still a significant material contributing factor to his current incapacity as is the second incident.

24 Dr Sutcliffe noted that Mr Whelan complained of constant pain varying in intensity in the right side of the neck and to a lesser extent on the left side. He also complained of pain in the right shoulder, right upper arm, forearm and pins and needles in the thumb, index and middle fingers of the right hand. Mr Whelan told Dr Sutcliffe that he experiences sleep disturbance, fatigue and increased pain on activity and takes medication in the form of Tramal 100mg, Lyrica twice per day, Allegron and Panadol Osteo three times per day. He told her that he can use his computer for approximately 20 minutes but avoids using his right arm and cannot move his head frequently and has poor reading skills as he was assessed as suffering dyslexia when aged 14 years. After viewing the radiological and ultra sound reports and the numerous medical reports with which she was provided, Dr Sutcliffe concluded that Mr Whelan sustained a right shoulder rotator cuff injury and possible bursitis in the glenohumeral joint together with the aggravation of spondylosis at C5/6 and C6/7 of the cervical spine with radiculopathy at C6/7 as a result of both work incidents.

25 Dr Sutcliffe expressed the opinion that Mr Whelan has no capacity to return to his pre-injury occupation or manual handling of any nature or driving. She noted that he has attempted to undertake training in the form of an

occupational health and safety certificate and a computer based certificate but continues to have limitations of sitting and computer operation. In her opinion, he does not have the capacity to perform the duties required as an occupational health and safety consultant or officer given the nature of the work which requires walking over rough ground, climbing stairs and steps and working in positions for long periods. Dr Sutcliffe is also of the opinion that he could not work with computers as he has insufficient capacity to sit at a computer for periods and would not be able to work as a maintenance manager, operations manager or warehouse manager. She suggested he may be able to work part time in a protected employment where he does not perform manual handling, computer work, limited reading and writing with the capacity to sit and stand.

26 **Dr Davison**, Occupational Physician, gave evidence on behalf of the defendant and medical reports prepared by him and dated 23 December 2008 and 1 February 2013 were tendered. At his first examination with Dr Davison on 11 December 2008, Mr Whelan told him that following the first injury in May 2006 his condition resolved following physiotherapy treatment at which time his job changed to a maintenance manager. Following his examination Dr Davison was unable to make a diagnosis of his medical condition and suggested further investigation occur. When he re-assessed Mr Whelan on 1 February 2013 and after reviewing the numerous medical reports provided to him together with the MRI Scan dated 4 March 2009 and 20 November 2012 he expressed the opinion that Mr Whelan's symptoms of chronic right sided neck pain radiating into the right shoulder were consistent with the radiological findings of him suffering from multi level degenerative and neurocentric joint disease resulting in right C7 and right C4 foraminal narrowing. He noted some inconsistencies during examination including the fact that there was no muscle wasting in the right upper limb and although there was evidence of restricted right shoulder movement he was not able to confirm the presence of a right rotator cuff lesion. He was unable to explain the reason for Mr

Whelan's complaints of a deterioration in his condition in the absence of any change in MRI Scan findings. He did note a secondary right sided thoracic outlet syndrome. Dr Davison expressed the opinion that Mr Whelan is unfit for his pre-injury employment but would have the capacity for suitable employment in sedentary positions. He recommends it be self paced and manual handling should not exceed 7.5 kg in force or weight using both hands. In his opinion, Mr Whelan has aggravated a pre-existing degenerative condition in his cervical spine as a result of the incidents at work which have contributed 75% to his current incapacity. He suggested restrictions include; sitting for 1-2 hours, lifting not to exceed 7.5 kg and driving limited to 60 minutes. Dr Davison is of the opinion that Mr Whelan could work as a maintenance manager, operations manager, warehouse manager and occupational health and safety representative but that he would require a period of work hardening because of his prolonged period off work and therefore should return to work on a graduated basis and undertake a functional restoration program prior to re-commencing work.

27 When giving evidence, Dr Davison told the court that Mr Whelan could return to suitable employment providing he performed work not involving; repetitive lifting; prolonged static postures, prolonged driving activities, work above head height and be able to take regular breaks.

28 **Mr Dooley**, Orthopaedic Surgeon, examined Mr Whelan on 15 April 2010 on behalf of the defendants lawyers. He opined that Mr Whelan sustained soft tissue injuries to his cervical spine with aggravation of underlying degenerative disc disease at C5/6 and C6/7. **Dr Rowe**, Occupational Physician, assessed Mr Whelan on 13 January 2011 for QBE. He was of the opinion that Mr Whelan most likely had a disc protrusion at C5/6 or C6/7 affecting the C6 or C7 nerve root. Dr Rowe attributed Mr Whelan's symptoms and incapacity for pre-injury employment to the injury occurring in 2008. He suggested that Mr Whelan be re-educated and retrained but opined that he

would be able to work as a maintenance manager and noted that he had applied for numerous jobs and was undergoing study to enter the occupational health and safety field. **Mr Carey**, Orthopaedic Surgeon, assessed Mr Whelan for the defendant's lawyers on 5 May 2011. He noted that Mr Whelan told him his symptoms were minimal after the first injury following 9 months of physiotherapy treatment. He told Mr Carey that after he "went off compo" in 2007, he felt "okay at the start" but in early 2008 as a result of increasing work his neck shoulder and arm were aching more significantly. Mr Carey was of the opinion that Mr Whelan sustained a chronic cervical pain syndrome in the form of aggravation of cervical spondylosis with referred symptoms to the right arm of a non radicular nature. He opined that Mr Whelan is unfit for his duties as a maintenance controller but would be fit for lighter office duties without the requirement to perform any manual work. He also noted that his sleep disturbance would make it difficult for him to reliably hold down any productive work. **Mr Davie**, Orthopaedic Surgeon, assessed Mr Whelan for the defendant's lawyers on 25 October 2012. He obtained a history from Mr Whelan that his shoulder improved following the first incident but he was still experiencing pain on the right side of his neck and right shoulder but no referred pain to the right arm. After reviewing the MRI Scan dated 4 March 2009 and a history from Mr Whelan of continuing right sided neck pain and reduced movement he expressed the opinion that Mr Whelan could return to work as a truck driver as on observation there is "very little the matter with him" as he has not aggravated, accelerated or exacerbated his underlying degenerative disc condition.

29 The defendant tendered Vocational Assessment Reports dated 13 January 2010 from Marissa Gavin at WorkFocus and from Loredana Pischettola, Rehabilitation Consultant at Healthe Work dated 29 March 2011. The report from Ms Gavin suggested suitable employment options as a transport company Manager, Maintenance Planner, Dispatch/Receiving Clerk and Warehouse Supervisor/Administrator. It is noted that QBE relied on the report

from Marissa Gavin and the medical opinion of Dr Rowe in addition to Mr Whelan completing a Certificate IV in Occupational Health and Safety and NES Job Seeker Program in determining there were grounds to terminate his weekly payments on the basis that he had a current work capacity. The report of Ms Gavin noted that Mr Whelan indicated that his English skills were good as were his numeracy and computer skills. She reported that he has attained a number of qualifications and possesses a large number of transferable skills and was interested in obtaining employment as an Operations Manager or Maintenance Manager. She also reported that he told her he had been unsuccessful in applying for these positions and felt that if he undertook a Certificate in Occupational Health and Safety or Frontline Management it would significantly enhance his employment prospects.

30 Ms Pischettola noted that Mr Whelan was complaining of right shoulder and neck pain with weakness in his right arm. He told her that he had limitations in respect to lifting up to 3 kg only, standing for 30 minutes, sitting for one hour, walking for 30 minutes, driving for one hour and could not reach overhead repetitively or with any weight in the right arm. He told her that he had been searching for work as a Maintenance Manager and Operations Manager and would be able to do that work within his limitations. She reported that he has attained a number of qualifications including a Certificate IV in Occupational Health and Safety at Swinburne University in 2010. She also reported that he possessed transferrable skills in administration, management and leadership, building and home maintenance, organisation and negotiation, occupational health and safety, basic computer, verbal communication and average English literacy skills. She noted that he did not have any skills in quality assurance, report writing, trades, training, customer service, mechanics, public relations, cash handling, retail, healthcare or hospitality.

31 Ms Pischettola reported that Mr Whelan told her he has looked for work as a Maintenance Manager and Operations Manager and would like to apply for a

job as a General Manager but would need to build up his experience. He also told her that despite completing the OHS course he is not interested in securing work in that area. Ms Pischettola identified suitable employment options as being; Occupational Health and Safety Advisor, Maintenance Manager, Operations Manager and Warehouse Manager. She noted that he would require computer re-training and should undergo a NES Refresher Program. A number of advertised employment positions in these fields were attached to her report which listed the essential job requirements.

32 The defendant also tendered an extract of evidence given by Mr Whelan in his common law serious injury application before Her Honour Judge Hogan on 11 May 2011. In evidence, Mr Whelan confirmed that he received very little by way of medication following the May 2006 injury and only attended doctors on limited occasions. He also told the court in that proceeding that he ceased physiotherapy treatment in July/August 2007 (actually September) because he felt a lot better and said; “we both thought that it was time we were at the end of where it was still a problem” and then, it was “no longer a major problem…and I was able to go back to try and continue with full duties at work”.

Submissions

33 The defendant submitted that the injury sustained on 17 May 2006 does not contribute to any ongoing incapacity for pre-injury duties based on; the evidence given by Mr Whelan in this proceeding and his common law proceeding; the medical evidence of Dr Jensen; and, the certificate for normal duties provided by Mr Philipps, his treating physiotherapist dated 19 September 2007.

34 The defendant also submitted that Mr Whelan no longer has any entitlement to weekly payments in relation to the 2006 injury as it does not result in any incapacity for his pre-injury duties and any entitlement he has had to the date

of the termination of his weekly payments on 4 June 2011 was as a result of the injury sustained on 16 March 2008, for which he has now received his statutory entitlement.

35 The defendant submitted that Mr Whelan has a current work capacity in that; he is able to work as a Maintenance Manager/Controller as identified by Ms Pischettola which is supported by Dr Davison; and, after considering the matters listed in the definition of "suitable employment" in s 5(1) of the Act.

36 Mr Whelan submitted that he has no current work capacity which is likely to last indefinitely. He submitted that the general consensus of medical opinion is to the effect that there are a number of physical restrictions that would need to be imposed on any occupation suggested by the rehabilitation consultants and Dr Davison which effectively causes him to have no "realistic" capacity for employment.

37 Mr Whelan contended that what the defendant has in effect done is to "cherry pick" occupations without having regards to the inherent requirements of the occupation which is similar to the approach adopted by the defendant and held to be impermissible by me in the matter of Manthopoulos v Spencwill Nominees.[1]

38 Mr Whelan also submitted that should the court find that he does have a current work capacity, he is nonetheless entitled to weekly payments of compensation in relation to the injury sustained on 17 May 2006 in accordance with s 93A and s 93B. In support of this submission, he relies on the medical opinions of Dr Siddique, Dr Jenson and Mr Lo that the 2006 injury still contributes to his current incapacity for his pre-injury employment and the evidence of Mr Whelan that he did not fully recover from the effects of that injury.

[1] 26 April 2012.

Conclusion

39 Mr Whelan is suffering from multi level disc degeneration in the cervical spine which has been aggravated by the work incidents on 17 May 2006 and 16 March 2008 resulting in a disc bulge at the C6/7 level compromising the C7 nerve root as indicated by MRI Scans performed on 4 March 2009 and 20 November 2012. On balance, I find that the first incident resulted in only a temporary aggravation of the underlying degenerative condition of his cervical spine. I make this finding for the following reasons; Firstly, Mr Whelan gave evidence that he "almost had" a complete resolution of all symptoms by mid 2007; secondly, Mr Whelan attended doctors infrequently during this period; thirdly, Mr Whelan told Dr Jensen and Mr Philipps in May 2007 that he had minimal symptoms; Fourthly, by September 2007, Mr Whelan told Mr Philipps that he only had occasional aches and tenderness in the shoulder; Fifthly, the certificate provided by Mr Philipps on 19 September 2007 to the effect that Mr Whelan was fit for normal duties as from 20 September 2007 indicates that his symptoms had resolved by that date; sixthly, Mr Whelan told Dr Jensen when reviewed by him on 3 February 2009, that he recovered from the original injury; seventhly, Mr Whelan gave evidence in his common law action that by September 2007 the injury he sustained in the first incident was no longer a major problem; eighthly, Dr Jensen told the court in these proceedings that Mr Whelan had made a "good recovery" from the injury sustained on 17 May 2006; and finally; Mr Whelan did not seek or obtain any further medical treatment after 19 September 2007 until after the second injury occurred.

40 The general consensus of medical opinion, save and except for Mr Davie, is that Mr Whelan is unfit for his pre-injury duties as a truck driver as a consequence of his cervical disc injury. The overwhelming opinion is to the effect that Mr Whelan could return to work with the following restrictions: no heavy lifting, no prolonged or fixed postures, an ability to sit, stand or walk when needed, limited driving (Dr Jensen); no bending or twisting of the neck,

lifting heavy weights, no raising of arms constantly above shoulder level or be left in a persistently flexed posture (Mr Lo); no prolonged travelling, lifting more than 3 kg with the right arm, no use of right arm above shoulder level or using it to push, pull or use of heavy jarring implements (Mr Kierce); no manual handling activities, no walking over rough ground, no climbing of stairs/steps, no prolonged or fixed posture, an ability to sit or stand at will (Dr Sutcliffe); self paced, no lifting over 7.5 kg or repetitive lifting, sitting for 1-2 hours maximum, driving limited to 60 minutes, no work above head height and the ability to take regular rest breaks (Dr Davison).

41 In addition to these physical restrictions, it is suggested that before being able to return to suitable employment, Mr Whelan would need to be; retrained/rehabilitated (Dr Rowe, Mr Lo and Dr Sutcliffe) or undergo a functional restoration program (Dr Davison). Furthermore, Dr Jensen and Dr Davison suggest a graduated return to work. Dr Jensen has also noted that Mr Whelan suffers from sleep disturbance for which he prescribed Allegron, an anti depressant, which causes drowsiness.

42 After considering these restrictions, it is necessary to consider whether Mr Whelan could perform any of the "suitable employments" as suggested by the defendant. Dr Davison expressed the opinion that Mr Whelan could return to work as a Maintenance Manager, Operations Manager, Warehouse Manager or Occupational Health and Safety officer notwithstanding the significant physical restrictions he recommended should be imposed. The job descriptions attached to the report from Ms Pischettola list the following requirements;

Maintenance Manager – Corporate Hotel Melbourne

Corporate hotel experience a must – technically proficient and implementing preventative maintenance programs – handling all safety procedures and facility support services – understanding of electrical, mechanical, plumbing

and carpentry – overseeing all OH&S legal compliances, fire safety & risk assessments – excellent communicator and reporting to General Manager – superb organisational and communication skills – proactive, pleasant personality, interactive to guest and travellers.

Maintenance Manager – Wind Company

Have the ability to grasp complex technical issues and be able to set up maintenance contracts and a maintenance system from scratch, defining this core business strategy for the future and contributing to overall financial performance. Further you will be a key promoter of OHS standards and compliance.

Operations Manager – Europcar

We are looking for an experienced operations manager who can drive change through our network locations - Candidates must have a strong operations background with 3-5 years in a comparable position – manage a team of approximately 50 corporate staff and a large number of Franchise locations – possess extensive knowledge of the car rental industry – strong business acumen – high level of communication skills – both verbal and written – multi site management experience – intermediate computer skills.

Operations Manager – proactive human capital

Require highly experienced Operations Manager – will not suit someone that has not held an operations management role previously – whilst not essential relevant tertiary qualifications will be viewed favourably.

Warehouse Manager

Required to develop and implement operational procedures – managing inventory control of both inward and outward goods – directing and managing OH &S requirements – planning and co-ordinating the allocation of labour

resources – managing warehouse team leaders – minimum of 3-5 years experience in a similar role – relevant experience within the apparel industry is a MUST – strong organisational and management skills and proven teamwork skills.

Warehouse Manager – Logistics

Require strong leadership and management skills – manage a team of staff – previous warehouse management experience is essential – this is a relatively manual environment and you will need to be comfortable working in such a situation.

OHS Coordinator

Tertiary qualification in OHS and previous experience in a similar size – implement and track safety inductions and training – monitor changes to legal, regulatory and company health and safety requirements – manage all workers compensation claims – implement return to work plans – reporting and internal reports – risk assessments – must be qualified in OHS – experienced in a large corporate environment – extensive reporting required therefore an understanding of Microsoft office including Excel, Word and Power Point required.

43 After considering the general requirements of these advertised positions, it appears to me that the defendant has simply embarked on an exercise in "cherry picking" as referred to by me in the decision in Manthopoulos. This is an artificial approach which is not appropriate when applying the concept of "suitable employment" under the Act. In my opinion, the suggested 'suitable employment' options are not "realistic". The defendant has embarked on an exercise in what amounts to "cherry picking" aspects of particular jobs for the purposes of creating fictional employment options. The suggested jobs do not, in any great detail, describe the precise physical activities required, the inherent requirements of the job, the duration of each duty, the number of

hours required to be worked and the flexibility allowed to cater for individual needs. There is no “degree of realism” in the suggested ‘suitable employment’ alternatives. The suggested suitable employments are not “realistic” when considering the personal characteristics and physical limitations of Mr Whelan. He is 44 years of age and after completing year 11 then worked as a trades assistant and then in manual employment until the age of 23. His resume indicates that for the majority of his working life he has performed manual employment which has included being an industrial cleaner, truck driver, warehouse manager and maintenance manager. The latter two positions have involved hands on physical work. Whilst his resume notes that he has numerous abilities and skills and has completed various courses relevant to his work duties at the relevant time, it is unrealistic to suggest that he would be able to perform the jobs suggested by the defendant. He would need to find an accommodating and understanding employer who would be prepared to accept him with the physical limitations imposed by the doctors as set out in paragraph 41.

44 In addition to the physical limitations imposed, Mr Whelan would also be an unreliable employee as it is unlikely he would be able to work full time on a regular basis as that would depend on his level of pain at the time and the effects of his medication intake. Furthermore, as suggested by Dr Jensen and Dr Davison, any return to work would need to be on a graduated basis and after further re-training or rehabilitation as suggested by Dr Rowe, Mr Lo and Dr Sutcliffe. Realistically, Mr Whelan has no current work capacity which is likely to last indefinitely.

45 Accordingly, he is entitled to weekly payments of compensation from 4 June 2011, in accordance with the provisions of the Act.