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2018 PERSONAL INJURY LAW MOOT

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**IN THE SUPREME MOOT COURT OF VICTORIA
AT MELBOURNE
COURT OF APPEALS DIVISION**

No. CI 2018 1005 ZAPL

BETWEEN

GIORGIO HATZIS

Applicant

-and-

DR WARTON &ORS

Respondent

-and

GREEN HILLS FARMS PTY LTD

Secondnamed Respondent

History:

On 5 November 1995, Giorgio Hatzis ('the Applicant') moved to Australia, at about the age of 12 years old from Yugoslavia with his late father and younger brother. The Applicant's family fled the country during difficult times and had no intention of returning home. The Applicant was settled in Dookie, a small remote town about 50kms northwest of Geelong. The Applicant and his family were granted permanent residency in around 1996. This was a joyful time for the Hatzis family, who celebrated with Cevapi and Rakijya.

At about the age of 14, the, Applicant commenced secondary schooling at Dookie Secondary College. The Applicant struggled immensely with command of the English Language and continued to have ongoing difficulties integrating into the school and connecting with his peers. After only completing up to year 8, the Applicant decided that he would leave school and '*work with his hands*'.

On or about 31 March 1999, the Applicant commenced employment with Green Hills Farms Pty Ltd ('the Employer') in the capacity of a Farm Hand. The Employer owns 100 acres of farming land in the Waggarandall region, farming cows, sheep and goats in addition to wheat and barley. The Employer sells its produce commercially to businesses around the region. The Applicant had not previously been employed.

As a Farm Hand, the Applicant was required to undertake general farm duties and maintenance as directed by the Employer. Farm hands are generally required to complete cropping operations including cultivating, seeding and applying appropriate fertiliser rates for all crops, maintain and tidy workshops and machinery, undertake fencing and fence maintenance, stock work including drenching, yard work and mustering, and soil conservation activities including tree planting, among other manual labour tasks. The Applicant was required to report his daily activities to Mr Kelly, General Manager and Owner of the farm.

The Applicant was one of 20 farming hands working on the property throughout 2016. Each farm hand was required to complete tasks of a similar nature. Depending on the size and the nature of the farm work, tasks would be completed in groups or individually.

On or about 1 November 2014, the Applicant was required to move hay bales in the North-Western portion of the farming land. The Applicant had been tasked with this role along with two other farm hands, Mrs Stanis and Mr Perera. The task involved transporting 100 hay bales onto trucks to be taken to the neighbouring farm land, and needed to be completed by the end of the day on 3 November 2014. At this time, the Applicant had been working for the Employer for a period of approximately 15 years.

On or about 3 November 2014, Mrs Stanis phoned Mr Kelly and advised he would be unable to work as he was feeling particularly unwell from the days prior. The North-Eastern region of Victoria was suffering through an extreme heatwave of 40+ degree days, for 6 consecutive days.

Due to the unusually hot weather for November, the task of transporting the 100 hay bales had been set back and the deadline of 3 November 2014 was looming.

Machinery has also been affected by the unusually hot weather and therefore the Applicant and Mr Perera were required to move the bales by hand.

The Applicant telephoned his manager, Mr Kelly, complaining of soreness in his lower back and the lack of assistance. Mr Kelly said to the Applicant something to the effect of *“if you want to keep your job, you’ll get the job done by the due date.”* Afterwards, the Applicant became quite anxious and felt victimised by Mr Kelly. He continued to work as he was scared to lose his job.

On or about 3 November 2014, at approximately 12:15 PM, the Applicant, under pressure from looming deadlines, attempted to move a hay bale on his own. As the Applicant lifted, he felt immediate pain in his back, causing severe shooting pains. The Applicant is then said to have dropped to the ground in pain. Mr Perera witnessed the incident and rang Mr Kelly and informed him of what had occurred, stating:

“I was attending to the truck when I heard a loud crack. When I walked around to the back of the truck, I saw Giorgio lying in the dirt grimacing in pain. I need to take him home now. I’ve got an ice-pack there.”

The Applicant took the rest of day off work and went to see his General Practitioner, Dr Sam, the following day. The Applicant’s GP referred him for scans. The Applicant underwent an MRI scan the following day which demonstrated:

L5/S1

There is moderate disc desiccation. A broad-based disc bulge is evident with an associated central and left paracentral annulus fissure. This sits close to the left S1 nerve root. The nerve root is not compressed nor displaced. Disc height is maintained. The exiting L5 nerve roots are not compromised. There is moderate right facet joint degeneration. Left facet joint is well maintained.

The other lumbar discs have retained their normal height and contour. The conus and cauda equina are normal. The lumbar pedicles are developmentally short. The sacroiliac joints are well maintained and the paraspinal muscles are not denervated.

Comment:

1. Central disc bulge at L5/S1 with a left sided annulus tear without impingement.
2. Degenerative right L5/S1 facet joint.”

The Applicant was referred to Neurosurgeon, Mr Zucker. The Applicant consulted with Mr Zucker on or around 8 November 2014. Mr Zucker recommended conservative treatment.

On or around 28 November 2014, the Applicant lodged a WorkCover claim. The claim was accepted by MMK ('the Authorised Agent') and assigned claim number 1800 55 1800. The Applicant was Compensation in the form of Weekly Payments and Medical and Like Expenses.

By way of notice dated 26 June 2016, MMK wrote to the Applicant and advised him that an adverse decision was made on his claim. MMK purported to terminate the Applicant's entitlements to Weekly Payments of Compensation. In making their decision, the Authorised Agent referred to the following material:

Medical Report of General Practitioner, Dr Sam dated 10 June 2017 opined:

"... due to Giorgio's condition, he continues to suffer from chronic pain as a result of his work injury; however, in my clinical opinion he is fit for light sedentary work requiring rest breaks every 15 minutes, I am hopeful that with pain management and other forms of treatment Giorgio will be able to work maybe even two hours a day after the pain management program."

Medical Report of Neurosurgeon, Mr. Zucker dated 12 May 2017 opined:

"My initial diagnosis of Mr Hatzis' L5/S1 injury is still a dominating contributing factor to his current condition. Mr Hatzis is currently not fit for pre-injury employment or alternative duties. Due to Mr Hatzis' poor sleep, possible poor mood and poor level of function, I think it would be extremely difficult for him to find suitable alternative duties, given his limited English ability and previous education. Restrictions would have to involve no prolonged sitting or standing and with no lifting of heavy objects. This man will struggle working any more than 2 hours uninterrupted. Prognosis is guarded"

Medical Report of Occupational Physician, Dr Jackson dated 21 May 2017 opined:

"Mr Hatzis' symptoms are not consistent with the organic basis of his claimed work injury. In my view, there is some abnormal illness behaviour. I no longer believe the work is a significant contributing factor to the injury and see no reason why Mr Hatzis cannot return to work on a graduated return to work plan. Mr Hatzis would benefit from a pain management program and potential psychological treatment although I will defer that opinion to the relevant expert, but should you ask for my opinion concerning

whether or not this man will recover after doing the pain management program, my answer is no - in my view, this man is for all intents and purposes, milking it, so to speak. The only treatment I would recommend is that the worker be provided with a copy of my book, 'Hurt is not harm: pain won't cause any damage'. The worker needs to understand that he was injured and nothing is going to reverse that."

The Applicant, was at a loss concerning the decision especially when his wife had read Dr Jackson's comments to him, the Applicant engaged solicitors, who advise him to request conciliation on the adverse decision notice. The Applicant follows the advice of his lawyers and, much to his disappointment, a conciliation conference occurred and no outcome was achieved.

As a result, the Conciliation Officer issued a Certificate of Genuine Dispute, certifying that he was unable to bring the parties together. The Applicant was still aggrieved by the decision and gave instructions to his solicitors to issue court proceedings by filing a Court Complaint with the Magistrates' of Victoria, Melbourne. The matter was set down for mention before a magistrate at which point, the Applicant made application to refer questions to the Medical Panel. Magistrate Stylianou ordered that the Medical Panel determine the following questions:

- 1) What is the nature of the worker's medical condition (including any sequelae) relevant to the claimed injury?
- 2) Is the worker incapacitated for pre-injury employment?
- 3) Does the worker have a capacity for suitable, alternative employment?

MEDICAL PANEL DETERMINATION

On or around 21 August 2017, a Medical Panel was commissioned. The Panel comprised of the members as stated below and examinations were conducted with the assistance of a professional interpreter on the following dates:

<u>Member</u>	<u>Specialisation</u>	<u>Examination</u>
Dr Warton	Neurologist	21 August 2017
Dr Karlos	Rehabilitation Physician	21 August 2017
Assoc Prof Ryan	Neurosurgeon	21 August 2017

In making their decision, the Medical Panel reviewed the following medical reports:

- Medical Report of General Practitioner, Dr Sam dated 10 May 2017;
- Medical Report of Neurosurgeon, Mr. Zucker dated 12 May 2017;
- Medical Report of Occupational Physician, Dr Jackson dated 21 May 2017; and the
- Vocational Assessment Report dated 3 July 2017.

Relevant extracts of the Medical Panel decision are extracted as follows:

"I Dr Richard Warton as Presiding Member of this Panel, have discussed the answers herein with the other Panel Member and this is the opinion of the Panel on the medical questions set out below.

Question 1: What is the nature of the worker's medical condition (including any sequelae) relevant to the claimed injury?

Answer: In the Panel's opinion the worker is suffering from persisting dysfunction and pain of the lumbar spine due to a central disc bulge at L5/S1 with a left sided annulus tear and a degenerative right L5/S1 facet joint.

Question 2: Is the worker incapacitated for pre-injury work?

Answer: The Panel is of the opinion that the worker does not have a current capacity for work in the worker's pre-injury employment due to a central disc bulge at L5/S1 with a left sided annulus tear and a degenerative right L5/S1 facet joint.

Question 3: Does the worker have a capacity for suitable, alternative employment?

Answer: The Panel is of the opinion that the worker has a current capacity for work in suitable employment."

The Medical Panel concluded that despite the Applicant's back injury had improved only slightly, it nonetheless opined that the Applicant had a current work capacity. The Medical Panel, furnished its reasons for its opinion.

REASONS FOR OPINION

"The Panel noted from the referral the agreed facts. The Panel also consider the Independent Medical Examination reports by General Practitioner, Dr Sam dated 10 May 2017, Medical Report of Neurosurgeon, Mr Zucker dated 12 May 2017, Occupational Physician, Dr Jackson dated 21 May 2017; and the Vocational Assessment Report dated 3 July 2017.

The Panel noted the opinions of Dr Sam and Mr. Zucker, but came to a different conclusion regarding the worker's capacity to work, specifically that the worker has a 'no current work capacity indefinitely'. In particular the Panel considered that the nature, extent and severity of the Worker's current condition is by far not the worst on the spectrum.

The Panel has read what the worker says about his own capacity. The Panel considers that the worker's bleak outlook may indeed be due to psychosocial factors not related to employment; such factors tend to amplify perception of pain. The Panel considers that the worker's current condition incapacitates him from his pre-injury employment. The Panel also considered the medical report of eminent Occupational Physician Dr Jackson and notes his standing within occupational medicine.

It also considered the Vocational Assessment Report dated 3 July 2017 and note that the Assessment identifies the following suitable employment options:

- *Information Officer;*
- *Forklift Driver;*
- *Despatch Clerk; and/or*
- *Workplace health Safety Adviser.*

Considering the definition of suitable employment under the relevant legislation, the worker has potential employment opportunities available to him.

The Panel noted that these employment options do not require much by way of skills. The Panel note that the worker could sit down during the entire examinations. The Panel notes that the worker did not finish school, but that was a long time ago. The Panel considers that after undergoing a short course, the worker may be able to even complete and be retrained as a workplace health and safety advisor. This option, is in the Panel's view the least likely to be achieved considering the worker's condition, but that is not to say unattainable. The Panel considers that the worker has a capacity to study or to retrain and is more mature now. The Panel echoes the view of Dr Jackson.

The Panel concluded that the worker's persisting condition is influenced predominately by psychosocial factors. The Panel considers that if the worker is incapacitated, it is due to such psychosocial factors that diminish his capacity and not by reason of the work-related injuries.

The Panel has considered the worker's residence and considers that there are particular types of employment, such as those raised in the Vocational Assessment that the worker is capable of performing."

AT FIRST INSTANCE

The Medical Panel returned its determination on or about 21 September 2017, on or around 28 September 2017, without much delay, the Applicant refused to adopt the Medical Panel determination and sought an order *Certiorari* by way of Originating Motion in the Supreme Moot Court of Victoria to set aside the Medical Panel determination and so that a newly constituted Medical Panel may be formed to re-examine the Applicant.

The Applicant was unsuccessful at first instance.

On or about 17 November 2017, Justice Vanderleest considered that the Medical Panel made no error of law, either by failing to take into account mandatory

considerations or by failing to provide adequate reasons for its decision. Justice Vanderleest dismissed the Applicant's initial application.

AGREED FACTS

- The Applicant is 35 years old being born on 1 January 1983;
- On or about 31 March 1999, the Applicant commenced his employment with the Respondent in the capacity of a Farm Hand. He had no previous work experience prior to this date;
- The Applicant ceased work on or about 3 November 2014 and has not returned to any form of employment since this date;
- On or about 28 November 2014, the Applicant lodged a WorkCover claim which was accepted by MMK ('the Authorised Agent');
- The Applicant's injuries are accepted as being serious injuries;
- The Applicant has from the following restrictions:
 - Walking - 20 minutes
 - Sitting - 40 minutes
 - Standing - Static 15minutes, alternating 30 minutes
 - Lifting - no more than 5kgs
 - No bending, squatting, kneeling
 - Concentration - fluctuating, depending on Medication
- English is the Applicant's second language and the Applicant has limited computer skills;
- The worker is able to navigate the internet and other favourite websites and/or social media platforms without much assistance;
- The employment options identified are within 45 minutes' drive of Dookie, VIC;

- The Vocational Assessment has identified the following roles:
 - Workplace health Safety Adviser;
 - Information Officer;
 - Forklift Driver
 - Despatch Clerk.

Brief position descriptions are included in the appendix

CURRENT PROCEEDINGS

The Applicant has sought leave from the Supreme Moot Court of Victoria, Leave is granted and the matter is set down on 09 May 2018 in the Supreme Moot Court of Victoria Court of Appeals Division.

The Applicant seeks for the Order of Justice Vanderleest to be set-aside on the following grounds:

1. The primary judge erred in the construction of the defined term 'no current work capacity' in section 5 of the Accident Compensation Act 1985.
2. The primary judge erred by failing to find that the Medical Panel had not taken into account mandatory relevant considerations.
3. The primary judge erred in finding that the Medical Panel's reasons were adequate.

Counsel for the Respondent submits that the Justice Vanderleest did not err in his judgement in denying the Applicant leave to have the Medical Panel Determination set aside. The Medical Panel has taken the Hardiman approach to these proceedings and, the Secondnamed Respondent is lonesome in their response to the current proceedings.

For the purposes of this Moot, you are expected to make submissions containing references to relevant Victorian legislation as well as all relevant case law.

- END -

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Appendix: IDENTIFICATION OF SUITABLE EMPLOYMENT OPTIONS

Job Title: Information Officer - ANZSCO: 541211

Duties: Responds to personal, written and telephone inquiries and complaints about the organisation's goods and services, provides information and refers people to other sources.

Physical / Psychological Demands:

- Sedentary role.
- Constantly sits at a workstation and carries out a variety of both manual and computerised data entry tasks.
- Employees occasionally to frequently stand and walk about the office to facilitate the collection of resources, carry out research and meet with customers.
- Lifting, carrying, stretching, twisting or climbing is not a significant component of the job.
- Bending, squatting or crouching movements are not a significant component of the job.
- Repetitive arm hand and finger movements are constant for data-entry, word-processing tasks and when using the phone.
- Use of hand-held objects such as pens, calculators and staplers, as well as computers and telephones will also be frequent. Employees will also need to operate printers, copiers and a range of other office equipment and refill paper trays and ink supplies.
- Mental skills necessary include a sound level of recording, organisation and communication skills.

Job Title: Crossing Supervisor – ANZSCO: 899913

Duties: Assists children, disabled and other pedestrians to cross roads by stopping traffic and ensuring all pedestrians have crossed safely before allowing traffic to flow through the crossing.

Physical / Psychological Demands:

- Sedentary to light physical work demand level.
- Constantly stands at the road side, may walk to assist pedestrians across the road.
- Light stretching and/or twisting movements may be required to observe the traffic and to assist pedestrians.
- Bending, squatting or crouching movements are not a significant component of the job.
- Lifting, pulling or carrying is not a significant component of the job
- Repetitive hand and finger movements are not required.
- Driving is not required.
- Mental skills necessary include an understanding of the road rules, judgement of traffic flow and communication skills.

Job Title: Despatch Clerk - ANZSCO: 591211

Duties: Verifies and maintains records of incoming and outgoing goods in a warehouse or distribution centre and prepares goods for despatch.

Physical / Psychological Demands:

- Sedentary to light physical demand levels.
- Employees frequently walk and/or stand about the work area to verify cargo and examine shipping documents.
- Employees frequently sit at computer stations while completing clerical tasks.
- Stretching, twisting, climbing, lifting and carrying movements are not typically a significant component of this job.
- Bending, squatting or crouching may be required for lifting tasks and the inspection of goods.
- Repetitive movements are likely on an occasional to frequent basis.
- Driving is not a significant component of the job although some roles will require forklift/fork hoist operation.
- Use of hand-held objects and equipment such as pens, calculators, markers and electronic scanners is frequent.
- Mental skills include record keeping, organisation and communication.

Job Title: Forklift Driver – ANZSCO: 721311

Duties: Operates a forklift to move bulk materials, containers, crates, palletised goods, cartons and bales.

Physical / Psychological Demands:

- Frequently light but up to medium work demand levels.
 - Sits in vehicle operating cab or similar constantly.
 - Climbs up steps to enter and to exit vehicle cab.
 - Uses upper limbs and body to stretch down and across to operate controls.
 - Squatting, crouching or kneeling movements are not required.
 - Twists body or neck when reversing vehicles.
 - Significant contact with water or skin irritants is not required.
 - Lifting or carrying is not required.
 - Bending is not required
 - Frequent repetitive hand, arm and leg/foot movements and pushing/pulling - required for operation of controls.
-
- Driving is constantly required.
 - Use of hand tools or equipment is occasionally required for machine maintenance.
 - Mental skills necessary include machine operation, practical and technical skills.

Job Title: Workplace Health Safety Adviser
ANZSCO: 251312

Duties: Implements and evaluates risk management policies and programs, trains employees in occupational health and safety procedures, monitors and audits the workplace, and records and investigates incidents to ensure safe and healthy working conditions.

Physical / Psychological Demands:

- Sedentary physical demand.
- Standing and walking is frequent within the office and at employment sites, when inspecting and auditing sites. Sitting at an office desk or computer for record-keeping, writing of reports and reviewing policy is likely to be frequent.
- Stretching and reaching across is not likely to be a significant component of this job. Bending is not likely to be a significant component of this job. Squatting, crouching and kneeling is not likely to be a significant component of this job.
- Twisting of the body or neck, and lifting, carrying and holding are not likely to be a significant component of this job. Repetitive movements are likely to be necessary when using a keyboard and mouse and other general office equipment.
- Contact with skin irritants or water may occur when visiting sites; personal protective equipment should be utilised when appropriate.
- Driving is likely to be required on an occasional to frequent basis.
- Use of equipment/materials will include copies of legislation, computers, calculators, writing instruments, research data other general office equipment.
- Mental skills necessary include technical problem solving, interpretation, computing, organisational, environmental and health and safety knowledge, report writing, knowledge of relevant laws and regulations, decision-making and communication skills.