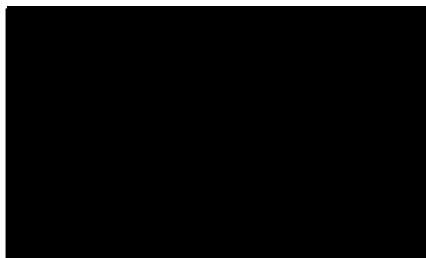


SUBMISSION TO MARK HALL



Years of service: 12 years

Postal Delivery Officer – Bendigo Delivery Centre

1. I would request that the Inquiry examine the Decision and Reasons for Decision of the AAT on my case dated 17 December 2007 and my Statement of Facts and Contentions as attached.
2. Since my operation I have been at work under a Return To Work programme. However I am continually pressured into doing work contrary to this (e.g. weighing heavy volumes of mail and pushing trolleys.) I believe this is why I have recently had a reoccurrence of pain.
3. Australia Post's treatment of me has prolonged and increased the effects of my injury. The stress of constantly defending my compensable status is very stressful.

IN THE ADMINISTRATIVE APPEALS TRIBUNAL)

VICTORIAN REGISTRY)

AT MELBOURNE)

Nos. V2006/429 and
V2006/870

BETWEEN:

MARK HALL

Applicant

- and -

AUSTRALIAN POSTAL CORPORATION

Respondent

**APPLICANT'S STATEMENT OF
FACTS AND CONTENTIONS**

Date of Document:

9 March 2007

Filed on behalf of:

The Applicant

Prepared by:

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PART I – DECISIONS TO BE REVIEWED

1. V2006/429 – A reviewable decision dated 20 March 2006 (T49/125-127) made pursuant to the Safety, Rehabilitation and Compensation Act 1988 ("the SRC Act"). The decision affirmed an earlier determination dated 14 September 2005 (T44/116-119). The effect of the decision is to find that the Respondent has no present liability for medical expenses and compensation leave payments pursuant to sections 16 and 19 of the SRC Act in relation to an injury to the Applicant's back described as **aggravation of underlying spondylolisthesis L5/S1** the subject of a claim identified by the claim number 04/303814.
2. V2006/870 – A reviewable decision dated 12 September 2006 (T62/213-215) made pursuant to the SRC Act. The decision affirmed an earlier determination dated 14 August 2006 (T60/207-209). The effect of the decision is to deny that the Respondent has liability pursuant to section 14 of the SRC Act in relation to an injury to the Applicant's back described as **lower back** the subject of a claim identified by the claim number 06/6368.

PART II – RESPONDENT'S REASONS FOR DECISION

3. The Respondent gave, in the course of reasons for the decision in V2006/429, the following reasons:
- (a) That (at T49/127, paragraph 14) the Applicant "is suffering from a congenital or degenerative condition, namely Grade 1 spondylolisthesis of the lumbar spine at L5/S1". The Respondent went on to state that "the majority of medical evidence supports the contention that Mr Hall's current pain symptoms are referable to this condition" (at T49/127, paragraph 14).
 - (b) The Respondent was "satisfied that Mr Hall's employment may have contributed to an aggravation of this condition [that is, spondylolisthesis L5/S1]" (at T49/127, paragraph 14).
 - (c) However, the Respondent was "no longer satisfied that his [that is, the Applicant's] employment continues to contribute to any such aggravation" (at T49/127, paragraph 14).
 - (d) In support of its finding at paragraph (c) above, the Respondent referred particularly to a report of [REDACTED] neurosurgeon, of 25 July 2005 (at T49/126-127, paragraphs 11-15). The report of [REDACTED] is to be found at T41/104-110.
4. The Respondent gave, in the course of reasons for the decision in V2006/870, the following reasons:
- (a) That (at T62/214, paragraph 12) the Applicant "suffers a pre-existing degenerative condition of the lumbar spine".
 - (b) Whilst the Respondent was "satisfied that Mr Hall [the Applicant] may at times experience pain in his lower back whilst at work, I [that is, the delegate] am satisfied that these symptoms are referable to his underlying degenerative condition and that there is no evidence to suggest that his work has in any way led to a worsening or exacerbation of this injury" (at T62/214, paragraph 13, and see also at paragraph 12).

PART III – ORDERS SOUGHT

5. V2006/429:

- (a) That the reviewable decision dated 20 March 2006 is revoked and in substitution therefor it is decided that the Applicant's employment continues to contribute to an aggravation of the Applicant's underlying spondylolisthesis L5/S1, and:
 - (i) the Applicant is presently entitled to compensation pursuant to section 16 of the SRC Act in relation to the said aggravation of underlying spondylolisthesis L5/S1; and
 - (ii) the Applicant is presently entitled to compensation pursuant to section 19 of the SRC Act in relation to the said aggravation of underlying spondylolisthesis L5/S1.
- (b) That the Respondent shall pay the Applicant's costs of these proceedings in accordance with section 67 of the SRC Act.

6. V2006/870:

- (a) That the reviewable decision dated 12 September 2006 is revoked and in substitution therefor it is decided that the Respondent has liability pursuant to section 14 of the SRC Act in relation to the Applicant's lower back.
- (b) That the Respondent shall pay the Applicant's costs of these proceedings in accordance with section 67 of the SRC Act.

PART IV – BRIEF STATEMENT OF FACTS

- 7. The Applicant was born on 12 June 1971.
- 8. The Applicant commenced employment with the Respondent on 5 May 1997. From 2 May 2002 to the present, he has been employed as a Postal Delivery Officer on a full-time basis.
- 9. The Applicant has been working full-time for the Respondent since 22 October 2001, however he was not formally employed on a full-time basis before 2 May 2002.

10. The Applicant has a back condition, namely spondylolisthesis L5/S1, which predates his employment with the Respondent. This condition was initially asymptomatic and undiagnosed.
11. In early 1998, the Applicant suffered pain that can now be recognised as symptoms of aggravation to his underlying spondylolisthesis L5/S1. The Applicant did not make a compensation claim then despite pain continuing intermittently since in "early 1998 ... [o]ne night unloading the mail from the ULD" (see Applicant's letter of 16 March 2004 to [REDACTED] of the Respondent, T10/24).
12. These symptoms (although the date is not given specifically) are described by [REDACTED] orthopaedic surgeon, in his report to the Respondent dated 29 April 2004: "After his initial training with Australia Post approximately eight years ago, having started night shift sorting, he [the Applicant] became aware of low back pain after about one week. He consulted his doctor and was certified unfit for work for three days. Mr Hall returned to work and his condition improved, but he continued to experience intermittent low back pain. This tended to depend upon what activities he performed and would develop when he leaned forward, such as leaning into the ULD's (Unit Loading Device)" (T17/44).
13. The Applicant's general practitioner [REDACTED] noted in a report of 16 April 2004: "As I understand, Mr Hall is a stable and sincere worker who has had a back problem in the past and was reluctant to claim it as workcover [sic]" (T15/40).
14. On or about 7 February 1999, the Applicant was involved in a motorcycle accident which was not work related. In the accident he fell from his motorcycle, sustaining a fractured collarbone. [REDACTED] orthopaedic surgeon, opined about the motorcycle accident as follows (in his report of 1 May 2006, T29/80): "This was not a serious injury and he returned to work three weeks following his accident. I note Mr Hall was initially found to suffer from spondylolisthesis at approximately that time. I do not consider there is any relationship between that motorcycle accident and Mr Hall's current condition."
15. In August 2003, the Applicant was working in the Respondent's delivery centre in Bendigo and began to suffer pain in his back. The Applicant reported on 11 September 2003: "It started about a month ago, my back (higher) was sore

due to faulty seat" (incident report form at T3/8). The Applicant made a compensation claim dated by him 15 September 2003 in respect of this (claim 03/305680; claim form at T4/10-12).

16. In response to that claim, on 22 September 2003, the Respondent accepted liability for "mid thoracic muscle spasm", and determined the date of injury as 1 August 2003 (T5/13).
17. On 1 March 2004, the Applicant reported that on 26 February 2004: "My back has been sore for some time. I have alot [sic] of pain. While sitting and when i [sic] walk I have pain down my legs and can be very painful" (incident report form at T8/18). The Applicant made a compensation claim dated by him 1 March 2004 in respect of this (claim 04/303814; claim form at T7/15-17).
18. Liability was initially denied on 12 May 2004, however on 7 July 2004 the Respondent made a reviewable decision revoking that determination (the determination is to be found at T19/50-53). The reviewable decision provided: "Pursuant to Section 14 of the SRC Act, Australia Post is liable to pay compensation benefits in respect of 'aggravation of underlying spondylolisthesis L5/S1" (T21/56). The reviewable decision had regard to reports from [REDACTED] the Facility Nominated Doctor [REDACTED] and [REDACTED] T21/especially at 56-57).
19. The Respondent made the following crucial findings in the course of accepting liability:

"[I]t is evident that you are suffering from a pre-existing constitutional condition, namely spondylolisthesis which was not caused by your employment with Australia Post.... I am however, based on the evidence provided by both [REDACTED] and [REDACTED] satisfied that this condition has been aggravated by your employment with Australia Post. Notably, both [REDACTED] and [REDACTED] are of the opinion that your duties as a night shift sorter, which involved prolonged sitting and bending, had led to an aggravation of symptoms, with a resulting improvement being achieved once a transfer to day shift duties had occurred. It is further noted that whilst [REDACTED] indicated that you would have sustained symptoms regardless of your employment, he did concur that your duties as a night sorter had expedited the onset of symptoms." (T21/57-58, at paragraphs 15 and 16)

20. On 12 August 2004, the Applicant reported an incident the previous, 11 August 2004, day while doing rounds on his bicycle: "While riding my bike on my usual shift I really didn't notice any pain; It wasn't until I got home and sat down, then got up that I felt the pain on my back" (incident report form at T23/60). The Applicant made a compensation claim dated by him 18 August 2004 in respect of this (claim 03/305680; claim form at T24/62-63).
21. In response to that claim, on 9 September 2004, the Respondent accepted liability for "muscle spasm dorsal paravertebral muscles", and determined the date of injury as 10 August 2003 (T25/65).
22. On 8 March 2005 the Applicant reported an incident on 4 March 2005, describing pain while peddling his bicycle when moving off from a letterbox while doing rounds (incident report form at T26/66-67).
23. In response to this incident report form, the Respondent advised the following in a letter which is dated (incorrectly) 24 March 2004 (T27/68): "Australia Post will associate this incident with your existing claim for compensation in respect of 'aggravation of underlying spondylolisthesis L5/S1'. It is noted that your description of the nature of illness on your incident report dated 1 March 2004 is similar to the description of your current condition as indicated on your incident report dated 8 March 2005."
24. In the first half of 2005, the Respondent reviewed claim 04/303814. As part of this review, the Applicant was assessed by [REDACTED] orthopaedic surgeon, on 19 April 2005. [REDACTED] report of 1 May 2006 is to be found at T29/76-81. On the basis of [REDACTED] report, the Respondent determined that liability continued under section 16 of the SRC Act in relation to the Applicant's aggravation of underlying spondylolisthesis L5/S1 – although liability was not accepted in respect of one specific treatment (a back care program at the John Lindal Centre) (determination of 20 June 2005, T37/91-93).
25. In respect of the specific point of denying liability for the John Lindal Centre back care program, the Respondent had preferred the opinion of the Applicant's treating specialist, [REDACTED] over [REDACTED] (T37/92; and see report of [REDACTED] of 14 June 2006, T36/90). It is worth noting, however, that [REDACTED] opinion was not against ongoing liability for medical expenses generally. Indeed, [REDACTED] opined that the Applicant "would be well advised to avoid an occupation which involves the manual handling of loads of medium weight and his current work undertaking postal

deliveries is unsuitable in the long term due to the necessities of climbing in and out of vans, driving for long periods, and unloading parcels" (T36/90).

26. A further review was conducted by the Respondent following its determination of 20 June 2005. As part of this review, the Applicant was assessed by [REDACTED] who reported on 25 July 2005 (T41/104-110). [REDACTED] opinion became the critical basis for the reviewable decision the subject of proceeding V2006/429 – relevant parts of the report and the reviewable decision are set out in this Statement of Facts and Contentions above at paragraph 3.
27. In relation to proceeding V2006/870, the Applicant was assigned by the Respondent to working on "DC" (Delivery Centre) boxes in 2006. The Applicant informed his Team Leader, [REDACTED] of the Applicant's concerns for his back. Within three to four weeks of commencing work on DC boxes, an incident occurred at 5.45 am on 6 June 2006 which is described by the Applicant in his own words as follows: "Noticed [sic] pain after sorting DC Boxes [sic]. When i [sic] sorted some non standed [sic] i [sic] went to pick up a letter from Roadside tub and pain worcend [sic]" (incident report form at T55/199). The Applicant made a compensation claim dated by him 24 July 2006 in respect of this (claim 06/6368; claim form at T57/202-204).
28. In response to this claim, the Respondent denied liability. The reviewable decision of 12 September 2006 and reasons for it are set out above in paragraph 4 of this Statement of Facts and Contentions.

PART V – CONTENTIONS

29. The Respondent's reviewable decisions of 20 March 2006 (in V2006/429) and 12 September 2006 (in V2006/870) are wrong. The decisions are against the weight of evidence, which supports the orders that the Applicant seeks.
30. In relation to proceeding V2006/429, the Applicant contends that his underlying spondylolisthesis L5/S1 was aggravated from:
- (a) work involved in night shift sorting for the Respondent since early 1998 (see paragraphs 11 and 12 of this Statement of Facts and Contentions);
 - (b) work for the Respondent identified as aggravating his underlying spondylolisthesis in February 2004 and thereafter (see paragraphs 17-19 of this Statement of Facts and Contentions);

- (c) the bicycle incident on 4 March 2005 (see paragraphs 22-23 of this Statement of Facts and Contentions); and
 - (d) further, or in the alternative, the nature and conditions of the Applicant's employment at the Respondent.
31. The reviewable decision of 20 March 2006 is against the evidence that was elegantly set out by the Respondent in its reviewable decision of 7 July 2004 (quoted at paragraph 19 of this Statement of Facts and Contentions above). In the submission of the Applicant, this evidence should be preferred to the evidence later relied upon by the Respondent, particularly that in the report of [REDACTED] of 25 July 2005.
32. The Applicant notes in support of its case that as recently as 20 June 2005, the Respondent had determined that liability continued under section 16 of the SRC Act in relation to the Applicant's aggravation of underlying spondylolisthesis L5/S1 (determination of 20 June 2005, T37/91-93).
33. In relation to proceeding V2006/870, the Applicant refers to the evidence establishing the Applicant's underlying spondylolisthesis L5/S1. In this context, the Applicant's engaging in new work on DC boxes in July 2006 is clearly a material contribution to the injury to the lower back which he sustained on 6 June 2006.
34. The Applicant contends that the Tribunal should make the orders sought in paragraph 5 above of this Statement of Facts and Contentions.

DATED the 9 March 2007

Maurice Blackburn Cashman

MAURICE BLACKBURN CASHMAN
Solicitors for the Applicant

FILED on behalf of the Applicant



Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION [2007] AATA 2063

ADMINISTRATIVE APPEALS TRIBUNAL
GENERAL ADMINISTRATIVE DIVISION

No. V 200600429
V 200600870
2007/2698

Re MARK DARREN HALL

Applicant

And AUSTRALIAN POSTAL
CORPORATION

Respondent

DECISION

Tribunal: G. D. Friedman, Senior Member

Date: 17 December 2007

Place: Melbourne

Decision: Application V 200600429: The Tribunal sets aside the decision under review and substitutes the decision that:

1. from 14 September 2005 to the present date and at the present date Mr Hall continued to suffer incapacity and impairment as a result of injury arising out of or in the course of employment;
2. the respondent is liable to pay compensation pursuant to the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) in respect of:

2.

- (a) weekly payments of compensation for all periods of incapacity after 14 September 2005 pursuant to s 19 of the SRC Act where actual earnings are less than normal weekly earnings as calculated in accordance with ss 8 and 9 of the SRC Act; and
- (b) reimbursement of reasonable medical treatment expenses pursuant to s 16 of the SRC Act.

Application **V 200600870**: The Tribunal sets aside the decision under review and substitutes the decision that:

- 1. Mr Hall sustained a further injury being on 6 June 2006 arising out of or in the course of his employment being a further aggravation of his spondylolisthesis at L5/S1 in his low back;
- 2. the respondent is liable to pay:
 - (a) weekly payments of compensation for those periods of incapacity attributable to the further 6 June 2006 aggravation injury pursuant to s 19 of the SRC Act; and
 - (b) reimbursement of reasonable medical treatment expenses pursuant to s 16 of the SRC Act. This includes medication, medical consultations, diagnostic radiology and the need for surgery and post operative care.

Application **2007/2698**: The Tribunal sets aside the decision under review and substitutes the decision that:

- 1. Mr Hall was incapacitated for work on the night shift at the Bendigo Delivery Centre for the period 3 June 2004 to 23 March 2005 resulting in a loss of income from night shift allowances; and
- 2. the respondent is liable to pay weekly payments of compensation pursuant to s 19 of the SRC Act for the period 3 June 2004 to 23 March 2005.

3.

The respondent shall pay Mr Hall's costs and disbursements in respect of these proceedings (V 200600429, V 200600870 and 2007/2698) in accordance with s 67 of the SRC Act.

(sgd) G.D. Friedman
Senior Member

COMPENSATION – pain to lower back and lower limbs – spondylolisthesis – postal sorting and delivery duties – whether work-related – whether temporary aggravation

Safety, Rehabilitation and Compensation Act 1988 ss 4(1), 14(1), 16, 19, 37

Comcare v Canute [2005] FCAFC 262

Comcare v Sahu-Khan (2007) 156 FCR 536

Commonwealth of Australia v Beattie (1981) 35 ALR 369

Re Baker and Commonwealth of Australia (1988) 16 ALD 784

Tippett v Australian Postal Corporation (1998) 27 AAR 40

REASONS FOR DECISION

17 December 2007

G.D. Friedman, Senior Member

1. Mark Hall worked in a number of labouring jobs until he joined the respondent as a mail sorter and delivery officer. He claimed that his lower back and lower limb pain were aggravated by his employment and caused him loss of wages. The respondent disagreed, and stated that any aggravation was temporary.

2. The issues before the Tribunal are:

- whether there was a liability for compensation as at 14 September 2005 and continuing under s 16 and 19 of the *Safety, Compensation and Rehabilitation Act 1988* (the SRC Act) for aggravation of underlying spondylolisthesis (application **V 200600429**);
- whether there was a liability for compensation under s 14 of the SRC Act for lower back pain sustained on 6 June 2006 (application **V 200600870**); and
- whether there was a liability for compensation for loss of wages for the period 3 June 2004 to 23 March 2005 under s 19 and s 37 of the SRC Act (application **2007/2698**).

WHAT IS MR HALL'S MEDICAL CONDITION?

3. The medical evidence is that Mr Hall suffers from lower back pain diagnosed as Grade 1 spondylolisthesis (forward shift of one vertebra on another due to a defect of the joints) of L5/S1 with bilateral pars defects.

WAS THE CONDITION AGGRAVATED BY HIS EMPLOYMENT WITH THE RESPONDENT?

4. Mr Hall told the Tribunal that he left school at age 15 in 1986 and worked in labouring and cleaning positions in Bendigo and New South Wales, in a sheepskin tannery and in an insulation installing business before obtaining employment in 1996 as a driver for a mail contractor in Bendigo. He drove a truck delivering mail to small towns in the Bendigo area, and in May 1997 he accepted the respondent's offer of a part-time position doing night shift mail sorting at the Bendigo Mail Centre. He later became a permanent employee. Mr Hall said that until this time he had not suffered any back or lower limb problems, but had been involved in a motorcycle accident in October 1995 in which he suffered abrasions to his hip, shoulder, back and arm.

5. Mr Hall stated that on 18 August 1997 during night shift mail sorting duties he experienced pain in his lower back while moving and unloading Unit Loading Devices (ULDs). He said that the next day he was unable to move and took two days off work as sick leave. He did not seek compensation. He said that he noticed sciatic or shooting pain in his right buttock and leg from time to time, which lasted for several days. However at that time he did not connect this to his back pain, which recurred occasionally. Mr Hall said that in February 1999 he had a second motorcycle accident which was unrelated to his employment, and this time he was off work for 6 – 8 weeks with a broken collarbone.

6. In 2001 Mr Hall began full-time work with the respondent at the Bendigo Mail Centre and in May 2002 was transferred to the Bendigo Delivery Centre as a mail delivery officer. He said that his duties included lifting, bending, twisting and turning. In August 2003 he began to suffer pain in his high and middle back which he attributed to a faulty chair. He lodged a claim for compensation in September 2003 which was accepted as *mid-thoracic muscle spasm*. He told the Tribunal that he

suffered further upper and lower back problems in February 2004, and lodged a claim for compensation on 1 March 2004. After denying the claim the respondent in July 2004 accepted liability for *aggravation of underlying spondylolisthesis L5/S1*. The respondent noted that medical opinion supported the view that prolonged sitting and bending during night shift sorting of mail had aggravated the condition.

7. Mr Hall said that in August 2004 he lodged a further claim for compensation after he experienced back pain after delivering mail by bicycle. In September 2004 the respondent accepted liability for *muscle spasm dorsal paravertebral muscles*. In March 2005 he reported lower back pain suffered while pedalling his bicycle during a delivery round. He said that he was carrying a heavy load of mail at the time. He said that on 23 March 2005 his medical certificate expired and he was placed on night shift, but this was harmful to his medical condition because after sitting for extended periods he could hardly walk, and was required to lift heavy tubs of mail.

8. He told the Tribunal that on 13 December 2005 he reported pain in his left leg and thigh, and had difficulty in walking. He partly attributed this to a defective trolley which required him to bend more than usual. He reported a further incident that occurred on 1 March 2006 in which he suffered pain in his lower left leg while sorting mail, and on 6 June 2006 while sorting boxes.

9. In respect of other incidents in which he suffered pain, Mr Hall said that on 7 February 2007 he experienced pain in his right buttock, right thigh and numbness in his right leg while delivering mail on foot, and on 26 March 2007 he felt pain in his right leg and foot. He said that in April 2007 he was forced to cease work because of the pain in his back and lower limbs. He could hardly walk. Mr Hall stated that he sought medical advice which recommended fusion surgery for his back, and he is on a waiting list. He explained that he returned to work in August 2007 and currently works 5 hours per day 5 days each week. He said that he still experiences back and right leg pain and undertakes exercises at home. He stated that he takes medication when required. Mr Hall said that his medical condition prevents him from playing sport or performing household tasks.

10. Under cross-examination Mr Hall stated that before working for the respondent he may have had minor back pain sustained in his fall from a motorcycle in 1995 and in employment in a tannery, but that since the onset of back pain in 1997 while working for the respondent activities such as bending, sitting, standing, lifting and driving have brought on the pain or made it worse. He conceded that clinical notes made at the time of his visit to his general practitioner on 16 October 1995 included: *Low lumbar pain...pulls on heavy sheepskin...* (Exhibit R3) which referred to his employment at the tannery. He also agreed that clinical notes made on 31 October 1995 included: *Fall off motorbike...hurt back, hip...shoulder...* (Exhibit R3) but he could not remember these visits. He agreed that in 1998 he was the Bendigo Go Karting Club champion but he said that he participated in this activity only once each month and the races were short. He said that the racetrack was bitumen and although there was some jolting and jarring resulting from contact with other karts, he doubted that his back would have been adversely affected by this sport.

11. In a report dated 14 December 2006 (Exhibit R1) [REDACTED] general surgeon, stated that Mr Hall is suffering from two level disc degeneration with spondylolisthesis at the lumbosacral junction, and an annular tear at L4/5. He stated that in his opinion the spondylolisthesis at least is pre-existing and has contributed significantly to Mr Hall's current status, and had been symptomatic prior to employment with the respondent. [REDACTED] said:

The spondylolisthesis is apparently due to pars interarticularis defects, which almost certainly developed during the adolescent years. It is noted that his back has been symptomatic as far back as 1995 which was apparently before he started work with Australia Post.

On the other hand I think that the general nature of his duties, particularly if he was repeatedly bending and lifting tubs of mail could aggravate the back condition.

It does not appear there has been any major episode or incident during the course of his employment, and whilst I accept that he may well have had some temporary aggravation of the condition in the earlier years when he was doing a fair amount of lifting I suspect that the effects of that aggravation have ceased and that his ongoing problems relate primarily to the underlying condition.

12. In a further report dated 30 July 2007 (Exhibit R2) [REDACTED] stated that he re-examined Mr Hall on 23 July 2007 and that Mr Hall described pain in the right side

of the low back extending into the right buttock and thigh down to the back of the calf to the foot, as well as numbness in the whole of the foot. ██████████ said that Mr Hall continues to suffer from mechanical back pain associated with pre-existing lytic spondylolisthesis and disc degeneration at L4/5 and L5/S1. He referred to the back problems in October 1995 when Mr Hall was pulling a heavy sheepskin and when he fell from a motorcycle, and concluded:

I have no difficulty in accepting that to the extent that his work involved prolonged or repetitive bending or heavy lifting that this could have aggravated his back condition and this applies to activities both before and after employment with Australia Post.

13. In oral evidence ██████████ said that he found difficulty in taking an accurate history from Mr Hall, whom he said did not mention pain in his left leg. ██████████ stated that he would be concerned if a person with Mr Hall's pathology participated in activities such as go karting because of the risk of injury caused by jarring and bumps. Under cross-examination ██████████ said that a lack of continuity of symptoms of back pain after 1997 suggested that any aggravation related to employment was temporary.

14. In reports dated 3 May 2004 (T18, page 49), 14 June 2005 (T36, page 90) and 25 June 2007 (Exhibit A4) ██████████ Mr Hall's treating orthopaedic surgeon, diagnosed Grade 1 spondylolisthesis of L5/S1 with bilateral L5 pars defects and deteriorating symptoms, and that the symptoms are consistent with the findings of an MRI scan in June 2005. He said that he referred Mr Hall for specialist advice regarding possible fusion surgery, and noted that Mr Hall will be unable to perform duties involving climbing in and out of vehicles, loading mail or any duties requiring manual labour.

15. Under cross-examination ██████████ said that when he first saw Mr Hall in 2004 he was not given any history of pre-Australia Post employment, and that Mr Hall did not mention pain in the lower left leg at any time. He said that the pars defects were probably present during Mr Hall's adolescence.

16. In a report dated 9 November 2006 (Exhibit A5) ██████████ orthopaedic surgeon, diagnosed mechanical lumbar back pains secondary to L4/5 and lumbosacral disc disruption with longstanding pars defects, Grade 1 anterolisthesis

lumbosacral level and moderate L5 root compromise in the exit foraminae. He said that Mr Hall's employment and incidents at work that were described materially contributed to his condition. [REDACTED] said that Mr Hall had not mentioned the incident that occurred at work on 6 June 2006. He also stated that Mr Hall does not suffer from a congenital back condition:

The bilateral L5 pars defects were not present when Mr Hall was born! These pars defects developed some years later probably during adolescent years. These defects are prone to further injury. It is likely that Mr Hall sustained a disc injury through the course of employment...

17. In oral evidence [REDACTED] stated that the 1995 incident of back strain while working at the tannery, and the back pain after the motorcycle accident, seem to have been minor disc strains and are unlikely to have contributed to Mr Hall's low back condition because after these incidents he returned work and performed heavy lifting activities without significant problems. He said that although spondylolisthesis is a progressive condition it does not necessarily lead to incapacitation. Some sufferers of pars interarticularis do not suffer the slippage of one vertebra over another. He referred to three stages: the first in childhood or early adolescence where the pars defects develops, possibly by stress fractures but with only mild pain and possibly no acute symptoms; the second in a person's 20s or 30s where there may be low back pain attributed to a disc injury, with possible buttock or leg pain aggravated by lifting, bending or twisting; and the third in a person's 50s where slippage of the vertebrae results in impingement of the nerve roots leading to sciatic pain, which may be relieved by fusion surgery, but may not relieve the low back pain. [REDACTED] said that the course of Mr Hall's spondylolisthesis had been accelerated to the extent where fusion surgery is being contemplated.

18. In a report dated 1 May 2005 (T29, page 76) [REDACTED] consultant orthopaedic surgeon, diagnosed aggravation of pre-existing congenital Grade 1 spondylolisthesis at the lumbosacral level of the spine. He stated that Mr Hall's employment with the respondent has materially contributed to the aggravation of his underlying condition by bending, lifting and twisting, and back strain incurred while pedalling a bicycle. [REDACTED] considered the contribution to Mr Hall's condition to be permanent.

19. In a report dated 25 July 2005 (T41, page 104) [REDACTED] consultant neurosurgeon, diagnosed low back pain due to congenital spondylolisthesis and degeneration of the lumbosacral spine as a natural process of ageing. He relied on the history given to [REDACTED] and said that Mr Hall's employment led to a temporary aggravation of symptoms that have improved with changes in the workplace, such as the ability to walk while delivering mail, but his current condition is not due to his employment with the respondent.

20. In a report dated 29 April 2004 (T17, page 43) [REDACTED] orthopaedic surgeon, stated that the diagnosis is a pre-existing spondylolisthesis of L5/S1 and that the back pain is related to the condition. He said that if this is so, then Mr Hall would have suffered his symptoms eventually, regardless of his employment with the respondent. However [REDACTED] concluded that postal duties involved in sorting and prolonged sitting have expedited the onset of the symptoms.

LEGISLATIVE BACKGROUND

21. Section 14(1) of the SRC Act provides:

Subject to this Part, Comcare is liable to pay compensation in accordance with this Act in respect of an injury suffered by an employee if the injury results in death, incapacity for work, or impairment.

Section 4 of the SRC Act, as it was at the relevant dates, provides:

(1) *In this Act, unless the contrary intention appears:*

injury means:

- (a) *a disease suffered by an employee; or*
- (b) *an injury (other than a disease) suffered by an employee, being a physical or mental injury arising out of, or in the course of, the employee's employment; or*
- (c) *an aggravation of a physical or mental injury (other than a disease) suffered by an employee (whether or not that injury arose out of, or in the course of, the employee's employment), being an aggravation that arose out of, or in the course of, that employment;*

but does not include any such disease, injury or aggravation suffered by an employee as a result of reasonable disciplinary action taken against the employee or failure by the employee to obtain a promotion, transfer or benefit in connection with his or her employment.

aggravation includes acceleration or recurrence.

ailment means any physical or mental ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development).

...
disease means:

- (a) any ailment suffered by an employee; or
- (b) the aggravation of any such ailment;

being an ailment or an aggravation that was contributed to in a material degree by the employee's employment by the Commonwealth or a licensed corporation.

...
impairment means the loss, the loss of the use, or the damage or malfunction, of any part of the body or of any bodily system or function or part of such system or function.

...
(9) A reference in this Act to an incapacity for work is a reference to an incapacity suffered by an employee as a result of an injury, being:

- (a) an incapacity to engage in any work; or
- (b) an incapacity to engage in work at the same level at which he or she was engaged by the Commonwealth or a licensed corporation in that work or any other work immediately before the injury happened.

...
Section 16 of the SRC Act provides for the payment of compensation in respect of reasonable medical expenses incurred in relation to an injury, and s 19 of that Act provides for the payment of compensation for incapacity for work resulting from an injury. Section 37 of the SRC Act provides for a rehabilitation program for an employee who has suffered an injury resulting in an incapacity for work or an impairment.

WAS THERE A PRESENT LIABILITY AS AT 14 SEPTEMBER 2005 AND CONTINUING?

22. In *Commonwealth of Australia v Beattie* (1981) 35 ALR 369 Evatt and Sheppard JJ said at 378:

It does not follow in every case that a worker with a pre-existing injury, who carries out work and as a result suffers pain, will have suffered an aggravation of his injury. A worker whose fractured leg is encased in plaster will be unable to put it to the ground without suffering pain and other disability. But that is not a case of aggravation. In such a case any incapacity for work arises only by reason of the pre-

existing injury. The evidence earlier recounted shows this to be a very different type of case. Thus each case must depend upon its own facts. For present purposes it is enough to say that pain brought on by work activity may constitute an aggravation of a pre-existing injury even though no pathological change takes place.

The Tribunal concludes that in Mr Hall's case there is pathological change, as spondylolisthesis is the forward slippage of vertebrae made possible because of prior defects in the pars interarticularis often following discal damage, and this has resulted in symptoms of pain, including pain in the buttocks and lower limbs. Mr Hall has reached the point where he experiences true sciatic pain and faces spinal fusion surgery to stabilise the pathology.

23. In *Tippett v Australian Postal Corporation* (1998) 27 AAR 40 Finkelstein J stated that if pain arising from an underlying condition is worsened or increased by reason of matters involving employment, then the person will have suffered a compensable injury. In *Comcare v Sahu-Khan* (2007) 156 FCR 536 Finn J adopted the conclusions of the majority in *Comcare v Canute* [2005] FCAFC 262 on the question of material contribution required for liability in respect of an ailment, and referred to an *evaluative threshold* below which a causal connection with an ailment may be disregarded. He held that this requires an evaluation of all relevant contributing factors in deciding whether the employment contributed to the necessary threshold level in relation to the ailment and stated at 542:

Bearing in mind that the course of statutory construction is often not aided by substituting for the word used in an enactment, another word which is not so used, probably the best that can ultimately be said is that the s 4 definition:

(i) requires a stronger causal relationship between the employment and the ailment, etc suffered than that exacted by the 1971 Act;

(ii) "in a material degree" requires an evaluation of all relevant contributing factors for the purpose of asking whether the employee's employment did or did not contribute materially to the suffering of the ailment, etc, in question ("the threshold evaluation");

(iii) whether this will be so in a given case will be a matter of fact and degree.

24. After observing Mr Hall and assessing his evidence the Tribunal finds that he did his best to recall events that occurred more than 10 years ago and presented as a reliable witness who answered questions frankly and truthfully. The Tribunal takes into account that the clinical notes for the visit to his general practitioner on 16 October 1995, which recorded *low lumbar pain* and ...*pulls on heavy sheepskin,*

are inconclusive and are not followed by any reference to treatment or further visits for back problems arising from that employment. Similarly the notes of the visit on 31 October 1995 referring to the motorcycle accident do not indicate that the back pain was considered to be of concern to the treating doctor. Consequently the Tribunal does not draw any negative inference from Mr Hall's failure to remember these visits in any detail, and concludes that these incidents caused, at most, minor back strain and that Mr Hall did not experience significant back pain until 1997.

25. Although Mr Hall did not acknowledge his participation in go karting until questioned in cross-examination, the Tribunal accepts his evidence that his involvement was limited to once per month; that he competed only for a short period each time; and that there was little contact with other karts during races or in practice sessions. Despite concerns expressed by some medical practitioners about the possible stress on Mr Hall's back while engaging in the sport, there is no medical or other evidence to suggest that this activity caused or aggravated his back problems. He was not aware in 1998 that he was suffering from spondylolisthesis.

26. On the medical evidence the Tribunal accepts the opinions of [REDACTED] and [REDACTED] that the course of progression of the spondylolisthesis suffered by Mr Hall and the way it was brought to the attention of examiners suggests that it is not congenital. It probably originated during Mr Hall's childhood or adolescence and developed before his employment with the respondent, remaining asymptomatic and undiagnosed for a number of years until it became apparent from X-rays performed in 1999.

27. The Tribunal accepts the evidence of [REDACTED] that the August 1997 injury and subsequent activities of bending, twisting and lifting aggravated his condition and contributed to its acceleration. The evidence of pathological change that has led to the situation where Mr Hall, despite his relatively young age, now requires fusion surgery because of the permanent damage to his spine, is consistent with the third stage of the development of pars defects described by [REDACTED] [REDACTED] also considered the aggravation to be permanent. On the totality of the material the Tribunal finds that the aggravation was not temporary and did not cease on 14 September 2005.

WAS THERE A LIABILITY FOR COMPENSATION UNDER S 14 OF THE SRC ACT FOR LOWER BACK PAIN SUSTAINED ON 6 JUNE 2006?

28. Mr Hall told the Tribunal that on 6 June 2006 he reported a sharp pain in his lower back when he attempted to pick up a letter while sorting Delivery Centre (DC) boxes. He said that he was sent by the respondent to [REDACTED] who provided a *Fitness for Duty Assessment* on 7 June 2006 and diagnosed *aggravation of spondylolisthesis*. [REDACTED] assessed him as fit for full-time work with restrictions. Mr Hall said that he had an MRI scan on 8 June 2006 confirming the spondylolisthesis, and he lodged a claim for compensation on 24 July 2006 in which he stated:

I felt my back was a bit sore when I was sorting DC boxes then I bent down...sorting DC boxes and felt pain, then walked over to pick up large letter tub and when I stood up the pain was there, whilst sorting.

29. On 3 August 2006 [REDACTED] his general practitioner, diagnosed *low back pain* and provided a certificate of capacity with restrictions on sitting and lifting, and a statement that Mr Hall was unfit for duty from 20 July to 21 August 2006. [REDACTED] said that in August 2006 the respondent refused the claim on the basis that there was no specific incident to aggravate his condition and that he had been on restricted and specially designed duties for one year.

30. In *Re Baker and Commonwealth of Australia* (1988) 16 ALD 784 the Tribunal stated at 785:

The question does now arise however as to what findings should be made from the medical evidence as to how long each of the incidents described may be said to have been productive of symptoms. Essentially, the problem is whether the periods of incapacity suffered by the applicant after the incidents in question relate to injury or to aggravation or acceleration of an underlying disease, or whether they relate to the natural progression of the disease as exacerbated by a series of individual episodes of strain.

The Tribunal concluded that, while the incidents in question gave rise to periods of prolonged pain, the cause of continuing pain was the underlying condition of spondylolisthesis.

31. In the matter under review, the Tribunal accepts Mr Hall's evidence about the events on 6 June 2006 as contained in the incident report, and takes into account the MRI scan, the certificate provided by [REDACTED] and the assessment by [REDACTED]. [REDACTED] concluded that the incident on 6 June 2006 did not change the diagnosis, and that *bending, twisting or lifting will aggravate Mr Hall's back condition.* [REDACTED] gave evidence that activities such as bending at the waist place further force on the discs of the lower lumbar spine and are likely to give rise to an increase in pain, causing aggravation of the condition which is compensable. [REDACTED] did not give consideration to the incident.

32. On all the material the Tribunal finds that on 6 June 2006 there was an aggravation of an existing condition that arose out of, or in the course of, Mr Hall's employment, which constitutes an injury as defined in the SRC Act. Therefore the respondent is liable to pay compensation under s 14 of the SRC Act.

WAS THERE A LIABILITY FOR COMPENSATION FOR LOSS OF WAGES FOR THE PERIOD 3 JUNE 2004 TO 23 MARCH 2005 UNDER S 19 AND S 37 OF THE SRC ACT?

33. Mr Hall claimed that he suffered a loss of wages during the period 3 June 2004 to 23 March 2005 because he was unable to work night shift as a result of his work-related medical condition. He said that there was no informal agreement that he work day shift instead of night shift, and told the Tribunal that the work restrictions imposed by medical practitioners prevented him from obtaining the 30 per cent loading that was payable for night shift work. Mr Hall stated that night shift involved sorting and lifting mail, while day shift allowed him to undertake delivery duties by walking.

34. In his report of 29 April 2004 [REDACTED] stated:

In my opinion, it is reasonable that Mr Hall works day shift, which involves delivery. Mr Hall feels much happier in that role, as his back is considerably more comfortable as there is no bending forward or prolonged sitting involved. This is understandable.

In the *Fitness for Duty Assessment* dated 20 May 2004 [REDACTED] certified Mr Hall as fit for work with restrictions and specified *on day shift only*. On 16 April 2004 [REDACTED] noted that sitting during night shift aggravated the back pain.

35. There is no persuasive material to suggest that the Tribunal cannot reach its decision without specialist evidence about work capacity. The Tribunal accepts Mr Hall's evidence that he did not enter into any agreement with his manager about working day shift. The Tribunal also takes into account [REDACTED] opinion; [REDACTED] report; the work restrictions (including *on day shift only*) imposed by [REDACTED] (the respondent's nominated general practitioner); together with restrictions on prolonged sitting, bending, twisting and lifting.

36. On all the material the Tribunal is satisfied that Mr Hall had an incapacity for night shift work during the relevant period, and that the transfer to day shift involved a compensable loss of the 30 per cent night shift penalty in that Mr Hall's ability to earn was less than his normal weekly earnings, and he was entitled to compensation benefits under s 19 of the SRC Act. No material was presented in relation to the provision of rehabilitation programs under s 37 of the SRC Act.

DECISION

37. Application **V 200600429**: The Tribunal sets aside the decision under review and substitutes the decision that:

1. from 14 September 2005 to the present date and at the present date Mr Hall continued to suffer incapacity and impairment as a result of injury arising out of or in the course of employment;
2. the respondent is liable to pay compensation pursuant to the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) in respect of:
 - (a) weekly payments of compensation for all periods of incapacity after 14 September 2005 pursuant to s 19 of the SRC Act where actual earnings are less than normal weekly earnings as calculated in accordance with ss 8 and 9 of the SRC Act; and
 - (b) reimbursement of reasonable medical treatment expenses pursuant to s 16 of the SRC Act.

Application V 200600870: The Tribunal sets aside the decision under review and substitutes the decision that:

1. Mr Hall sustained a further injury being on 6 June 2006 arising out of or in the course of his employment being a further aggravation of his spondylolisthesis at L5/S1 in his low back;
2. the respondent is liable to pay:
 - (a) weekly payments of compensation for those periods of incapacity attributable to the further 6 June 2006 aggravation injury pursuant to s 19 of the SRC Act; and
 - (b) reimbursement of reasonable medical treatment expenses pursuant to s 16 of the SRC Act. This includes medication, medical consultations, diagnostic radiology and the need for surgery and post operative care.

Application 2007/2698: The Tribunal sets aside the decision under review and substitutes the decision that:

1. Mr Hall was incapacitated for work on the night shift at the Bendigo Delivery Centre for the period 3 June 2004 to 23 March 2005 resulting in a loss of income from night shift allowances; and
2. the respondent is liable to pay weekly payments of compensation pursuant to s 19 of the SRC Act for the period 3 June 2004 to 23 March 2005.

The respondent shall pay Mr Hall's costs and disbursements in respect of these proceedings (V 200600429, V 200600870 and 2007/2698) in accordance with s 67 of the SRC Act.

I certify that the thirty-seven [37] preceding paragraphs are a true copy of the reasons for the decision of:

G.D. Friedman, Senior Member

(sgd) Mara Putnis
Associate

Dates of hearing:	21, 22 and 23 November 2007
Date of decision:	17 December 2007
Counsel for applicant:	Mr M. Carey
Solicitor for applicant:	Maurice Blackman
Counsel for respondent:	Mr J. Ferwerda
Solicitor for respondent:	Australian Government Solicitor