



Independent  
Review Office

# **IRO Regional Seminars**

## **Newcastle**

March 2024

# **IRO acknowledges traditional owners**



*We acknowledge the Awabakal and Worimi People as the Traditional Custodians of the land we are meeting on today, and part of the oldest surviving continuous culture in the world. We recognise their continuing connection to Country and thank them for protecting this land and its ecosystems since time immemorial.*

*We pay our respects to Elders past and present, and extend that respect to all First Nations people present today*





# Agenda

- **Welcome** – Jeffrey Gabriel, A/Independent Review Officer
- **Hearing Loss** - Mario Bechelli, Senior Associate, Whitelaw McDonald
- **Spinal Injuries and Surgeries – the consequences and benefits**  
Dr Rob Kuru, Orthopaedic Surgeon
- **IRO Solutions Update**- Jeffrey Gabriel, A/Independent Review Officer
- **ILARS Update** - Philip Jedlin, Director, IRO
- **Estoppel in the Personal Injury Commission** – Michelle Riordan, Manager, Legal Education
- **IRO Priorities 2024 and Closing Remarks** - Jeffrey Gabriel, A/Independent Review Officer





# HEARING LOSS

Mario Bechelli, Senior Associate,  
Whitelaw McDonald

**A. Preliminary**

**B. Why the need for a seminar on hearing loss?**

**C. Categories of workers**

# Coal Miners



# *Police, ambulance officers, and firefighters*



# *All other workers*



[This Photo](#) by Unknown Author is licensed under [CC BY-NC](#)



**D. Section 17 of the 1987 Act**

**E. The date of injury and the employer liable to pay compensation (the employer against whom the claim is to be made)**

**F. Worker about to start a new job**

**G. The identity of the employer liable to pay compensation and against whom the claim should be made may not necessarily be the one that your client considers to be liable**

## **H. Authorities**

**I. No injury unless notice of injury has been given**

**J. Is there to be a deduction for the effects of subsequent extraterritorial employment on hearing loss?**

**K. What constitutes noisy employment?**

**L. What if hearing protection is provided—  
does that mean the employment is not noisy?**

**M. Proving noisy employment**

**N. Is there a threshold of hearing loss for hearing aid claims?**

**O. Amount recoverable for hearing aids**

**P. Sections 254 and 261 of the 1998 Act**

**Q. Section 68B(4) 1987 Act and section 323  
1998 Act**

**R. Whether and when to make a claim**

**S. Hearing aids purchased prior to giving  
notice of injury or the making of a claim and  
section 60(2A) of the 1987 Act**

**T. Tinnitus**

**U. Sections 69B of the 1987 Act**

**V. Nominal Insurer**



**QUESTIONS ?**



# Low Back Pain

Time to walk down the hall of  
mirrors

IRO Mar 2024

Rob Kuru MBBS FRACS FAOrthA LLM

# Disclosures

- 1999-2024 Spinal surgeon
- 2000-2024 President, Spine Society of Australia
- 2011-2017 Member, Spinal Prosthesis Advisory Group
- 2017-2019 Chair, Spinal Prosthesis Advisory Group
- 2016-2019 Member, Spinal MBS review
- 2015-2016 Member, Low Back Pain Imaging Working Group
- 2018-2024 Accredited Medical Specialist

# Personal opinion

- Presentation is not on behalf of and does not represent the position of
  - Personal Injury Commission
  - Spine Society of Australia

# Proposition

- Current method of injury treatment and compensation for low back pain deemed to be the result of workplace injury
  - encourages high cost low value treatment; which
  - often is harmful; and
  - doesn't satisfy the intent of reasonable and necessary treatment
- Alternative measures to support and compensate for work related low back pain should be considered

[aci.health.nsw.gov.au](http://aci.health.nsw.gov.au)

# Model of care for the management of low back pain

## Summary

FEBRUARY 2024

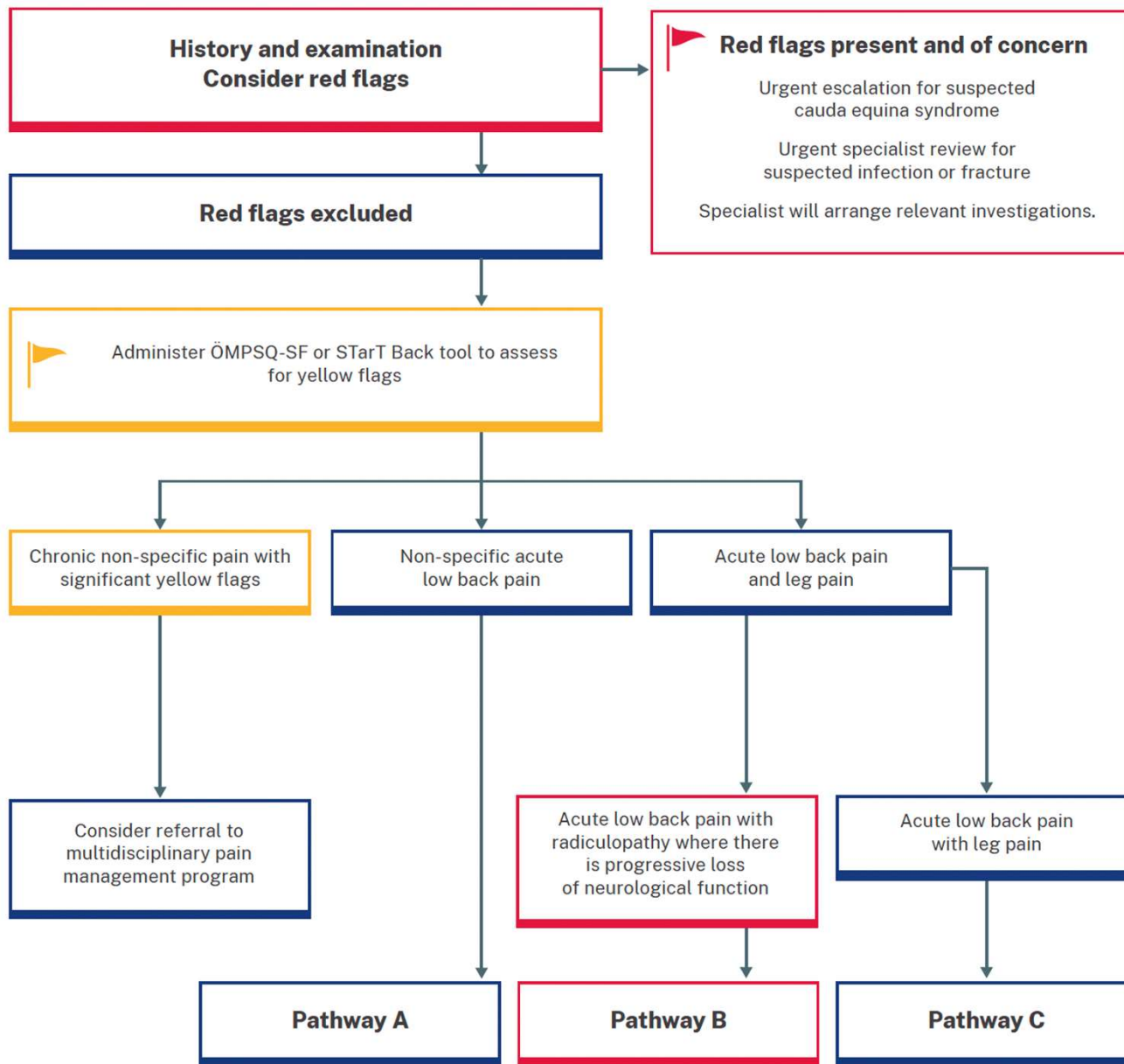


AGENCY FOR  
**CLINICAL  
INNOVATION**

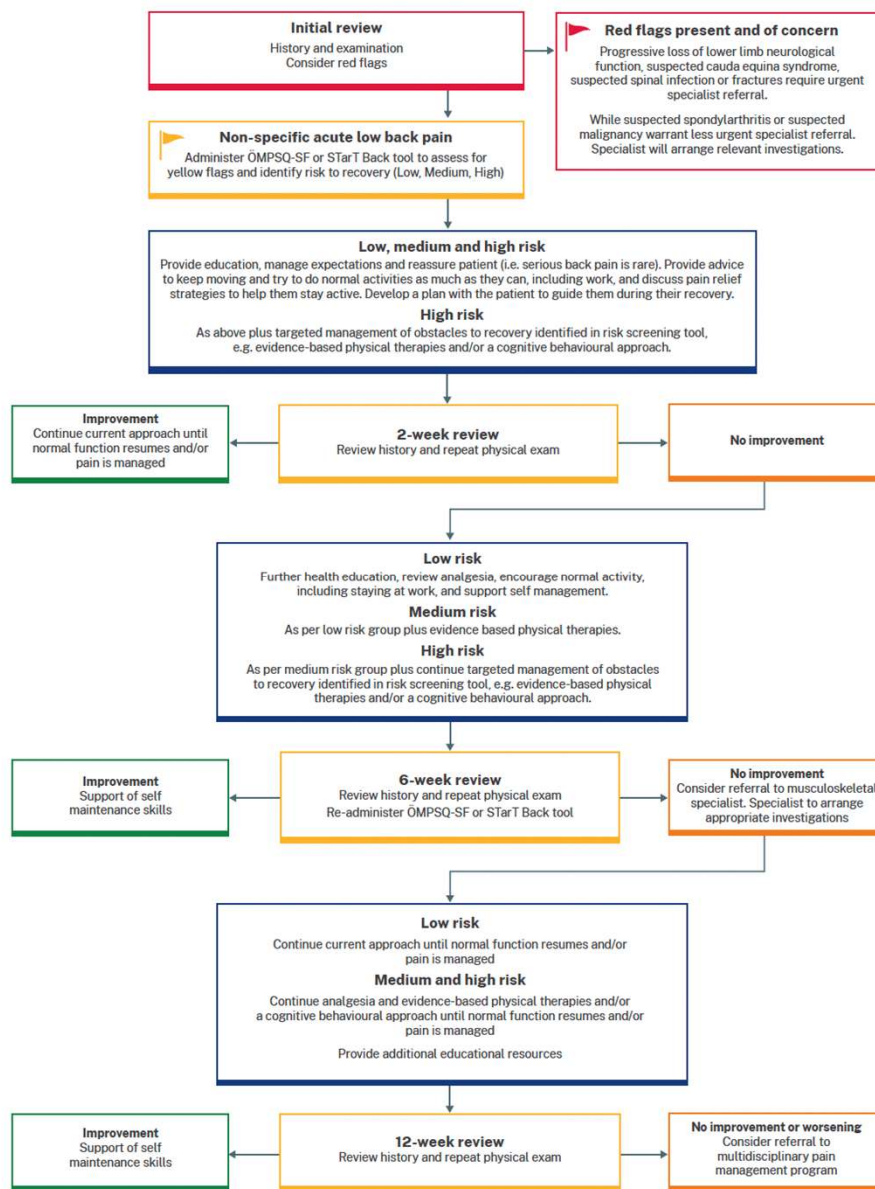


State Insurance  
Regulatory Authority

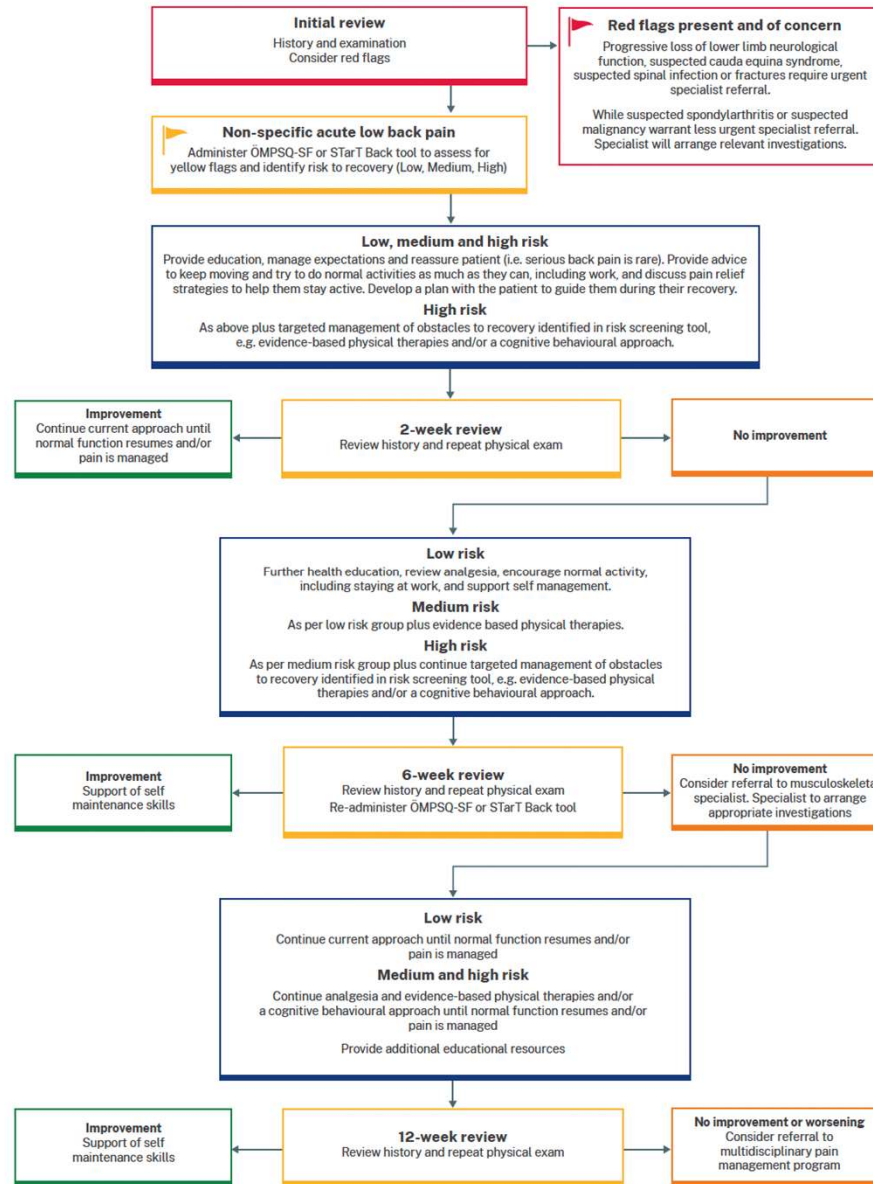




## Pathway A: Non-specific acute low back pain



## Pathway A: Non-specific acute low back pain



No imaging

No surgical review



RESEARCH

Open Access

# Rates, costs, return to work and reoperation following spinal surgery in a workers' compensation cohort in New South Wales, 2010–2018: a cohort study using administrative data



AM Lewin<sup>1\*</sup>, M Fearnside<sup>2</sup>, R Kuru<sup>3</sup>, BP Jonker<sup>4</sup>, JM Naylor<sup>1</sup>, M Sheridan<sup>5</sup> and IA Harris<sup>1</sup>

Rates, costs, return to work and reoperation following spinal surgery in a workers' compensation cohort in New South Wales, 2010–2018: a cohort study using administrative data

AM Lewin<sup>1\*</sup>, M Feamside<sup>2</sup>, R Kuru<sup>3</sup>, BP Jonker<sup>4</sup>, JM Naylor<sup>5</sup>, M Sheridan<sup>6</sup> and IA Harris<sup>7</sup>

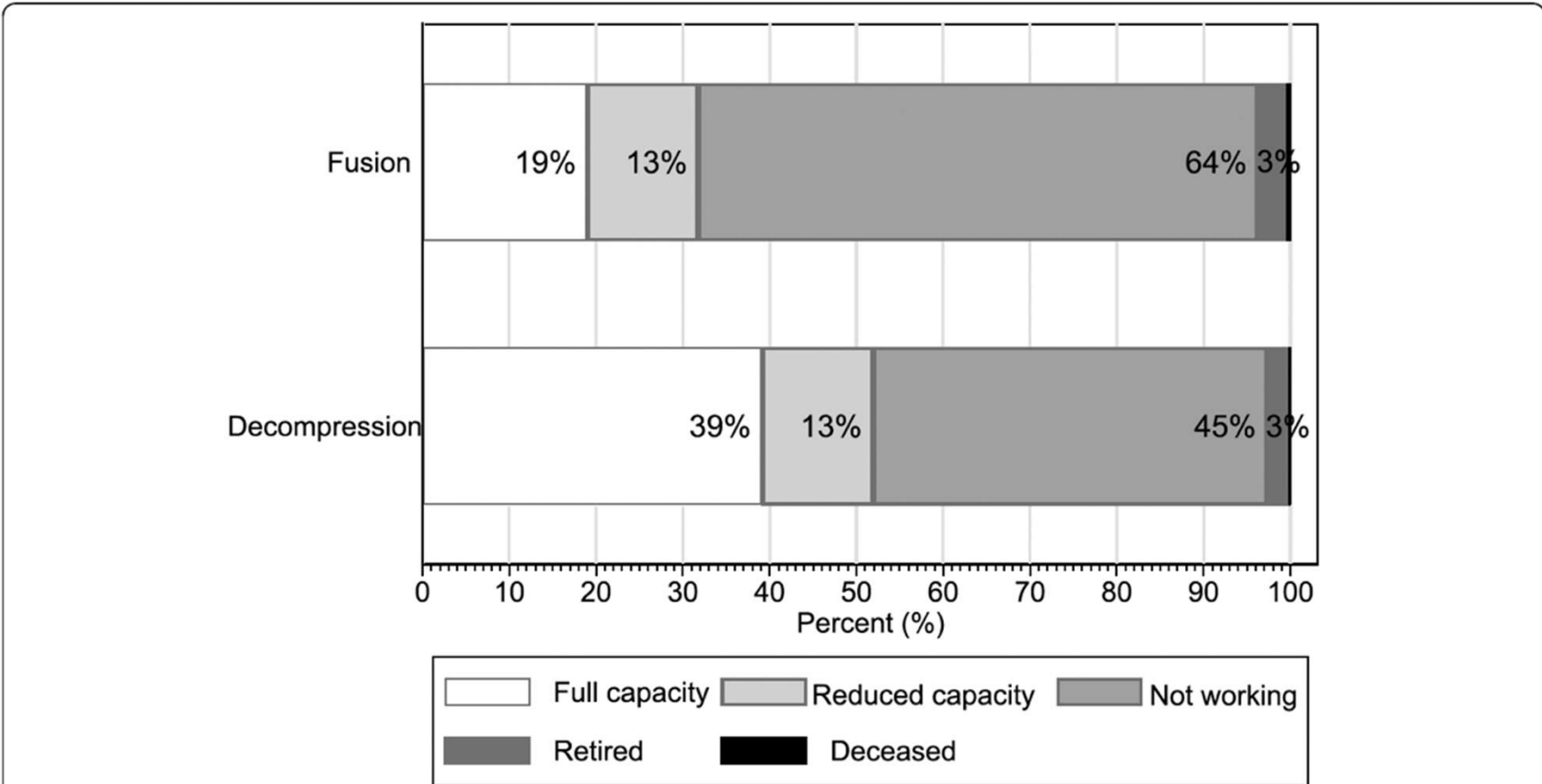


Fig. 4 Return-to-work status at 24 months post-surgery by surgery type

RESEARCH Open Access

Rates, costs, return to work and reoperation following spinal surgery in a workers' compensation cohort in New South Wales, 2010–2018: a cohort study using administrative data

AM Lewin<sup>1\*</sup>, M Feamside<sup>2</sup>, R Kuru<sup>3</sup>, BP Jonker<sup>4</sup>, JM Naylor<sup>5</sup>, M Sheridan<sup>6</sup> and IA Harris<sup>7</sup>

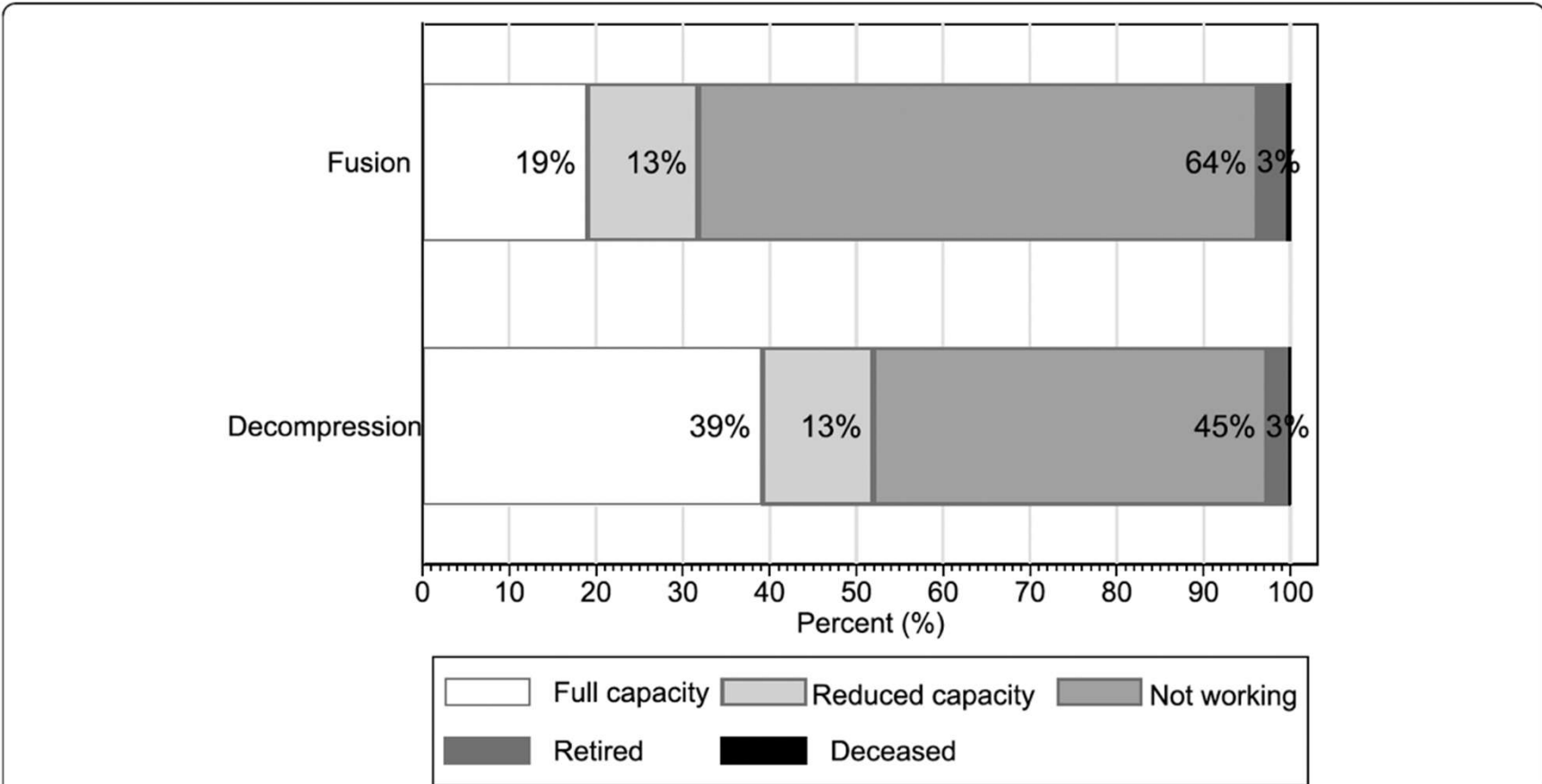
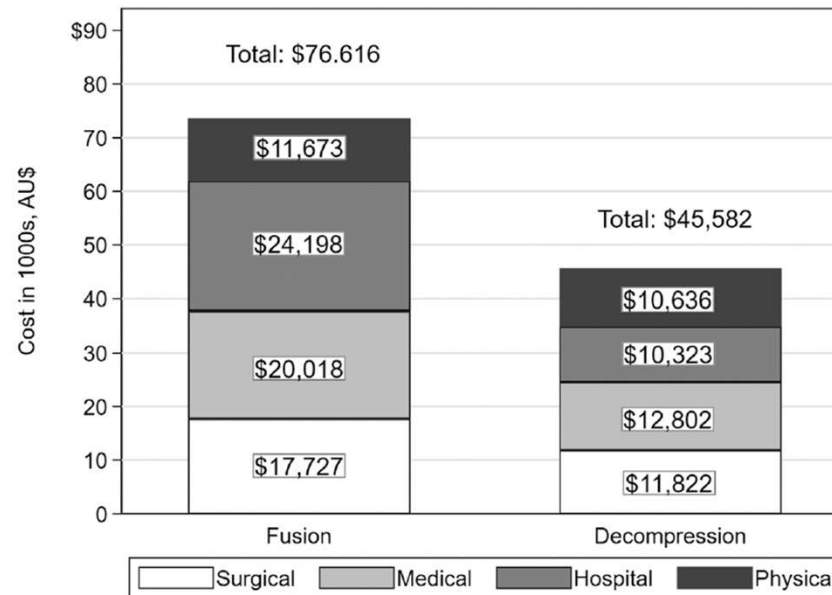
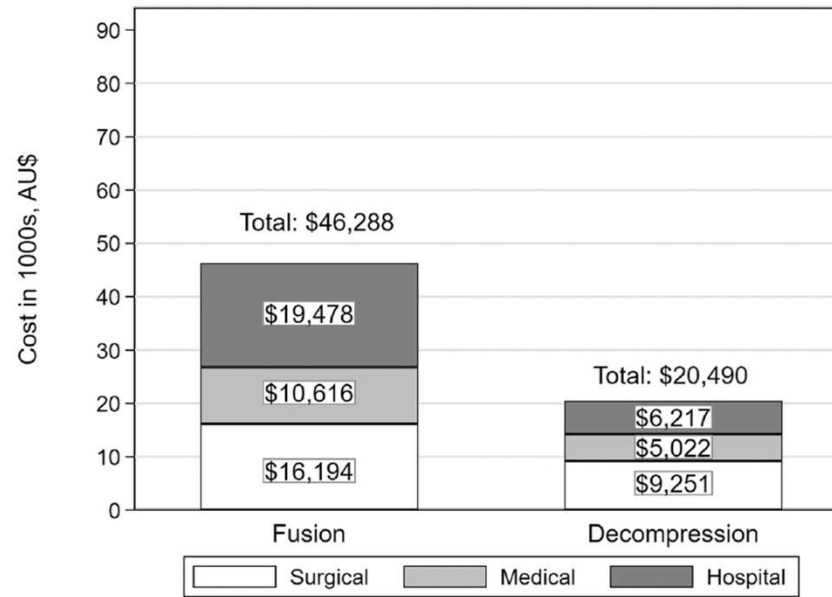


Fig. 4 Return-to-work status at 24 months post-surgery by surgery type

Rates, costs, return to work and reoperation following spinal surgery in a workers' compensation cohort in New South Wales, 2010–2018: a cohort study using administrative data

AM Levin<sup>1\*</sup>, M Fearnside<sup>2</sup>, R Kuru<sup>3</sup>, BP Jonker<sup>4</sup>, JM Naylor<sup>1</sup>, M Sheridan<sup>5</sup> and IA Harris<sup>1</sup>



Revision surgery within 2 years

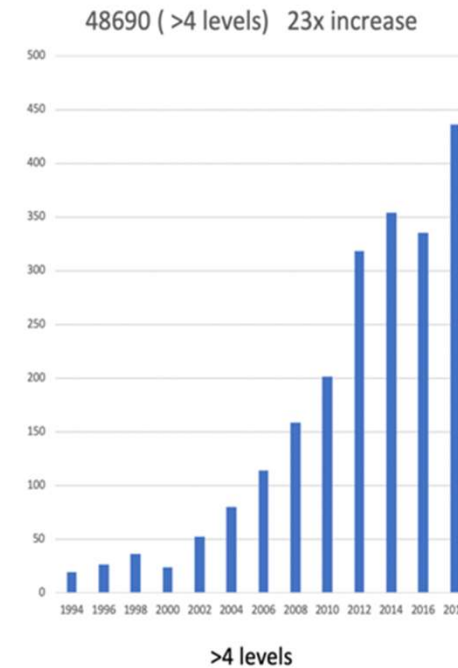
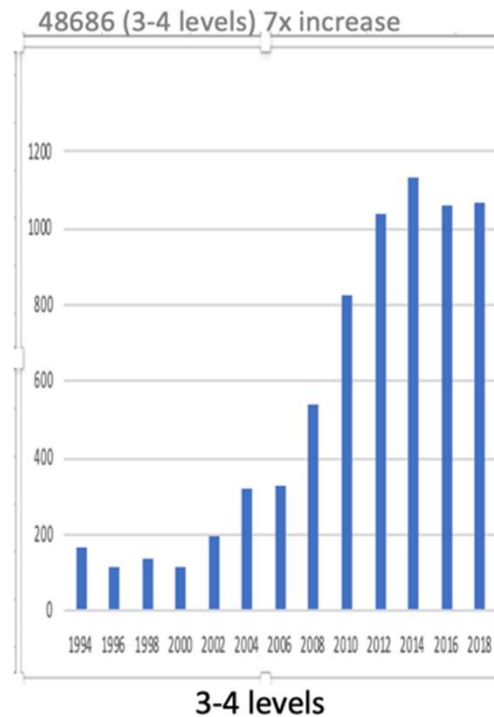
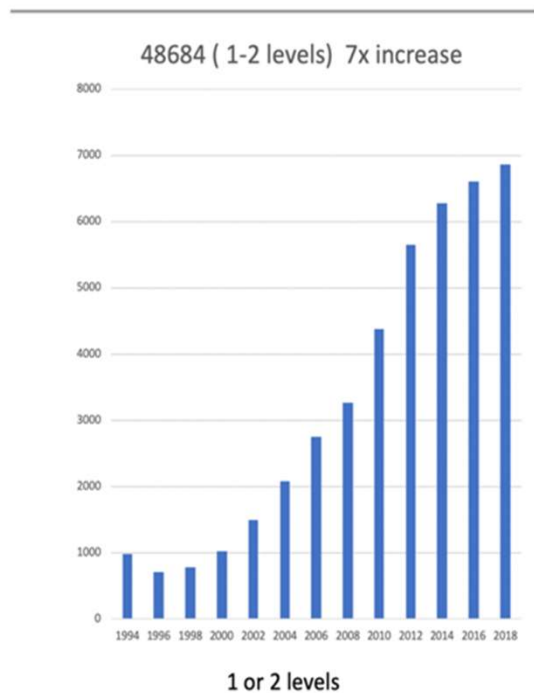
18% fusions

20% decompressions

Rate at 5 years?

# MBS statistics over time (1994 – 2018)

## 48684/48687/48690






- 38.6% population increase



Australian Spine Registry



# Elective spinal surgery in New South Wales adults, 2001–20, by procedure funding type: a cross-sectional study

Duong Thuy Tran<sup>1</sup> , Adriane M Lewin<sup>2</sup> , Louisa Jorm<sup>1</sup>, Ian A Harris<sup>1,3</sup> 

**The known:** The benefits of spinal decompression and fusion for people with degenerative conditions are dubious, but procedure rates in high income countries have risen substantially in recent decades.

**The new:** Rates of privately funded spinal fusion and decompression procedures have increased much more rapidly in New South Wales than those of procedures that are publicly funded or covered by workers' compensation.

**The implications:** Differences in procedure rates suggest that too many privately funded or too few publicly funded spinal procedures are undertaken. The influence of financial considerations, access to specialist care, and patient and surgeon preferences should be investigated.

## Abstract

**Objective:** To investigate elective rates of spinal fusion, decompression, and disc replacement procedures for people with degenerative conditions, by funding type (public, private, workers' compensation).

**Design, setting:** Cross-sectional study; analysis of hospitals admissions data extracted from the New South Wales Admitted Patient Data Collection.

**Participants:** All adults who underwent elective spinal surgery (spinal fusion, decompression, disc replacement) in NSW, 1 July 2001–30 June 2020.

**Main outcome measures:** Crude and age- and sex-adjusted procedure rates, by procedure, funding type, and year; annual change in rates, 2001–20, expressed as incidence rate ratios (IRRs).

**Results:** During 2001–20, 155 088 procedures in 129 525 adults

### Elective spinal surgery in New South Wales adults, 2001-20, by procedure funding type: a cross-sectional study

Dung Thy Tran<sup>1</sup>, Ashlan M Lewis<sup>2</sup>, Leticia Jara<sup>1</sup>, Ian A Harris<sup>1,2</sup>

**Background:** The benefits of spinal decompression and fusion for people with degenerative conditions are debated, but procedure rates (high business expenses) have risen substantially in recent decades. The new rates of privately funded spinal fusion and decompression procedures have increased much more rapidly in New South Wales than those of procedures that are publicly funded or privately insured (compensation). The implications: Differences in procedure rates suggest that the main drivers are financial, not clinical. The influence of financial considerations, across the spectrum of care, and patient and surgeon preferences should be investigated.

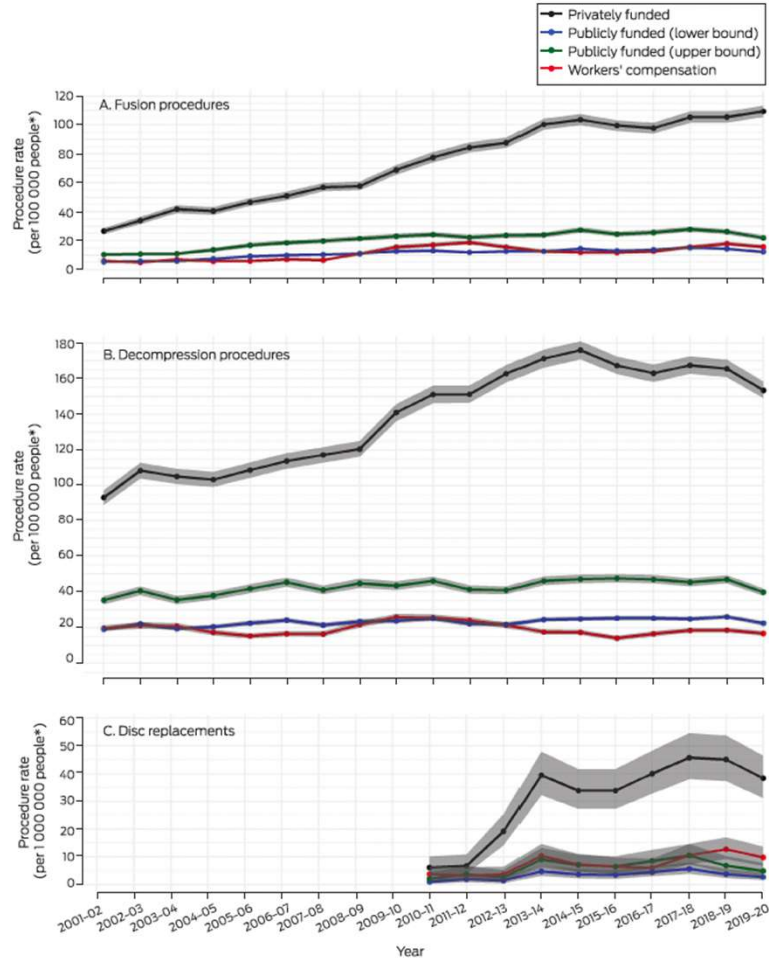
**Objective:** To investigate elective rates of spinal fusion, decompression, and disc replacement procedures for people with degenerative conditions, by funding type (public, private, workers' compensation).

**Design, setting:** Cross-sectional study, analysis of hospital admissions data extracted from the New South Wales Admitted Patient Data Collection.

**Participants:** All adults who underwent elective spinal surgery (spinal fusion, decompression, disc replacement) in NSW, 2001-2019.

**Main outcome measures:** Crude and age- and sex-adjusted procedure rates, by procedure, funding type, and year; annual change in rates, 2005-20, expressed as procedure rate ratios (RR).

### 3 Adults who underwent elective procedures for degenerative spinal conditions in New South Wales, 2001-20, by procedure type and funding type: crude rates, with 95% confidence intervals



\* Denominators for publicly funded, lower bound procedure rates: NSW people aged 18 years or more;<sup>16</sup> publicly funded, upper bound rates: NSW people aged 18 years or more who did not have hospital cover private health insurance;<sup>17,18</sup> privately funded procedure rates: NSW people aged 18 years or more who had hospital cover private health insurance;<sup>17</sup> workers' compensation procedure: NSW people aged 18 or more with workers' compensation cover. Prior to April 2011, few disc replacement procedures were undertaken (any funding type), and most were associated with claims for a fusion or for an indication other than degenerative spine disorders.<sup>20</sup> The data for these graphs are included in the Supporting Information, table 5. ♦

# Mythbusters

- Bulging discs, annular tears, arthritis and nerve compression are proven causes of back pain
- Imaging ( xray, CT, MRI, bone scan) demonstrate the source of back pain
- Occupational exposure/ injury leads to imaging changes
- Interventional treatments are effective in managing back pain



# Evidence based care – what is evidence?

- Medicine
  - P value < 0.05
    - 1 in 20 association by chance
    - 1 in 16 with 8 variables
- Common law
  - On the balance of probabilities
  - Expert evidence
    - Opinion v scientific evidence

# What is the evidence?

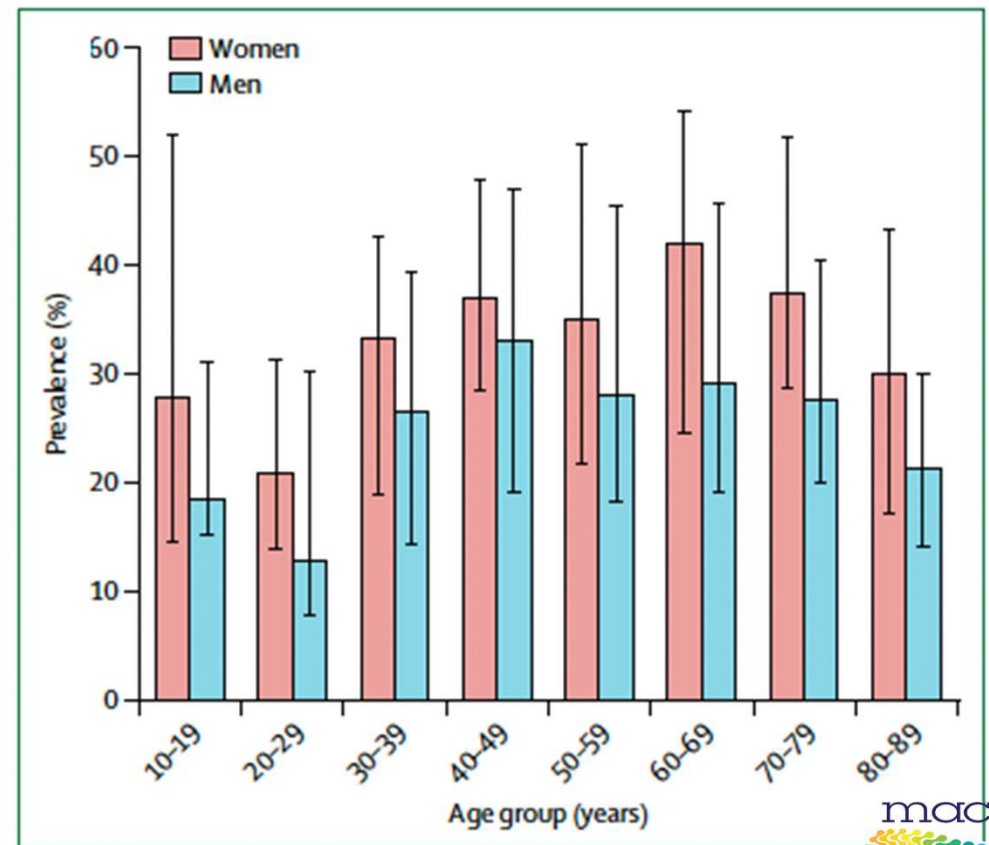
- Back pain is common
- Leading cause of global disability
- 28% severe
  - 77% disability

## Low back pain 1

### What low back pain is and why we need to pay attention

Jan Hartvigsen\*, Mark J Hancock\*, Alice Kongsted, Quinette Louw, Manuela L Ferreira, Stéphane Genevay, Damian Hoy, Jaro Karppinen, Glenn Pransky, Joachim Steyer, Rob J Smeets, Martin Underwood, on behalf of the Lancet Low Back Pain Series Working Group†

Lancet 2018; 391: 2356-67 Low back pain is a very common symptom. It occurs in high-income, middle-income, and low-income countries



# What is the evidence?

- Associations

Social factors		
Physical work loads	Chronic disabling pain* at 3–6 months; higher vs lower physical work demands: median LR 1.2 (range 1.1–1.6); chronic disabling pain* at 12 months; higher vs lower physical work demands: median LR 1.4 (range 1.2–1.7)	Systematic review including four longitudinal studies <sup>63</sup>
Education	Chronic disabling pain* at 3–6 months; no college education or not college graduate vs more education: median LR 1.0 (range 0.97–1.3); chronic disabling pain* at 12 months; no college education or not college graduate vs more education: median LR 1.1 (range 1.1–1.2)	Systematic review including ten longitudinal studies <sup>63</sup>
Compensation	Chronic disabling pain* at 3–6 months; compensated work injury or sick leave vs not compensated work injury or sick leave: median LR 1.3 (range 0.97–2.7); chronic disabling pain* at 12 months; compensated work injury or sick leave vs not compensated work injury or sick leave: median LR 1.4 (range 1.2–1.8)	Systematic review including seven longitudinal studies <sup>63</sup>
Work satisfaction	Chronic disabling pain* at 3–6 months; less vs more work satisfaction: median LR 1.1 (range 0.64–1.8); chronic disabling pain* at 12 months; less vs more work satisfaction: median LR 1.5 (range 1.3–1.8)	Systematic review including five longitudinal studies <sup>63</sup>



## Low back pain 1

### What low back pain is and why we need to pay attention

Jan Hartvigsen\*, Mark J Hancock\*, Alice Kongsted, Quinette Louw, Manuela L Ferreira, Stéphane Genevay, Damian Hoy, Jaro Karppinen, Glenn Pransky, Joachim Sieper, Rob J Smeets, Martin Underwood, on behalf of the Lancet Low Back Pain Series Working Group

Lancet 2018; 391: 2356–67 | Low back pain is a very common symptom. It occurs in high-income, middle-income, and low-income countries

# What is the evidence?

- Associations

Lifestyle factors		
Body mass	Chronic disabling pain* at 3–6 months; BMI >25 or >27 vs lower BMI: median LR 0.91 (range 0.72–1.2); chronic disabling pain* at 12 months; BMI >25 or >27 vs lower BMI: median LR 0.84 (range 0.73–0.97)	Systematic review including three longitudinal studies <sup>63</sup>
Smoking	Chronic disabling pain* at 3–6 months; current smoker vs not: median LR 1.2 (range 1.0–1.6)	Systematic review including three longitudinal studies <sup>63</sup>
Physical activity	Disability 1–5 years; significant association in one of five studies (no effect size reported)	Systematic review including five longitudinal studies <sup>64</sup>



## Low back pain 1

### What low back pain is and why we need to pay attention

Jan Hartvigsen\*, Mark J Hancock\*, Alice Kongsted, Quinette Louw, Manuela L Ferreira, Stéphane Genevay, Damian Hoy, Jaro Karppinen, Glenn Pransky, Joachim Sieper, Rob J Smeets, Martin Underwood, on behalf of the Lancet Low Back Pain Series Working Group



# What is the evidence?

- Associations

Psychological factors		
Depression	Mixed outcomes; significant associations with poor outcome in eight of 13 cohorts; OR (range) 1.04–2.47	Systematic review including 13 longitudinal studies <sup>65</sup>
Catastrophising	Disability at 3–12 months; significant association in nine of 13 studies; high catastrophising: OR 1.56 (95% CI 1.05–2.33); 0–6 scale: 7.63 (3.70–15.74); 0–52 scale: 1.05 (1.02–1.08); contribution to explained variance: 0–23%	Systematic review including 13 longitudinal studies <sup>66</sup>
Fear avoidance beliefs	Pain or activity limitation at 3–12 months; no pooled estimates; no systematic association between fear avoidance and outcome; poor work-related outcome at 3–12 months; elevated fear avoidance: OR (range) 1.05 (95% CI 1.02–1.09) to 4.64 (1.57–13.71; from four studies done by disability insurance companies); chronic disabling pain* at 3–6 months; high vs no fear avoidance: median LR 2.2 (range 1.5–4.9); chronic disabling pain* at 12 months; median LR 2.5 (range 2.2–2.8)	Systematic review including 21 longitudinal studies <sup>67</sup> Systematic review including four longitudinal studies <sup>68</sup>



## Low back pain 1

### What low back pain is and why we need to pay attention

Jan Hartvigsen\*, Mark J Hancock\*, Alice Kongsted, Quinette Louw, Manuela L Ferreira, Stéphane Genevay, Damian Hoy, Jaro Karppinen, Glenn Pransky, Joachim Sieper, Rob J Smeets, Martin Underwood, on behalf of the Lancet Low Back Pain Series Working Group

Lancet 2018; 391: 2356–67 | Low back pain is a very common symptom. It occurs in high-income, middle-income, and low-income countries



# What is the evidence?

- Imaging

*‘Importantly, no evidence exists that imaging improves patient outcomes and guidelines consistently recommend against the routine use of imaging for people with low back pain.’*



## Low back pain 1

### What low back pain is and why we need to pay attention

Jan Hartvigsen\*, Mark J Hancock\*, Alice Kongsted, Quinette Louw, Manuela L Ferreira, Stéphane Genevay, Damian Hoy, Jari Karppinen, Glenn Pransky, Joachim Sieper, Rob J Smeets, Martin Underwood, on behalf of the Lancet Low Back Pain Series Working Group

Lancet 2018; 391: 2356-67 | Low back pain is a very common symptom. It occurs in high-income, middle-income, and low-income countries



# What is the evidence?

- Imaging
- Significant findings:
  - Tumour, infection, fracture inflammatory arthritis
- Incidental findings
  - Bulging discs, disc degeneration, annular tear/HIZ, spondylolisthesis, modic

# What is the evidence?

Imaging

ORIGINAL RESEARCH  
**SPINE**

## **Systematic Literature Review of Imaging Features of Spinal Degeneration in Asymptomatic Populations**

W. Brinjikji, P.H. Luetmer, B. Comstock, B.W. Bresnahan, L.E. Chen, R.A. Deyo, S. Halabi, J.A. Turner, A.L. Avins, K. James, J.T. Wald, D.F. Kallmes, and J.G. Jarvik





# What is the evidence?

## Imaging

**Table 2: Age-specific prevalence estimates of degenerative spine imaging findings in asymptomatic patients<sup>a</sup>**

Imaging Finding	Age (yr)						
	20	30	40	50	60	70	80
Disk degeneration	37%	52%	68%	80%	88%	93%	96%
Disk signal loss	17%	33%	54%	73%	86%	94%	97%
Disk height loss	24%	34%	45%	56%	67%	76%	84%
Disk bulge	30%	40%	50%	60%	69%	77%	84%
Disk protrusion	29%	31%	33%	36%	38%	40%	43%
Annular fissure	19%	20%	22%	23%	25%	27%	29%
Facet degeneration	4%	9%	18%	32%	50%	69%	83%
Spondylolisthesis	3%	5%	8%	14%	23%	35%	50%

<sup>a</sup> Prevalence rates estimated with a generalized linear mixed-effects model for the age-specific prevalence estimate (binomial outcome) clustering on study and adjusting for the midpoint of each reported age interval of the study.

ORIGINAL RESEARCH  
SPINE

Systematic Literature Review of Imaging Features of Spinal Degeneration in Asymptomatic Populations

W. Brinjikji, P.H. Luetmer, B. Comstock, B.W. Bresnahan, L.E. Chen, R.A. Deyo, S. Halabi, J.A. Turner, A.L. Aarås, K. James, J.T. Walsh, D.J. Cahoon, and J.C. Jarvik

10.1226/spine.2017.42.11

# What is the evidence?

## Imaging

### ORIGINAL RESEARCH

L.M. Ash  
M.T. Modic  
N.A. Obuchowski  
J.S. Ross  
M.N. Brant-Zawadzki  
P.N. Grooff

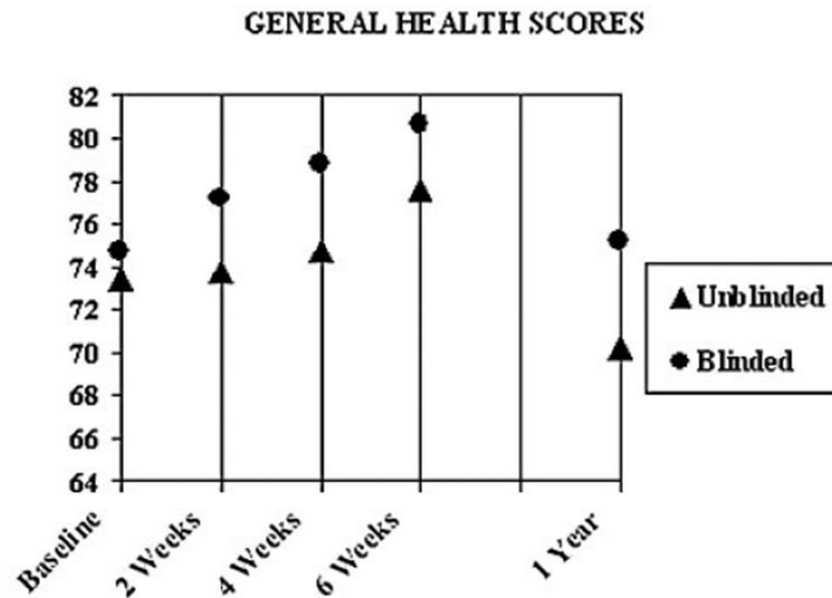
## Effects of Diagnostic Information, Per Se, on Patient Outcomes in Acute Radiculopathy and Low Back Pain

**BACKGROUND AND PURPOSE:** We conducted a prospective randomized study of patients with acute low back pain and/or radiculopathy to assess the effect of knowledge of diagnostic findings on clinical outcome. The practice of ordering spinal imaging, perhaps unintentionally, includes a large number of patients for whom the imaging test is performed for purposes of reassurance or because of patient expectations. If this rationale is valid, one would expect to see a measurable effect from diagnostic information, per se.

**MATERIALS AND METHODS:** A total of 246 patients with acute (<3 weeks) low back pain (LBP) and/or radiculopathy (150 LBP and 96 radiculopathy patients) were recruited. Patients were randomized using

# What is the evidence?

## Imaging



**Fig 2.** GH scores of unblinded and blinded patients at baseline; 2, 4, and 6 weeks; and 1 year.

**Effects of Diagnostic Information, Per Se, on Patient Outcomes in Acute Radiculopathy and Low Back Pain**

ORIGINAL RESEARCH

L.M. Ash  
M.T. Meolic  
N.A. Olschowski  
J.S. Ross  
M.N. Brani-Zawadzki  
P.N. Groff

**BACKGROUND AND PURPOSE:** We conducted a prospective randomized study of patients with acute low back pain and/or radiculopathy to assess the effect of knowledge of diagnostic findings on clinical outcomes. The practice of ordering spinal imaging, perhaps erroneously, includes a large number of patients for whom the imaging test is performed for purposes of reassurance or because of patient expectations. If this rationale is valid, one would expect to see a measurable effect from diagnostic information, per se.

**MATERIALS AND METHODS:** A total of 287 patients with acute 1-3 week old low back pain (LBP) and/or radiculopathy (150 LBP and 98 radiculopathy patients) were recruited. Patients were randomized using

# What is the evidence?

- Surgery

SPINE Volume 31, Number 18, pp 2115–2123  
©2006, Lippincott Williams & Wilkins, Inc.

---

## ■ A Gold Standard Evaluation of the “Discogenic Pain” Diagnosis as Determined by Provocative Discography

Eugene J. Carragee, MD, Todd Lincoln, MD, Vik Singh Parmar, MD, and Todd Alamin, MD

# What is the evidence?

- Surgery

**Table 3. Clinical Outcome Criteria**

---

Success (must fulfill all)

VAS score  $\leq 2$

ODI score  $\leq 15$

No narcotic use

No daily analgesic of any type

Return to full employment or equivalent

Minimal acceptable (must fulfill all)

VAS score  $< 4$

ODI score  $< 30$

No narcotic use

Return to at least partial employment or equivalent

---

VAS = Visual analog scale; ODI = Oswestry Disability Index.

---

SPINE Volume 31, Number 18, pp 2115-2123  
©2006, Lippincott Williams & Wilkins, Inc.

■ A Gold Standard Evaluation of the "Discogenic Pain"  
Diagnosis as Determined by Provocative Discography

Eugene J. Carragee, MD, Todd Lincoln, MD, Vik Singh Parmar, MD, and Todd Alamin, MD

# What is the evidence?

- Surgery

**Table 8. Success by Minimal Acceptable Outcome Criteria**

	Spondylolisthesis	"Discogenic" Pain	<i>P</i>
No. of patients	32	30	
VAS <4	31 (96.9%)	17 (56.8%)	<0.0001
ODI ≤30	30 (93.8%)	18 (60.2%)	0.0001
Medications (no daily narcotics)	31 (96.9%)	20 (66.7%)	0.01
Any work or equivalent	31 (96.9%)	21 (70%)	0.04
All criteria	29 (91.7%)	13 (43.2%)	0.0024

VAS = Visual Analog Scale low back pain score; ODI = Oswestry Disability Index scale score.

**Table 7. Success by High-Level Criteria**

	Spondylolisthesis	"Discogenic" Pain	<i>P</i>
No. of patients	32	30	
% success by protocol			
VAS <2	27 (84.3%)	9 (30%)	<0.0001
ODI <15	23 (71.9%)	10 (33%)	0.0001
Medications (no narcotic and no daily medications)	28 (87.5%)	9 (30%)	<0.0001
Working in usual occupation	26 (81.2%)	9 (30%)	<0.0001
All criteria	23 (71.9%)	8 (26.6%)	0.0004

VAS = Visual Analog Scale low back pain score; ODI = Oswestry Disability Index scale score.

SPINE Volume 31, Number 18, pp 2115-2123  
©2006, Lippincott Williams & Wilkins, Inc.

■ A Gold Standard Evaluation of the "Discogenic Pain" Diagnosis as Determined by Provocative Discography

Eugene J. Carragee, MD, Todd Lincoln, MD, Vik Singh Parmar, MD, and Todd Alamin, MD

# What is the evidence?

- Surgery


**RESEARCH**

---

## Surgery with disc prosthesis versus rehabilitation in patients with low back pain and degenerative disc: two year follow-up of randomised study

Christian Hellum, orthopaedic surgeon,<sup>1</sup> Lars Gunnar Johnsen, orthopaedic surgeon,<sup>2,3</sup> Kjersti Storheim, physiotherapist,<sup>4,5,6</sup> Øystein P Nygaard, neurosurgeon,<sup>2</sup> Jens Ivar Brox, consultant,<sup>1</sup> Ivar Rossvoll, orthopaedic surgeon,<sup>2,3</sup> Magne Rø, consultant,<sup>7</sup> Leiv Sandvik, professor,<sup>8</sup> Oliver Grundnes, orthopaedic surgeon<sup>5</sup> and the Norwegian Spine Study Group

# What is the evidence?

- Surgery





# What is the evidence?

- Surgery

European Spine Journal (2018) 27:778–788  
<https://doi.org/10.1007/s00586-018-5469-4>

ORIGINAL ARTICLE



## **EUROSPINE 2017 FULL PAPER AWARD: Time to remove our rose-tinted spectacles: a candid appraisal of the relative success of surgery in over 4500 patients with degenerative disorders of the lumbar spine, hip or knee**

Anne F. Mannion<sup>1</sup> · Franco M. Impellizzeri<sup>1</sup> · Michael Leunig<sup>2</sup> · Dezsö Jeszenszy<sup>3</sup> · Hans-Jürgen Becker<sup>3</sup> · Daniel Haschtmann<sup>3</sup> · Stefan Preiss<sup>2</sup> · Tamas F. Fekete<sup>3</sup>

Received: 11 August 2017 / Accepted: 6 January 2018 / Published online: 19 February 2018  
© Springer-Verlag GmbH Germany, part of Springer Nature 2018

# What is the evidence?

- Surgery

**Table 5** Proportion of patients perceiving a successful surgery according to different criteria

Groups	Satisfaction with care		Good GTO		Achieving MCIC		Achieving PASS	
	%	OR (95% CI)	%	OR (95% CI)	%	OR (95% CI)	%	OR (95% CI)
Lumbar DegDef	84	Reference group	75	Reference group	67	Reference group	44*	Reference group
Lumbar SS	83	0.97 (0.70–1.35)	73	0.93 (0.70–1.25)	67	1.17 (0.89–1.53)	48**	1.25 (0.96–1.61)
Lumbar DegSeg	88	1.44 (0.96–2.16)	81	1.20 (0.78–1.83)	74	1.31 (0.89–1.95)	53	1.44 (1.00–2.06)
Lumbar DegSpon	88	1.37 (0.95–1.98)	83	1.58 (1.15–2.18)	73	1.55 (1.16–2.08)	56	1.63 (1.25–2.13)
Lumbar HD	90	1.44 (0.96–2.16)	84	1.69 (1.19–2.40)	79	1.79 (1.30–2.46)	55	1.48 (1.11–1.97)
Knee	96	4.04 (2.10–7.74)	95	6.25 (3.37–11.59)	90	6.93(4.34–11.08)	81**	5.32 (3.63–7.80)
Hip	96	4.62 (2.50–8.52)	98**	16.9 (7.25–39.61)	93**	11.62 (7.21–18.72)	93**	13.79 (8.80–21.59)
Study group average	88		81		75		57	
Contingency coeff.	0.22		0.20		0.19		0.26	



# Is spinal fusion reasonable and necessary treatment?

In so deciding, the Court will have regard to medical opinion as to the relevance and appropriateness of the particular treatment, any available alternative treatment, the cost factor, the actual or potential effectiveness of the treatment and its place in the usual medical armoury of treatments for the particular condition.

Rose v Health Commission (NSW) [1986] NSWCC 2

# Impairment

- 4.37 Effect of surgery: AMA5 tables 15-3 to 15-5 (pp 384, 389 and 392) do not adequately account for the effect of surgery on the impairment rating for certain disorders of the spine. The assessor should note that:
- Surgical decompression for spinal stenosis is DRE category III (AMA5 Table 15-3, 15-4 or 15-5)
  - Operations where the radiculopathy has resolved are considered under the DRE category III (AMA5 Table 15-3, 15-4 or 15-5).
  - Operations for spinal fusion (successful or unsuccessful) are considered under DRE category IV (AMA5 Table 15-3, 15-4 or 15-5)

**Table 15-3** Criteria for Rating Impairment Due to Lumbar Spine Injury

DRE Lumbar Category I 0% Impairment of the Whole Person	DRE Lumbar Category II 5%- 8% Impairment of the Whole Person	DRE Lumbar Category III 10%-13% Impairment of the Whole Person	DRE Lumbar Category IV 20%-23% Impairment of the Whole Person	DRE Lumbar Category V 25%-28% Impairment of the Whole Person

# Impairment

4.37 Effect of surgery: AMA5 tables 15-3 to 15-5 (pp 384, 389 and 392) do not adequately account for the effect of surgery on the impairment rating for certain disorders of the spine. The assessor should note that:

- Surgical decompression
- Operations where the
- Operations for spine

**DRE II → DRE IV**  
**5% → 20%**

(table 15-3, 15-4 or 15-5)  
 the DRE category III (AMA5 Table  
 and under DRE category IV (AMA5

**Table 15-3** Criteria for Rating Impairment Due to Lumbar Spine Injury

DRE Lumbar Category I 0% Impairment of the Whole Person	DRE Lumbar Category II 5%- 8% Impairment of the Whole Person	DRE Lumbar Category III 10%-13% Impairment of the Whole Person	DRE Lumbar Category IV 20%-23% Impairment of the Whole Person	DRE Lumbar Category V 25%-28% Impairment of the Whole Person

# Options

- Move away from making a structural diagnosis
  - Rarely exists and is associated with worse outcomes
  - Avoid/defer imaging
  - education
- Review panel for high cost procedures
- Replacement of the threshold test
  - Separate surgical treatment and impairment
  - Consider work disability/functional impairment<sup>1</sup>
- Access to multi-disciplinary rehabilitation program

# Options

- Move away from making a structural diagnosis
  - Rarely exists and is associated with worse outcomes
  - Avoid/defer imaging
  - education
- Review panel for high cost procedures
- Replacement of the threshold test
  - Separate surgical treatment and impairment
  - Consider work disability/functional impairment<sup>1</sup>
- Access to multi-disciplinary rehabilitation program

# Options

- Review panel for high cost procedures

<b>ELECTIVE SPINAL SURGERY CLINICAL REVIEW MODEL – READY RECKONER</b>	<b>August 2022</b>
<b>The Elective Spinal Surgery Clinical Review model</b>	
Includes:	
<ul style="list-style-type: none"><li>• Any request for spinal surgery inclusive of Fusions, Micro-discectomies, Discectomies, Laminectomies, Fixations and Disc Replacements/Arthroplasties</li></ul>	
Does not include (Exclusion Criteria):	
→ Spinal injections (including Medial Branch Blocks)	
→ Radio Frequency Denervations (RFDs)	
→ Spinal Cord Stimulators or other IPTs (which have their own review process)	
→ Diagnostic Procedures (including provocative discography)	
→ Retrospective requests (which are handed at the Agent level- yet a SAP <i>billing</i> review referral can be made)	



# Options

- Review panel for high cost procedures

<b>ELECTIVE SPINAL SURGERY CLINICAL REVIEW MODEL – READY RECKONER</b>	<b>August 2022</b>
<b>The Elective Spinal Surgery Clinical Review model</b>	
Includes:	
<ul style="list-style-type: none"><li>• Any request for spinal surgery inclusive of Fusions, Micro-discectomies, Discectomies, Laminectomies, Fixations and Disc Replacements/Arthroplasties</li></ul>	
Does not include (Exclusion Criteria):	
→ Spinal injections (including Medial Branch Blocks)	
→ Radio Frequency Denervations (RFDs)	
→ Spinal Cord Stimulators or other IPTs (which have their own review process)	
→ Diagnostic Procedures (including provocative discography)	
→ Retrospective requests (which are handed at the Agent level- yet a SAP <i>billing</i> review referral can be made)	

<b>AGENTS MUST:</b>
<ul style="list-style-type: none"><li>• Confirm that liability for the spinal injury has been accepted (if a non-spinal surgeon IME is arranged to determine liability, do NOT ask the examiner to comment on the surgery request itself as this is outside of their expertise)</li></ul>

# Options

- Move away from making a structural diagnosis
  - Rarely exists and is associated with worse outcomes
  - Avoid/defer imaging
  - education
- Review panel for high cost procedures
- Replacement of the threshold test
  - Separate surgical treatment and impairment
  - Consider work disability/functional impairment<sup>1</sup>
- Access to multi-disciplinary rehabilitation program

1. Consultation on the MDougall Review, COVID-19 and future opportunities for personal injury schemes.  
The Law Society of NSW 9 Nov 2021

# Options

- Move away from making a structural diagnosis
  - Rarely exists and is associated with worse outcomes
  - Avoid/defer imaging
  - education
- Review panel for high cost procedures
- Replacement of the threshold test
  - Separate surgical treatment and impairment
  - Consider work disability/functional impairment
- Access to multi-disciplinary rehabilitation program





**For All Enquiries, please contact**

**Sinergy Pty Ltd**

**Tel: 1300 304 144**

**E-mail: [info@sinergy.net.au](mailto:info@sinergy.net.au)  
[irene.watt@sinergy.net.au](mailto:irene.watt@sinergy.net.au)**



Independent  
Review Office

# ILARS Update

**Philip Jedlin**

Director ILARS



# ILARS Update

- ILARS – key statistics
- Applications and invoices – how to improve efficiency
- Right to reviews under the ILARS Funding Guidelines
- Changes to ILARS Processes
  - Automated Updates
  - Centralised email management

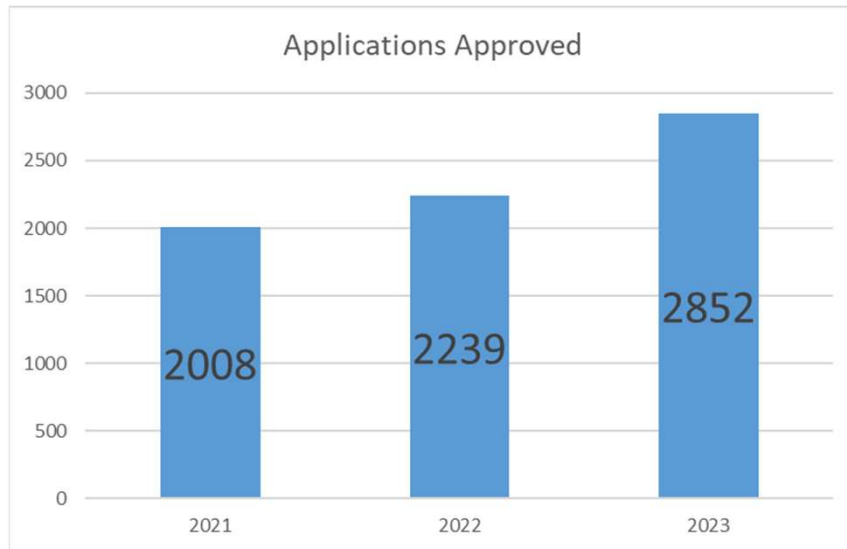




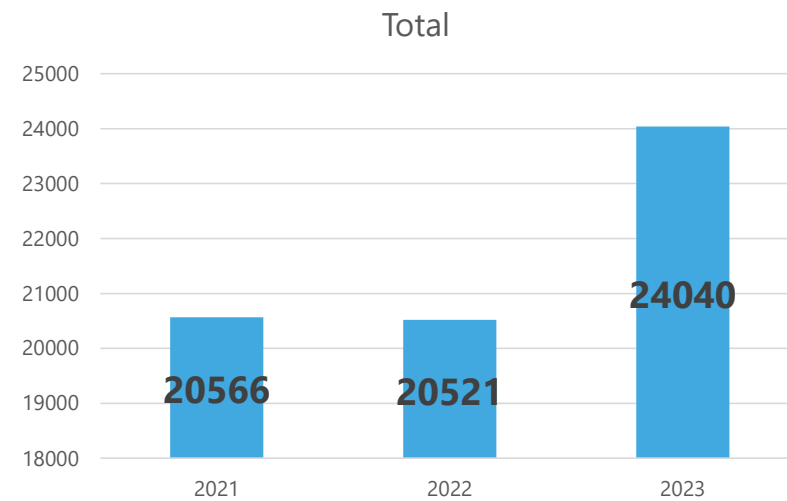
# Applications Approved

Your region includes Central Coast and Hunter

## Your Region



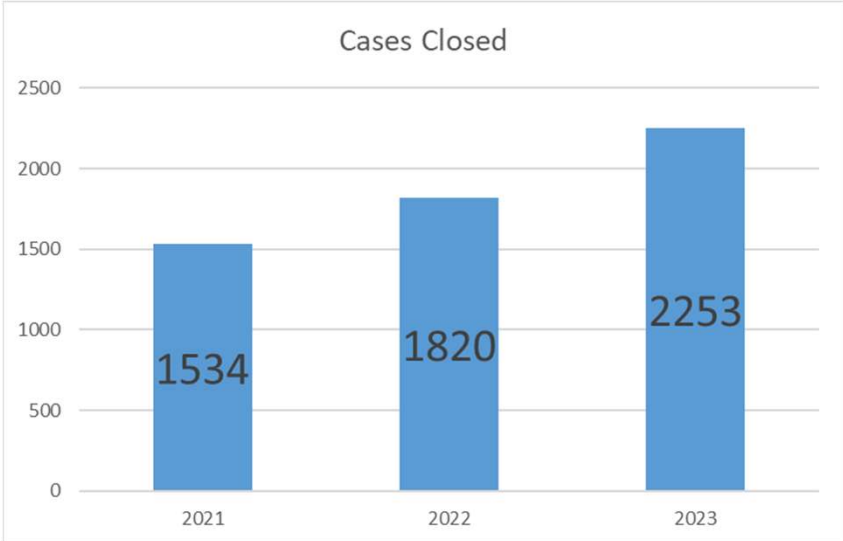
## All Firms



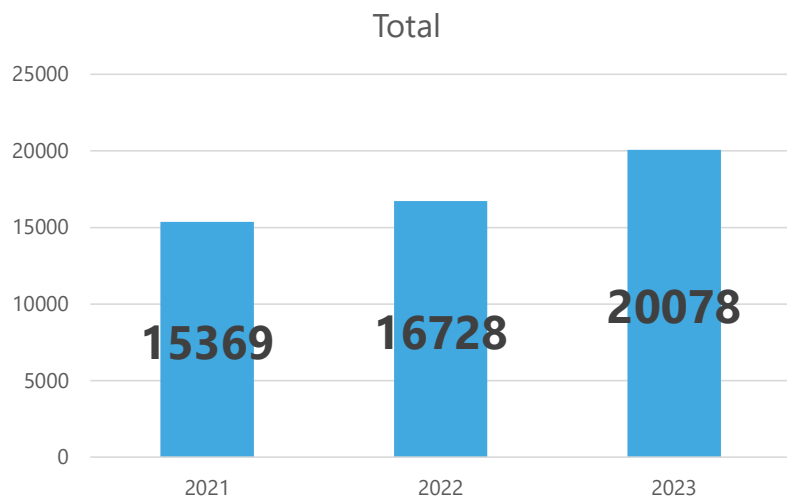


# Closed Cases

## Your Region



## All Firms





## Stages of Cases

Stages	Number of cases	Percentage	% all Firms
Stage 1	1027	28%	30%
Stage 2	1956	53%	50%
Stage 3	638	17%	19%
Stage 4	17	0%	1%
Stage 4 Conditional	37	1%	1%
<b>Grand Total</b>	<b>3675</b>	<b>100%</b>	<b>100%</b>



# Injured persons in your Region



	Hearing	Lower extremity	Psychiatric and psychological disorders	The spine	Upper extremity	Grand Total
Your Regions	930	661	853	864	1027	4335
All other Regions	1397	683	1109	853	1058	5100
<b>Total</b>	<b>2327</b>	<b>1344</b>	<b>1962</b>	<b>1717</b>	<b>2085</b>	<b>9435</b>
Percent of matters managed by AL's in your region	40%	49%	43%	50%	49%	46%
-Excluding Hearing loss						48%



# Where do your injured workers come from



Injured Person Region	Hearing	Lower extremity	Psychiatric and psychological disorders	The spine	Upper extremity	Grand Total
Hunter	643	436	556	511	687	2833
Central Coast	287	225	297	353	340	1502
North Coast	258	67	143	80	116	664
Tamworth	52	21	21	20	24	138
Western Sydney	20	20	30	21	41	132
Other Regions	397	142	255	220	221	1235
<b>Total</b>	<b>1657</b>	<b>911</b>	<b>1302</b>	<b>1205</b>	<b>1429</b>	<b>6504</b>



# Application for Grants issues - 2021-23



Issue	All Regions		Your Region	
	Number	%	Number	%
Request for further information	4977	8%	602	8%
Remind Request for further information	900	18%	98	16%
Average time to approve application - All accepted applications (Days)	4.5		4.3	
Where NO request made for further information (Days)	3.0		2.7	
Where a request is made for further information (Days)	24.9		25.3	



# Applications



Supporting material

Explanation of the merit/arguable case of a request for funding

Details of insurer's response to claims. Be Mindful of the timeframes for responses to claims by Insurers.

Requests for Updates

Correct ILARS reference in the subject line in correspondence

Accurate details in application for funding

Attaching PDF's, not links



# Invoices - 2021-23



Issue	All Regions		Your Region	
	Number	%	Number	%
Invoices processed from law firms	53237		5453	10%
Number of cases with invoice errors	12797	24%	1219	22%
An invoice may have more than one issue and may be returned more than once				
Grant related issues	11453	22%	1081	20%
Invoice related issues	5395	10%	446	8%
Issues with MRP invoices	2674	3%	232	3%



## Recurring Themes

Unique tax invoice number

Only one event number for costs per Tax invoice can be used (except for appeals)

Date Missing or incorrect

ILARS reference incorrect or missing

GST added to disbursements



## Recurring Themes continued

Incorrect amounts

Copies of medico-legal reports

Specify the Doctor, date of examination and category of report

EFT details

Format –PDF is required

Invoices do not tally

# Invoices in Your Region - Requests for amendment

Grant related errors	
Disbursements exceed approved funding	17%
Legal cost exceed approved funding -	23%
Supporting documents not supplied	53%
Invoice related errors	
No unique invoice number-	9%
Wrong amount -	45%
Wrong GST -	12%
Incorrect bank details -	2%

## Impact of Invoice errors

Causes a failure in the payment system

Multiple interactions

Causes delay in the payment of the invoice

# Reviews of Funding Decisions under the ILARS Guidelines

Clause 2.12 of the Funding Guidelines sets out the review process

- 2.12.1 When the IRO will review a funding decision
- 2.12.2 What a review will consider
- 2.12.3 How a review will be conducted
- 2.12.4 Possible outcomes of a review of a funding decision
- 2.12.5 Final Review

## Example of review - Request for Stage 2 Funding

- AL submits the following to the PL
  - Certificate of Capacity
- Funding Request is refused by IRO and further information is sought
- AL seeks review and provides additional information with submissions
  - That the IP is MMI and that in their opinion the WPI > 10%

## Examples of reviews - Request for Stage 2 Funding (cont)

- Learnings
  - Had the information provided to the reviewer been available to the PL stage 2 would have been provided
  - There would have been a far more timely funding of this matter
  - Far fewer interactions and emails



## What have we learned from reviews?

- There is great benefit when the Approved Lawyer provides all relevant and up to date information to the Principal Lawyer when the request for funding is first made
  - You can always provide the additional information to the Principal Lawyer after they decline your request rather than asking for a Director Review
- If there is a difficulty with a request from a Principal Lawyer please call them to discuss the circumstances of the matter
  - Ask the Principal Lawyer what further information they need to approve your request



# Changes to update requests

## What has changed

- Requests are consistent – about 250-300 per day

## What is expected of you

- Timely response to update requests

## Where contact is unsuccessful

- After 12 months your grant maybe closed



## Where contact is unsuccessful

Your attention is drawn to clause 2.14 of the ILARS Funding Guidelines

- Where a grant matter remains open for a period of twelve (12) months without any progress, the grant matter may be closed without payment of legal costs
- A fresh application maybe required to continue funding
- Submissions will be required to support the payment of any costs on the closed matter
- Please respond to our update requests to avoid closure of your grant



## Key Messages

- Completion of all the fields in the Update form assists IRO
- Where information is received by you please advise IRO by forwarding the information to the [ILARSALmail@iro.nsw.gov.au](mailto:ILARSALmail@iro.nsw.gov.au)
- Please use the ILARS grant number for the live grant in the subject line
- Where extension requests are made please address the merit test and the arguable case test
- If there is a doubt please call the Grant Manager or an ILARS Manager
- When you call 13 94 76 the call is answered by our Solutions team who deal with Injured Persons and not ILARS cases. They often cannot assist you and will pass your message onto the Principal Lawyer or paralegal managing your matter
- Updates
  - Please respond to the update requests.
  - Please reply using the email option on the email rather than creating a new email.
  - Please use the templates provided in your response





## Reminder on how we send and process emails

- The Centralised Email Management System will send all emails to you from a new mail box - [ILARSALmail@iro.nsw.gov.au](mailto:ILARSALmail@iro.nsw.gov.au)
- Please send New Funding applications to [ILARSCONTACT@iro.nsw.gov.au](mailto:ILARSCONTACT@iro.nsw.gov.au)
- Please ensure that you use only the current live grant number in the subject line of the email.
- If you have issued a tax invoice the matter is closed – please do not use that ILARS grant reference number – you need a fresh funding application.



## What impact does the email changes have on you?

There is no change to how you send new applications to ILARS

- Please continue to use [ILARScontact@iro.nsw.gov.au](mailto:ILARScontact@iro.nsw.gov.au)

For current ILARS matters, when sending emails to ILARS or responding to ILARS emails

- Please use [ILARSALmail@iro.nsw.gov.au](mailto:ILARSALmail@iro.nsw.gov.au) in the "To" field and include the ILARS case number – C/NN/YYYYYY or G/NN/YYYYYY in the subject line



Independent  
Review Office

# **IRO Solutions and the IRO Direction**

**Jeffrey Gabriel**

A/Independent Review Officer



## **IRO Solutions Jurisdiction**

- Complaints

Schedule 5, Clause 8 of the *Personal Injury Commission Act 2020*

- Workers Compensation Enquiries
- Early Solutions

Schedule 5, Clause 9 (2)

*"The purpose of ILARS is to...provide assistance in finding solutions for disputes between workers and insurers."*





## MISSION OF THE INDEPENDENT REVIEW OFFICE

The Independent Review Office (IRO) helps persons who are injured at work or in motor accidents and insurers find fair solutions to complaints and claims. IRO also recommends improvements to the statutory compensation schemes for workers compensation and motor accident injuries. IRO is established under the *Personal Injury Commission Act 2020*.

## IRO SERVICES – WHAT WE DO

- help persons who are injured and insurers find fair and fast solutions
- fund experienced lawyers to assist workers who are injured access their workers compensation entitlements
- identify, report on and recommend solutions to emerging and systemic issues in the statutory compensation schemes.

## IRO VALUES – HOW WE WORK

IRO has six core Values that inform how we do our work:

- integrity, trust, service, and accountability, which we share with the NSW government sector
- independence and expertise, which are unique to IRO.

## IRO PRIORITIES AND STRATEGIES – WHERE WE WILL FOCUS

<p><b>An effective and valued agency</b></p>	<p><b>Achieving fair and quick solutions for injured persons' complaints and claims</b></p> <ul style="list-style-type: none"> <li>• increasing IRO's capacity and capability to deal with motor accident injury complaints</li> <li>• identifying more opportunities to implement early solutions in Independent Legal Assistance and Review (ILARS) matters</li> </ul>	<p><b>Enabling injured workers' access to appropriate legal assistance</b></p> <ul style="list-style-type: none"> <li>• acting on the recommendations of the 2022 ILARS Review</li> <li>• completing the review of medical report provider arrangements and appeal costings, and acting on the outcomes</li> <li>• reviewing matters where workers' outcomes not improved to identify any opportunities to refine Funding Guidelines</li> </ul>	<p><b>Offering insights that improve the operation of the injury compensation schemes</b></p> <ul style="list-style-type: none"> <li>• making suggestions to improve the complaint and claim handling of insurers</li> <li>• contributing to external reviews of the injury compensation schemes</li> <li>• improving the experience of injured persons who are dissatisfied with the compensation schemes</li> </ul>
<p><b>A great place to work</b></p>	<p><b>Fostering the wellbeing and expertise of IRO's team</b></p> <ul style="list-style-type: none"> <li>• enhancing the connection and effectiveness of IRO teams and team members in a hybrid work environment</li> <li>• responding to the results of IRO's People Matter Employee Surveys</li> <li>• making ongoing development of IRO's team a hallmark of our culture, and supporting the training and development of every IRO team member</li> </ul> <p><b>Improving how we work</b></p> <ul style="list-style-type: none"> <li>• embedding continuous improvement as a way of working at IRO</li> <li>• improving how we engage with those who rely on us</li> <li>• increasing the quality and value of our data, and improving the use of data in all our functions</li> <li>• embedding good practice in our financial, governance, ICT, and risk management arrangements</li> </ul>		

## IRO SUCCESS MEASURES – HOW WILL WE KNOW IF OUR STRATEGIES ARE SUCCESSFUL

- improving satisfaction by injured persons as measured by user experience surveys
- achieving timeliness and quality measures in how we perform our work
- identifying more ILARS matters for early solutions
- increasing IRO team member engagement as measured by People Matter surveys.



# Operationalising our function

- **The IRO Complaint Handling Protocol**
  - Defines how and which matters we deal with
  - Consultation with industry participants
  - A complaint outcome that is “fair and reasonable”
  - What complaints we may not deal with?
    - Matters the subject of the PIC
    - Where no attempt to resolve with insurer



## **CTP Focus**

- Uplift in CTP work
  - CTP Care
  - Adapt to changes in legislation
  - Emerging case law from PIC
- Deal with increasing volumes
- More engagement with insurers



## **IRO Early Solutions**

- Specifically called out in PIC Act
- No Response to Claim (NRTC)

TIP: If NRTC – carefully check timelines and check with insurer before seeking Stage 3 funding

- Medical disputes pilot
- Other early solutions



# **IRO Early Solutions – Medical Dispute Pilot**



- A limited pilot
- To assist parties to find early solutions for disputes about medical treatment
- Run through Solutions Group in parallel with No Response To Claim (NRTC) and other early solution matters
- Applies to disputes meeting eligibility criteria



# IRO Early Solutions – Medical Dispute Pilot



- Eligibility criteria:
  - > Eligible for funding
  - > Approved Lawyer (AL) asks for stage 3 funding
  - > Liability for injury not disputed
  - > Only medical/treatment disputes
  - > Only disputed on basis of insufficient evidence
  - > Not affected by s.59A
  - > Medical support
  - > AL has already requested s.287A review
  - > Currently excludes ifnsw/TMF (except Department of Education)



## **IRO Complaints – the numbers**

- 1 July – 31 December 2023  
**4091** WC complaints (compared to 3766 in the same period H1 2022-2023)  
**359** CTP complaints (compared to 408 in the same period H1 2022-2023)



# Common Workers Compensation Matters

Percentage of all workers compensation complaints for H1 2023-24

- Delay in determining liability 29.1%
- Delay in payment 23.3%
- Denial of liability 9.7%
- Request for documents 9.2%
- General Case Management 9.2%





# Common CTP Complaint Matters

Percentage of all motor accident complaints for H1 2023-24

## Subjects

- Treatment and care 29.5%
- Income support/weekly payments 23.6%
- Case Manager 10.0%

## Issues

- Decisions 39.0%
- Timeliness 30.1%
- Service/Communication 17.8%



# CTP Focus

## Treatment and Care

- Complaints related to medical expenses and domestic assistance
- Most prominent issue for this complaint subject is timeliness
- Timeliness is critical in claims where compensation period is limited (e.g., minor injury / threshold injury or at fault claims). Claimants often miss out due to untimely decisions.
- Changes to minor / threshold injuries
- Case studies



# CTP Focus

## Income Support/Weekly Payments

- Biggest driver of IRO CTP complaints in 2022-23 but not the biggest driver in H1 2023-2024
- Time taken to commence weekly payments
- Time taken to confirm PAWE, meaning extended periods on interim rate
- Case studies



# CTP Focus

## Case Manager

- Complaints of this kind often relate to customer service issues
- Often tied to processing of benefits
- Case studies





# After the IRO Intervention

## IRO Impact

- At a local level with insurer – changes to payment cycles
- Referral of matters to SIRA
- Aggregated data and significant matters
- Contributes to SIRA's regulatory work
  - Licence conditions on insurers
  - Penalties
- Legislative change



# Key Lessons from our Experience in Complaints



## Service

- Unreturned phone calls + emails are behind a lot of complaints
- Communication – keep claimants updated
- Timeliness
- Start weekly payments ASAP – MAIA claims
- Try to find out the issue behind the question

## Detail

- Notices that lack detail attract complaints. e.g., dispute notices in MAIA claims





# How to help IRO help you deliver early Solutions to Injured Workers - Approved Lawyers

---

ILARS Grant Number (if applicable)

---

A clear summary the issues and proposed solution – remember IRO does not adjudicate disputes

---

All necessary information (copy of claim, communication serving the claim, details of how, when and to what address the claim was made)

---

Details of any follow up with insurer (when/how/who)

---

If there has been any acknowledgement by the insurer or their representative about the claim/issue (including date and nature of communication)





# How to help IRO help you deliver Early Solutions - Insurers

---

If you are relying on a document/decision, please provide it.

---

If a claim has been overlooked in error, please provide a date for when the claim will be determined, and, when it is determined please provide a copy of the decision once issued.

---

If you consider you are inside timeframes for a decision, please provide a brief timeline establishing that.





Independent  
Review Office

# Estoppel in the Personal Injury Commission

**Michelle Riordan**

Manager, Legal Education

## What is meant by:

Res Judicata	Issue Estoppel	Anshun Estoppel
<p>A thing, matter, or determination that is adjudged or final. i.e. a claim, issue, or cause of action that is settled by a judgment conclusive as to the rights, questions, and facts involved in the dispute.</p>	<p>A long-established principle that prevents a party to a proceeding denying to the contrary an issue of fact or law that was established in previous proceedings.</p>	<p>An estoppel that prevents a party from making a claim which should have been pursued by that party in earlier proceedings:</p> <p><i>See: Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589</i></p>





# Relevant cases

<b>Res Judicata &amp; Issue Estoppel</b>	
Etherton v ISS Property Services Pty Ltd	[2019] NSWCCPD 53
<b>Anshun Estoppel</b>	
Miller v Secretary, Department of Communities & Justice (No. 9)	[2021] NSWPICPD 29
Geary v UPS Pty Ltd	[2021] NSWPICPD 47
OneSteel Reinforcing Pty Ltd t/as Liberty OneSteel Reinforcing v Dang	[2022] NSWPICPD 32
Racing NSW v Goode	[2023] NSWPICPD 43
Inner West Council v BFZ	[2023] NSWPICPD 62



# Res Judicata & Issue Estoppel





# Etherton v ISS Property Services Pty Ltd

- In 2015, the worker injured his right leg. The Insurer disputed the claim under ss 4, 9A, 33 & 60 WCA.
- On 9/02/2016, he filed an ARD and claimed weekly payments & s 60 expenses for right TKR surgery.
- On 5/05/2016 an Amended COD – Consent Orders issued, which:
  - Added an allegation of injury due to the nature & conditions of employment until 15/04/2015.
  - Entered an award for the respondent for that alleged injury.
  - Awarded the appellant a closed period of weekly payments, with an award for the respondent thereafter.
  - Awarded the appellant s 60 expenses up to \$3,871.25.
  - Entered an award for the respondent with respect to a claim for right total knee replacement surgery.



# Etherton

- The appellant later claim compensation under s 66 WCA for 18% WPI, based on an opinion from Dr Giblin, which was based on the right total knee replacement.
- The insurer disputed the claim and relied upon the Consent Orders.
- **Arbitrator Wynyard** entered an award for the respondent. He held that:
  1. Dr Giblin either ignored or was unaware of the Consent Orders; and
  2. The effect of the Consent Orders was that the appellant could not claim that the right TKR resulted from the injury on 15/04/2015.

# Etherton

- **On appeal**, the appellant alleged that the Arbitrator erred:
  1. In finding that he was estopped from proceeding with the s 66 claim;
  2. In acting ultra vires to determine a medical dispute; and
  3. By construing the 2018 amending Act as having retrospective effect.
- **President Phillips** upheld the appeal. His reasons included:
  - In *Bouchmouni v Bakhos Matta t/as Western Red Services*, Roche DP held that Consent Orders can give rise to res judicata estoppel, but only to the extent of what was '*necessarily decided*': (*Habib* at [186] per McColl JA);
  - In deciding what was '*necessarily decided*', the Commission will closely examine the pleadings and particulars, the s 74 notice, and the legislation, because that forms part of the mutually known facts and assists in objectively determining the '*genesis*' and '*aim*' of the orders: (*Isaacs* at [75]; *Spencer Bower* at [39]; *DTR Nominees* at [429]);

# Etherton

- Consent Orders should be construed by reference to what a reasonable person would understand by the language used in the orders, having regard to the context in which the words appear and the purpose and object of the transaction: (*Cordon Investments* at [52]);
- Where the words in the Consent Orders are ambiguous or susceptible of more than one meaning, extrinsic evidence is admissible to show the facts which the negotiating parties had in their minds: (*Codelfa* at 350).
- Prior negotiations that tend to establish objective background facts which were known to both parties and the subject matter of the consent orders will be admissible (*Codelfa* at 352).
- However, evidence of prior negotiations that are reflective of the parties' actual (subjective) intentions is not receivable: (*Codelfa* at 352).

# Etherton

- His Honour found that:
  - When the Consent Orders issued, the pleading and body of evidence alleged a frank injury to the right knee on 15/04/2015.
  - The award for the respondent for the s 60 claim for the TKR with respect to that frank injury causes problems, as Dr Giblin was not instructed about it.
  - Based on *Habib*, the Consent Orders '*necessarily decided*' that there were awards for the respondent regarding the allegation of right knee injury due to the nature and conditions of employment until 15/04/2015 and s 60 expenses after 4/03/2016 (including that the right TKR surgery was not reasonably necessary as a result of the frank injury).
  - When the Consent Orders issued, the pleading and body of evidence alleged a frank injury to the right knee on 15/04/2015.
  - The award for the respondent for the s 60 claim for the TKR with respect to that frank injury causes problems, as Dr Giblin was not instructed about it.

# Etherton

- Based on *Habib*, the Consent Orders '*necessarily decided*' that there were awards for the respondent regarding the allegation of right knee injury due to the nature and conditions of employment until 15/04/2015 and s 60 expenses after 4/03/2016 (including that the right TKR surgery was not reasonably necessary as a result of the frank injury).
- The Consent Orders *did not necessarily decide* whether the appellant suffered a frank injury to his right knee on 15/04/2015, although orders 4 and 5 could only apply to that injury.
- Therefore, the Arbitrator erred in finding that the appellant *was estopped* from seeking compensation under s 66 WCA and no relevant estoppel arose from the Consent Orders.
- ***His Honour rejected grounds (2) and (3).***
  - This was not a not a claim in relation to compensation paid or payable in respect of any period before 1/01/2019 (the appellant sought a referral to an AMS under s 66 WCA). Therefore, Part 19L(2) does not apply.
  - The effect of Pt 19L(1) is that the 2018 amendments apply, and the Arbitrator acted within power in determining the claim under s 66 WCA.
  - As the Arbitrator assessed 10% WPI, the appellant was not entitled to recover compensation under s 66 WCA.



# Anshun Estoppel



## Miller (No 9)

- This was a claim for death benefits, the worker died after suffering an Asthma attack whilst working in remote NSW. This appeal was against a decision by **Arbitrator Harris** dated 8/01/2021, which found an *Anshun* estoppel.
- The respondent argued that:
  - (1) These proceedings sought "*the same entitlement ... arising out of the same fact circumstance and relating to the same compensation*" and that the appellants made a conscious decision not to allege injury under s 4(a) WCA at first instance;
  - (2) This was unreasonable having regard to the benefits of finality of litigation and other matters identified by the President in *Miller No. 5*; and
  - (3) The appellants bore the onus of proving that it was not unreasonable to pursue the s 4(a) claim in these proceedings and they failed to adduce any evidence about why it was not claimed initially.

## Miller (No 9)

- The appellants appealed on multiple grounds and alleged that the Arbitrator erred:
  - (1) In finding that they failed to provide evidence about why they chose to argue a particular injury in *Miller No 1* and to raise a different injury in *Miller No 4*;
  - (2) In finding that they failed to adduce evidence about why they chose not to allege a s 4(a) injury initially;
  - (3) In finding that their explanation, that they were not aware of a s 4(a) injury, did not stand up to any proper analysis;
  - (4) In finding that it was unreasonable for them to not file evidence about why they could not rely upon s 4(a) initially;
  - (5) In rejecting their submissions that the "*rules of evidence are not strictly applied in the PIC*" as being relevant to the consideration of the *Anshun* principle;



## ***Miller (No 9)***

6. In rejecting their argument that the “legislation is considered to be beneficial” when considering the Anshun principle;
7. In deciding that both proceedings relate to the same factual circumstances and involved similar causes of action;
8. In finding that at the time of Miller (No. 1), they knew that the deceased suffered both an asthma attack (a s 4(b)(ii) disease) and “*anoxia and cardiac arrest*” (a s 4(a) injury);
9. In finding that the factual matrix showed that the current subject matter was relevant to that in the previous proceedings; and
10. In failing to consider and refer to the obligation to conduct proceedings according to law, with due regard to equity, good conscience, and the substantial merits of the case.



## ***Miller (No 9)***

### ***Deputy President Snell dismissed the appeal.***

- He rejected grounds (1), (4), (7) and (9) as being without merit.
- He considered grounds (2), (3) and (8) together and rejected them.
- He considered grounds (5) and (10) together and rejected them.
- He held that in *Miller No. 5*, the President specifically held that the principles in *Anshun* apply in an appropriate case. His Honour accepted that "*whether the principle of estoppel is engaged must be considered in the rubric of the practices and procedure applicable to proceedings in the Commission*".
- He rejected ground (6) and found that the appellants had not demonstrated, based on any authority or reasoned argument, that finding that the legislation is "*beneficial in a general sense*" would change the result.

## ***Geary v UPS Pty Ltd***

- The appellant injured his neck and both shoulders at work and he claimed compensation under s 66 WCA for 37% WPI (cervical spine & both upper extremities) based on assessments from Dr Guirgis & s 60 expenses for proposed left shoulder surgery.
- On 29/11/2018, the WCC issued Consent Orders, which:
  - Amended the ARD to plead injuries to the cervical spine and right shoulder and consequential injuries to the left shoulder and neck;
  - Entered an award for the respondent for the alleged injury and the consequential injury to the neck;
  - Discontinued the claim under s 66 WCA; and
  - Noted that the respondent would pay s 60 expenses for left shoulder surgery.
- On 14/01/2021, he claimed compensation under s 66 WCA for 46% WPI (cervical spine + both upper extremities + scarring) for an injury deemed to have occurred on 1/02/2018.
- The respondent disputed the claim.

## Geary

- On 9/02/2021, the appellant filed an amended ARD, which alleged injury to the neck as a result of the nature and conditions of employment until 12/12/ 2018 and, alternatively, a consequential injury to the neck due to *"overuse, overcompensation and overload following on from the right and left shoulder injuries and surgeries."*
- **Member Perry** found that there was an Anshun estoppel, based on the Presidential decisions in *Fourmeninapub Pty Ltd v Booth, Habib and Miller (No 9)*.
  - The relevant question is *"whether the claim made in the 2021 proceedings was so closely related to the 2019 proceedings that it would have been reasonably expected to have been raised at the time, having regard to the substance of the proceedings?"*
  - Disease was integral to the dispute (Dr Guirgis apportioned 90% of WPI to a disease, Dr Endrey-Walder provided a similiar opinion and all doctors diagnosed a disease in the shoulders).
  - Discontinuing the s 66 claim did not mean that an *Anshun* estoppel did not apply, as the doctrine is concerned with substance and not form: *Habib*;
  - The facts in both proceedings were essentially the same;

# Geary

- Consent orders may create an estoppel and the parties clearly intended for an injury to the cervical spine to be pleaded, and for there to be an award for the respondent with respect that alleged injury and/or consequential injury; and
- The consent orders made it clear enough that the applicant '*could not succeed in gaining compensation for a consequential benefit*'.
- On appeal, the appellant argued that:
  1. The 2019 COD must be read in the light of the pleadings, which alleged a frank injury;
  2. The only claim determined in 2019 was the s 60 claim (left shoulder surgery) and it was not unreasonable that disease injuries to the shoulders and cervical spine were not pleaded then;
  3. The fact that the s 66 claim was discontinued meant that there was no *Anshun* estoppel, and it would not align with the PIC's practice to apply *Anshun* to "*mechanisms of injuries and body parts, the liability for which was only required to be determined in respect of a claim that was discontinued and hence not so determined*"; and
  4. "*A worker is entitled to pursue his rights independently*".



## Geary

- **President Phillips DCJ** dismissed the appeal and he held that.
  - *Anshun* estoppel is available in PIC proceedings;
  - In *Israel v Catering Industries (NSW) Pty Ltd* [2017] NSWCCPD 53, Wood DP set out various authorities (at [114]–[119]) that dealt with the application of *Anshun* estoppel.
  - The mere fact that a party chooses to litigate a matter in other proceedings in and of itself is insufficient to ground an *Anshun* estoppel.
  - However, this does not mean that every decision to litigate separate claims will always be permissible from an *Anshun* point of view.
  - Rather, such a decision will only give rise to an *Anshun* estoppel if it was unreasonable not to have pleaded this cause in the earlier action.
  - The 2020 Act did not modify or derogate from the approach to *Anshun* estoppel by the WCC or Compensation Court.

# Geary

- In *Bruce v Grocon Ltd* [1995] NSWCC 10, Neilson J summarised the relevant principles:
  - The principle in *Anshun* extends to claims and defences;
  - Estoppel will arise if in second or further proceedings there would be a judgment inconsistent with a judgment in the first proceedings, or the granting of remedies inconsistent with the remedy originally granted, or the declaration of rights of parties inconsistently with the determination of those rights made in the earlier proceedings;
  - the matter being agitated in the second or further proceedings must be relevant to the original proceeding; and
  - it was unreasonable not to rely on that matter in the original proceedings; such unreasonableness would depend on the facts of each particular case.

# Geary

- His Honour dismissed ground (1). He held that:
  - The claim for disease injury to the neck was connected with the subject matter of the 2019 proceedings;
  - The Member exercised a discretion of the type in *House v The King* [1936] 55 CLR 499 at 504-505 (House) and the appellant must prove error in exercising that discretion:

*"If a judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution, for his if it has the materials for doing so."*

- The appellant did not challenge the finding that the facts pleaded in both proceedings were essentially the same;
- The Member found there was no explanation about any difficulties that existed, or might reasonably have been perceived, in raising a disease injury earlier. This pointed towards it being unreasonable to have not relied on a disease injury in 2019; and

# Geary

- It is "*artificial in the extreme*" for the appellant to assert that the claim for the neck injury was not a claim or issue connected with the 2019 proceedings. It cannot be said that he or his solicitors were ignorant about the medical evidence regarding his condition before those proceedings were commenced.
- His Honour rejected ground (2).
  - He found that this was not argued before the Member and a Member cannot have erred in law in relation to an argument that was not put to him.
- His Honour also rejected ground (3).
  - Reading the decision as a whole, it is abundantly clear that the Member carefully considered the authorities and applied them in find that there was an Anshun estoppel regarding the disease injury to the neck in the 2021 proceedings.

# Geary

- His Honour rejected ground (4).
  - The appellant effectively argued that different causes of action were pursued in the 2019 and 2021 proceedings, but in *Anshun*, the High Court stated:

*"By 'conflicting' judgments we include judgments which are contradictory, though they may not be pronounced on the same cause of action. It is enough that they appear to declare rights which are inconsistent in respect of the same transaction"*.
  - The Court's finding in *Anshun* is entirely relevant to consideration of this ground and the Member found that the two sets of proceedings were *"essentially the same"*.
  - This is exactly what happened in *Anshun* and it was an approach that found no favour with the Court.

# ***OneSteel Reinforcing Pty Ltd t/as Liberty OneSteel Reinforcing v Dang***



- The worker claimed compensation for a back injury on 25/09/2016 (deemed).
- On 24/07/2019, Consent Orders were issued, which:
  - Amended the ARD to claim weekly benefits from 2/11/2016;
  - Awarded the worker weekly payments from 25/11/2016 to 2/05/2019 with an award for the respondent thereafter;
  - The respondent agreed to pay s 60 expenses up to \$5,500, with an award for the respondent thereafter; and
  - Noted that the worker acknowledged that as and from 2/05/2019, he was able to earn “as much or more than he would have earned had he remained in the employ of the respondent uninjured” in suitable employment.



## ***Dang***

- On 1/12/2020, the worker sought approval from the insurer for an MRI scan of his lumbar spine.
- The appellant asserted that there was no further entitlement under s 60 WCA by reason of the Consent Orders.
- He then claimed compensation under s 66 WCA for 12% WPI.
- The appellant disputed that claim and asserted that the worker was prevented from making this claim “as it was based on medical evidence that existed at the time of the prior proceedings and was not disclosed”. It alleged prejudice and that that “*the full extent of the claim brought in 2019*” had resolved.
- The worker then filed an ARD claiming s 60 expenses (including costs of the MRI scan) and compensation under s 66 for an injury on 25/09/2016.
- ***Senior Member Capel*** held that the worker was not estopped from bringing this claim and that the appellant was liable for the compensation claimed.

## ***Dang***

- On appeal, the appellant alleged that the Senior Member erred as follows:
  - in law, as to the nature of an Anshun estoppel;
  - In law, by failing to exercise his discretion to apply the Anshun principles to the case;
  - in fact, by accepting that the worker only decided not to proceed with surgery in 2021; and
  - in law, by taking into account an irrelevant consideration.



## ***Dang***

- ***Deputy President Wood*** dismissed the appeal.
- She rejected ground 1.
  - She noted that the appellant argued that the relevant medical report was available to the worker in the earlier proceedings.
  - It relied on the High Court's decision in *Tomlinson v Ramsey Food Processing Pty Limited* [2015] HCA 28 (*Tomlinson*) and argued that the earlier authorities that were relied upon by the worker and cited by the Senior Member, were inconsistent.
  - In *Tomlinson*, the Court considered the concept of abuse of process, and found that this is inherently broader and more flexible than estoppel. This can be available to relieve against injustice to a party or impairment to the system of administration of justice which might otherwise be occasioned in circumstances where a party to a subsequent proceeding is not bound by an estoppel.
  - It has been recognised that making a claim or raising an issue which was made or raised and determined in an earlier proceeding, or which ought reasonably to have been made or raised for determination in that earlier proceeding, can constitute an abuse of process even where the earlier proceeding might not have given rise to an estoppel.

## ***Dang***

- In its submissions to the Senior Member, the appellant referred to an “*abuse of process*” but it did not actively argue that there was an abuse of process or that the worker’s action was unjustly oppressive or had brought the administration of justice into disrepute. Instead, it argued that an *Anshun* estoppel applied.
- Abuse of process and an *Anshun* estoppel are two distinct concepts, although may have overlapping features.
- She rejected ground (2).
  - The critical reasons given for not pursuing the claim in the earlier proceedings were that the worker only had an entitlement to make one claim under s 66 WCA and the surgery, if undertaken, might likely alter the assessment of his WPI and he was yet to make a final decision about the surgery. The evidence supported these matters.
  - The Senior Member addressed the relevant factors that the appellant relied upon to show that the failure to bring the claim was unreasonable.
  - The appellant’s case substantially rests on an assertion that because the worker could have brought his case in the earlier proceedings, he should have. That submission falls foul of the observations of Allsop P in *Manojlovski*.
  - The Senior Member did not fail to apply the *Anshun* principles.

## ***Dang***

- She rejected ground (3).
  - The Senior Member's conclusion that the worker only decided against surgery in 2021 was consistent with the evidence.
- She rejected ground (4).
  - She noted that the grounds of appeal did not point to any error by the Senior Member in proceeding to determine the s 66 claim.



## ***Racing NSW v Goode***

- The worker was a jockey.
- He suffered paraplegia at the T4 level, and multiple other injuries from a fall and was permanently wheelchair-bound. He required ongoing medical care and assistance with ADLs.
- On 21/10/2010, a Complying Agreement was signed, under which he received compensation under s 66 WCA for 85% WPI and \$50,000 for pain and suffering.
- In June 2012, the worker and his wife returned to their native UK, after which he submitted numerous claims to the insurer for treatment, medication, rehabilitation, housing modifications and maintenance. Some claims were paid, but some were disputed.
- On 18/02/2020, he filed an ARD claiming s 60 expenses for house repairs and hotel expenses.
- On 22/04/2020, Consent Orders were issued, under which the appellant agreed to pay some claims, it received an award for the respondent for some claims, and the worker discontinued some claims.
- On 10/12/2021, the worker filed a further ARD, which claimed s 60 expenses, but the appellant disputed those claims.



# Goode

- **Member Wynyard** determined the dispute.
  - The appellant disputed that the claims were “allowable” based on definitions in s 59 WCA and/or that they were reasonably necessary under s 60 and sought argue *Anshun* estoppel.
  - As *Anshun* had not been raised, the appellant required leave under s 289A WIMA.
  - He refused to grant leave to rely upon *Anshun* estoppel under s 289A WIMA and awarded the worker compensation under s 60 WCA.
- **On appeal**, the appellant argued that:
  1. The parties were legally represented at all relevant times during the 2020 and 2021 proceedings.
  2. It accepted liability for the worker’s injuries;
  3. The WCC and the PIC, are the tribunals of competent jurisdiction to hear and determine both applications; and
  4. The parties to the 2020 and 2021 proceedings are the same and both proceedings involved a dispute regarding s 60 expenses.

# Goode

- **President Judge Phillips** upheld the appeal.
  - He noted that the Member held that he needed to be satisfied that it was in the interests of justice to allow it to rely on *Anshun* estoppel and he quoted from his decision in *Geary*.
  - The correct authority – *Mateus* – was brought to the Member’s attention, but he failed to engage with the parties’ arguments and to grapple with the *Mateus* factors. This was a failure to exercise a discretion in accordance with the law.
- Accordingly, he redetermined the application under s 289A WIMA and he decided that:
  1. *Anshun* applies to statutory compensation schemes.
  2. Consideration of the s 289A application requires an assessment of the relative merits of the proposed *Anshun* defence in accordance with *Mateus*.
  3. The *Anshun* defence was only proposed to apply to claims that existed, but were not advanced, before the 2021 proceedings. There was no earlier decision on the merits of the matters in dispute that could possibly conflict with any decision in the current proceedings.

## Goode

4. *Mateus* set out a number of non-exhaustive factors to be considered when dealing with a leave application and whether it is in the interests of justice to grant leave. The starting point is to undertake a broad review of all the circumstances surrounding the matter.
5. The worker's needs will change from time to time depending upon his condition, the advice given by his treating doctors and possible developments in medical science that may assist in the management of his condition.
6. As Hutley JA said in *Thomas v Ferguson Transformers Pty Ltd*, "*the process of dealing with an incapacitated person may involve a continual war with disease, atrophy of muscles by lack of use, and even psychological decay by reason of lack of something to do.*" In *Thomas*, the worker was a paraplegic, and the decision has "*considerable resonance*" with this matter.

## **Goode**

- In relation *Mateus* factors, his Honour held that:
  - The application to rely upon *Anshun* was made at the commencement of the hearing and the appellant did not act promptly in bringing it to the notice of the PIC or the worker;
  - While the appellant's counsel referred to a "*pleading oversight*", there was no explanation of how that occurred;
  - The worker had no opportunity to consider what evidence may be required to answer the defence and it was unreasonable for the appellant to expect him to meet it without notice;
  - The s 60 claim was based on "*poikilothermia*" and the appellant did not properly respond to it; and
  - The defence was not articulated in a compelling manner.
  - A fundamental precept in establishing an *Anshun* defence is that the later claim was so relevant to the subject matter of the earlier dispute that it was unreasonable not to have advanced it in the earlier proceedings.



## Goode

- In *Miller No 10*, Brereton JA held that *Anshun* “**is engaged only where the party has unreasonably failed to assert a right or defence in connection with or in the context of the earlier proceeding.**” (emphasis in original)
- Other than the fact that both sets of proceedings concerned s 60 WCA, the claims were not such that they had to be brought at once. The mere fact that a claim **could have been brought in earlier proceedings does not automatically mean that it should have been so brought** (emphasis added).
- What is required is the evaluative exercise spoken about by McColl JA in *Habib* (at [84]).
  - In *Champerslife Pty Ltd v Manojlovski*, the Court of Appeal said that deciding whether the matter in question was so relevant that it can be said to have been unreasonable not to rely upon it in the first proceedings involves a value judgment to be made referable to the proper conduct of modern litigation.
  - “*Unreasonableness*” is a key feature of *Anshun* estoppel – namely, was it unreasonable not to have advanced the claims in the earlier proceedings?

## Goode

- *Anshun* is not an inflexible principle. As the High Court said, “there are a variety of circumstances, some referred to in the earlier cases, why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings”. He considered this in *Miller No 5* at [194].
- His Honour declined to infer that the worker had behaved unreasonably.
- He held that the appellant effectively asked him to elevate the *Anshun* principle from “**what could have been brought in the earlier proceedings to a principle which requires that it should have been brought**” (emphasis added).
- The *Anshun* defence had little merit and the discontinuance of claims in the 2020 proceedings did not mean that the appellant was entitled to treat them as abandoned.



## ***Inner West Council v BFZ***

- The worker suffered a psychological injury.
- On 27/05/2020, Consent Orders were issued. The appellant agreed to pay:
  - A closed period of weekly benefits (18/03/2020 to 26/05/2020), with an award for the respondent thereafter; and
  - Section 60 expenses up to \$2,000, with an award for the respondent thereafter.
- The worker resigned effective from 26/05/2020 and the appellant agreed not seek credit for paid sick leave.
- In 2022, the worker claimed compensation under s 66 WCA, but the appellant disputed the claim.
- The worker argued that the appellant was estopped from denying liability under ss 4(a), 4(b), 9A and 11A WCA because of the 2020 Consent Orders.
- ***Principal Member Bamber*** determined that the appellant was estopped from disputing liability because of the Consent Orders, and she remitted the dispute to the President for referral to a Medical Assessor.



## ***BFZ***

- On appeal, the appellant alleged that the Principal Member erred:
  1. In determining that it was estopped from disputing liability; and
  2. In referring the s66 dispute to the President for referral to a MA.
- ***Acting Deputy President Nomchong SC*** granted leave to appeal and allowed it. She remitted the matter to another member for re-determination. Her reasons included:
  - Issue estoppel arises where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided, and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to re-open that issue.
  - Estoppel is to be applied strictly.
  - Issue estoppel will apply only to prevent the assertion in later proceedings of the precise matter of fact or law that has already been necessarily and directly decided in the earlier decision.

## ***BFZ***

- The 3 conditions that must exist for issue estoppel to apply are:
  1. the first decision was final;
  2. the same question has been decided, and
  3. the same parties, or at least parties with the same legal interest, are the same.
- In this matter, (1) and (3) were established and the issue for the Principal Member to determine was whether the same question or questions were decided in 2020?
- The Principal Member needed to identify precisely what issues were determined in 2020, as the COD did not refer to the nature or extent of the injury.
- There had been no arbitration on liability issues and consent orders were to resolve the dispute.
- The authorities referred to by Roche DP in *Bouchmouni* (including *Habib*) provide that in these circumstances there must be an examination of the evidence to ascertain what matters were in dispute and what matters were necessarily resolved in the actual decision assented to by the parties. The Principal Member recognised this and referred to these authorities.

## **BFZ**

- However, the Principal Member concluded that the only relevant characteristic for determining the nature of the injury was whether it was work-related. This was an error of law.
- “*Injury*” refers to both the event that caused it and the pathology arising from it.
- In *Department of Juvenile Justice v Edmed*, Roche DP held that for the purposes of a determination of a s 66 entitlement, it is the pathology which must be determined.
- Specificity is required for the application of estoppel and the fact that the Principal Member found that there was “*an evolution over time into a different type of psychopathology*” necessarily means that there can be no issue estoppel.
- The injury that is the subject of the s 66 claim is different in kind to that which was the subject of the 2020 Consent Orders, and it is a matter for a merits consideration as to whether there had been other incidents or events (workplace or otherwise) in the worker’s life since the 2020 Determination.



## ***Recommendation***

- When faced with issues of a possible *Anshun estoppel*, I recommend that the Principal Lawyer refers to ADP Nomchong's decision in **BFZ**, as this provides an excellent summary of the principles that the PIC will apply in determining whether an *Anshun estoppel* arises from previous litigation between the parties.





Independent  
Review Office

# **IRO Priorities 2024 and Closing Remarks**

**Jeffrey Gabriel**

A/Independent Review Officer



# QUESTIONS

