

IN THE COUNTY COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION  
SERIOUS INJURY LIST

Revised  
Not Restricted  
Suitable for Publication

Case No. CI-22-00371

TALIB BAKHSHI

Plaintiff

v

VICTORIAN WORKCOVER AUTHORITY

Defendant

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JUDGE: HER HONOUR JUDGE TRAN  
WHERE HELD: Melbourne  
DATE OF HEARING: 11, 12 August 2022  
DATE OF JUDGMENT: 5 October 2022  
CASE MAY BE CITED AS: Bakhshi v Victorian WorkCover Authority  
MEDIUM NEUTRAL CITATION: [2022] VCC 1662

**REASONS FOR JUDGMENT**

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Subject: Serious Injury Application  
Catchwords: Serious injury – back injury – where history of similar back pain  
Legislation Cited: *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic)  
Cases Cited:  
Judgment: Leave granted

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr C Hangay with Mr B Johnson	Zaparas Lawyers
For the Defendant	Mr J Angenent	Wisewould Mahony

HER HONOUR:

- 1 Talib Bakhshi was born in Afghanistan in 1987. At the age of 10, he moved to Pakistan. He had no schooling in either Afghanistan or Pakistan.
- 2 In late February 2013, at age 25, he arrived in Australia via a refugee camp in Indonesia.
- 3 Within a couple of days of arriving in Australia, Mr Bakhshi complained to his doctor of lower back pain. He said the onset of his lower back pain was after lifting weights in a gym in the refugee camp in Indonesia.<sup>1</sup>
- 4 Between February 2013 and June 2016, Mr Bakhshi consulted many medical practitioners about this lower back pain, including general practitioners, a rehabilitation medicine physician, physiotherapists and a pain specialist. He received treatment, including physiotherapy and prescription painkilling medication (Endone, Tramal, Panadol Osteo and Lyrica). By mid-late 2013, he was describing back pain radiating into his legs and buttock.<sup>2</sup> On 7 July 2013, the pain was so severe that he attended the emergency department of the Royal Adelaide Hospital. In September 2014, he had a cortisone injection.<sup>3</sup> By late 2014/early 2015, the clinical records painted a picture of a man who had suffered years of chronic lower back pain with no improvement over the course of his therapy.<sup>4</sup>
- 5 On 23 June 2016, Mr Bakhshi saw Dr Bridget Sawyer, a general practitioner with a special interest in spinal medicine. In her report, she records that Mr Bakhshi was disappointed that there was no solution to his problem with lower back pain. She said that “whilst [Mr Bakhshi] is fit to work he is not fit to partake in jobs

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1 Plaintiff’s Court Book (PCB) 132

2 Amended Defendant’s Court Book (“ADCB”) 128, 129, 130

3 ADCB 141

4 eg: ADCB 143, PCB146-147

which involve heavy lifting or any rotational twisting activities such as that involved with wielding a knife in a butcher shop”.<sup>5</sup>

6 There is no further express reference to back pain in the clinical records tendered in evidence until 7 March 2020.

7 Mr Bakhshi says that by 2017, his lower back pain had recovered, and he was ready to return to work. He initially worked as a mechanic in Adelaide, then in 2018 he moved to Melbourne and commenced work at Hallam Automotive. After about six to eight months, he said Hallam Automotive offered him an apprenticeship as a mechanic, which he accepted. His duties included changing tyres, changing oil, and engine and transmission work, for both cars and trucks. He said it involved heavy lifting at times, including when changing tyres of large vehicles.

8 Mr Bakhshi said that in about February 2020, he started to feel pain in his legs when doing heavy lifting work. Soon after, he said, the pain extended to his feet.

9 On 20 March 2020, Mr Bakhshi said he was changing the tyres on a Ford Ranger. As he lifted a tyre, he said he felt a sudden pain in his lower back and also heard a noise coming from his back. He reported his pain to his manager, who sent him home. He provided a WorkCover certificate stating that he was unfit for his usual duties. No light duties were made available to him. His employment was terminated on 3 April 2020. He has not worked since.

10 This is a serious injury application. Mr Bakhshi claims he has suffered a serious injury as a result of his employment at Hallam Automotive in the form of:

- (a) a permanent serious impairment to his spine; or
- (b) a permanent severe mental or behavioural disturbance or disorder.

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<sup>5</sup> Defendant’s Supplementary Court Book (“DSCB”) 182

11 The critical issue in this proceeding is the extent to which Mr Bakhshi's current condition is referable to his employment with Hallam Automotive, rather than the continuation of a pre-existing condition. A secondary issue is whether his condition (insofar as it relates to his employment) is sufficiently serious to amount to a serious injury, in relation to either pain and suffering or loss of earning capacity consequences.

### **The parties' submissions**

12 Counsel for the defendant submitted that:

- (a) Mr Bakhshi was not a credible or reliable witness;
- (b) I should not be satisfied that Mr Bakhshi had recovered from the significant physical and mental issues he suffered prior to his employment at Hallam Automotive;
- (c) it was not possible to "disentangle" any symptoms now suffered by Mr Bakhshi from those pre-existing issues; and
- (d) any ongoing symptoms suffered by Mr Bakhshi were not sufficiently serious to amount to a serious injury.

13 Counsel for Mr Bakhshi submitted that the Court should consider Mr Bakhshi's evidence in the context of his background of trauma, English language difficulties and lack of education. He accepted that there were issues with the reliability of Mr Bakhshi's evidence, however, he submitted that Mr Bakhshi was not a liar. He submitted that Mr Bakhshi's evidence that he had recovered from his pre-existing back pain was supported by the objective evidence of the clinical records; the radiological evidence; the medical experts; and his return to full-time employment. He submitted that Mr Bakhshi had been able to work successfully for two years but, due to the pain and other symptoms he suffered as a result of his employment, he could no longer work. He submitted that this amounted to a

serious injury in relation to both pain and suffering and loss of earning capacity consequences.

### **Credibility and reliability of Mr Bakhshi's evidence**

- 14 Mr Bakhshi presented at Court with a personal background which included cultural displacement, a history of trauma at the hands of authorities, ongoing mental health issues (including reported symptoms of poor memory), poor English language comprehension and a lack of formal education. His oral and written evidence, and his descriptions of his history to medical practitioners, must be understood in this context.
- 15 Mr Bakhshi was generally an agreeable witness who seemed to do his best to answer the questions asked of him, and made appropriate admissions as to the truth of the clinical records. There was no melodrama or exaggeration in the delivery of his evidence. Nor was there any sign of defensiveness or deliberate evasion. On several occasions, it was apparent that Mr Bakhshi did not adequately understand the questions being asked of him. On other occasions, he seemed to answer either “yes” or “no” to be agreeable; or in a confused manner.<sup>6</sup>
- 16 Mr Bakhshi gave evidence through an interpreter. As is often the case, this was a slow and difficult process. There were times where it was apparent that the interpreter was struggling to adequately interpret the questions asked by counsel for the defendant in a manner capable of being understood by Mr Bakhshi.
- 17 Having regard to these matters, I do not accept that Mr Bakhshi was telling deliberate untruths. However, for the following reasons, it was apparent that Mr Bakhshi's recall of his medical symptoms was not reliable:

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<sup>6</sup> eg: Transcript (“T”) 72, Lines (“L”) 27-30

- (a) it is clear from the numerous reports of back pain in the clinical records between 2013 and 2016 that Mr Bakhshi was suffering significant chronic back pain in this period. Despite this:
- (i) Mr Bakhshi did not disclose any pre-existing back pain in his first affidavit;
  - (ii) Mr Bakhshi's second affidavit contained only a cursory reference to prior back pain;
  - (iii) Mr Bakhshi did not disclose any significant pre-existing back pain to the medical practitioners who prepared reports in this proceeding until May 2022;
  - (iv) Mr Bakhshi did not disclose any pre-existing back pain in his claim form (although this was not completed by him); and
  - (v) even in oral evidence, initially Mr Bakhshi described "a little bit of pain in my lower back".<sup>7</sup>
- (b) Mr Bakhshi frequently could not recall matters put to him in cross-examination. For example, Mr Bakhshi did not recall reporting leg pain prior to working at Hallam Automotive. This is contradicted by the clinical records (although he readily accepted what was recorded in the clinical records);<sup>8</sup>
- (c) in cross-examination, Mr Bakhshi maintained he was happy and not taking medication for anxiety whilst working at Hallam Automotive. This is contradicted by the clinical records which include consultations for high

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<sup>7</sup> T14, L21-22

<sup>8</sup> T27, L15-31

levels of anxiety in 2018 and 2019, for which he appears to be prescribed Mirtanaza, Cymbalta and Endep.<sup>9</sup>

- 18 Mr Bakhshi's recall of his psychological and physical symptoms, even as recent as 2018/2019, was demonstrably unreliable. Accordingly, I do not accept his evidence of past symptoms unless it is corroborated by independent evidence or there is some other good reason that it should be treated as reliable.

**Did Mr Bakhshi recover from his pre-existing lower back pain in 2017?**

- 19 However, a review of the documentary evidence corroborates Mr Bakhshi's evidence that by 2017, he had recovered from his previous symptoms of lower back pain:

- (a) by late 2015/2016, the frequency of Mr Bakhshi's attendances complaining of lower back pain was declining;
- (b) a clinical record from 20 August 2015 by Dr Taha Ali, a rehabilitation medicine physician, records a significant improvement in back pain, and states that as a result, no further appointments have been made;<sup>10</sup>
- (c) there are no express references to any back pain in the tendered clinical records from June 2016 until March 2020;
- (d) although there is a letter on 19 July 2017 from the Neurosurgery Clinic of the Royal Alfred Hospital to Mr Bakhshi's general practitioner, which refers to a referral requesting an outpatient appointment, the referral itself was not able to be obtained by the defendant and so was not tendered in evidence. In the absence of any other supportive evidence from this time, I am not prepared to draw an inference that this referral was made in about mid-2017 and related to lower back pain. In any event, the letter from the Royal Alfred Hospital stated that a specialist outpatient appointment was not

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<sup>9</sup> DSCB 193, 196, 197-8, 198-9

<sup>10</sup> PCB 148

recommended at that point in time, so whatever was recorded in the referral appears not to have been so serious as to justify a specialist appointment;

- (e) there are no references in the clinical records to the prescription of medication for pain between 2016 and 2018, despite previous annual prescriptions of Panadol Osteo and individual prescriptions for Tramal and Lyrica;
- (f) Mr Bakhshi was able to work full-time at Hallam Automotive from 2018 until March 2020; and performed his duties sufficiently well to obtain an apprenticeship after six to eight months of employment; and
- (g) there are reports of muscle aches and pain in October 2019, for which he is prescribed Panadol Osteo. It is not clear whether these muscle aches and pain were in his lower back. Even if they were, this was after he had been working for over a year at Hallam Automotive; and so is consistent with an employment related injury.

20 Having regard to these matters, I am satisfied that Mr Bakhshi was not suffering from significant lower back pain from 2017 until at least mid-2019.

21 For completeness, I note that counsel for Mr Bakhshi also submitted that the radiology revealed a recovery in Mr Bakhshi's spinal issues by 2016 (principally at L5/S1) and then a new injury at a different site in the spine (L3/4):

- (a) a CT Scan from 2013 recorded a minimal disc bulge at L3/4 and a minor disc bulge at L5/S1;
- (b) by 2016, a CT Scan revealed no disc bulge or protrusion at either L3/4 or L5/S1 and an MRI revealed no disc laxity or facet arthropathy at L3/4 or L5/S1; and



(c) in March 2020, after his claimed workplace injury, a CT Scan demonstrated an annular disc bulge at L3/4 and no disc protrusion at L5/S1. The disc bulge at L3/4 was also apparent in MRIs taken in June 2020 and April 2021.

22 The difficulty with this submission is there is very little by way of specific expert evidence as to the significance of changes in the radiology of this nature. I am not prepared to infer that these changes in the radiological observations are significant in the absence of this evidence.

### **What were Mr Bakhshi's duties at Hallam Automotive?**

23 Mr Bakhshi said that he commenced employment at Hallam Automotive in 2018 and was offered an apprenticeship as a mechanic after working there for about six to eight months. He described duties such as tyre changes for cars and trucks which involved heavy lifting and twisting. He described worsening leg pain in conjunction with the performance of his duties from about February 2020, and then a discrete incident on 20 March 2020 when he experienced sudden pain in his lower back and heard a noise in his back. He says he reported this back pain to his boss and was sent home.

24 Mr Bakhshi was not cross-examined about his description of his duties at Hallam Automotive or his account of the incident on 20 March 2020. No evidence was called by the defendant to contradict Mr Bakhshi's description of his role or duties. It is reasonable to assume that the defendant would have called such evidence if it assisted its case.

25 Although not corroborated, I also accept Mr Bakhshi's evidence in relation to the nature and duration of his employment at Hallam Automotive; his duties; and the incident on 20 March 2020.

### **Findings from medical evidence**

26 The reliability of much of the medical evidence is reduced by Mr Bakhshi's failure to disclose his history of back pain to the treating or medico-legal practitioners he

saw prior to June 2022. I do not consider the reports of those medico-legal practitioners who do not consider the details of this past history of particular assistance on the question of causation. It seems to me that the most recent reports are also the most reliable in terms of the nature and impact of Mr Bakhshi's condition. Although I have read and considered all medical reports tendered in evidence, I will therefore focus on the most recent reports in these reasons.

- 27 Mr Bakhshi's history of lower back pain is considered in some detail by Dr Meena Mittal, a treating pain specialist, in her report of 19 July 2022; and in a manner which is consistent with my factual findings of a resolution of his symptoms by 2018. She diagnoses Mr Bakhshi with lumbar spondylosis with pain of myofascial and facetogenic nature. She concludes that:<sup>11</sup>

"Based on the information provided I believe that Mr Bakhshi has a previous history of lumbar spondylosis that appeared to have resolved over a significant period of time. I do believe however that the repetitive activities that he has engaged in as a mechanic involving twisting, turning, working in particularly awkward positions, repetitive bending and lifting activities resulted in aggravation of lumbar spondylosis particularly leading to pain originating from myofascial structures as well as facet joints. Hence I believe that his employment with Hallam Automotive Pty Limited was a significant contributing factor to his lumbar spine injury."

- 28 Dr Hazem Akil, a medico-legal neurosurgeon retained by the plaintiff, was informed by Mr Bakhshi that he injured himself in 2010 whilst at a gym in Indonesia; that Mr Bakhshi was reviewed by musculoskeletal doctors, as well as a neurosurgeon, and that Mr Bakhshi's pain had settled by around 2017. Although this history is not as detailed (or accurate) as that provided to Dr Mittal, it provides the essential features of Mr Bakhshi's pre-existing lower back pain, including its duration for years. Dr Akil nevertheless concludes:<sup>12</sup>

"Based on the mechanism of injury, the history and the findings of the clinical examination Mr Bakhshi does have evidence of aggravation of cervical spondylosis as well as aggravation of lumbar spondylosis. I

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<sup>11</sup> PCB 84

<sup>12</sup> PCB 156

agree that there is no particular surgical intervention that is suitable to treat his symptoms...

In my opinion his work was physically demanding as it included tyre change, lifting heavy tyres as well as engine oil-changing which involved repetitive bending as well as engine transmission which also involves repetitive bending, pushing and pulling. I therefore conclude that his work is a major contributing factor to his current condition.”

- 29 Dr Graeme Doig is a medico-legal orthopaedic surgeon retained by the plaintiff. He notes the history of lower back problems with scans undertaken in 2013 and 2016. He also notes that “Mr Bakhshi maintains his back problems did settle down, however this may require clarification [emphasis added]”<sup>13</sup>. Having raised concerns about whether Mr Bakhshi’s back problems had indeed settled down, he says “There is a strong possibility the lower-back condition was pre-existing...It is most likely the worker would have come to his current condition in the absence of his employment duties with the defendant in 2018 to 2020 for the reasons previously stated”.
- 30 I prefer the opinions of Dr Mittal and Dr Akil to that of Dr Doig. Both Dr Mittal and Dr Akil rely upon the heavy nature of the duties at Hallam Automotive in a context where Mr Bakhshi had previously suffered lumbar back pain but had recovered prior to commencing his employment. This fits well with the facts as I have found them. Dr Mittal and Dr Akil’s process of reasoning was clearer; and their diagnoses more detailed. Dr Mittal also had the advantage of being a treating practitioner who had observed bilateral paravertebral muscle spasm during an examination.<sup>14</sup>
- 31 Dr Doig asserts that Mr Bakhshi would have come to his current condition even without his employment duties at Hallam Automotive for the “reasons previously stated”, but his report does not make it clear what those reasons are. His view that the lower back condition was pre-existing was initially expressed somewhat equivocally (“strong possibility”) and in the context of his concern that Mr

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<sup>13</sup> ADCB 78, see also ADCB 80 (Question 5)

<sup>14</sup> PCB 82

Bakhshi's back problems may not have settled down as reported. This is contrary to my factual finding that Mr Bakhshi's lower back pain had settled by 2017. Dr Doig also assumes that Mr Bakhshi did not suffer an acute injury at work.<sup>15</sup> Again, this is contrary to my factual finding that on 20 March 2020, Mr Bakhshi felt sudden lower back pain and heard a noise in his back when changing a tyre. He relies upon a pre-existing annular tear at L4/5 on the MRI scan of June 2016, but does not explain the significance of this given this annular tear is not observed in MRI scans taken in 2020 and 2021.

32 I accept the opinions of Dr Mittal and Dr Akil that, as a result of his employment, Mr Bakhshi has suffered an aggravation of lumbar spondylosis. I find that this caused Mr Bakhshi's pre-existing but asymptomatic lumbar spondylosis to become symptomatic and Mr Bakhshi to suffer ongoing lower back pain.

### **Does Mr Bakhshi have a serious injury?**

33 I have found that Mr Bakhshi lacked reliable recall of his medical history. However, I have not found that he told deliberate untruths. There was no significant challenge to the veracity of his evidence as to his current symptoms and the consequences of those symptoms for his daily activities and work capacity in cross-examination. The only substantial challenges were some questions about his ability to drive to Adelaide; whether he looked for work; and the length of time he was capable of sitting. No surveillance was tendered, although it is apparent from the medical reports tendered in evidence that surveillance was conducted by the defendant.

34 I accept Mr Bakhshi's evidence that he has pain in his lower back all the time, which is aggravated by activity, cold weather, lifting and sitting or standing for prolonged periods. I accept that he also suffers referred pain in his legs as a result of his spinal impairment. I am satisfied that this lower back pain is the predominant source of disability for him. I accept that he takes prescription

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<sup>15</sup> DACB 78, 81

Gabapentin and Norgesic for this pain, as well as over-the-counter painkillers. I accept that he receives treatment from a pain specialist and physiotherapist, as well as his general practitioner, and has had a sacroiliac joint injection in the past, although this was not effective. I accept that his pain impacts on his capacity to help with household chores, cooking and lawn mowing. I accept that it impacts upon his sleep, which in turn causes daytime tiredness. I accept that it interferes with his intimate relations with his wife. I accept that it interferes with his capacity to engage in active play with his four young children.

35 Mr Bakhshi is of the view that he cannot work as a result of his lower back pain. This view is supported by the evidence of his treating pain specialist, Dr Mittal, who states that he will not be capable of returning to any form of work that is of a “physically laborious nature”. She notes that he may “in theory” be able to engage in sedentary employment for no more than 12-16 hours per week, however:

“...the consistency and reliability would be under question based on the fact that Mr Bakhshi’s levels of pain are high as a baseline, they are easily triggered and he suffers from ongoing lethargy with unpredictable exacerbations of pain on a day-to-day basis.”<sup>16</sup>

36 Similarly, Dr Akil records his opinion that:

“I therefore feel that he is not suitable to do any kind of employment including the ones that are included in the Vocational Assessment Report on 23 December 2021 as well as in the JSS Report of Resolve dated August 2020 where they identified multiple jobs for him. It is very unrealistic for someone in significant chronic pain that is not improving with associated severe depressive disorder that is a consequence of the presence of a chronic pain to be asked to do any of these jobs and I therefore consider them as inappropriate.”<sup>17</sup>

37 Dr Michael Baynes is a medico-legal occupational physician who examined Mr Bakhshi on behalf of the defendant. Dr Baynes also restricts Mr Bakhshi to duties of a sedentary nature, but expresses the view that he could return to work on a limited hours basis five hours per day, three days per week with a

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<sup>16</sup> PCB 85

<sup>17</sup> PCB 157

progressive increase in hours. His report does not expressly address the difficulty of Mr Bakhshi performing such work on a consistent and reliable basis when suffering ongoing chronic and variable pain, particularly in the context of his limited English language skills and mental health issues. I prefer the opinions of Dr Akil and Dr Mittal.

38 Mr Bakhshi is a refugee with no formal education, limited English language skills and significant mental health issues. Despite this, he demonstrated an aptitude and willingness to train in occupations such as mechanic and butcher. Until prevented by his injury, he in fact worked for Hallam Automotive for over 1.5 years. I accept his evidence that he genuinely wants to work, but that, by reason of his chronic lower back pain, those occupations are now ruled out to him. I accept that given his lack of education and language skills, his employment options are likely to be limited to occupations involving some physical labour. I also accept that by reason of his chronic and variable lower back pain, it is unreasonable and unrealistic to expect him to work in any employment on a consistent and reliable basis. In this context, I accept that Mr Bakhshi is unlikely to be able to work consistently and reliably in any occupation for which he is suited in the foreseeable future. He therefore meets the specific criteria for a serious injury by reason of loss of earning capacity consequences in s325(2)(e) of the *Workplace Injury Rehabilitation and Compensation Act* (“the Act”).

39 I accept that Mr Bakhshi has suffered a serious injury as to both pain and suffering and income earning consequences.

40 Finally, I note that Mr Bakshshi also complained of other physical and mental symptoms, including gastroenterological symptoms, neck pain, depression and anxiety. Given my finding that he suffered an aggravation of his lumbar spondylosis as a result of his employment and that that aggravation, taken alone, amounted to a serious injury, it is not necessary for me to consider whether these other symptoms amounted to a serious injury. However, for completeness

I record that I am not satisfied that Mr Bakhshi's gastroenterological symptoms or neck pain resulted from his employment. Whilst I accept that Mr Bakhshi's chronic lower back pain has impacted on his mental health, I am not satisfied that the extent of impact is "severe" as required by the definition of serious injury in s325(1) of the Act.

- 41 I will grant leave to bring proceedings for damages for pain and suffering and economic loss and hear from the parties on the question of costs.

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### **Certificate**

I certify that these 13 pages are a true copy of the reasons for decision of her Honour Judge Tran, delivered on 5 October 2022.

Dated: 5 October 2022

Alana Zepackic  
**Associate to her Honour Judge Tran**