WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

Matter Number: **3343/19**
Applicant: **Hussain Jafar Zsadeh Khademlo**
Respondent: **Cornerstone HR Pty Limited**
Date of Determination: **28 August 2019**
Citation: **[2019] NSWWCC 284**

The Commission determines:

1. The Application to Resolve a Dispute is amended:

    (a) to name the applicant as Hussain Jafar Zsadeh Khademlo;
    (b) to remove "primary" from before "psychological" in the injury description;
    (c) to claim past s 60 expenses of $5,000;
    (d) to withdraw the claim for permanent impairment compensation, and
    (e) to remove the report of Dr R Rowe at pages 46-50.

2. The respondent is to pay the applicant weekly compensation of $767.31 from 6 September 2018 to date and continuing.

3. The respondent is to pay the applicant's medical and related expenses pursuant to s 60.

A brief statement is attached setting out the Commission's reasons for the determination.

Catherine McDonald
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF CATHERINE McDONALD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Hussain Jafar Zsadeh Khademlo was employed by Cornerstone HR Pty Ltd (Cornerstone). In about December 2016, he was referred to the host employer, Austcor, where he was employed as a machine operator. On 23 August 2017, he suffered an injury to his left arm when he reached into a machine to clear a jam. Mr Khademlo suffered an injury to his left arm and a psychological injury.

ISSUES FOR DETERMINATION

2. The parties agree that the following issues remain in dispute:

    (a) the nature and extent of any incapacity for work suffered by Mr Khademlo, and

    (b) whether medical treatment is reasonably necessary as a result of the injury.

PROCEDURE BEFORE THE COMMISSION

3. The matter was listed for conciliation conference and arbitration hearing on 14 August 2019 when Mr L Morgan of counsel appeared for Mr Khademlo and Mr Adhikary of counsel appeared for Cornerstone.

4. A series of amendments were made to the Application to Resolve a Dispute (ARD) -

    (a) to name the applicant as Hussain Jafar Zsadeh Khademlo;
    (b) to remove “primary” from before “psychological” in the injury description;
    (c) to claim past s 60 expenses of $5,000;
    (d) to withdraw the claim for permanent impairment compensation, and
    (e) to remove the report of Dr R Rowe at pages 46-50.

5. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

6. The following documents were in evidence before the Commission and taken into account in making this determination:

    (a) ARD and attached documents;

    (b) Reply.

7. There was no oral evidence.

8. Mr Khademlo was born in Iraq and came to Australia in about 2009. He was employed to work at Austcor as a machine operator.

9. Mr Khademlo said in his statement that he had been instructed to reach into the machine to clear jams without stopping it and thus delaying production. There were two sensors on the packing machine which were intended to detect his hand but he had noticed that one of the sensors had been malfunctioning for months. On 23 August 2017 he reached into the machine to clear a jam and the gate closed, trapping his arm between the hydraulic plate and the gate. A colleague pressed the emergency button and the gate released. Mr Khademlo fell on his back and hit his head and he felt severe pain in his left arm.

10. He was taken by ambulance to Liverpool Hospital where he was treated by Dr Richard Walker. He said he was diagnosed with compartment syndrome and advised to undergo surgery. Following his discharge his arm was painful, stiff and weak. He also felt traumatised by the accident, could not stop thinking about it and had nightmares.

11. Mr Khademlo described his ongoing symptoms. He was certified unfit for work until 22 September 2017 then fit for some employment. He said that the insurer attended the appointments with his general practitioner and "pressured my GP to change my certificate so that I could go back to work." Mr Khademlo did not agree that he was fit to return to work. He returned to work as Austcor but could not continue because he felt dizzy. He said he was disoriented by the medication he was taking. From 5 October 2017 he was certified unfit.

12. Mr Khademlo's general practitioner was Dr Hua, who prescribed analgesic medication. He was referred to physiotherapy.

13. Dr R Walker, orthopaedic surgeon, reported to Mr Khademlo's general practitioner on 28 August 2017. He said that Mr Khademlo was admitted to Liverpool Hospital on 23 August with a crush injury to his left elbow. There were no signs of compartment syndrome but there was significant sensory and motor loss in the hand and forearm. There was "nothing that needed to be acutely released." At review on 28 August, Mr Khademlo was marginally better. Dr Walker was happy for Mr Khademlo to start moving his elbow though Mr Khademlo was reluctant. Dr Walker recommended Tramadol for pain relief and physiotherapy.

14. Dr Walker saw Mr Khademlo again on 18 September 2017. Mr Khademlo had stopped physiotherapy because of severe pain and continued to wear a sling. He said that his condition was deteriorating. Dr Walker noted that Mr Khademlo could move his thumb, limited by pain, but that there was no active movement of his fingers. Dr Walker was unable to explain the altered sensation purely on a peripheral nerve lesion and recommended an MRI scan. He also recommended that Mr Khademlo stop using the sling and attend physiotherapy. The review was a case conference attended by the rehabilitation provider.

15. The MRI scans of the left elbow and left forearm and wrist were undertaken on 22 September 2017. Each was reported as showing no evidence of osseous or soft tissue injury.

16. Nerve conduction studies on 7 December 2017 were normal though the needle EMG examination was terminated early because Mr Khademlo felt faint.

17. Dr Walker reported to Mr Khademlo's new general practitioner, Dr Pope, on 12 December 2017 and said that Mr Khademlo had not made any progress. He was unable to move the arm and had no sensation but was on pain patches for severe pain. He continued to wear the sling and his shoulder was becoming weak. Dr Walker said that he had nothing to offer Mr Khademlo and was unable to explain his symptoms. He recommended a second opinion from Prof G Gumley because of that doctor's experience with hand and peripheral nerve problems. He considered that Mr Khademlo was unfit from a psychological and physical point of view.

18. Dr Walker described the consultation further in his letter to Cornerstone's insurer dated 20 March 2018. The insurer had asked Dr Walker to undertake an independent medical examination. He noted that he had not seen any correspondence from Prof Gumley and assumed Mr Khademlo had not attended. As well as noting that he was unable to perform an independent medical examination because he had treated Mr Khademlo, Dr Walker said:

> "During this last consultation, this gentleman became very aggressive verbally. He was also physically quite intimidating. Most of this aggression was centred around questions of return to work by the rehabilitation provider and the lack of diagnosis and what he perceived as lack of treatment.
>
> I do not wish to see this gentleman in the future."

19. Ms A Fong, physiotherapist, completed a questionnaire for Cornerstone's insurer on 13 December 2017. She said that Mr Khademlo was unable to perform any tasks with his left hand.

20. Mr Khademlo saw Dr A Skapinker as an injury management consultant on 18 December 2017. He was referred by Cornerstone's insurer because "of a clack of a clear diagnosis and failure by the worker to admit to any recovery from symptoms." On examination, Dr Skapinker noted that Mr Khademlo claimed he was unable to move his elbow, hand or fingers. Dr Skapinker observed that Mr Khademlo had a global, non-anatomical loss of sensation over his left arm to the shoulder.

21. In his role as an injury management consultation, Dr Skapinker spoke to Dr Pope. He said:

> "I spoke with Dr Pope by telephone on 191 December 2017. Dr Pope also believes that his presentation is psychological in nature rather than physical. He will continue to certify him unfit for work on the basis that this is a psychological condition that is somehow related to the injury in question.
>
> Dr Pope agrees that Mr Khademlo needs referral for psychiatrist assessment."

22. Dr Skapinker diagnosed a soft tissue crush injury and said that Mr Khademlo presented with a "typical conversion disorder – a mental disorder in which an unconscious emotional conflict is expressed as an alteration or loss of physical functioning , either voluntary motor or sensory."

23. Mr Khademlo saw Dr D Manohar, pain physician, on 20 December 2017. Dr Manohar noted that Mr Khademlo had no movement of his left arm and recommended a bone scan.

24. The bone scan was undertaken on 8 January 2018. It showed:

> "symmetric perfusion to the upper limbs with symmetric activity demonstrated in the long bones of both the upper limbs. Mild arthritic change in the left acromioclavicular joint and spondylosis at level C6/7 within the cervical spine. Mild diffuse activity in the left wrist."

25. Mr Khademlo saw Dr R Schwartz, neurologist, who reported to Dr Pope on 12 February 2018. Dr Schwartz noted that sensation to pinprick was markedly diminished in a global fashion in Mr Khademlo's left hand and that he was unable to move his left arm proximally or distally. However, Dr Schwartz was able to position his left arm in a way that Mr Khademlo could maintain resisting gravity. Dr Schwartz said that the nerve conduction studies did not show evidence of peripheral median or ulnar nerve entrapment. He said that the precise nature of Mr Khademlo's symptoms was not clear and that there did appear to be some embellishment. The EMG findings suggested polyradiculopathy or brachial plexopathy and Dr Schwartz noted that Mr Khademlo had some pain in his neck.

26. Dr Schwartz reported again on 26 February 2018 and said that given the disparity between the extent of Mr Khademlo's "weakness" and the lack of objective evidence, he had referred Mr Khademlo to Dr W Huynh, another neurologist.

27. Dr B Darwish, neurosurgeon, reported to Dr Pope on 15 May 2018. Dr Darwish noted that Mr Khademlo wore an elbow sling and a wrist brace. Dr Darwish was unable to see any obvious wasting. Mr Khademlo complained of numbness of his whole left upper limb in a non-dermatomal distribution. Dr Darwish said that the symptoms could not be explained by the investigations done and requested that further nerve conduction studies and an EMG be undertaken.

28. The further nerve conduction studies undertaken on 4 July 2018 were within normal limits.

Medical certificates and rehabilitation report

29. On 22 September 2017, Dr Hua provided a certificate stating that Mr Khademlo had some capacity for four hours work for five days a week, being fit for carrying up to 5kg with his right arm and no lifting using his left arm. Mr Khademlo was certified unfit from 5 October 2017.

30. With respect to that medical certificate, Mr Khademlo said in his statement:

> "When getting this WorkCover certificate, the insurer came with me to the GP and pressured my GP to change my certificate so that I could go back to work. I did not agree with this because I was still in significant physical pain, as well as suffering from psychological trauma."

31. On 8 January 2018, Dr Pope certified that Mr Khademlo had no current work capacity because there was a "need to define why there is a discrepancy between the clinical presentation and the investigations, possible non-organic problem." Dr Pope noted a referral to a psychologist, Lien Tan.

32. A detailed Rehabilitation Closure Report from Phil Botros of Pinnacle Rehab dated 2 August 2018 appears in the Reply. Mr Botros described a workplace assessment on 13 November 2017. He noted that Mr Khademlo was unable to return to work because his role required him to lift up to 10kg and he was only certified fit to lift 5 kg. Mr Khademlo said he was afraid that his injury would be permanent and that he would lose the use of his left arm. He also noted that Mr Khademlo was a "professional body builder" but he had not been to the gym since the injury.

33. Mr Botros set out the services and activities undertaken which consisted of attending 16 medical case conferences. The second was with Dr Hua on 21 September 2017. Mr Botros recorded:

> "Pinnacle Rehab confirmed Mr Khademlo has had an MRI scan on the 21/09/2017 and is scheduled to have another scan on the 23/09/2017. Dr Hua advised the diagnosis is a crush injury to the left arm with nerve involvement. Pinnacle Rehab advised a Workplace Assessment has not yet been performed and suitable duties have not been confirmed. Dr Hua issued Mr Khademlo with capacity for some form of employment for 4 hours/day 5 days/week from the 22/09/2017 till the 05/10/2017 within the restrictions of up to 5kg lifting with right arm, no lifting with left arm, and no driving."

34. On 5 October 2017, in respect of the following case conference with Dr Hua, Mr Botros recorded:

> "Dr Hua reviewed the MRI results and advised that it showed no significant cause for the symptoms Mr Khademlo is experiencing. Dr Hua advised Mr Khademlo to continue with the pain medication and physiotherapy to prevent deconditioning of his left arm. Mr Khademlo advised he attempted to return to work performing suitable duties however his employer advised him he would be unable to work due to the side-effects of his medications. Dr Hua agreed and issued Mr Khademlo with no capacity for employment due to medication side effects from the 05/10/2017 till the 15/11/2017."

35. Following a case conference with Dr Hua on 23 November 2017, Mr Botros recorded that Dr Hua had agreed that Mr Khademlo could perform some office based duties but Mr Khademlo said he would be unable to do so because of his injury and the medication he was taking. Mr Botros recorded:

> "Mr Khademlo's wife advised he had too much pain and was unable to work. Pinnacle Rehab and Dr Hua advised Mr Khademlo's pain will likely be long-standing and that a return to work has shown benefits in reducing perceived pain and improving function. Mr Khademlo advised all he cared about was recovering from his injury and advised a return to work should not be a priority. At this stage Mr Khademlo became visibly distressed and began slapping and smashing his left arm onto the bed and wall to show that he had no use or sensation in his arm. Mr Khademlo became verbally aggressive towards Dr Hua before leaving the consultation room with his wife reporting he would review with another doctor."

36. Mr Botros attended a case conference with Mr Khademlo and Dr Pope on 15 December 2017. Mr Botros described the conference:

> "Pinnacle Rehab provided Dr Pope with the nerve conduction study results and MRI results of the left elbow and forearm, and Dr Pope reviewed these and noted that these tests do not explain the clinical presentation of Mr Khademlo's left arm. Pinnacle Rehab advised that Nominated Treating Specialist, Dr Walker recommended Mr Khademlo get a second opinion from Professor Graham Gumley, a hand and nerve specialist. Dr Pope advised he would like Mr Khademlo to consult with a neurologist and to undergo another nerve conduction study to confirm the results."

37. Dr Pope said that it was necessary to define the discrepancy between Mr Khademlo's clinical presentation and investigation findings and certified Mr Khademlo unfit.

38. Mr Khademlo said he had arranged an appointment with Prof Gumley on 1 February 2018. Mr Botros attended Prof Gumley's rooms at that time but Mr Khademlo did not.

39. Mr Botros described other case conferences, several of them in the manner set out above – where significant elements of the history was said to have been provided by Pinnacle Rehab. Another example is the conference with Dr Schwartz on 12 February 2018 which included the statement "Pinnacle Rehab advised that a previous MRI of the left shoulder was performed and showed no evidence of damage."

40. The last case conference attended was that on 9 July 2018 with Dr Darwish when "Dr Darwish advised there is no treatment that he can offer Mr Khademlo to address his current presentation and advised a pain specialist may be better able to assist."

Medico-legal reports

41. Mr Khademlo saw Dr M Assem, rehabilitation specialist at the request of his solicitors on 3 August 2018. Dr Assem noted that Mr Khademlo is left hand dominant and does not have any formal qualifications. Dr Assem considered the treatment provided and noted that Mr Khademlo complained of constant pain in his left elbow, forearm and hand, together with loss of sensation, weakness and stiffness. Mr Khademlo said that he is constantly dizzy from medication.

42. Dr Assem undertook an examination and noted some atrophy of Mr Khademlo's left forearm compared to the right. There was marked weakness with almost no movement. There was a greater passive range of movement but some voluntary resistance.

43. Dr Assem said that Mr Khademlo suffered a crush injury to his left forearm and developed pain weakness and sensory loss which "appeared to be confounded by secondary psychological factors leading to the development of chronic pain behaviour." He described his examination:

> "There was 1.5 cm atrophy of his left dominant forearm compared to the right. There was no obvious change in colour, temperature or perspiration. There was no tenderness or allodynia. Sensation was reduced in a global distribution. There was marked weakness with almost no movement present. Passively, he was able to obtain a better range of movement to his fingers, wrist and elbow but it accompanied by some voluntary resistance. There were no dystrophic changes or hair loss. His reflexes were symmetrical. There were no abnormal movements or fasciculations."

44. Dr Assem said:

> "He practically has a flail left arm. Although there may be some functional overlay, his condition is consistent with the injuries he sustained during the course of his employment. Without appropriate treatment, he will continue to have chronic pain, disability and dependence upon narcotic analgesia."

45. Dr Assem considered that Mr Khademlo should be referred to a multidisciplinary rehabilitation program "to reverse the physical, functional and psychological consequences of the injuries that have led to his current incapacity." Dr Assem said:

> "I accept that there may be some psychological and functional features as noted by other medical examiners, but this does not account for the fact that his left arm was crushed and he probably developed a compartment syndrome leading to residual weakness, muscle atrophy and sensory loss that has been perpetuated by lack of active treatment. The absence of pathology on radiological imaging or electro physiological studies does not exclude the fact that he sustained a significant injury to his left arm and continues to have ongoing symptoms and limitations.
>
> Although some medical examiners have been dismissive of his condition as his symptoms are disproportionate to what is normally expected, an alternative diagnosis such as a chronic pain syndrome or chronic regional pain syndrome should be considered. Declining liability for the injury would be counter-productive to his rehabilitation and may lead to the development of entrenched chronic pain behavior and disability."

46. A/Prof M Robertson, psychiatrist, also saw Mr Khademlo at the request of his solicitors and reported on 22 November 2018. A/Prof Robertson reviewed the information provided to him which he said largely related to Mr Khademlo's physical injuries. He obtained the following history:

> "In the period following the injury, Mr Khademlo evolved psychological distress manifesting as depressed mood, self-reproach, diminished self-worth and a sense of grievance and demoralisation of being unable to train and his declined physical state. He is irritable and has developed a propensity to deliberate self-harm with multiple self-inflicted lacerations with a knife "to relieve tension". He has had periods of more florid suicidal ideation but has not acted on these. He is prone to periods of severe anxiety and has had episodes of florid panic attacks and phobic avoidant behaviour. He has impaired concentration, short-term memory, which he believes is in part determined by his anxiety and also by opioid analgesia. He takes fluoxetine 20 mg, which had been of minimal benefit."

47. A/Prof Robertson said:

> "Mr Khademlo is a 32-year-old man who sustained a crush injury to his left elbow. This in itself was a traumatic event, although the nature of his actual pain remain something of an open question - particularly per the varied opinions amongst my orthopaedic and occupational physician colleagues. I must remain agnostic in such debates around the nature of his physical pain. There is however clear evidence of a depressive illness, likely an adjustment disorder with anxiety and depressed mood. It is possible that his limb pain is a manifestation of somatisation that would fit within the DSM 5 category of a somatic symptom disorder in which there is some persisting pain that is the focus of psychological distress and that exists independent of any medical explanation."

48. A/Prof Robertson did not believe that a conversion disorder was the most appropriate diagnosis. He considered that Mr Khademlo required treatment from a psychiatrist and that his prognosis was poor. He said:

> "Mr Khademlo seems to have evolved a state of chronic illness behaviour and is likely to be persistently disabled by this."

49. A/Prof Robertson's comments on the method of assessment of permanent impairment in the report discussed above and his report dated 20 May 2019 are not relevant to this determination.

50. Dr R Breit, orthopaedic surgeon, reported to Cornerstone's insurer on 8 May 2018. He noted that Mr Khademlo's wife was able to act as interpreter and said that "in future an appropriate interpreter must be available."

51. Dr Breit recorded a history of the injury. He noted that Mr Khademlo had worn a sling since that the injury and also wore a wrist support. Mr Khademlo complained of pain from the left side of his neck down to the forearm. He had no pain but complained of pins and needles in his fingers.

52. On examination, Dr Breit noted 2 cm of diminished girth in the forearm. He said:

> "He had no active elbow flexion or extension, pronation or supination. However, when I was examining him having held the right forearm in 90° flexion and at the same time doing an assessment on the right arm so that he was distracted, I gently removed support for the left forearm which stayed at 90° flexion. I then resupported the area.
>
> At a later stage, when he was seated and I was trying to flex the left elbow, it did not bend due to muscular resistance. However, when I formally tested triceps with the arm in a position to neutralise gravity, there was no movement, not even a muscle twitch."

53. Dr Breit said:

> "I cannot provide you with any musculoskeletal diagnosis.
> The findings are not consistent with organic pathology, setting aside the matter of the inconsistency. That leaves one with two options, either this is feigned or there is a psychiatric disorder."

54. Dr Breit did not see why Mr Khademlo could not be undertaking physical pre-injury duties on a physical basis.

55. A former solicitor for Cornerstone arranged an examination by Dr P Whetton, psychiatrist, who reported on 27 March 2019. The report does not indicate that an interpreter was present.

56. Dr Whetton obtained a history of the incident and said:

> "Importantly, treatment by his general practitioner was with opioid analgesics, initially Tramadol and Targen, and later Fentanyl and it is noted that Mr Khademlo has remained on opioids for non-cancer pain the last 18 months. Prolonged treatment with opioids is not recommended for non-cancer pain."

57. Dr Whetton noted that the opioid analgesia was prescribed by Mr Khademlo's general practitioner whom he saw every fortnight. When reporting on his examination, Dr Whetton said:

> "He demonstrated a scar on his abdomen which he said had been the result of his taking to himself with a knife in a fit of frustration."

58. Dr Whetton suggested obtaining the notes from Liverpool Hospital concerning the attendance when the scar was stitched.

59. Dr Whetton said:

> "He has complaints of ongoing pain and limitation in functioning. From the enclose documents his physical complaints are beyond a demonstrable physical pathology and the accuracy of his reporting is questioned.
>
> From the psychiatric perspective, he gives symptoms of frustration, disheartenment and some depression of mood.
> …

> From the history that he gives he provides symptoms which lead to a diagnosis of an Adjustment Disorder with Depression. There is the complication of his being prescribed long term opioid analgesics which may well be adding to his described poor functioning in his life and this clouds the diagnosis."

60. Dr Whetton said that Mr Khademlo's return to pre-injury duties would depend on recovering the use of his left arm and said that he would be more likely helped by physical rehabilitation rather than medication.

Dispute notices

61. Cornerstone's former insurer issued a dispute notice denying the claim for compensation on 25 July 2018. It denied that Mr Khademlo was prevented from working as a result of his injury and that he required treatment. Subject to the provision of certificates, payments would continue until 6 September 2018. The notice summarised the treatment undergone and investigations undertaken and concluded:

> "We note that you sustained an injury to your left upper limb on 23 August 2017. You underwent a total of 15 sessions of physiotherapy to treat the strain to your left elbow and shoulder. All MRI Imaging and Nerve Conduction Studies have been identified to be within normal limits for your left elbow, shoulder and cervical spine. This was agreed by Dr Walker, Dr Rowe and Dr Breit in their reviews of you, Dr Breit also recommending that you are fit for your pre-injury duties, as undertaken prior to 23 August 2018. Given the distinct lack of pathology, we consider that your left elbow, shoulder and cervical spine injury has resolved and we do not accept you are suffering an incapacity as a result of the injury sustained on 23 August 2018. Accordingly, we do not accept that you are prevented from working as a result of your injury and dispute liability for the same pursuant to Section 33 of the *Workers Compensation Act 1987*.
>
> As such we do not accept that any further treatment is required or reasonably necessary for the resolved left elbow, left shoulder and cervical spine strain and dispute any liability for treatment pursuant to Section 60 of the *Workers Compensation Act 1987*."

62. Cornerstone's current insurer issued a further dispute notice on 8 April 2019 in respect of a claim for permanent impairment compensation as a result of a psychological injury. The notice also disputed any liability for weekly compensation and s 60 expenses. The basis of the denial was that Dr Whetton had determined that Mr Khademlo suffered a secondary psychological injury.

Pre-injury medical reports

63. The notes of Mr Khademlo's previous and current general practitioners are produced in the ARD in their entirety. Dr Hua referred Mr Khademlo to Dr Darwish on 13 March 2017 for management of cervical disc disease. He referred Mr Khademlo to Dr A Sanki on 4 April 2017 for management of a cervical disc prolapse with severe radiculopathy.

64. A Chronic Disease Management report dated the same day noted that Mr Khademlo had physio the previous year and was referred to Dr Teychenne. The report noted that Mr Khademlo had a recent exacerbation of chronic neck pain, that he had been unable to work for the last month and had stopped going to the gym. Also on 4 April 2017, Dr Hua referred Mr Khademlo for physiotherapy for his neck. A report from Ms A Fong, physiotherapist, dated 26 April 2017 confirmed that Mr Khademlo's pain was improving and that he had resumed going to the gym.

SUBMISSIONS

65. The submissions of counsel were recorded. I will summarise them briefly.

66. Mr Morgan said that the best description of the injury was in the report of Dr Skapinker who diagnosed a conversion disorder. Four months later, Mr Khademlo saw Dr Breit who considered that Mr Khademlo's physical symptoms were not due to the injury. Though this was inconsistent with the opinion of Dr Skapinker, liability was declined.

67. Mr Morgan said that Dr Assem provided a well-considered and logically consistent report and said that referral to a multidisciplinary rehabilitation program was required, without which Mr Khadelmo's condition would remain entrenched. Though A/Prof Robertson became "side tracked" with his categorisation of the injury, his opinion was that Mr Khademlo's prognosis was poor and that he was likely to continue to be disabled by a condition in which chronic illness behaviour had become entrenched.

68. Mr Morgan said that the insurer's denial of liability was inconsistent with Dr Whetton's acceptance that it was appropriate to make a psychological diagnosis. The medical evidence showed that there were persisting issues in 2017 and 2018 for which there was a need for focussed treatment which did not occur. Dr Skapinker foreshadowed the likely outcome and recommended psychiatric treatment and Dr Whetton noted the dangers of prescription of unsafe levels of opioid medication. Dr Whetton accepted that Mr Khademlo was unfit. Mr Morgan said that I would accept that Mr Khademlo was totally incapacitated and that he was entitled to ongoing weekly compensation.

69. Mr Adhikary said that the evidence was to the effect that Mr Khademlo was not totally incapacitated. At its highest, the evidence was that he was unable to perform pre-injury duties but there was no reason why he could not perform suitable duties. Mr Adhikary stressed the contents of the medical certificates in late 2017 and the references in the report of Pinnacle Rehab to the opinions of Dr Hua and Dr Walker that Mr Khademlo could undertake suitable duties, while Mr Khademlo considered that he could not.

70. Mr Adhikary referred to the decision of Acting President Roche in *Boral Recycling Pty Ltd v Figueira*[1] (*Figueira*) where Roche DP said:

> "Even if it were accepted that Ms Figueira thought she was fit for full-time work, and the Arbitrator (correctly) did not believe that that was her view, that was not determinative of the issue in dispute. First, a worker's subjective view of his or her fitness for work will rarely be determinative, especially in a case involving a psychological injury, and the Arbitrator was not bound to accept the job applications as evidence of a capacity to work. He had to consider the whole of the evidence, including the medical evidence, and make an assessment based on that evidence."

71. Mr Adhikary said that Dr Whetton's opinion was that Mr Khademlo's return to pre-injury duties will depend on recovery of his left arm and that his psychiatric state was not leading to an inability to work was evidence that Mr Khademlo was fit for suitable duties. He took me to the report of Mr Botros of Pinnacle Rehab and the summaries of the case conferences. In particular he said that Dr Pope did not consider that Mr Khademlo was not fit for suitable duties but wished to obtain a definitive diagnosis before providing appropriate certification.

72. Mr Adhikary said that a finding of total incapacity depended wholly on Mr Khademlo's evidence but that there were a number of inconsistencies in that evidence. First, Mr Khademlo said that he was told at Liverpool Hospital that he had compartment syndrome and that he might require surgery which was inconsistent with Dr Walker's report.

[1] [2014] NSWWCCPD 41 at [38].

73. Second, Mr Khademlo told Dr Whetton that he had stabbed himself in the abdomen but Dr Pope's note for 22 March 2018 was that he had been stabbed the previous week. A Centrelink certificate from Dr Pope dated 17 April 2018 said that Mr Khademlo was unfit because of "multiple lacerations abdomen and chest from knife attack" as well as "paralysis left arm."

74. The third inconsistency relied on by Mr Adhikary was that Mr Khademlo said in his statement that he had never suffered a major medical condition or physical injury which was inconsistent with the referral to Dr Darwish in 2017 for management of cervical disc disease and the reports which noted that Mr Khademlo had stopped going to the gym.

75. Mr Adhikary said that Dr Whetton did not recommend psychological treatment.

76. In response to my question as to the nature of the suitable duties for which Mr Khademlo was fit, Mr Adhikary said that Mr Khademlo was fit for 20 hours work per week.

77. In reply, Mr Morgan said that the medical certificates on which Mr Adhikary relied were issued during the period when weekly compensation was being paid. The lack of a diagnosis was immaterial to questions of capacity. Mr Khademlo had no training for office work and the medical evidence shows that he has a limited command of English. Mr Morgan referred to Mr Khademlo's evidence with respect to the request of the rehabilitation provider to certify him fit for suitable duties.

78. With respect to the submissions made about credit, Mr Morgan noted that Dr Breit found evidence of wasting. He said that the failure to provide the treatment recommended by Dr Skapinker and to refer Mr Khademlo to a pain specialist, had led to the condition becoming entrenched.

FINDINGS AND REASONS

79. Mr Adhikary's submissions focused on the extent of Mr Khademlo's incapacity. He said that Mr Khademlo had been fit for suitable duties since September 2017 and remained so.

80. That is not the basis on which the claim was disputed by Cornerstone's insurers. The first dispute notice stated that the condition had resolved and that Mr Khademlo did not suffer any incapacity. The second notice disputed the claim on the basis that Mr Khademlo suffered a secondary psychological injury.

81. Mr Adhikary did not make an application under s 298A(4) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) to rely on the alternative argument that Mr Khademlo remained unfit for work. However, Mr Morgan did not object to Mr Adhikary's submissions.

82. Mr Adhikary did not articulate what the nature of the suitable duties for which Mr Khademlo was fit, other than to suggest 20 hours per week, of perhaps office work. There is no evidence of the tasks involved in that work nor of the amount he might be paid for that work.

83. Suitable employment is relevantly defined in s 32A as:

> "**'suitable employment'**, in relation to a worker, means employment in work for which the worker is currently suited:
>
> (a) having regard to:
>
> (i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and

(ii) the worker's age, education, skills and work experience, and

(iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and

(iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and

(v) such other matters as the WorkCover Guidelines may specify, and

(b) regardless of:

(i) whether the work or the employment is available, and

(ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and

(iii) the nature of the worker's pre-injury employment, and

(iv) the worker's place of residence."

84. Even though the legislation was then different, the statement by Mahoney P (with whom the other members of the Court of Appeal agreed) in *Lawarra Nominees Pty Ltd v Wilson*[2] remains apposite:

> "… it is necessary to bear in mind that what is in question is capacity or incapacity 'for work'. The legislation is not concerned merely in the abstract with work or work capacities as such. It is concerned with the capacity to do work of a particular kind or kinds and in a context which will produce income. I do not wish by what I say to narrow the scope of the enquiry to be undertaken in the assessment of capacity or compensation. But in assessing whether a worker is wholly or partially incapacitated and to what extent, the Court will ordinarily not be concerned, for example, to determine in an artificial or theoretical situation what he could do if the work available to him would allow him to stand for a time, sit for a time, cease when the pain he suffers becomes unacceptable, and generally work as, in his condition, he would fairly wish to work. The Court does not, as it were, spell out according to the periods of time which could be spent at work in such a way and what he could do during those periods, the extent of his capacity for work. The exercise is, in my opinion, a more practical exercise. It involves the assessment of a capacity 'for work' having regard to the realities of the labour market in which he is to be engaged."

85. The labour market in which a worker is likely to be engaged is not relevant under s 32A[3].

86. There is no evidence as to the tasks likely to be involved in the work for which Cornerstone contended Mr Khademlo might be fit. His English is limited. That is confirmed by the report of Dr Breit who insisted on an interpreter at any future examination. Mr Khademlo said in his statement that he has only done physical work. Some of the medical reports say that he worked in retail in Iran. There is no evidence that he would be capable of undertaking office work of any kind.

[2] [1996] NSWSC 106; (1996) 25 NSWCCR 206.
[3] *Wollongong Nursing Home Pty Ltd v Dewar* [2014] NSWWCCPD 55 at [54]-[56].

87. In any event, the period during which Mr Khademlo was certified fit for suitable duties was short lived. Mr Khademlo did return to work in October 2017 but was unable to continue because of the side effects from the medication he took. When he commenced to see Dr Pope in December, he was certified as having no current work capacity.

88. When the medical evidence is read as a whole, it is clear that Mr Khademlo remains totally incapacitated for work. That incapacity arises from a significant injury to his left forearm and his reaction to that injury. The psychological or chronic pain component of that injury has not been adequately treated. It is a medical condition rather than Mr Khademlo's subjective belief about his own capacity.

89. Dr Skapinker identified the injury in his report dated 18 December 2017 as a conversion disorder. He recommended referral to a psychiatrist. That referral did not occur. Dr Skapinker's recommendation was made about the same time that Dr Pope issued a certificate stating that Mr Khademlo was totally unfit because it was necessary to resolve the discrepancy between clinical presentation and investigation findings. That certificate is consistent with Dr Skapinker's opinion and was issued after a conversation between Dr Skapinker and Dr Pope.

90. A few months later in May 2018, Dr Darwish was unable to offer any treatment but suggested further investigations. There is no report of the subsequent consultation with Dr Darwish other than the report of Mr Botros of Pinnacle Rehab. Dr Darwish recommended referral to a pain specialist at a consultation on 9 July 2018. That referral did not take place because the claim was disputed on the basis of Dr Breit's opinion dated 8 May 2018. It does not appear that Cornerstone's insurer considered the treatment recommended by Dr Skapinker and Dr Darwish.

91. There was no basis to dispute the claim based solely on Dr Breit's report. He found wasting of Mr Khademlo's left forearm. He said that the condition was not consistent with organic pathology and was either feigned or consistent with a psychiatric disorder. Instead of considering that statement in the light of the opinions of Dr Skapinker and Dr Darwish, Cornerstone's insurer declined the claim. It did not consider whether Mr Khademlo might suffer a psychiatric disorder.

92. Dr Assem saw Mr Khademlo in August 2018 and agreed that a lack of appropriate treatment had led to chronic pain behaviour, loss of function and dependence on narcotic analgesia. That opinion is consistent with Dr Skapinker's diagnosis several months before.

93. It is also consistent with the opinion of Dr Whetton who diagnosed an adjustment disorder. He considered that treatment was required. Contrary to Mr Adhikary's submission that Dr Whetton's report provides support for a finding of partial incapacity, his opinion is that Mr Khademlo will not return to pre-injury duties until he recovers the use of his left arm. He has not recovered the use of his left arm.

94. I am satisfied that Mr Khademlo suffered a crush injury to his forearm which has led to the development of a psychological disorder. That psychological disorder has caused him to stop using his left arm. The condition renders him totally unfit for work.

Credit

95. Mr Adhikary's submissions with respect to credit are not persuasive. The decision I have made is based on the medical evidence rather than Mr Khademlo's evidence about his capacity.

96. The evidence suggests a pre-existing condition in Mr Khademlo's cervical spine. Though the first dispute notice refers to a cervical spine injury, such an injury does not form part of the claim in these proceedings. There is no evidence which suggests a connection between the condition in his cervical spine and the left arm injury and its consequences. The evidence to which Mr Adhikary took me shows that after physiotherapy treatment, Mr Khademlo had recovered sufficiently to resume going to the gym.

97. There is no inconsistency in the evidence with respect to the stabbing injury noted by Dr Whetton. A/Prof Robertson also obtained a history of self-inflicted injuries. A careful reading of the evidence to which Mr Adhikary took me does not suggest that the wounds were anything other than self-inflicted.

98. There is an inconsistency between the description of the initial treatment at Liverpool Hospital and Mr Khademlo's statement. That inconsistency appears to be no more than an error in the statement.

99. I do not accept Mr Adhikary's submission with respect to credit.

Orders

100. Counsel did not make any submissions as to the amount to be awarded for weekly compensation. The amount said in the ARD to be in dispute in the second entitlement period is $767. That is roughly 80% of $959.14 nominated as pre-injury average weekly earnings and not disputed in the Reply. The precise figure for 80% is $767.31 and that is the amount I adopt for the purpose of the award of weekly compensation.

101. There is ample evidence that Mr Khademlo has undergone treatment and that he requires treatment in the future. It is to be hoped that Mr Khademlo will be able to have appropriate medical treatment such as that suggested by Dr Assem.

102. I order Cornerstone to pay Mr Khademlo weekly compensation in respect of total incapacity for work from 6 September 2018 to date and continuing.

103. I order Cornerstone to pay Mr Khademlo's medical and related treatment expenses pursuant to s 60.