WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **424/19**
Applicant: **Nader Abdel-Malek**
Respondent: **The Star Entertainment Group Ltd**
Date of Determination: **1 July 2019**
Citation: **[2019] NSWWCC 228**

The Commission determines:

1. The applicant suffered an injury to his back within the meaning of section 4 of the *Workers Compensation Act 1987* with a date of injury of 15 July 2015.

2. Award for the applicant on the claim for weekly benefits compensation. The respondent is to pay the applicant pursuant to section 36 and 37 of the *Workers Compensation Act 1987*:

    (a) for the period 15 July 2015 to 13 October 2015, $182.88 per week; and

    (b) for the period 14 October 2015 to 10 January 2018, $450.85 per week.

3. The respondent is to have credit for any payments made during the above periods.

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

Nicholas Read
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 NICHOLS READ, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Nadel Abdel-Malek, the applicant, was employed by the Star Entertainment Group Ltd, the respondent as a security guard.

2. The applicant alleged he suffered an injury to his left knee and lumbar spine as a result of a fall at work on 15 July 2015.

3. The applicant made a claim for workers compensation, including a claim for an arthroscopy recommended by Dr Doron Sher as well as a claim for weekly benefits compensation.

4. The respondent declined liability on the basis that the applicant's left knee condition had resolved, the claimed surgery was not reasonably necessary, the applicant did not suffer an injury to his lumbar spine, and the applicant was not incapacitated for work as alleged.

5. The matters in dispute were previously notified in letters issued under section 74 of the *Workplace Injury Management and Workers Compensation Act 1998* dated 16 October 2015 and 6 March 2018.

PROCEDURE BEFORE THE COMMISSION

6. The parties attended a conciliation conference and then arbitration on 18 April 2019.

7. Ross Goodridge of counsel appeared for the applicant and Josh Beran of counsel appeared for respondent.

8. The matter could not be concluded on 18 April 2019. It was agreed that as a preliminary matter the issue of whether the claimed surgery was reasonably necessary would be determined and the remaining issues would be stood over for a further conciliation/arbitration.

9. On 13 May 2019, I gave an oral decision via telephone in which I gave an award for the applicant on his claim for future medical expenses and ordered the respondent to pay the costs of the claimed left knee arthroscopy and incidental expenses. These reasons are to be read in conjunction with the reasons given orally on 13 May 2019.

10. The matter was listed for further conciliation/arbitration before me on 7 June 2019.

11. Again, Mr Goodridge of counsel appeared for the applicant and Mr Beran of counsel again appeared for the respondent.

12. I was satisfied that the parties to the dispute understood the nature of the application and the legal implications of the assertions made in the information supplied. I used my best endeavours to attempt to bring the parties to the dispute to a settlement acceptable to all of them. I was satisfied that the parties had sufficient opportunity to explore settlement and that they were unable to reach an agreed resolution of the dispute.

ISSUES FOR DETERMINATION

13. The issues for determination were as follows:

    (a) Whether the applicant suffered a compensable injury to his lumbar spine on 15 July 2015;

(b) Whether the applicant is entitled to weekly benefits compensation as a result of injuries to his left knee and lumbar spine, and if so, at what rate should weekly benefits compensation be paid.

14. For the purposes of the claim for weekly benefits compensation, the applicant adopted the respondent's wages schedule. It was agreed between the parties that the applicant's loss for the periods claimed was:

(a) For the period 15 July 2015 to 13 October 2015, $182.88 per week;

(b) For the period 14 October 2015 to 10 January 2018, $450.85.

DOCUMENTS

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

(a) Application to Resolve a Dispute (ARD), and attachments;

(b) Reply filed by the respondent (Reply), and attachments; McMahon;

(c) Application to Admit Late Documents lodged by the applicant dated 10 April 2019 (applicant's ALD);

(d) Application to Admit Late Documents lodged by the respondent on 11 April 2019 (respondent's ALD).

EVIDENCE

The applicant's evidence

16. In a statement dated 30 January 2018 the applicant gave the following relevant evidence:

(a) The applicant confirmed he had a prior history of problems with his left leg having been born with a clubbed left foot for which he had corrective surgery on his knee in 2001 (ARD page 66, paragraph 22);

(b) The applicant said post-surgery he had no ongoing issues with his left knee and was able to engage in activities, including playing rugby league;

(c) The applicant said prior to his fall on 15 July 2015 his left knee was asymptomatic, but since that day it had been problematic (ARD page 66, paragraph 26);

(d) The applicant said he commenced employment with the respondent in May 2015 on a casual basis;

(e) The applicant said on 15 July 2015 he slipped on the bathroom floor and landed heavily after which he felt immediate pain in his knee;

(f) The applicant said prior to the fall he had never had any problems with his back (ARD page 66);

(g) The applicant said the following his injury he was off work for one to two weeks before returning on light duties. He continued to undertake light duties up until the respondent's insurer denied liability for his claim. The applicant said:

> "Immediately following my injury, I was off work for approximately 1-2 weeks before I returned l work on light duties. These duties involved limited hours and me only doing seated duties. I continued these duties up until the insurer denied liability [16 October 2015]. At that point, my employer advised that no further suitable duties would be provided and I was unable to return to my normal duties, which required me to be on my feet for protracted periods. I have not been able to return to work since...Since that time I have been unable to find any work for which I am suitably qualified by my, age, education, training and experience. The only work which I have previously undertaken is in the construction industry for which I am now absolutely not fit. I cannot do kneeling, squatting, lifting, I cannot be on my feet, I am unable to go up and down stairs…Even as a security officer, I am required to be my feet for the entire time. I now simply not able to cope with those restrictions. I can only stand for approximately 15 minutes before I need to be seated" (ARD page 66);

(h) The applicant said he had considered alternative employment, such as office work but was prevented from doing such work because of his back. According to the applicant, he could not sit for more than 45 minutes without experiencing a significant increase in back pain (ARD page 67).

17. In a supplementary statement also dated 30 January 2018 the applicant said as a result of his physical injuries he had become significantly depressed and had been placed under a mental health plan arranged by Dr Prakash. The applicant said he remained on antidepressants and other medication which affected his concentration (ARD page 68).

18. The applicant said any physical activities were difficult for him and he could not stand or sit for long periods (ARD page 68). The applicant said he would not be employable "on the open labour market" and there was no way he would be able to work in a full-time capacity and in a part-time capacity he would be unreliable at best (ARD page 68).

19. The applicant said:

> "To make matters worse I now suffer depression. This makes it difficult for me to be around people. I tend to be locked away; I'm a bit of a loner and shut myself away from family. I find it very difficult to socialise and get out and about" (ARD page 69).

20. The applicant said he would also have difficulty travelling to seek and attend work (ARD page 69).

21. In a further supplementary statement, the applicant said in April 2017 he injured his knee and shoulder when falling from a quad bike in Thailand. This information was not included in the earlier statements. The applicant said the affects from this injury were "short lived" and his condition returned to the way it had been prior to that accident (applicant's ALD page 20).

Medical evidence

22. The applicant saw his general practitioner, Dr Basobas, on 16 July 2015. The clinical notes record the applicant fell at work on 15 July 2015 and injured his left knee. The notes also record that the applicant complained of low back pain after the fall which was tolerable (ARD page 28).

23. The clinical notes dated 30 July 2015 record the applicant continued to complain of left knee pain and a clicking sound. The notes record the applicant was concerned about his low back pain as it was getting worse since he had his left knee injury: "IW [injured worker] anxious that he might have other back problems as well when he fell and injured his left knee" (ARD page 26).

24. The clinical notes dated 6 August 2015 record the applicant's symptoms were improving and he was not using his walking stick. The notes record the applicant continued to complain of back pain (ARD page 25 – 26).

25. The clinical notes dated 21 August 2015 record the applicant continued to complaint of pain, especially when walking. The notes record the applicant was feeling depressed due to his left knee injury and that since the injury he also had back pain (ARD page 25).

26. On 21 August 2015, the applicant was referred to Dr Doron Sher, orthopaedic surgeon (Reply page 66). An MRI was undertaken on the applicant's left knee on 7 September 2015 (Reply page 72).

27. On 27 August 2015 applicant had an x-ray on his lumbar spine (ARD page 8, 24, 33).

28. The clinical notes dated 3 September 2015, seven weeks post injury, record the applicant was experiencing pain in his left knee especially on prolonged standing and complained of low back pain. The notes record the outcome of the x-ray were discussed.

29. The clinical notes dated 18 September 2015 record the applicant's symptoms remained the same. The notes record the applicant felt depressed due to his current condition (ARD page 24).

30. The clinical notes dated 22 September 2015 record the applicant was complaining of severe low back pain at work. It was recorded that the pain in the applicant's lower back was progressively getting worse (ARD page 23).

31. A physiotherapy management plan dated 23 September 2015 records that the applicant had restricted active range of movement in his knee and lower back (ARD page 19).

32. The clinical notes dated 6 October 2015 record the applicant's back pain was improving but aggravated on prolonged sitting. Left knee pain was better, but the applicant still walked with a limp (ARD page 23).

33. There are further clinical notes post-dating the fall on 15 July 2015 that post-date record complaints of ongoing back pain are recorded (ARD page 30 - 31, Reply page 95).

34. On 8 December 2015 Dr Hany Hanna, general practitioner, issued a medical certificate stating the applicant was receiving medical treatment and would be unfit to continue his usual occupation for a period of one day (Reply page 112).

35. On 9 December 2016 Dr Hanna referred the applicant to Dr Sher. The referral stated the applicant was still having severe left knee and back pain and was being referred for "continuous treatment" (Reply page 118).

36. In a letter addressed to the Unified Healthcare Group dated 9 December 2016 Dr Hanna advised that the applicant's condition had not improved with physiotherapy, rest, and nonsteroidal anti-inflammatory drugs. Dr Hanna said the lack of improvement that applicant had been referred to a specialist again. Dr Hanna said the applicant could not undertake sedentary work because he was unable to sit for more than 15 minutes on a chair due to severe back pain (Reply page 119).

37. On 5 May 2017, Dr Hanna referred the applicant to Dr Bijoy Thomas after he sustained an injury to his left knee in the quadbike accident (Reply page 121). Dr Hanna also referred the applicant for a CT scan on his lumbar spine (ARD page 37).

38. On 9 May 2016, the applicant had a CT scan on his lumbar spine. The outcome of the CT scan was that there were no features of nerve root compression or impairment, no significant

wedging or loss of lumbar vertebral body height and the appearances of both sacroiliac joints may represent early sacroiliitis (ARD page 37).

39. In a report dated 24 May 2017 Dr Thomas said the applicant had sustained an injury to his left knee five weeks ago and recommended the knee be drained (Reply page 171). Dr Thomas noted the complex pathology in the applicant's knee, part of which I am comfortably satisfied came about as result of the fall on 15 July 2015.

40. In a letter dated 28 July 2017 Dr Hanna stated the applicant was suffering from major depression and anxiety and also back pain due to multiple disc lesion and pain in his left knee. Dr Hanna said the applicant was a candidate for the disability pension (Reply page 124).

41. Further clinical notes in August 2017 record complaints of knee pain and a depressed mood (Reply page 88).

42. On 25 August 2017, the applicant was referred to Dr Medhat Guirgis. The referral letter notes the applicant had injured his neck at work and had a CT scan for his cervical spine which showed multiple disc lesions (Reply page 125).

43. On 25 May 2018, the applicant was referred to Dr James Burrell due to fainting and numbness of the left side of his face. The referral letter stated he been admitted to hospital a few times this year (Reply page 147).

44. In a report dated 4 July 2018 Dr James Burrell recorded history of the applicant suffering facial sensory symptoms and unsteadiness over a period of five months which began abruptly after an incident "while working in a garage" (Reply page 194). Dr Burrell said:

> "He had a couple of falls, and find his confidence when walking is much reduced. The latest physical symptoms occur in the context of exacerbation of anxiety and depression symptoms. He has difficulty concentrating, and is concerned about the nature of his symptoms. Nader has had significant depression and anxiety in the past which was treated with a combination of psychological therapy and medication. He was also born with a club foot on the left-hand side. In 2015, he had a fall while at work which resulted in a lower back problem, as was [sic.] a knee injury, for that reason he is now workers compensation..." (Reply page 194).

45. There are various certificates of capacity in the documents. They can be summarised as follows:

    (a) From 16 July 2015 to 20 October 2015 the applicant was certified by Dr Basobas as having capacity for usual hours on usual days with significant restrictions (no lifting/carrying, standing as tolerated, no pushing/pulling, no squatting/kneeling and "seated duties only") (Reply page 17, 45, 49, 53, 57, 60, 64, 66, 70, 75, 78, 81). The first reference to a back injury ("muscular strain lower back") is recorded in the certificate dated 22 September 2015 (Reply page 78). The certificate specifically recorded that the applicant had experienced tolerable low back pain when he sustained an injury to his left knee on 15 July 2015, and the pain was progressive and gradually increasing in intensity and worse on 22 September 2015 (ARD page 16). The respondent declined liability for the claim on 16 October 2015 (ARD page 70). There are no further WorkCover certificates of capacity after that date.

    (b) Dr Hanna completed a Centrelink Medical Certificate on 20 June 2017. The certificate records a diagnosis of back and left knee pain and major depression, both said to be permanent in nature. The certificate recorded the prognosis was uncertain and for the period 20 June 2017 to 20 September 2017 inclusive the applicant could not do his usual work/study or any other work for eight hours or

more per week (Reply page 123). A similar certificate was issued for the period 25 May 2018 18 June 2018 (Reply page 146) and 14 November 2017 to 4 February 2018 (Reply page 127).

Forensic medical reports

46. The applicant saw Dr Steven Rimmer, orthopaedic surgeon, on 30 September 2015. In a report of the same date Dr Rimmer recorded history of the applicant's fall on 15 July 2015. Dr Rimmer opined the applicant left knee injury was a pre-existing condition and not related to the fall. For the reasons set out in my oral decision given on 13 May 2019 I rejected Dr Rimmer's opinion in respect of the left knee.

47. Dr Rimmer saw the applicant again on 8 December 2017. Dr Rimmer recorded a history of the applicant injuring back on 15 July 2015, which he said was in marked contrast to the history provided previously when there was no mention of a back injury. Dr Rimmer also said the applicant admitted to becoming depressed to the point of considering suicide and being addicted to pain medications (Reply page 8).

48. Dr Rimmer said on examination that the applicant had painful restricted range of motion to his lumbar spine and diagnosed mechanical lumbosacral back pain secondary to morbid obesity (Reply page 11).

49. Dr Rimmer said on the balance of probabilities the applicant's back pain was due to his morbid obesity (Reply page 12).

50. In respect of the applicant's fitness for work, Dr Rimmer said the overwhelming problem was narcotic dependence and the applicant was unsuitable to attend the workplace until this was addressed and resolved (Reply page 14).

51. Dr Rimmer also said it defied logic why no health professional had addressed the applicant's morbid obesity (Reply page 15).

52. The applicant saw Dr WG D Patrick, general and vascular surgeon, on 13 October 2016. In a report dated 7 January 2017 Dr Patrick noted the applicant's symptoms included ongoing low back pain:

> "He has some degree of low back pain ever since the accident (but it appears it has not been actually documented by treating doctor until 22 September 2015 a little over two months post-accident)" (ARD page 4).

53. Dr Patrick noted the applicant was in the super obese category. He said there was no clinical evidence for radiculopathy arising at the lumbar spine on examination (ARD page 5).

54. Dr Patrick said there was little doubt the applicant sustained a significant injury to his left knee at the time of the accident and, on the balance of probabilities, he also sustained a lumbar spine injury. Dr Patrick believed it would be reasonable and appropriate for the applicant to be referred for an MRI of his lumbar spine. He said there was no evidence of radiculopathy however clinically the applicant had ongoing lumbar back pain (ARD page 5).

55. Dr Patrick agreed with Dr Sher's recommended treatment plan. He said:

> "The way he is at present Mr Abdel-Malek is effectively incapacitated for work. This will not necessarily be the situation into the long-term at it is important that he receives optimal management of his knee and lumbar spine/sacroiliac condition as soon as possible. It is important not to lose sight of the weight reduction, cessation of cigarette smoking entirely and the pool therapy where he can exercise to some extent in a relatively unweighted situation." (ARD page 7).

REASONS

Injury to lumbar spine

56. The applicant has the onus of proving that he sustained injuries to his lumbar spine within the meaning of section 4 of the *Workers Compensation Act 1987* (the 1987 Act).

57. The applicant's onus of proof extends to all matters for consideration (*Chen v State of New South Wales (No 2)* [2016] NSWCA 292 per Leeming JA at [33]-[34]; McColl JA agreeing at [1]).

58. The standard of proof is the balance of probabilities. I must feel actual persuasion of the existence of the facts relied upon by the applicant (see *Nguyen v Cosmopolitan Homes (NSW) Pty Ltd* [2008] NSWCA 246 at [44]).

59. In *Military Rehabilitation and Compensation Commission v May* [2016] HCA 19 (11 May 2016) the plurality of the High Court observed:

> "[45] …As Gleeson CJ and Kirby J explained in *Kennedy Cleaning Services Pty Ltd v Petkoska*, if 'something ... can be described as a *sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state*, it may qualify for characterisation as an "injury" in the primary sense of that word' (emphasis added).
>
> [46] That physiological change or disturbance of the normal physiological state may be internal or external to the body of the employee. It may be, for example, the breaking of a limb, the breaking of an artery, the detachment of a piece of the lining of an artery, the rupture of an arterial wall or a lesion to the brain. Each would be described as an 'injury' in the primary sense.
>
> [47] However, as the Full Court correctly held, 'suddenness' is not *necessary* for there to be an 'injury' in the primary sense. A physiological change might be 'sudden and ascertainable'. A physiological change might be 'dramatic'. The employee's condition might be a 'disturbance of the normal physiological state'. That an 'injury' in the primary sense can arise, and can be described, in a variety of ways does not mean that 'suddenness' is irrelevant. As the Full Court said, 'suddenness' is often useful where there is a need to distinguish a physiological change from the natural progress of an underlying (and in one sense, closely related) disease (as occurred in *Zickar v MGH Plastic Industries Pty Ltd* and *Kennedy Cleaning*). But it is the *physiological* change – the nature and incidents of that change – that remains central (footnotes omitted)."

60. In *Lyons v Master Builders Association of NSW Pty Ltd* (2003) 25 NSWCCR 422 Neilson CCJ said that the word "injury" refers to both the event and the pathology arising from it (at 429). The Commission has consistently applied that meaning to injury: for example, *Department of Juvenile Justice v Edmed* [2008] NSWWWCD 6; *Spicer Axle Australia Pty Ltd v Merza* [2007] NSWWCCPD 148.

61. In this case the applicant fell at work on 15 July 2015 sustaining a traumatic injury to his knee. He also claims he injured his back at the same time.

62. The applicant says prior to the fall he had no symptoms in his back. The contemporaneous clinical notes record an onset of back pain after the fall on 15 July 2015, which was initially "tolerable" but increased in severity. The clinical notes corroborate the applicant's evidence. In the circumstances, I accept the applicant's evidence that after the fall he experienced an onset of back pain.

63. I acknowledge that the applicant has complex pre-existing medical conditions in his left leg and is morbidly obese, both of which have the capacity to cause the development of lumbar pain separate from any traumatic injury. However, the applicant's evidence suggests he living a fairly active lifestyle prior to the injury (playing rugby league) and his mobility was not hampered prior to the fall in 2015. I also note that an injury or condition can have condition can have multiple causes and work only need by a substantial contributing to injury (see *ACQ Pty Ltd v Cook* [2009] HCA 28 at [25] and [27]).

64. The issue of injury is also to be determined by reference to the expert medical opinion. The weight given to expert medical opinion is to be determined by the extent of correlation between assumed facts and the facts that are proven (see *OneSteel Reinforcing Pty Ltd v Sutton* [2012] NSWCA 282 citing *Paric v John Holland Constructions Pty Ltd* (at 846) the Court (Mason CJ, Wilson, Brennan, Deane and Dawson JJ) at [67]).

65. Having regard to the extensive contemporaneous records of back pain in the clinical notes, I do not find Dr Rimmer's opinion to be persuasive. Dr Rimmer's opinion is largely based on the non-reporting of a back injury immediately after the fall, which does not correlate with the contemporaneous clinical notes. Notably, the clinical notes record complaints of back pain both a short time before and after the applicant's first consultation with Dr Rimmer.

66. I have had regard to Dr Rimmer's opinion that the cause of back pain is secondary to his morbid obesity. I do not find this opinion to be persuasive having regard to the clinical notes documenting the onset of back pain following the fall (which worsened) and the applicant's evidence that he was asymptomatic prior to the fall, noting that an injury can have multiple causes. In my view, the evidence supports that the traumatic incident on 15 July 2015 brought about a disturbance of the ordinarily physiological state in the applicant's back which manifested in gradually worsening pain.

67. I find Dr Rimmer's opinion persuasive. Dr Patrick's opinion correlates with the contemporaneous clinical notes recording reports of back pain since the injury and the applicant's claims he was asymptomatic prior to fall. I therefore accept Dr Rimmer's opinion that the applicant injured his back on 15 July 2015.

68. I am therefore comfortably satisfied that the applicant suffered an injury to his back on 15 July 2015. Although is no evidence of direct trauma to the applicant's back, the evidence supports an almost immediate onset of pain, which gradually worsened.

69. I am also satisfied that work was a substantial contributing factor to the applicant's injury to his back. The fall occurred at work whilst the applicant was undertaking his ordinary work duties. It was not submitted by the respondent there were any other causal factors to the injury, rather reliance was placed on the matters set out in the section 74 notice dated 6 March 2018. Although the section 74 notice cites section 9A it does not provide any alternatives contributing factors to the injury. Rather, the reasons for the denial of liability was based on an erroneous view that the applicant has failed to complain of back pain after the fall and the opinion of Dr Rimmer.

Work capacity

70. Section 33 of the 1987 Act provides that if total or partial incapacity for work results from an injury, the compensation payable by the employer under this Act to the injured worker shall include weekly payments during the period of incapacity.

71. The applicant bears the onus of proving that he was totally or partially incapacitated for work during the relevant periods. I must feel actual persuasion that the applicant was either totally or partially incapacitated for work during the period claimed (*Nguyen*).

72. There can be multiple causes of incapacity and injury (*Calman v Commissioner of Police* [1999] HCA 60; (1999) 73 ALJR 1609; *Conkey & Sons Ltd v Miller* (1977) 51 ALJR 583 at 585; *Cluff v Dorahy Bros. (Wholesale) Pty Ltd* [1979] 2 NSWLR 435). It is not necessary that employment be the main (or a substantial) contributing factor to the incapacity (*NSW v Rattenbury* [2015] NSWWCCPD 46 at [91]).

73. The incapacity for work upon which the right to compensation depends is a physical incapacity for doing work in the labour market in which a worker was working or might reasonably be expected to work (*Arnotts Snack Products Pty Ltd v Yacob* [1985] HCA 2).

74. An entitlement to weekly benefits compensation under the 1987 Act calls for an assessment of a worker's "current work capacity".

75. "Current work capacity" is defined in section 32A of the 1987 Act as "a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment".

76. "No current work capacity" is defined in section 32A as "a present inability arising from an injury such that the worker is not able to return to work, either in the worker's pre-injury employment or in suitable employment".

77. The term "suitable employment" is defined in section 32A as follows:

> "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 Workers Compensation 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 in the employment market, and
> (iii) the nature of the worker's pre-injury employment, and
> (iv) the worker's place of residence."

78. "No current work capacity" exists when a worker is not able to return to work either in the worker's pre-injury role or in suitable employment.

79. The task of determining whether a worker may return to work in suitable employment requires the identification of whether there are any "real jobs which the worker is able to do, having regard to the matters in subsection (a) of the definition of 'suitable employment', regardless of whether those jobs are available to the worker or in the employment market generally" (*Wollongong Nursing Home Pty Ltd v Dewar* [2014] NSWCCPD 55 at [63]).

80. The applicant submitted he was incapacitated for work from 15 July 2015 to 10 January 2018. This is the maximum period claimable given the applicant does not meet the special requirements for continuation of weekly payments after this period (section 37 and 38 of the 1987 Act).

81. During the first period of incapacity claimed the applicant was certified fit for usual hours, but with restrictions including no lifting/carrying, standing as tolerated, no pushing/pulling, no squatting/kneeling and "seated duties" only. The applicant's evidence and the certificates of capacity support significant physical restrictions following the fall on 15 July 2015. I am satisfied that the applicant was incapacitated as claimed during the first entitlement.

82. The applicant claims he was totally incapacitated for work during the second entitlement period. Although there are no WorkCover certificates of capacity for this period, the medical records demonstrate the applicant continued to complain of knee and back pain and was referred for treatment. For the reasons given on 13 May 2019 I am satisfied that the fall caused or contributed to a tear in the applicant's medial meniscus, which has been untreated to date. The clinical notes also support the applicant's back pain gradually worsened after the fall. Dr Hanna has referred to the applicant's back pain as being "permanent" in nature. Further, I infer from extent of the physical restrictions recorded in the certificates of capacity for the first entitlement period, that the applicant continued to suffer from at least some of the effects of the injury during the second entitlement period.

83. There are inconsistencies in the evidence which to some extent undermine the applicant's claim. In particular, the evidence regarding the quad bike fall in Thailand is troubling. Although the applicant was not cross-examined, it appears the information was deliberately omitted from his first two statements. The fact that the applicant was able to travel to Thailand and ride a quad bike in April 2017 is at odds with his claim of total incapacity for work until 10 January 2018 as well as having restrictions sitting and standing. It is also at odds with the applicant's assertions that he would have difficulty travelling to seek and attend work and that he had become withdrawn as a result of the injury (ARD page 69). The delay in bringing the claim (brought after the accident in Thailand) also causes me to question the veracity of the applicant's claim of total incapacity for the second entitlement period.

84. Further, the entry in the clinical note dated 25 August 2017 regarding a possible injury to the applicant's neck "at work" would suggest at that date he had some capacity for work, and was working (Reply page 125). However, in respect of this mater there was no evidence before me recording any earnings during the period. I also note Dr Burrell's report of 4 July 2018 also records the applicant as having an incident whilst working in a garage in or around January 2018 (Reply page 194). Whist I accept the applicant has the onus of proof, information about the applicant's earnings in the second entitlement period may have been obtained via a notice to produce or cross-examination.

85. Whilst the above matters have caused me some concern, ultimately, they are not determinative of the issue of whether the injury has caused incapacity. This is because the medical records support a continuation of symptoms in the applicant's knee and back post-incident which have not resolved. Therefore, notwithstanding the above matters undermine the applicant's claim, the medical evidence, including the opinion of Dr Patrick, provides me with comfort that the injury on 15 July 2015 has caused an ongoing incapacity for work. Further, the key parts of the applicant's evidence regarding the effects of the injury are corroborated by the contemporaneous medical records.

86. The applicant also submitted there has been an onset or worsening of psychological symptoms after the accident which has impacted on work capacity. That submission is consistent with the medical evidence and I accept it. Whilst the applicant may have had a prior history of mental illness (or a pre-existing condition) the records support a worsening of the condition post-incident and because of physical restrictions.

87. I have considered whether there is any suitable employment the applicant may participate in for the period claimed.

88. The applicant is a relatively young man (34 years of age). He says he has limited experience other than in construction and roles that require some degree of physicality. The medical certificates in the first period record significant physical limitations. The Centrelink certificates detail ongoing back and left knee problems. In September 2015 Dr Sher recommended a three-stage process of addressing the applicant's knee injury. The first stage, an arthroscopy to deal with the meniscal tear has not been undertaken due to the claim being declined by the respondent.

89. Dr Patrick opined that the applicant was effectively incapacitated for work and needed treatment and to lose weight before reintegrating into the workforce. I accept Dr Patrick's opinion. To some extent it is consistent with the opinion of Dr Sher in September 2015. I also note that Dr Rimmer says the applicant was also unsuitable for work but for a different reason, due to addiction to pain medication. Dr Rimmer has not provided any specific opinion on whether the applicant's back pain would cause incapacity for work. I also note the applicant's evidence regarding the continuation of psychological symptoms resulting from the injury.

90. Having regard to the matters in section 32A, I find that during the second entitlement period there were not real jobs that the applicant was able to do and therefore he was not able to return to work in his pre-injury duties or in suitable employment. Therefore, I am comfortably satisfied the applicant had "no current work capacity" for the second entitlement period.

91. There will be an award for the applicant on the claim for weekly benefits compensation in the agreed amounts.