WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **3663/19**
Applicant: **Dianne Dimakis**
Respondent: **Home Care Service of NSW**
Date of Determination: **21 October 2019**
Citation: **[2019] NSWWCC 339**

The Commission determines:

1. Amend the name of the respondent to "Home Care Service of NSW."

2. The applicant has a consequential condition affecting her lower back, as a result of the injury sustained to her left knee on 16 January 2012.

3. The L4/5 and L5/S1 decompression laminotomy and neurolysis as proposed by Dr New is reasonably necessary.

4. I decline to make an award of weekly compensation from 17 April 2018 onwards.

The Commission orders:

1. Pursuant to sections 60 (5) and 61 (4A) of the *Workers Compensation Act 1987*, the respondent is to pay the applicant's costs of the L4/5 and L5/S1 decompression laminotomy and neurolysis as proposed by Dr New.

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

John Isaksen
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 JOHN ISAKSEN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. The applicant, Dianne Dimakis, sustained an injury to her left knee on 16 January 2012 whilst employed as a carer with the respondent, Home Care Service of NSW.

2. The respondent admitted liability for this injury to the left knee and has met the costs of two operations which the applicant underwent on her left knee as follows:

    (a) A partial arthroscopic meniscectomy performed by Dr Rizkallah on 29 March 2012;

    (b) A unicompartmental arthroplasty performed by Dr Coffey on 22 July 2015.

3. The applicant claims that as a consequence of an altered gait that results from the injury to the left knee, she has aggravated the condition of her lumbar spine and now requires surgery by way of a L4/5 and L5/S1 decompression laminotomy and neurolysis as recommended by Dr New.

4. The applicant received 183 weeks of weekly benefits of compensation up until 16 April 2018.

5. The respondent issued a section 74 notice dated 17 April 2018 wherein it declined liability for ongoing medical expenses as not being reasonably necessary and declined liability for weekly payments of compensation on the basis that the injury that the applicant sustained on 16 January 2012 no longer caused her any incapacity for work.

6. The applicant seeks an order pursuant to section 60 (5) of the *Workers Compensation Act 1987* (the 1987 Act) that the respondent meets the costs of the surgery to her lumbar spine that is recommended by Dr New and also the reinstatement of weekly payments of compensation from 17 April 2018.

ISSUES FOR DETERMINATION

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

    (a) Whether the applicant has a consequential condition affecting her lumbar spine which results from the injury she sustained to her left knee on 16 January 2012;

    (b) Whether the surgery proposed by Dr New is reasonably necessary;

    (c) Whether an award can be made by the Commission that the applicant can receive weekly payments of compensation from 17 April 2018 onwards.

PROCEDURE BEFORE THE COMMISSION

8. The parties attended a conference and hearing at Penrith on 10 October 2019. 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 have 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.

9. Mr Horan appeared for the applicant, instructed by Ms Survery. Mr Simon Hunt appeared for the respondent.

10. Mr Horan advised that the claim made by the applicant that the injury to her lumbar spine was a disease injury was not pressed. Mr Horan also advised that although the applicant claimed that she sustained some injury to her lower back at the time she fell on 16 January 2012, her claim that the respondent meet the cost of surgery to her lower back is based upon her lower back condition being as a consequence of the injury to her left knee.

EVIDENCE

Documentary Evidence

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

    (a) Application to Resolve a Dispute (ARD) and attached documents;

    (b) Reply and attached documents;

    (c) Clinical notes from Astley Medical Centre;

    (d) A letter from Rankin Ellison dated 2 September 2019 which states that the applicant has been paid 183 weeks of weekly compensation;

    (e) A further report of Dr Shatwell dated 8 October 2019.

Oral Evidence

12. There was no application to cross-examine the applicant or to adduce oral evidence

FINDINGS AND REASONS

The applicant's case

13. The applicant has provided a statement dated 13 September 2018. She states that on 16 January 2012 she was working at a client's home when she tripped on some wet leaves in the driveway, causing her legs to fall in opposite directions, and she landed heavily on her left side and left knee.

14. The applicant states that following the first operation that she underwent on 29 March 2012, her left knee became increasingly unstable. She states that she walked with an altered gait and needed to use a walking stick to provide some stability but there continued to be occasions when she fell.

15. The applicant states that following the second operation that she underwent on 22 July 2015, she was able to return to work in February 2016 but on limited duties. She states that following this second bout of surgery she continued to have pain in the left knee and the lower back. She states that her back pain increased over time and she was referred to Dr New.

16. The applicant states that on 18 August 2017, while working for the respondent, she tripped on a sling attached to a hoist and fell forward, landing on both knees. She states that this caused increased pain in her left knee and lower back.

17. The applicant states that on 20 February 2018 she underwent an injection in the lower back on the recommendation of Dr Coffey but that it did not provide any real relief for the symptoms in her lower back.

18. The applicant states that because the insurer for the respondent declined ongoing liability in April 2018, she was booked in on the public list at Nepean Hospital to have surgery on her lower back on 8 August 2018. However, on 30 July 2018 she had a heart attack and that surgery was cancelled.

19. The applicant states that she continued to work for 15 to 20 hours per week with the respondent up until she had the heart attack on 30 July 2018. She states that she has been unable to work since 30 July 2018 mainly because of her back and left knee injury.

20. Dr New has provided a report to the solicitors for the applicant dated 28 March 2019. Dr New writes that he reviewed the applicant on 20 June 2018 and opined that from his clinical examination, and nerve conduction studies that were performed in April 2018, that the applicant had left L5 radiculopathy and required surgical intervention in the form of a left L4/5 and L5/S1 decompression laminotomy and neurolysis.

21. Dr New records that the applicant states that she had a very significant altered gait which resulted in an exacerbation of what had started as a fairly minor lumbar complaint. On examination, Dr New found the applicant to have an antalgic left-sided gait and needed the assistance of a cane in her right hand. He found tenderness over the facet joints at L4/5 and L5/S1 and marked lumbar spinal movement.

22. Dr New concludes that:

> "In my opinion, the patient's employment with Australian Unity was a substantial contributing factor to her injury. She had minor backache at the time of the injury which became progressively worse with an altered gait."

23. I should add that in the clinical notes from Astley Medical Centre there are reports from Dr New from reviews he undertook of the applicant on 23 April 2018, 20 June 2018, 26 July 2018 and 12 December 2018. In a report dated 21 June 2018, Dr New writes that the applicant has been placed on the public hospital waiting list for a left L4/5 and L5/S1 decompression laminotomy and neurolysis but that she is conferring with her legal counsel regarding another request to QBE and SIRA in regard to this.

24. Mr Horan refers to other medical evidence which confirms that the applicant has suffered quite debilitating pain in her left knee ever since the injury in January 2012, which has caused her to alter her gait and place stress and strain upon her lower back.

25. Dr Biggs, an orthopaedic surgeon whom the applicant sees for a second opinion in May 2013, records that the applicant complains of unremitting left knee pain that is exacerbated by any attempted weight-bearing on the left knee.

26. A report from Dr Adler, a consultant in pain management, dated 11 September 2013 records of the applicant as having a lancinating pain at the arthroscopy site of her left knee which occurs suddenly and unpredictably and has given rise to some falls. Dr Adler records that the applicant uses a walking stick. There is, however, no reference to lower back pain in that report.

27. Dr Coffey in his first report to the applicant's general practitioner dated 18 July 2014 records that the applicant experiences buckling or giving way of the left knee joint and has had to use a walking stick since May 2014 when she fell and injured some ribs.

28. In a later report dated 2 February 2016, Dr Coffey writes that the applicant is troubled with some residual sciatica in the left leg.

29. Dr Patrick provided a report to the applicant's previous firm of solicitors dated 22 April 2015, which is before the applicant underwent the second operation to her left knee. On examination, Dr Patrick found the applicant's gait to be tentative and somewhat antalgic, and that she used a stick.

30. Dr Patrick also records that the applicant's left knee gives way. He records that the applicant does not use a walking stick inside her home but does use her hands-on furniture and hand holds to get about.

31. Dr Patrick does record that the applicant developed significant low back pain from January 2012 and opines that this probably resulted from both the fall in January 2012 and the effects of altered gait over a considerable period.

32. Mr Horan submits that there is a clear causal chain that is consistent with the test set out by Kirby P in *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452, 10 NSWCCR 796) (*Kooragang*) whereby a significant and debilitating injury to the applicant's left knee has caused the applicant to have an altered gait, which in turn has aggravated the degenerative condition of her lumbar spine, and which now warrants surgery to the lower back that has been recommended by Dr New.

33. Mr Horan submits that the opinion of Dr New should be preferred because of the role he has as the applicant's treating specialist.

The respondent's case

34. The applicant was examined by A/Prof Shatwell, orthopaedic surgeon, at the request of the respondent on two occasions, and has provided reports dated 14 March 2018 and 5 August 2019.

35. In his first report dated 14 March 2018, A/Prof Shatwell records the applicant having a satisfactory recovery from the second operation performed by Dr Coffey in July 2015 whereby she was able to return to her usual occupation as a carer, although with some limitations on performing her work duties.

36. A/Prof Shatwell records that the applicant had a fall at work on 18 August 2017 which caused bruising to her knees. He also records that the applicant began to experience low back pain while doing additional cleaning work for her daughter in preparation for her daughter's wedding in September 2017. That led to the applicant undergoing x-rays of her lumbar spine on 20 October 2017.

37. A/Prof Shatwell diagnoses the applicant as having degenerative disc disease in the lumbar spine. He opines that those degenerative changes are constitutional and not secondary to any injury.

38. In his next report dated 5 August 2019, A/Prof Shatwell opines that the chronic pain that the applicant is experiencing around her left knee is not due to problems with the knee replacement surgery that she underwent in July 2015 but due to chronic degenerative change in the lumbar spine with pain referred to the left leg. He opines that the applicant had a reasonable result from the partial knee replacement surgery in July 2015 as she was able to get back to her work though not to her pre-injury capacity.

39. A/Prof Shatwell also writes that he is not in a position to recommend the surgery proposed by Dr New without up-to-date investigations of the applicant's spine and the ability to perform a full neurological examination which he could not do during his examination due to the applicant's severe pain.

40. A/Prof Shatwell provides a further report dated 8 October 2019 upon review of the clinical notes from Astley Medical Centre. He opines that he does not consider there is any relationship between the applicant's knee pathology and the development of lumbosacral degenerative disease with sciatic pain in the left leg. His review of the clinical notes from June 2012 through to the surgery in July 2015 do not suggest that there was any low back pain or pain of a sciatic nature reported to the applicant's medical advisors.

41. Mr Hunt referred to the lack of complaints of low back pain by the applicant in the medical evidence and that the few references that do exist are indicative of mere degenerative change.

42. Mr Hunt points out that except for an entry in the notes of Dr Leones on 11 July 2012 of pain around the left sacroiliac joint, there are no references to low back pain between the date of the injury and the record made by Dr Coffey in February 2016 of residual sciatica.

43. Mr Hunt submits that if the applicant was experiencing ongoing low back pain over the years following the injury that there should be records of this in the medical evidence. Mr Hunt submits that this puts in issue whether the applicant has sustained a lower back condition as a consequence of the injury to her left knee.

44. Mr Hunt also submits that the opinions expressed by Dr New and Dr Patrick on the cause of the applicant's lower back problems are unsound because those doctors have not considered problems that the applicant has had with her right knee and how that might have affected her altered gait and in turn contributed to her lower back condition. Mr Hunt refers to an entry in the notes of Dr Lin on 8 October 2015 that the applicant's right knee buckled the previous day at a union meeting, which led to a referral for an MRI scan of the right knee. Mr Hunt also refers to the fall that the applicant had in August 2017 onto both her knees which is not considered by Dr New.

45. Mr Hunt also submits that I should query the extent of pain complained of by the applicant in her left knee as the reports from Dr Coffey in September and October 2015 and February 2016 following the applicant's surgery in July 2015 record the applicant as doing very well from that surgery.

Determination

Whether the applicant's low back condition is as a consequence of the injury she sustained to her left knee on 16 January 2012

46. The determination of whether a pathological condition suffered by a worker is as a consequence of a work injury was considered by DP Roche in *Moon v Conmah Pty Limited* [2009] NSWWCCPD 134 (*Moon*). In that matter, the worker claimed whole person impairment from symptoms experienced in the left shoulder as a consequence of an accepted injury to the right shoulder. DP Roche said at [45-46]:

> "It is therefore not necessary for Mr Moon to establish that he suffered an 'injury' to his left shoulder within the meaning of that term in section 4 of the 1987 Act. All he has to establish is that the symptoms and restrictions in his left shoulder have resulted from his right shoulder injury. Therefore, to the extent that the Arbitrator and Dr Huntsdale approached the matter on the basis that Mr Moon had to establish that he sustained an 'injury' to his left shoulder in the course of his employment with *Conmah* they asked the wrong question.

> The test of causation in a claim for lump sum compensation is the same as it is in a claim for weekly compensation, namely, has the loss 'resulted from' the relevant work injury (see *Sidiropoulos v Able Placements Pty Limited* [1998] NSWCC 7; (1998) 16 NSWCCR 123; *Rail Services Australia v Dimovski & Anor* [2004] NSWCA 267; (2004) 1 DDCR 648)."

47. Deputy President Roche then proceeded to state that the expression "results from" should be applied using the principles set out by Kirby P in *Kooragang*. In *Kooragang* Kirby P said at [462]:

> "It has been well recognised in this jurisdiction that an injury can set in train a series of events. If the chain is unbroken and provides the relevant causative explanation of the incapacity or death from which the claim comes, it will be open to the Compensation Court to award compensation under the Act".

48. Kirby P then said at [463-4]:

> "…What is required is a common sense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation. In each case, the question whether the incapacity or death 'results from' the impugned work injury… is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions".

49. Although Dr New's opinion that the applicant's minor backache at the time of the injury has become progressively worse due to her altered gait is short and succinct, I am satisfied from the details of the progression of the applicant's injury as recorded by Dr New, his examinations of the applicant during the course of 2018, and his consideration of the radiological evidence, that Dr New has provided a reasoned explanation for the lower back pain that the applicant suffers from.

50. I also have particular regard to the opinion of Dr New because of his primary role as the applicant's treating specialist in determining the diagnosis of the applicant's condition, the cause or causes of that condition and the appropriate treatment that is required for that condition.

51. The evidence of the applicant and the opinion of Dr New identify a causal chain which starts with a significant injury to the left knee, progresses to the applicant experiencing considerable ongoing pain in her left knee which requires her to alter her gait and use a walking stick, and then the onset of pain in her lower back as a consequence of that altered gait. What is apparent is that the applicant has been experiencing significant and instability in the left knee following the injury in January 2012 to the extent that she walks with an altered gait and needs to use a walking stick, which places pressure and strain upon her lower back.

52. I acknowledge the submission made by Mr Hunt that I should query the extent of pain and disability complained of by the applicant in the left knee, which in turn becomes the basis for the claim of a consequential condition affecting the lower back, given the very positive improvement recorded by Dr Coffey following the surgery in July 2015. That is supported by the opinion of A/Prof Shatwell that the applicant had a reasonable result from that surgery, evidenced by her ability to return to work.

53. The clinical notes from Astley Medical Centre reveal that the applicant did not attend there at all for treatment for her left knee between February 2016 (when there is an entry "normal duties final clearance") until August 2017, which lends support to the opinion of A/Prof Shatwell that the applicant had a reasonable result from her surgery and that her subsequent lower back problems were not related to her left knee injury.

54. The records made by Dr Coffey are contained within a period of several months following her surgery. That the applicant did not attend her general practitioner for treatment for her left knee for some 18 months does not mean that she was not continuing to suffer the effects of her left knee injury, in particular continuing to walk with an altered gait and use a walking stick. I accept from a review of all the medical evidence available that the applicant has struggled with significant pain in her left knee ever since the injury in January 2012, that this has caused her to walk with an altered gait and that as a consequence she has developed a lower back condition which has led to treatment by Dr New.

55. I also acknowledge the submission made by Mr Hunt that there is precious little by way of contemporaneous medical evidence of complaints by the applicant of lower back pain, especially from the time of the injury in January 2012 until 2016. However, that does not mean that the applicant was not experiencing pain and symptoms in her lower back over that period of time or that there was not a gradual onset and increase of pain and symptoms in her lower back due to her altered gait.

56. When Dr Adler, a consultant in pain management, sees the applicant in September 2013, he does not record any low back pain but he does record episodes of lancinating pain in the left knee, which has caused the applicant on occasions to fall. That is consistent with the applicant's own evidence that after her first bout of surgery there were times when she fell due to lack of stability in her left knee. Dr Adler also records the applicant using a walking stick.

57. Although Dr Adler does not record the applicant having an altered or antalgic gait, I infer from the record that has been made by Dr Adler that the symptoms that the applicant was experiencing some 18 months after her injury was causing her to alter her gait, which in turn placed stress and strain upon other parts of her body, including her lower back.

58. The buckling or giving way of the left knee is thereafter recorded by Dr Coffey in July 2014 and by Dr Patrick in April 2015. That confirms the progression of ongoing problems that the applicant was having with her left knee and the likelihood that the applicant was altering her gait in an effort to relieve pressure on her left knee.

59. The evidence of the applicant and the complaints of problems recorded by Dr Adler, Dr Coffey, Dr Patrick and Dr New leads me to conclude that the applicant was altering her gait to deal with the pain and instability she was experiencing in her left knee, which in turn has led to the opinion expressed by Dr New that the applicant's lower back pain has been worsened by that altered gait.

60. I prefer the opinion of Dr New to that provided by A/Prof Shatwell. A/Prof Shatwell does not, from my reading of his reports, address the issue of whether the applicant's altered gait results in lower back symptoms. He does not consider whether the restrictions or symptoms that the applicant has in her lower back or down her left leg result from the injury to her left knee. He maintains that the degenerative changes in the applicant's lower back are constitutional without enquiring as to whether those degenerative changes have been aggravated or exacerbated by her altered gait.

61. In contrast, Dr New does concede that the applicant does have lumbar spondylosis as well as lateral canal stenosis but opines her lower back pain has been progressively worsened by her altered gait.

Whether the surgery proposed by Dr New is reasonably necessary

62. In *Murphy v Allity Management Services Pty Ltd* [2015] NSWWCCPD 49 (*Murphy*), DP Roche considered the test to be applied in section 60 (1) of the 1987 Act for medical treatment to be reasonably necessary 'as a result of an injury received by a worker' and said at [57-58]:

> "Moreover, even if the fall at Coles contributed to the need for surgery, that would not necessarily defeat Ms Murphy's claim. That is because a condition can have multiple causes (*Migge v Wormald Bros Industries Ltd* (1973) 47 ALJR 236; *Pyrmont Publishing Co Pty Ltd v Peters* (1972) 46 WCR 27; *Cluff v Dorahy Bros (Wholesale) Pty Ltd* (1979) 53 WCR 167; *ACQ Pty Ltd v Cook* [2009] HCA 28 at [25] and [27]; [2009] HCA 28; 237 CLR 656). The work injury does not have to be the only, or even a substantial, cause of the need for the relevant treatment before the cost of that treatment is recoverable under s 60 of the 1987 Act.
>
> Ms Murphy only has to establish, applying the commonsense test of causation (*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796), that the treatment is reasonably necessary "as a result of" the injury (see *Taxis Combined Services (Victoria) Pty Ltd v Schokman* [2014] NSWWCCPD 18 at [40]–[55]). That is, she has to establish that the injury materially contributed to the need for the surgery (see the discussion on the test of causation in *Sutherland Shire Council v Baltica General Insurance Co Ltd* (1996) 12 NSWCCR 716)."

63. Dr New does not specifically state that the proposed surgery results from the applicant's injury or that her injury materially contributes to the need for surgery. There is no other medical evidence which addresses this issue.

64. However, I have accepted the opinion of Dr New that there is a causal connection between the injury the applicant has sustained to her left knee, the subsequent need to alter her gait because of that injury, and the onset of lower back pain and symptoms, which includes referred pain down the left leg. A reading of not only the substantive report of Dr New dated 28 March 2019 but also his reports to the applicant's general practitioner that are contained in the clinical notes from Astley Medical Centre, supports a finding that Dr New considers the applicant's injury now materially contributes to the need for lower back surgery to relieve pain she is experiencing in the lower back and down the left leg because of the effects of that altered gait.

65. As was recognised in *Murphy*, the work injury may not be the only cause or substantial cause for the need for surgery, but from my reading of the reports of Dr New, the work injury does materially contribute to the need for surgery because of the way the applicant's altered gait has progressively worsened her lower back pain.

66. The proposed surgery is recommended by Dr New, who is in the best position as treating specialist to provide that opinion. A/Prof Shatwell in any event does not opine that the surgery is not reasonably necessary, only that he cannot recommend it at the present time without up to date investigations of the applicant's spine and a full neurological examination.

67. Dr New has not changed his opinion for well over a year now that he recommends the proposed surgery. I accept that the L4/5 and L5/S1 decompression laminotomy and neurolysis as recommended by Dr New is reasonably necessary and the costs of that surgery are to be met by the respondent.

The claim for weekly payments of compensation

68. The respondent asserts that the applicant has been paid 183 weeks of weekly benefits of compensation. That is not disputed by the applicant.

69. That means that any ongoing payment of weekly benefits of compensation must be paid pursuant to section 38 of the 1987 Act.

70. In *Lee v Bunnings Group Limited* [2013] NSWWCCPD 54 (*Lee*) Keating P said at [57]:

> "It is clear from the unambiguous terms of s 38 that an entitlement to compensation under that section must be assessed by the insurer, not by the Commission."

71. Mr Horan submits that the section 74 notice dated 17 April 2018 can be regarded as a work capacity decision and is now capable of review by the Commission, which then allows for the award of further payments of weekly benefits of compensation.

72. Those parts of the section 74 notice which are relevant to the issue of work capacity are:

> "In our opinion, the work injury that you allege to have received on 16 January 2012, has not caused you any incapacity (either partial or total) for work. Section 33 of the *Workers Compensation Act 1987* requires that you either be partially or totally incapacitated as a result of the injury in order to obtain weekly benefits compensation."

And

> "We do not consider the evidence provided in support of your claim to be satisfactory in addressing that your current incapacity is as a result of the original date of injury of the 16 January 2012, is not related to your unicompartmental left knee joint replacement performed in July 2015 and is not related to a further incident which occurred on the 18 August 2017. QBE is of the opinion that your current incapacity is a result of you assisting during your daughters wedding in September 2017 and that you have suffered an aggravation to a pre-existing condition. QBE would like to confirm that liability of your claim is declined as of 4 April 2018."

73. Section 43 (2) of the 1987 Act provides:

> "(2) The following decisions are not work capacity decisions:
> (a) a decision to dispute liability for weekly payments of compensation;
> (b) a decision that can be the subject of a medical dispute under Part 7 of Chapter 7 of the 1998 Act."

74. I am of the view that the section 74 notice dated 17 April 2018 is not a work capacity decision, rather a decision to dispute liability for weekly payments of compensation. There is no other notice or decision in evidence of a work capacity decision made by the respondent. If there was such a decision then, subject to its content, it may be capable of review by the Commission. I therefore agree with the submission made by Mr Hunt for the respondent that absent a work capacity decision, I have no jurisdiction to make an award of weekly payments of compensation to the applicant.

75. If I am wrong in regard to this, I also consider that I cannot make an award of weekly payments because I have insufficient evidence available which meets the requirements of section 38. The claim made for weekly benefits in the ARD is from 17 April 2018 to date and continuing. The applicant states that in April 2018 she was working 15 to 20 hours per week until she had a heart attack on 30 July 2018. However, no evidence has been provided as to what her actual earnings were from 17 April 2018 to 30 July 2018. That makes it impossible to make a calculation of a weekly payment of compensation for this period under the formula prescribed by section 38 (7).

76. The applicant states that she has been unable to work since 30 July 2018 mainly because of her knee and back injury. As the applicant has not worked since 30 July 2018, she can only receive weekly payments of compensation if she is assessed as having no current work capacity. Section 32A of the 1987 Act defines "no current work capacity" as follows:

"…means 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. Dr New in his report dated 28 March 2019 opines that the applicant "is not fit for her previous type of work as a result of her injury." A/Prof Shatwell in his report dated 5 August 2019 opines that the applicant is "incapacitated for work by her low back and left sciatic pain."

78. The applicant not being fit for her previous work or incapacitated for work does not equate to having no current work capacity, certainly without any further explanation. There is also no medical evidence to explain why the situation has changed from July 2018 when the applicant had some partial capacity to work to the applicant now having no current work capacity. It may be that the gradual deterioration of her left knee and lower back has led to a situation where she has no current work capacity, but there is nothing to explain this.

79. In the circumstances, then, I decline to make an award of weekly compensation from 17 April 2018 onwards.