

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 549/20
Applicant: Jeremiah Roeland
Respondent: Way-Up Creative Services Pty Limited trading as Eden Café & Catering Service
Date of Determination: 14 April 2020
Citation: [2020] NSWCC 115

The Commission determines:

1. Award for the respondent for the claim made by the applicant of a consequential condition affecting his right knee, as a result of injury sustained on 17 February 2009 and 14 April 2016.
2. The applicant had no current work capacity from 30 September 2016 to 31 December 2017.
3. The applicant had a current work capacity whereby he was able to return to work in suitable employment for 12 hours per week from 1 January 2018 to 7 October 2018.

The Commission orders:

1. The respondent is to pay weekly benefits of compensation to the applicant as follows:
 - (a) \$729.60 per week from 30 September 2016 to 31 December 2017 pursuant to section 37 of the *Workers Compensation Act 1987*;
 - (b) \$503.88 per week from 1 January 2018 to 30 June 2018 pursuant to section 37 of the *Workers Compensation Act 1987*;
 - (c) \$495.96 per week from 1 July 2018 to 7 October 2018 pursuant to section 37 of the *Workers Compensation Act 1987*.
2. The respondent is to pay the applicant's reasonable medical expenses for treatment for injury to the applicant's left knee for injury sustained on 17 February 2009 and 14 April 2016, and for treatment for injury to the applicant's lumbar spine for injury sustained on 14 April 2016.

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.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. The applicant, Jeremiah Roeland, sustained an injury to his left knee on 17 February 2009, and an injury to his left knee and lumbar spine on 14 April 2016, whilst in the course of his employment with the respondent, Way-Up Creative Services Pty Limited trading as Eden Café & Catering Service.
2. The respondent has admitted liability for those injuries.
3. Following the injury on 17 February 2009, the applicant underwent a left knee arthroscopic chondroplasty, removal of loose body, and medial retinacular repair on 4 April 2009, performed by Dr Rizkallah. The applicant was off work for about three months and then returned to his normal duties as a cook with the respondent.
4. Following the injury on 14 April 2016, the applicant underwent a left knee arthroscopic partial medial and lateral meniscectomy and chondroplasty on 12 July 2016, again performed by Dr Rizkallah.
5. The applicant received weekly payments of compensation following the injury on 14 April 2016 until 29 September 2016. A section 74 notice was issued by AAI Ltd, the insurer of the respondent, on 30 September 2016 which disputed ongoing liability on the grounds that the applicant had fully recovered from the effects of the injury and that any ongoing incapacity was no longer due to the work injury.
6. The applicant has not worked since the cessation of weekly payments of compensation, except for an occasional event of singing in a rock band.
7. The applicant claims that he has sustained a consequential condition affecting his right knee as a result of the injury to his left knee. That claim is denied by the respondent.

ISSUES FOR DETERMINATION

8. The parties agree that the following issues remain in dispute:
 - (a) Whether the applicant has a consequential condition affecting his right knee which results from the injury he sustained to his left knee on 17 February 2009 and/or 14 April 2016;
 - (b) Whether the applicant has any total or partial incapacity for work which results from injury sustained in the course of his employment with the respondent on 17 February 2009 and/or 14 April 2016; (sections 32A, 33, and 37 of the *Workers Compensation Act 1987* (the 1987 Act)).

PROCEDURE BEFORE THE COMMISSION

9. The parties attended a conference and hearing on 1 April 2020. 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.

10. Mr Hanrahan appeared for the applicant, instructed by Mr McDonnell. Mr Adhikary appeared for the respondent.
11. The hearing was conducted by telephone in accordance with the protocols set out by the Commission as a result of the coronavirus pandemic.
12. At the commencement of the hearing the applicant withdrew his claim for a lump sum payment for whole person impairment for injury to the left knee and lumbar spine and consequential condition affecting his right knee.
13. The applicant also amended his claim for weekly payments of compensation to start from 30 September 2016 and to run for the balance of the period allowed by section 37 of the 1987 Act. Mr Adhikary advised that the period would end on 7 October 2018.
14. The parties agree that pre-injury average weekly earnings (PIAWE) is \$912, and 80% of PIAWE, for the purposes of any weekly payments of compensation to be made pursuant to section 37, is \$729.60.

EVIDENCE

Documentary evidence

15. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute and attached documents;
 - (b) Reply and attached documents; and
 - (c) Application to Admit Late Documents filed by the applicant on 11 March 2020.

Oral evidence

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

FINDINGS AND REASONS

Whether the applicant has a consequential condition affecting his right knee which results from the injury he sustained to his left knee on 17 February 2009 and/or 14 April 2016

The applicant's evidence

17. The applicant has provided a statement dated 19 October 2019. He states:

“Prior to the second surgery to my left knee, I tended to weight bear more on my right knee, since the first surgery on 4 April 2009. My duties as a cook required prolonged bending, lifting and standing.

My right knee got a lot worse after the second surgery to my left knee. I was weight bearing totally on the right knee because I was in a brace from my left hip to my left ankle, because of the left knee surgery.”

The medical evidence

18. There are reports in evidence from Dr Rizkallah during the time that he treated the applicant following both injuries to his left knee. The last report provided by Dr Rizkallah following the injury in 2009 is dated 30 November 2009. In that report Dr Rizkallah records that the applicant was on normal duties without pain or disability. Dr Rizkallah writes that he would expect the applicant to suffer from a degree of impairment as a result of that first injury, although he opines: "Mr Roeland's injury at the moment is stable." He also writes that the applicant may or may not have discomfort in the left knee in the future but it may not be disabling.
19. The last report provided by Dr Rizkallah following the injury in 2016 is dated 12 October 2016. Dr Rizkallah records a full range of painless motion in the left knee and that the left knee is very stable.
20. I could not locate any reference in the reports from Dr Rizkallah to any difficulties the applicant was having with his right knee.
21. Dr Rizkallah also provided a report at the request of the applicant's solicitors, dated 17 September 2017, which is very much a summary of his previous reports. He does again opine that he would expect the applicant to have some degree of impairment of the left knee. Again, there was no reference to any difficulties the applicant was having with his right knee.
22. The applicant's general practitioner, Dr Fong, has provided a report dated 24 October 2016, which is in response to a report from Dr Machart, who was qualified by the respondent and whose report was relied upon to terminate the weekly payments of compensation being made to the applicant.
23. Dr Fong records the onset of pain in the applicant's right knee on 2 August 2016, some three weeks after the surgery which the applicant had undergone.
24. Dr Fong writes that there was a good reason for the applicant to use a walking stick following his surgery in July 2016 because there was a clear subluxation and signs of inflammation of the left knee.
25. Dr Fong also opines that the surgery was a significant procedure which caused post-operative pain. He opines: "It also aligns with common sense that because of pain, Mr Roeland would apply more weight on his right leg to bear the majority of his weight."
26. The findings of an MRI scan of the right knee dated 31 August 2016 are reported to be unremarkable except for some mild dysplasia in the patellofemoral joint.
27. Dr Giblin, orthopaedic surgeon, has provided four reports at the request of the applicant's solicitors.
28. In his first report dated 19 September 2017, Dr Giblin notes the previous injury to the applicant's left knee in 2009, but otherwise the report is based upon the effects of the 2016 injury. Dr Giblin records that the applicant's right knee "became sore shortly after the injury as he said he had to favour the left leg."
29. Dr Giblin finds some clicking and irritability, and some chondromalacia, in both knees on examination.
30. Dr Giblin diagnoses a secondary soft tissue injury to the applicant's right knee, which "is reasonably causally related to the subject accident."

31. In a supplementary report dated 19 February 2018, Dr Giblin opines:
- “...it is my opinion that the symptom complex formation in the right knee, primarily related to the patellofemoral joint is due to an altered gait pattern, secondary to the earlier injuries particularly the left knee on the 17 February 2009 and to the lesser extent, the lower back on the 14 April 2016.”
32. In a third report dated 7 August 2018, Dr Giblin assesses the applicant as having 2% whole person impairment for each of his knees due to the applicant’s injury in 2009.
33. In a fourth report dated 24 January 2019, Dr Giblin opines:
- “...on the basis that Mr Roeland's Statement indicates his right knee pain began on 12 July 2016 and noting the report from Dr Machart dated 12 November 2018 stating right knee pain started shortly after the operation on the left knee, given that information, it would be my opinion that the right knee problems arose, consequent upon the injury 14 April 2016.”
34. There are four reports in evidence from Dr Machart, who was retained on behalf of the respondent. In his first report dated 16 September 2016, Dr Machart takes a history of the applicant suffering pain about two weeks after the 2016 injury as a result of “favouring”.
35. Dr Machart finds on examination some tenderness in the right knee but a full range of movement.
36. Dr Machart opines that the applicant has no identifiable pathology in the right knee and the notion of “favouring” over two weeks, which causes substantial symptoms in an MRI defined normal knee, does not bear consistency.
37. In a later report dated 12 November 2018, Dr Machart states that he does not agree with Dr Giblin on the subject of “overuse”. Having previously taken a history of the applicant developing symptoms in the right knee about two weeks after the surgery in July 2016, Dr Machart opines that there would have been under use rather than “over use” and that would not have been sufficient time to cause symptoms in the right knee.

Determination

38. The determination of whether a pathological condition suffered by a worker is as a consequence of a work injury is well summarised by DP Roche in *Moon v Conmah Pty Limited* [2009] NSWCCPD 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).”

39. 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 Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796 (*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”.

40. 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”.

41. Mr Adhikary for the respondent referred to the decision of *Munce v Thomson Cool Rooms Pty Ltd* [2017] NSWCCPD 39 (*Munce*), to support his submission that the applicant has failed to provide evidence in this dispute to supporting a finding that he had sustained a consequential condition affecting his right knee as a result of the injury to his left knee. Keating P said in *Munce* at [101], in relation to claim for a consequential condition affecting a shoulder from an injury to the opposite upper limb:

“The submission that by reason of the serious nature of the injury to the left shoulder, “overloading” of the right shoulder was “obvious and compelling” is rejected. For the reasons already given, far from being compelling the evidence in relation to overloading was, as the Arbitrator correctly observed, almost non-existent. It does not necessarily follow that because of a serious injury to the left limb that there must be a resulting overuse of the right limb. The causal relationship must be established on the balance of probabilities from evidence in an acceptable form. It was the lack of such evidence which caused the Arbitrator to conclude that he could not be satisfied on the balance of probabilities of a causal connection between the right shoulder condition and the accepted injury.”

42. In this dispute which I have to determine, there is a lack of evidence whereby I cannot be satisfied on the balance of probabilities that the applicant has sustained a consequential condition affecting his right knee.
43. There is firstly the applicant’s own evidence, which does little to advance his cause. His evidence that: “Prior to the second surgery to my left knee, I tended to weight bear more on my right knee, since the first surgery on 4 April 2009”, provides no information as to how that additional weight was taken upon his right knee. I accept that his duties as a cook required prolonged bending, lifting and standing but he does not provide evidence of the particular activities that he was performing while working as a cook which caused him to put additional weight on his right knee. Nor has the applicant provided evidence as to how long or how often during a shift he would be placing more weight on to his right knee.
44. The applicant’s evidence regarding the worsening of symptoms in the right knee following his second operation (in July 2016) is restricted to a period when he was weight bearing on his right knee because he was in a brace from his hip to his ankle. The applicant provides no evidence of any other activities following the removal of the brace which may have caused restrictions and symptoms in the right knee.

45. The applicant does state that since July 2016 he has been using a walking stick but this is because his knees give way, and it also assists with his lower back pain. He does not provide any evidence of whether the use of walking stick places additional weight upon his right knee or provide evidence of the circumstances as to when he uses the walking stick and often during the day.
46. The lack of evidence from the applicant as to what particular activities causes him to put additional weight on his right knee, and how often that occurs, is particularly relevant because the applicant has not worked since the injury in April 2016. Dr Machart records in November 2018 that the applicant sleeps in until late morning, does not do much, and is unable to do any housework. There is no evidence available of what day to day activities are undertaken by the applicant which puts additional weight on his right knee.
47. The expert evidence relied upon by the applicant does little to assist this particular claim. In October 2016 Dr Fong opines that there is a good reason for the applicant to use a walking stick because of the pain that he was experiencing following his surgery. He also notes the onset of pain in the right knee some three weeks after the applicant underwent surgery on his left knee.
48. However, Dr Fong offers no explanation for the onset of those symptoms other than to opine that it aligns with common sense that because of pain in the left knee, the applicant applies more weight on his right leg. In *Hevi Lift (PNG) Ltd v Etherington* [2005] NSWCA 42 (*Hevi Lift*) McColl JA (Mason P and Beazley JA agreeing) said at [84] that: "It has been long been the case that a court cannot be expected to, and should not, act upon an expert opinion the basis for which is not explained by the witness expressing it."
49. While it may be that the applicant was placing weight upon his right leg due to pain in his left knee following his surgery, there is no explanation provided by Dr Fong as to how that has caused the applicant to have symptoms or restriction in his right knee. It is not enough for Dr Fong to state that it "aligns with common sense." The causal relationship between the injury that the applicant has sustained to his left knee and the symptoms he complains of in the right knee has not been established in an acceptable form.
50. I cannot confidently rely upon the opinions expressed by Dr Giblin due to their lack of consistency. Dr Giblin initially opines that the applicant has a soft tissue injury to the right knee, which is causally related to the subject accident, which on my reading of his report can only be the injury of 14 April 2016. However, there is no explanation provided by Dr Giblin other than the applicant having to "favour the left leg." There is no explanation of how the applicant has had to "favour the left leg" or how that has caused restrictions or symptoms in the right knee.
51. The lack of consistency is then compounded by Dr Giblin by writing a supplementary report dated 19 February 2018 that "the symptom complex formation in the right knee" is due particularly to the injury to the left knee in 2009, when there is but the most cursory of details of that injury in his earlier report, and to the injury to the lower back in April 2016. In a further report dated 7 August 2016, Dr Giblin assesses impairment of the right knee solely on it being as a consequence of the 2009 injury.
52. In his last report dated 24 January 2019, Dr Giblin changes his opinion based upon a statement from the applicant and perusal of the report of Dr Machart dated 12 November 2018, to conclude that the applicant's right knee problems arose consequent upon the injury of 14 April 2016. However, that change of opinion is not made after his own further interrogation of the applicant to determine the cause of any consequential condition affecting the right knee.

53. In my view, Dr Giblin's opinions are so compromised and inconsistent that they cannot be relied upon.
54. Finally, Dr Rizkallah does not mention any problems the applicant was having with his right knee. That is significant because Dr Rizkallah treated the applicant following both injuries to his left knee. Dr Rizkallah is in an ideal position to assist on this issue because of his role as the applicant's treating specialist for both injuries. He has provided a comprehensive report dated 17 September 2017, in which he opines that the applicant would expect to have some impairment in the left knee but is silent on any problems that the applicant was having with his right knee.
55. It would seem that the last time the applicant saw Dr Rizkallah was on 12 October 2016. By that time the applicant had complained to Dr Fong about pain in the right knee and had undergone an MRI scan of the right knee. However, there is no mention of this in Dr Rizkallah's reports. Nor is there any evidence of the applicant returning to see Dr Rizkallah so that an opinion could be provided by the doctor best placed to opine on this issue.
56. Given the lack of evidence from the applicant himself, the lack of explanation by Dr Fong regarding the cause of any consequential condition affecting the right knee, the inconsistencies in the reports of Dr Giblin, and the lack of any reference, or opinion from, Dr Rizkallah regarding any restrictions or symptoms in the applicant's right knee, I am not satisfied on the balance of probabilities that the applicant did sustain a consequential condition affecting his right knee as a result of the injury to his left knee.
57. There will be an award for the respondent for the claim made by the applicant of a consequential condition affecting his right knee, as a result of the injury he sustained to his left knee on 17 February 2009 and 14 April 2016.

Whether the applicant has any total or partial incapacity for work which results from the injury sustained by the applicant in the course of his employment with the respondent on 17 February 2009 and/or 14 April 2016

The applicant's evidence

58. The applicant states that he completed Year 10 in 2001. He states that he had a few short term jobs in manual work until he commenced employment with the respondent in 2007 washing dishes. He states that he worked as a cook for the respondent until his second injury on 14 April 2016. He has not worked since that injury, except for an occasional event of singing in a rock band.
59. The applicant does not provide any further evidence as to what symptoms and restrictions from the injury to his left knee and lower back restrict his capacity to work, other than to state that his knees give way and his back causes him pain.

The medical evidence

60. The respondent concedes that the applicant sustained an injury to his left knee on 17 February 2009 and an injury to his left knee and lumbar spine on 14 April 2016.
61. There are Certificates of Capacity in evidence from Dr Fong which cover the period from 14 April 2016 to 12 October 2016 and which certify the applicant having no current work capacity due to "Patella dislocation and foreign body, mechanical lower back pain".

62. A review of the medical evidence indicates that it has mainly been the lower back injury which has affected the applicant's work capacity since weekly payments of compensation were terminated at the end of September 2016.
63. When Dr Rizkallah last reviews the applicant on 12 October 2016, Dr Rizkallah records a full range of painless motion in the left knee and that the left knee is very stable. He does opine in his report dated 17 September 2017 that the applicant may require temporary modification of his work duties until he comes to require further reconstructive surgery such as a knee replacement. However, it is apparent that in October 2016 Dr Rizkallah is concerned with complaints that the applicant is making about his lower back and writes: "I believe that Mr Roeland has spinal problems that are affecting his function and return to work." Dr Rizkallah recommends that the applicant obtain an orthopaedic opinion from a spinal surgeon.
64. There is no indication from the available material that the applicant saw a spinal surgeon. However, he did attend Dr Ho, a pain specialist, between 6 December 2016 and December 2018. There are multiple reports from Dr Ho for his treatment of the applicant. The reports refer to treatment for the applicant's lower back injury and I could not locate any specific reference to the injury to the applicant's left knee in any of those reports.
65. Dr Ho diagnoses mechanical lower back pain and spondylosis with bilateral L4/5 facet joint arthritis, along with central sensitisation, from the injury sustained on 14 April 2016.
66. When Dr Ho first sees the applicant in December 2016, he records that the applicant reports severe back pain post-injury and on examination finds hyperaesthetic response to superficial stimulus to the lower back. Dr Ho writes of his concern as to the high opiate dosage being taken by the applicant.
67. The reports from Dr Ho during the course of 2017 record the trialling of different analgesic medication, attempts to reduce the applicant's intake of that medication, and some benefit derived from facet joint injections. However, Dr Verma, the applicant's new general practitioner, in a report dated 27 November 2017, writes of the applicant: "He is on high doses of opioids and is unable to come off them."
68. On 30 January 2018, Dr Ho records that the applicant is more active in the community and is auditioning for TV ads.
69. On 24 April 2018, Dr Ho writes: "We are still setting a goal for gradual reduction of opioids as tolerated." Dr Ho also records that the applicant continues to be more active in the community, and that he is coping better with pain.
70. Dr Ho has provided a report at the request of the applicant's solicitors dated 19 December 2017. In that report Dr Ho opines that the applicant is unfit to return to his pre-morbid work duties and his capacity to compete in the current job market is compromised due to his chronic pain syndrome. He does opine that with re-training, the applicant would be fit for part time sedentary work for 12 hours per week.
71. Dr Verma in his report dated 27 November 2017 opines that the applicant is unlikely to return to his pre-injury duties but may be able to take positions where he could sit down, once he has appropriate training.
72. In his first report dated 19 September 2017, Dr Giblin diagnoses soft tissue injuries to the lower back and left knee. He assesses the applicant as being permanently unfit for heavy repetitive bending, lifting and twisting, prolonged periods of kneeling and squatting, pivoting and twisting, stair or ladder climbing, impact activities or working at heights. He considers that the applicant would be fit for a sedentary work environment within the restrictions he has referred to and where the applicant could change his body habitus at will.

73. Dr Thomson provided a report dated 23 September 2016 at the request of the respondent. Dr Thomson diagnoses the applicant as having a musculo-ligamentous strain of the lumbar spine at least, with the possibility of aggravation of previously asymptomatic lumbar spondylosis, along with the meniscal and lateral tears to the left knee which were the subject of surgery.
74. Dr Thomson opines that the applicant is unfit for duties as a chef but considers that the applicant is fit to do 12 hours of work per week, with a 5 kilogram lifting limit, in the jobs of cashier, general clerk assistant or call centre operator.
75. In his first report dated 16 September 2016, Dr Machart opines that the applicant sustained a soft tissue injury to the lower back, which had healed. In answer to a question regarding the applicant's work capacity, Dr Machart replies that he did not see objective evidence of disability.
76. The report of Dr Machart dated 12 November 2018 comes after the period that weekly payments of compensation can be awarded to the applicant. Nonetheless, Dr Machart opines that the lumbar pathology is minor and could not be responsible for the severity of the applicant's ongoing symptoms or disability. He considers the applicant is fit for predominantly sedentary work, walking or standing no more than third of his working time and that suitable duties would include sales, food preparation if predominantly seated, or office work.

Determination

77. Relevant definitions contained in section 32A of the 1987 Act on the issue of the applicant's capacity for work are the following:

"No current work capacity" is defined 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".

"Current work capacity" is defined 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".

"Suitable employment, in relation to a worker" is defined as

"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 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."

78. Having reviewed the medical evidence, I consider that the best guide to determining the extent of the applicant's capacity for work during the two year period that he is entitled to be awarded weekly payments of compensation by the Commission is to be found in the reports of Dr Ho, because it is Dr Ho who consistently reviewed and treated the applicant over much of this period.
79. Dr Ho does not provide an opinion as to the applicant's work capacity until a report dated 19 December 2017, wherein he opines that the applicant is unfit to return to his pre-injury work but could undertake 12 hours of sedentary work per week with re-training.
80. Prior to that opinion in December 2017, the reports of Dr Ho reveal an ongoing strategy to have the applicant reduce the high levels of opiate medication that he was taking and ameliorate his complaints of lower back pain. By early 2018 the reports from Dr Ho indicate at least partial success with this strategy, with the applicant coping better with his pain, being active in the community, and auditioning for some jobs.
81. The extent of applicant's pain and disability and the high level of analgesic medication being taken by the applicant as recorded by Dr Ho throughout the course of 2017 leads me to the view that until at least the end of 2017 the applicant had no current work capacity in that he was not able to return to his pre-injury work as a chef and was not able to undertake suitable employment.
82. I prefer the evidence and opinions provided by Dr Ho to those of Dr Machart because of the important role Dr Ho had in the treatment of the applicant over a two year period. Dr Machart initially opines that the applicant did sustain a soft tissue injury to his lower back and that it healed after several months, but two years later opines that the lumbar pathology is minor and could not be responsible for the severity of the applicant's ongoing symptoms or disability.
83. There is no medical evidence which suggests that the applicant has serious disc pathology. However, I do accept from a review of all the medical evidence, but particularly Dr Ho, that the applicant did have a soft tissue injury to his lumbar spine which caused him significant pain and disability until at least the end of 2017.
84. In *Wollongong Nursing Home v Dewar* [2014] NSWCCPD 55 (*Dewar*), DP Roche considered the application of the term 'suitable employment' and said at [63]:
- "the task requires the identification of whether there are any 'real jobs' (*Giankos v SPC Ardmona Operations Ltd* [2011] VSCA 121 at [102]) which, having regard to the matters in sub-s (a) of the definition, the worker is able to do, regardless of whether those jobs are 'available' (to the worker) or are 'of a type or nature that is generally available in the employment market'."
85. In light of the findings and treatment provided by Dr Ho during 2017, I cannot identify any real jobs which the applicant would have been able to do, even on a part time basis.

86. In September 2016, Dr Thomson opines that the applicant is unfit for duties as a chef but that he is fit to do 12 hours of work per week, with a 5 kilogram lifting limit, in the jobs of cashier, general clerk assistant or call centre operator. The applicant has not responded with his own evidence as to whether he could or could not do those jobs, but I do not accept that the applicant could undertake any of those jobs from the evidence which is available.
87. The applicant left school in Year 10. He has worked in manual jobs all his working life. He has had no experience in work as a cashier, clerical work or call centre work. The jobs nominated by Dr Thomson are not jobs which the applicant could have been regarded as currently suited for during the course of 2017.
88. I therefore find that from 30 September 2016 until at least the end of 2017, the applicant had no current work capacity and is entitled to a weekly payment of \$729.60 per week.
89. The reports from Dr Ho indicate that by the beginning of 2018 the applicant's condition had improved. In December 2017 Dr Ho opines that the applicant could undertake 12 hours of sedentary work per week with re-training. In November 2017 Dr Verma opines that the applicant may be able to take positions where he could sit down, once he has appropriate training. In September 2017 Dr Giblin considers that the applicant would be fit for a sedentary work environment where the applicant could change his body habitus at will. Although Dr Machart provides an opinion at a later date in November 2018, he also considers that the applicant is fit for predominantly sedentary work for what would amount to about 12 hours of work per week in sales, food preparation if predominantly seated, or office work.
90. I consider that by January 2018 there had been an improvement in the applicant's lower back condition as recorded by Dr Ho that placed the applicant in a position where he was fit for suitable employment for 12 hours of work per week. I consider that three hours of work per day for four days per week, using Wednesday as a day of rest, would be within the applicant's capacity for work, and that this is consistent with the opinions of all the doctors who have opined on this issue.
91. Mr Hanrahan submits that the applicant would not be able to do any of the jobs suggested by Dr Thomson or Dr Machart and I agree with that, with the exception of food preparation where the applicant is able to sit for most of the time. Three hours of that work each day for four days per week would have been a job that the applicant was suited for by 1 January 2018 based upon the evidence that is available. That is not a job that requires re-training, which is a qualification made by Dr Ho and Dr Verma, as the applicant has had several years of experience of work in a commercial kitchen.
92. Food preparation work could be done in a large restaurant or on a process line in a factory. It is a job which by 1 January 2018 the applicant was suited to do for 12 hours per week, regardless of whether the work was available in the employment market.
93. The work referred to is covered by the Food, Beverage and Tobacco Award 2010, which includes the preparing, filleting, gutting, grading, and processing of food products. At the very least the applicant would meet Level 2 in that award for a worker who has more than three months experience. The hourly rates for a Level 2 employee for the period in which the applicant is to be compensated are:
- (a) \$18.81 per hour from 1 January 2018 to 30 June 2018;
 - (b) \$19.47 per hour from 1 July 2018 to 7 October 2018.
94. I therefore find that the applicant had a partial incapacity for work from 1 January 2018 and was able to earn in suitable employment as follows:
- (a) \$225.72 per week from 1 January 2018 to 30 June 2018;
 - (b) \$233.64 per week from 1 July 2018 to 7 October 2018.

95. Based on 80% of PIAWE being \$729.60, there will be an award for the applicant as follows:
- (a) \$503.88 per week from 1 January 2018 to 30 June 2018;
 - (b) \$495.96 per week from 1 July 2018 to 7 October 2018.

The claim for medical expenses

96. There was also a claim made by the applicant for medical expenses, which was quantified at \$3,172.60, although the Medicare Notice of Charge was only valid until 21 April 2018.
97. There will be an order that the respondent is to pay the applicant's reasonable medical expenses for treatment for injury to the applicant's left knee for injury sustained on 17 February 2009 and 14 April 2016, and for treatment for injury to the applicant's lumbar spine for injury sustained on 14 April 2016.