

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 5531/18
Applicant: Fayez Ali-Ahmad
Respondent: Sydney Trains
Date of Determination: 9 July 2019
Citation: [2019] NSWCC 238

The Commission determines:

1. The respondent will pay the weekly sum of \$1,262.93 from 16 November 2015 to 15 February 2016 pursuant to s 36.
2. The respondent will pay the weekly sum of \$1,063.52 from 16 February 2016 to 16 November 2016 pursuant to s 37.
3. The respondent will pay s 60 expenses upon production of accounts, receipts and/or HIC Notice of Charge.

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

John Wynyard
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 WYNYARD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Fayez Ali-Ahmad (the applicant) brings an action against Sydney Trains (the respondent) in respect of a psychological/psychiatric injury that he suffered on 16 November 2015 (deemed). He seeks payment of weekly compensation from 16 November 2015 to 16 November 2016, s 60 expenses and lump sum payment pursuant to s 66.
2. A s 74 and related notices were issued on 26 August 2016, 12 December 2016, 27 February 2017 and 27 March 2018. In each notice liability was disputed. However, on 30 November 2018 Consent Orders were issued by which the matter was referred to an AMS for a whole person impairment assessment. That assessment was issued on 5 February 2019 by an AMS finding that Mr Ali-Ahmad was suffering from an 8% WPI. Liability was accordingly admitted.
3. An Application to Resolve a Dispute (ARD) was issued on 22 October 2018 and the Reply was lodged on 23 November 2018.

ISSUES FOR DETERMINATION

4. The parties agree that the following issues remain in dispute:
 - (a) Does Mr Ali-Ahmad have any current work capacity?
 - (b) If so, to what suitable employment is Mr Ali-Ahmad suited.

PROCEDURE BEFORE THE COMMISSION

5. This matter was heard over two days, 3 June 2019 and 7 June 2019. Mr Paul Stockley of counsel appeared for the applicant and Ms Lyn Goodman of counsel appeared for the respondent. 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.

EVIDENCE

Documentary Evidence

6. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) ARD and attached documents;
 - (b) Reply and attached documents;
 - (c) Certificate of Determination dated 30 November 2018;
 - (d) Medical Assessment Certificate dated 5 February 2019.

Oral Evidence

7. No application for oral evidence was made.

FINDINGS AND REASONS

8. Mr Ali-Ahmad made a statement dated 27 April 2017¹ and a statutory declaration dated 26 July 2018.
9. Mr Ali-Ahmad was born in Lebanon in 1950 and first worked there as a Police Officer before coming to Australia in 1977. He commenced employment with the respondent in April 1977 as a labourer.
10. In 1989, he commenced work as a station assistant at Redfern Station and after working there for one year moved to Bankstown Station. His duties were to patrol the platform, to check and sell tickets and to assist customers.
11. Mr Ali-Ahmad said that from 2014 a supervisor would often belittle him or make unsubstantiated allegations and "I gradually became increasingly anxious". Mr Ali-Ahmad said that on 6 February 2014 a female passenger was verbally abusive and discussion ensued between Mr Kemp, Mr Ali-Ahmad's supervisor and the applicant as to whether he was discriminating against the passenger because of her colour. Mr Ali-Ahmad alleged that he consulted his gp that day, although there is no entry in the clinical notes of Dr Nabil Assad, his regular GP for that date. I note that Mr Ali-Ahmad also consulted other general practitioners such as Dr Nasr Ragy, who issued a certificate for "stress" on 4 May 2015.² There may have been others.
12. Mr Ali-Ahmad said in his statement that on another occasion the supervisor abused him when he told a passenger trying to board the train to stand back. No date was given for this event.
13. Similarly, Mr Ali-Ahmad referred to another occasion without any more specificity. When he blew his whistle whilst on the platform he said that some passengers started swearing at him as a result and the supervisor told Mr Ali-Ahmad that he should not blow his whistle if there were passengers around, which is against normal safety practice Mr Ali-Ahmad asserted.
14. There was further animosity between the supervisor and Mr Ali-Ahmad when Mr Ali-Ahmad was alleged to not have flagged a train. There was considerable friction generally with the supervisor and Mr Ali-Ahmad said that the supervisor was deliberately trying to get him into trouble.
15. He raised this issue with the General Manager of Customer Service for the Illawarra Region, Mr Geoff Sturik and another gentleman Mr Nick Cartwright. Mr Ali-Ahmad said that he received an email from Mr Sturik saying that the matter would be investigated and that a Mr Roach was copied into the email, but Mr Ali-Ahmad said he never heard from Mr Roach.
16. An event occurred on 11 July 2014 when Mr Ali-Ahmad approached the supervisor as the new rosters prevented him from attending his Mosque to prayer on Fridays, notwithstanding that he had found a colleague who would relieve him at that time. Mr Ali-Ahmad again attended Dr Assad feeling stressed and dizzy. An entry in Dr Assad's clinical notes on 11 July 2014 recorded that Mr Ali-Ahmad complained of "anxiety and stress leave from argument & boss today at work"³.
17. Mr Ali-Ahmad related another occasion where again he told a passenger to stay behind the line for safety reasons and the supervisor remonstrated with him.

¹ ARD 187

² ARD 29

³ ARD 29

18. When the supervisor went on leave in late 2014 for six weeks, another supervisor moved Mr Ali-Ahmad's chair, making him stand for eight hours per day. When he complained about this he was told that if he couldn't manage without the chair he would be declared unfit for work.
19. The Union got involved, Mr Ali-Ahmad said, and the chair came back the next day.
20. On 10 June 2015, he related an incident regarding an Opal card which was assigned to him with his employee number but which had been reported stolen by the person described by Mr Ali-Ahmad his son's mother.
21. The replacement supervisor Ms Michael, raised issues with respect to the Code of Conduct and there were five charges brought against Mr Ali-Ahmad of which four were upheld. He was given two weeks without pay.
22. In July 2015, Mr Ali-Ahmad developed kidney stones and required time off work for surgery. As will be seen this was a recurring health problem for Mr Ali-Ahmad, however he said that stress and anxiety increased at this time because he was harassed by Ms Michael.
23. In May 2015, he sought carer's leave to assist his elderly parents but Ms Michael suggested that he should put his parents in a nursing home and leave was refused.
24. On 2 July 2015, Mr Ali-Ahmad said he called in sick to advise of his medical condition (which other evidence such will show was to do with his renal problems) and he was certified unfit until 16 November 2015. Evidence shows that the last day he worked for the respondent was 30 October 2015.
25. In August 2015, Mr Ali-Ahmad's GP referred him to Mr Medhat Metry, Psychologist, in view of Mr Ali-Ahmad's symptoms.
26. On 30 October 2015, he accepted a voluntary redundancy. He said:

"I felt like if I did not accept the redundancy that my employment would be terminated. I had 2000 hours sick leave when I left because I rarely took sick leave.

I have not worked since. I continue to experience symptoms of anxiety and depression. I find I am increasingly irritable and impatient and have difficulty sleeping".
27. In his statutory declaration⁴ he advanced the reasons why he had not made a claim pursuant to s 261 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) which is not a relevant matter in view of the admission of liability.
28. He then discussed the redundancy that he accepted. He said that he accepted it because he was constantly harassed, bullied and belittled. He said that he thought "they just wanted an excuse to terminate my employment." He said that he was not supported even when he was giving them medical certificates advising that he had a medical condition. He said⁵:

"I did not at the time advise them that I was seeking treatment for the depression and stress because I am a traditional and personal person and did not wish to make them think that they were getting to me or what they were doing was working."

⁴ ARD 190

⁵ ARD 190

29. When Mr Ali-Ahmad sought to be re-hired, he was told by a Human Resources person, Ms Sally Horn, that there were a number of complaints made against him detailed by Ms Michael. Mr Ali-Ahmad said⁶:

“These were all misconceived issues and were unfounded allegations of my performance. My lifelong service to Sydney Trains was never taken into consideration and I was belittled and harassed forcing me to take the redundancy.”

30. Mr Ali-Ahmad said that he continued to see Mr Sam Albassit, a Psychologist, regularly on a monthly basis. He referred to his symptoms and said⁷:

“6. My condition has been caused during the course of my employment and was aggravated at the time that I took my redundancy. My employment is the main contributing factor of my injury and I was constantly harassed, belittled and felt that I had no support whatsoever causing my depression and other symptoms including stress, worthlessness and hopelessness which has continued to date.”

31. A letter of claim was made against the respondent on 12 August 2016⁸ and on 28 November 2018 served a report of Dr Richa Rastogi of 17 November 2016 together with a report of the GP, Dr Nabil Assab of 13 October 2016.

Dr Richa Ristogi

32. Dr Rastogi in her report of 17 November 2016 took a history that was broadly consistent with the content of Mr Ali-Ahmad’s first statement. She noted⁹:

“He started feeling anxious and was not coping. He developed sleep problems and he was agitated. He stated that the last straw was being set up and being issued disciplinary action against him for having a Gold Pass and dismissal for carer leave in 2014 after approval from HR.

This led to a build up of anxiety and stress due to a series of events since 2014 and he was unable to cope”.

33. Dr Rastogi said that these problems forced him to accept a voluntary redundancy on 30 October 2015. Dr Rastogi also took a history of the development of renal problems saying that in July 2015 Mr Ali-Ahmad developed kidney stones needing medical and surgical interventions. Mr Ali-Ahmad alleged that during that time he was being harassed by Ms Michael and threatened with the withdrawal of his redundancy agreement. This, Dr Rastogi said, exacerbated Mr Ali-Ahmad stress and anxiety and caused “significant fear”.
34. Dr Rastogi noted that Mr Ali-Ahmad had been having psychological sessions on a fortnightly basis since September 2015.

⁶ ARD 190

⁷ ARD 191

⁸ ARD 130

⁹ ARD 20

35. She said that Mr Ali-Ahmad reported¹⁰:

“Ongoing resentment and poor frustration tolerance and given the allegations with fabrication of his reputation, he has been significantly consumed with anxiety and fear. These allegations have not been addressed and there are unresolved grievances, which is exacerbating his anxieties.”

36. The diagnosis given by Dr Rastogi was of Adjustment Disorder with Depressed Mood and Anxiety. She said that Mr Ali-Ahmad was not fit to work in any capacity. She said¹¹:

“The client is not fit to work in any occupation currently but in the near future may be able to work part time in sedentary role in limited capacity however vocational options remain limited. His grievances need to be addressed for him to move forward.”

37. As to Mr Ali-Ahmad’s capacity to engage in employment, Dr Rastogi was asked:¹²

“What occupations, if any, our client is presently able to undertake. In that regard, please consider our clients age, educational qualifications, training, experience, employment skills and individual characteristics.”

38. Dr Rastogi replied:

“The client is not fit to work in any occupation currently but in near future may be able to work part time in sedentary role in limited capacity, however, vocational options remain limited. His grievances need to be addressed for him to move forward.”

39. Dr Rastogi gave a further report on 26 February 2018 when she again interviewed Mr Ali-Ahmad. She reported that since the last occasion, Mr Ali-Ahmad had continued to see Mr Albassit regularly on a monthly basis, and that he continued taking Lovan 20mg every night. He complained of chronic sleep deprivation, explosive outbursts, and poor frustration tolerance¹³.

40. Dr Rastogi was told that Mr Ali-Ahmad did not participate in household activities or perform any chores in the house. He was emotionally detached, aloof and disconnected from his children and from his wife. He said that he hates being around people and spends most of the time in his own company. She noted¹⁴:

“He feels worthless and hopeless and has uncertainty of future. The lack of vocational uncertainty and unresolved grievances at work with lack of validation by management is perpetuating his depression.”

41. He resented particularly the lack of support from Ms Michael and not being rehired. The diagnosis on his occasion was Adjustment Disorder with Depressed Mood.

¹⁰ AR 191

¹¹ ARD 24

¹² ARD 24

¹³ ARD 11

¹⁴ ARD 12

42. Dr Rastogi thought that Mr Ali-Ahmad:

“Is not fit to work in any occupation currently and in future his ability to work is impaired due to ongoing depression and cognitive impact as well as marked into personal conflict. His vocational options remain limited. His grievances need to be addressed for him to move forward.”

43. He was “currently” unfit.

44. In the meantime, Mr Ali-Ahmad had seen Mr Graham George, Psychiatrist who was retained as the medico-legal referee by the respondent. Dr Rastogi commented:

“Dr George has not taken [Mr Ali-Ahmad’s] symptoms and reports of his treating doctors and psychologist in consideration for a diagnosed opinion and cross sectionally stated that he does not have a psychiatric injury despite functional impairments and loss of interest in activities and poor motivation and drive”.

Mr Sam Albassit

45. Mr Sam Albassit, Psychologist, provided a report dated 31 October 2017.¹⁵ He said that Mr Ali-Ahmad had been first referred to him by Dr Nabil Assab on 17 March 2016, but there had been a re-referral for therapy by Dr Gergis. Mr Ali-Ahmad said was consulting with psychologist Medhat Metry prior to consulting with himself. He said Mr Metry was the treating psychologist from 25 September 2015 to 3 June 2016. The first consultation with Mr Albassit was 20 October 2016.

46. Mr Albassit said that Mr Ali-Ahmad’s symptomatology was consistent with a Major Depression with features of Anxiety the cause of which was “as a result of his workplace Bullying and Harassment.”

47. As to fitness for work, Mr Albassit said that Mr Ali-Ahmad was unfit and continued to be unfit as a result of the ongoing symptomatology.

Mr Medhat Metry

48. Mr Medhat Metry, Psychologist, provided a report on 26 February 2016¹⁶. He said that Mr Ali-Ahmad had last attended his rooms on that date and that he had received six psychological therapy sessions in the form of cognitive behavioural therapy. Mr Ali-Ahmad commenced counselling therapy and psychological treatment. Mr Metry said that the purpose of the treatment was:

“...to address his condition and alleviate the debilitating symptoms he experienced.”

49. Treatment was then given and Mr Metry said:

“Unfortunately, Mr Ali-Ahmad still has ongoing symptoms of depression and anxiety with no change in her [sic] psychological condition”.

50. He felt that Mr Ali-Ahmad would benefit from continuing psychological therapy and requested the GP, Dr Assad to approve further psychological therapy sessions.

¹⁵ ARD 35

¹⁶ ARD 85

Dr Nabil Assad

51. On 13 October 2016, Dr Nabil Assad reported to Messrs Turner Freeman, Lawyers¹⁷. He said that Mr Ali-Ahmad presented on 8 May 2012 in a state of anxiety following a dispute at work. He was certified unfit for one day due to anxiety and stress. Dr Assad said that he again saw Mr Ali-Ahmad on 6 February 2014 with a complaint of another dispute with his boss, for which Valium was prescribed.
52. On 13 August 2015, Mr Ali-Ahmad was also stressed from work and was again prescribed Valium. On 28 August 2015 Mr Ali-Ahmad complained of being stressed and unable to sleep and Dr Assad certified him unfit until 20 September 2015. It was then that Mr Ali-Ahmad was referred to Mr Metry.
53. On 26 November 2015, Dr Assab prescribed Valium.
54. On 10 March 2016, Dr Assad made a diagnosis of depression as well as anxiety.
55. On 10 March 2016, Dr Assad prescribed Lovan in addition to Valium, as well as counselling from the psychologist.
56. He was re-referred for treatment with Mr Metry on 17 March 2016.
57. On 5 May 2016, Dr Assad again thought he needed counselling.
58. On 18 May 2016, Dr Assad prescribed Lovan.
59. On 30 June 2016, Mr Ali-Ahmad was re-referred to Mr Metry for further counselling.
60. On 1 September 2016, he was again re-referred to Mr Metry.
61. Dr Assad said that the last time he saw Mr Ali-Ahmad was on 20 September 2016, when he prescribed Lovan.
62. Dr Assad said:

"Mr Ali-Ahmad has problems with renal stones since 23/5.2015 up until now, and he was off from work for a long period of time since then.

I certified him unfit for work on several occasions since then due to the renal stones."
63. Dr Assad thought that the anxiety and depression was caused by "dispute at work as he stated, which happened on few occasions in the past 4 years."

Clinical notes

64. Dr Assad provided his clinical notes which went back to 1979. I have reproduced the entry of 11 July 2014.
65. On 4 May 2015, an entry appears:

"Anxiety and stress from argument with boss at work"¹⁸.

¹⁷ ARD 61

¹⁸ ARD 29

66. On 6 August 2015, the entry read:¹⁹
"Likes to go back to work."
67. On 13 August 2015, the entry read:²⁰
""Stressed out work from work 8/8/15."
68. On 6 February 2016, the entry shows a prescription of Valium, without any reason being given.
69. On 2 April 2016, the entry reads, doing the best I can with the handwriting:
"stones (the next word might be 'kidney') Depression, unable to concentrate, unfit to attend court."

Dr Andrew Mitterdorfer

70. Mr Ali-Ahmad's renal condition is relevant. He was referred to Dr Andrew Mitterdorfer, Urologist who reported on 3 August 2015²¹.
71. Dr Mitterdorfer noted that "five weeks before", Mr Ali-Ahmad noted right sided loin pain of an intermittent nature. Investigation showed a large stone in the right renal pelvis, and a ureteroscopy was recommended.
72. On 16 November 2015, Dr Mitterdorfer reported to Dr Assad. He said that on 27 October 2015 surgery was carried out, but during the procedure the 15 x 10 mm calculus slipped up into the renal pelvis and Mr Ali-Ahmad had to be referred to Prince of Wales for extracorporeal shockwave lithotripsy²².
73. On 30 May 2016, Dr Mitterdorfer reviewed Mr Ali-Ahmad after two lithotripsy procedures; one in February and one in April at Prince of Wales.²³ He said Mr Ali-Ahmad had an indwelling stent with a stone street in the proximal ureter as well as a large proximal calculus probably sitting in the renal pelvis measuring 22 x 6 mm. Dr Mitterdorfer said:
"Obviously the stone is not fragmented completely and he will require further procedures."
74. Dr Mitterdorfer said that he had arranged for Mr Ali-Ahmad to be admitted into Bankstown-Lidcombe Hospital for ureteropyeloscopy and Holmium Laser to stone²⁴.
75. On 29 June 2016, Dr Mitterdorfer reported on further surgery saying that one further procedure would be necessary as the current operation was limited to 1.5 hours to prevent urosepsis.²⁵
76. On 18 July 2016, Dr Mitterdorfer reported on a further surgical procedure at Bankstown-Lidcombe Hospital on 29 May 2016. He said further laser treatment was going to be necessary.

¹⁹ ARD 75

²⁰ ARD 75

²¹ ARD 74

²² ARD 79

²³ ARD 90

²⁴ ARD 90

²⁵ ARD 92

77. On 23 August 2016, at Concord Repatriation General Hospital Dr Mitterdorfer was the consultation during a procedure in related to the intrarenal stones and a further operation was carried out on 15 November 2016 at Concord²⁶.

The Medical Assessment Certificate (MAC)

78. As indicated, a MAC was issued by an AMS, Dr Michael: Hong, on 5 February 2019.
79. The AMS took a consistent history. He noted that Mr Ali-Ahmad had undergone seven operations for his recurrent renal stones condition the last one being in February 2017. The AMS noted that Mr Ali-Ahmad asserted that the renal stones were not the reason for his stopping work. The AMS also noted that Mr Ali-Ahmad did not stop work because he needed to care for his mother either. He noted that the work issues were well documented and noted Mr Ali-Ahmad's allegation that he had been set up by someone placing money around the station to be found. The AMS recorded Mr Ali-Ahmad's assertion that when he applied to become a carer for his mother barriers were created and he was picked on, and further that he was not aware that his son had taken his Gold Pass and then used it.
80. The activities of Mr Ali-Ahmad's daily living which included going for walks, sitting in the garden, visiting the Prayer Centre on Fridays, reading the Koran, going to the shops. In his summary, the AMS said:²⁷

"I note [Mr Ali-Ahmad] developed anxiety and depressive symptoms in the context of feeling bullied and has never recovered fully. He has had various treatment and only takes psychotropic medication on an as needed basis, which is not how anti-depressant medication should be taken. There is a consensus that he developed an Adjustment Disorder with Anxiety and Depressive Symptoms."

81. In considering the opinions of Dr Rastogi he noted that Mr Ali-Ahmad was much improved since Dr Rastogi's assessment. He said:

"..... he is clearly functioning with a higher level - exercising most days, watching football games online intermittently, regularly attendance at Prayer Centre".

82. The AMS also had access to surveillance material contained in a surveillance report of 25 January 2017. The AMS made the following summary of the surveillance footage²⁸:

"Mr Ali-Ahmad was observed to be driving around, socialising with shop staff members in different locations, and with his neighbour and shopping for groceries at several shops. Mr Ali-Ahmad presented as well-groomed and cleanly shaven, smiling, laughing during conversations with people. There were accompanying photos. Mr Ali-Ahmad was observed to be walking as a form of exercise. He drove to the local shopping centre by himself at times. He attended a bank. The observation from surveillance was consistent with the history that I had taken."

²⁶ ARD 99, 102

²⁷ MAC 4

²⁸ MAC 6

83. The AMS said²⁹:

“My impression was that Mr Ali-Ahmad developed a psychiatric disorder during his employment. Whether this disorder is related to and caused by his employment or not, has been determined by the legal members of the Commission.”

84. Notwithstanding the low whole person impairment assessed by the AMS, he found with regard to the category of “employment:”

“Mr Ali-Ahmad is severely dysfunctional due to his psychiatric symptoms and his level of adaption is poor³⁰.”

Factual Investigation

85. A Factual Investigation Report was prepared by LS Partners under the hand of Mr Steve Castrisios. This was a document of over 120 pages containing 16 attachments most of which were concerned with the question of liability and accordingly are of no assistance with regard to the question of Mr Ali-Ahmad’s residual earning capacity.

86. Statements were filed by Biljana Michael³¹, Dimi Mantsis³², Christopher Walsh³³ and Arthur (Athanasios) Loucas³⁴. The witnesses were concerned to relate the circumstances surrounding Mr Ali-Ahmad’s application to become a carer for his parents but noted that at the end of his employment, Mr Ali-Ahmad, from about June 2015, went off work with renal problems.

87. Ms Michael was at the relevant time Acting Station Customer Manager on the Bankstown line where Mr Ali-Ahmad was employed. She said that Mr Ali-Ahmad went off work sometime in June 2015 and accepted voluntary redundancy on 31 October 2015.

88. She said there were conduct issues with Mr Ali-Ahmad but that the main issue prior to his going off work was his application for carer's leave. There was also an issue that Mr Ali-Ahmad would breach the agreement reached with the respondent regarding the time Islamic employees could have on Fridays for prayer. Other conduct issues involved customer complaints regarding Mr Ali-Ahmad's behaviour whilst working on the turnstiles, including his approach to school children.

89. An email was also lodged dated 11 September 2015 from Ms Michael to Dr Casolin³⁵ which confirmed that Mr Ali-Ahmad went off work on 3 July 2015. The email sought clarification as to why Mr Ali-Ahmad was off work. Ms Michael said:

"Also find out if [Mr Ali-Ahmad's] Doctor is aware that he is a Rail Safety Worker and of the conditions associated with this especially around returning to work after an extended period away? [Mr Ali-Ahmad] has supplied medical certificates saying nothing more than "Medical Condition" which is his prerogative yet he is able to visit the station frequently to send emails, talk to the staff et cetera?"

²⁹ MAC 6

³⁰ MAC 10

³¹ Reply 33

³² Reply 36

³³ Reply 39

³⁴ Reply 42

³⁵ Reply 17

90. Mr Loucas was General Manager of Customer Service for the South/Illawarra Regions. He outlined the principal dispute that all of the witnesses were concerned with, namely Mr Ali-Ahmad application to become carer for his parents. Mr Lucas said that carer's leave was a process that was being reviewed by Sydney Trains. He said that there was a misconception amongst the employees that the policy provided for a blanket carer's leave and that the organisation was attempting to correct that assumption.

91. In any event Mr Loucas said:³⁶

“At some point during this period of illness when voluntary redundancy was offered Fayez was one of the first to put his hands up and left the business shortly afterwards. Since then he has been very active about putting complaints about measurers such as Biljana Michael alleging inappropriate conduct. Although there has been no evidence to substantiate his claim, these grievances has been handled by Sally Horn, the General Manager of people (HR) and there have been no adverse findings against any Sydney Trains employees.

22. As Fayez was not at work due to sick leave, I do not see how he could have felt he was being pressured into taking redundancy. It was voluntary and he still had the option of returning to Bankstown...”

92. None of the witnesses were aware that Mr Ali-Ahmad was suffering from a psychiatric condition.

Surveillance reports

93. Also lodged by the respondent were surveillance reports which I have made mention of earlier in these reasons. The first report was dated 25 January 2017 and concerned observations carried out on 22 December and 23 December 2016, both periods being for 8 hours. 32.5 minutes of video was obtained during these periods of observation.

94. On 22 December 2016, it seems that work was being done on his property as a tradesman arrived and unloaded tools. Mr Ali-Ahmad appeared relaxed and jovial when talking to the tradesman. Mr Ali-Ahmad was seen going about his business on that day which included a trip the Assalah Cheese Factory and a visit to Aldi at Villawood.

95. He was videoed doing some shopping at Aldi and after contact was lost on the drive back, the operatives saw him arrive back at his residence shortly after 1pm, where he unloaded his purchases. Shortly thereafter Mr Ali-Ahmad left in a silver Toyota Corolla that he had been driving in the morning.

96. On Friday 23 December 2016, some activity by what would appear to be other family members around the property was noticed until Mr Ali-Ahmad was seen to walk to his silver Toyota Corolla and drive off wearing what the operative thought was Muslim religious style Taqiyya head gear. Tradesmen were observed to arrive at the premises around midday and shortly thereafter Mr Ali-Ahmad was observed to arrive back in his silver Toyota Corolla but not wearing the Taqiyah cap. Shortly after Mr Ali-Ahmad left the premises and drove to an address in Greenacre being the Greenacre Youth Community Centre where a large gathering of Muslim men were conducting prayer. After over one hour Mr Ali-Ahmad was seen talking to a fellow worshipper with whom he had had a long conversation in the carpark. Mr Ali-Ahmad was seen getting some items from a grocer on Waterloo Road on his way

³⁶ Reply 43

home where he unloaded his groceries just after 2pm. Surveillance ceased around 5pm as Mr Ali-Ahmad was not seen again.

97. The operative reported³⁷

“To the casual observer, the Claimant seemed in good health, as he made a point to be well groomed, dressed and clean shaven prior to leaving the residence to go shopping in his vehicle. Prior to this, the Claimant also showed no visible awkwardness towards socialising with others, as he was observed smiling and laughing during conversations with people seen at his residence and at the prayer hall.”

98. Further surveillance was carried out on 28 and 29 January 2017 again of eight hours duration for each day. 28 January 2017 was a Saturday during which Mr Ali-Ahmad drove to several destinations from his home.

99. He was seen at around 8pm to leave the premises dressed in T-shirt and shorts and make his way to Roberts Park where he was observed to walk around the field about nine times after which period he returned home at about 9:15. At about 12:30 he returned to the residence and departed in his silver Toyota Corolla to Punchbowl Road where contact was lost. About 20 minutes later Mr Ali-Ahmad was seen to return to the vehicle with bags of items and depart the vicinity. He then went to a fuel station and bought some items. He then went to another grocery shop near Highclare Avenue where he was seen and filmed purchasing items.

100. At about 2pm he left the shop and contact was lost.

101. On 29 January 2017 Mr Ali-Ahmad was observed dressed in shorts and a shirt to leave his residence in company with his wife where they went to Roberts Park and walked around the field separately with Mr Ali-Ahmad walking around the field about eight times.

102. They arrived home just before 8am (they left at about 7am).

103. About one hour later he departed the scene in his Toyota Corolla. He went to a fuel station on Punchbowl Road, and then drove to a bakery where he was observed conversing with another male before the leaving the area in his vehicle. He was seen to do two U turns in this time. He was seen about 10 minutes later driving around Punchbowl where he bought bags of items and left the vicinity. Contact was lost at about 9:30am. When the operative arrived back at Mr Ali-Ahmad's residence the Toyota Corolla was there.

104. The next sighting was when Mr Ali-Ahmad left the residence at about 11:20 and drove away in his silver Toyota Corolla. He was observed to drive through a red traffic signal and contact was lost. The operative waited near Mr Ali-Ahmad's residence from about 11:45 to 2:30 but no further sighting was made.

105. The operative reported:³⁸

“When observed, over the two days of surveillance, the Claimant was noted socialising with shop staff and an unknown male at different locations and also with his neighbour, driving a motor vehicle and shopping for groceries at several other shops, to include carrying them inside the residence. To the casual observer, the Claimant seemed in good health, as he made a point to be well groomed, dressed and clean shaven prior to leaving the residence to go shopping in his vehicle. Prior to this, the Claimant also showed no visible

³⁷ Reply 234

³⁸ Reply 252

awkwardness towards socialising with others, as he was observed smiling and laughing during conversations with people.”

106. A further period of surveillance occurred over three days of observations, 5, 6 and 9 July 2017. On 5 July surveillance lasted eight hours and on 6 and 9 July, four hours per day.
107. Surveillance was undertaken at Mr Ali-Ahmad’s residence and although visitors were seen coming and leaving during the period of observation, Mr Ali-Ahmad was not himself seen. He was not seen either on 6 July 2017.
108. On 9 July 2017 people were again seen coming and going from the residence but no sightings of Mr Ali-Ahmad were made initially.
109. Mr Ali-Ahmad was seen however when he went for a power walk just before 8 o’clock. Again, he went with his wife and they walked Roberts Park separately.
110. When he returned home, at about 9:15 he was not seen again.
111. Further surveillance was carried out on 6, 7 and 8 April 2017³⁹. The same behaviour was noted by the operatives. On the Friday, he was seen returning to his residence after what appeared to be a walk and he was seen going about his business, shopping and banking during the day.
112. On 7 April 2018, he was driven by his wife to the John Moroney Correctional Centre Berkshire Park before returning home, a round trip time of 2 hours and 100kms. Further detailed description is not necessary.

Submissions

113. Ms Goodman submitted the evidence showed that between 3 July 2015 and the redundancy taken on 30 October 2015 Mr Ali-Ahmad was only at work on the one day, 8 August 2015. His absence from work was on account of his renal problems as was described in the multiple reports of Dr Andrew Mitterdorfer.
114. Ms Goodman submitted that there was no support for Mr Ali-Ahmad’s assertion that he had been forced to take a voluntary redundancy.
115. Ms Goodman submitted that there was very little contemporaneous evidence of any incapacity during the period pleaded as a result of any psychological injury.
116. With regard to the deemed date of injury Ms Goodman conceded that she was unable to understand why that date was accepted by the parties as being the deemed date of injury when the matter was referred to the AMS. In that regard, it appears to be the date that Dr Assad’s medical certificate expired.
117. Ms Goodman submitted that there was no support within the contemporaneous clinical notes for any psychological condition from 3 July 2015 to 30 October 2015. During that time she submitted, the evidence showed that Mr Ali-Ahmad only attended work on one day, 8 August 2015.
118. Ms Goodman referred to the reports contained in the clinical notes supplied by Dr Mitterdorfer, and the protracted history of Mr Ali-Ahmad’s renal problems and the multiple bouts of surgery he had to undergo as a result. She referred to the email of 11 September 2015 from Dr Casolin to Ms Michael, reporting that Mr Ali-Ahmad was to

³⁹ Reply 266

undergo surgery on 23 October 2015 and would accordingly be unfit for at least another six weeks.

119. At this point, the case was adjourned until 7 June 2019.
120. On resumption Ms Goodman referred to the MAC, submitting that I would accept the view of the AMS that Mr Ali-Ahmad was functioning at a higher level at his assessment on 5 February 2019 than when he was seen by Dr Rastogi on 26 February 2018. Ms Goodman submitted that although Dr Rastogi in her report of 17 November 2016 had found Mr Ali-Ahmad not fit to work in any capacity, she nonetheless found in the Psychiatric Impairment Rating Scale that he was capable of working in a restricted capacity at less than 20 hours per week. Ms Goodman submitted that this was the closest in time to the period of compensation sought mainly from 16 November 2015 to 14 November 2016, and therefore on his own case Mr Ali-Ahmad had some capacity to earn.
121. I would not however accept Dr Rastogi's assessment in any event, it was submitted. Ms Goodman referred to the surveillance reports which demonstrated, she submitted, that Mr Ali-Ahmad, contrary to Dr Rastogi's opinion, was fit for full duties away from the respondent. He was capable of working in a customer service capacity, Ms Goodman asserted, such as working at Bunnings, being a parts finder and a motor vehicle shop, or indeed being a console operator.
122. Ms Goodman submitted that the mild impairments that the AMS had found in respect of other categories in the scale would enable me to be satisfied that Mr Ali-Ahmad could find some suitable employment within the definition contained in s 32A of the *Workers Compensation Act 1987* (the 1987 Act). I was referred to *Wollongong Nursing Home v Dewar*.⁴⁰ In the light of all the evidence, I would be satisfied that Mr Ali-Ahmad was able to earn a significant income on suitable duties, and that his situation was not of that "ilk" whereby only a nominal residual learning capacity could be found.

Mr Stockley

123. Mr Stockley referred also to s 32A of the 1987 and particularly (a)(ii).
124. He submitted that the applicant was born in 1950 and his entitlement therefore pursuant to s52 ceased on 16 November 2016 when Mr Ali-Ahmad was 65 years old. Mr Stockley, in dealing with the work experience of Mr Ali-Ahmad, said that he had been working for Sydney Trains since 1977, first as a labourer and then since 1989 as a station assistant at Redfern.
125. He said Mr Ali-Ahmad's skills could be defined as being a labourer which was clearly available to him at his age or working for customer service. Mr Stockley submitted that Mr Ali-Ahmad's capacity to understand English was limited in the context of his conducting the level of communication with members of the public that will be required in any form of customer service. He said that Mr Ali-Ahmad had minimal communication skill and the work done blowing a whistle as a station attendant was a different matter to the types of jobs that Ms Goodman was suggesting. He submitted that there was no opinion from the respondent regarding the question of capacity.
126. Mr Stockley said that he was not alleging that there was an inversion to the onus of proof, but on the evidence before me a prima facie case can be drawn that incapacity had been established, and that the respondent had not put on any evidence to contradict or overcome the effect of that prima facie case.

⁴⁰ [2014] NSWCCPD 121

127. Mr Stockley referred to the medical case. He submitted that although there was an absence of WorkCover certificates certifying incapacity, this could perhaps be explained by the fact that Mr Ali-Ahmad had become an aged pensioner.
128. Mr Stockley referred to the report of Dr Rastogi dated 17 November 2016. He submitted that the later report was of not much assistance as it well post-dated the relevant period.
129. Mr Stockley referred to Dr Rastogi's opinion that his client was not then fit to work in any capacity and conceded that that opinion was qualified by the entry in the PIRS category completed by Dr Rastogi in a separate report of the same date that Mr Ali-Ahmad was able to work in a restricted capacity less than 20 hours per week.
130. Mr Stockley put that in context with the earlier comment by Dr Rastogi that Mr Ali-Ahmad might be able to work part-time in a sedentary role, in the near future.
131. Mr Stockley submitted that in context, no capacity for work was possessed by Mr Ali-Ahmad up to that time.
132. Mr Stockley submitted that the opinion of the AMS demonstrated a trajectory of improvement from the time Mr Ali-Ahmad left work.
133. Notwithstanding, Mr Stockley submitted that the AMS still found that Mr Ali-Ahmad was a class 4 for employability.
134. So far as the surveillance was concerned, Mr Stockley submitted that it was relevant to show that the applicant had improved since the end of 2016 and he submitted that all of the observations occurred after that period.
135. He also submitted that the material was before the AMS and that although he only mentioned the report of the surveillance observations dated 27 January 2017 there was no reason to think that all the documents contained in the Reply were not before him.
136. He submitted that the evidence was capable of showing that the applicant had no current work capacity during the relevant time and that by applying s 32A (a)(ii) I would be satisfied that such an order should be made.
137. It was agreed that a general order for s 60 expenses could be made up until 15 November 2016 which was the expiry of the two-year period provided pursuant to s 59A of the 1987 Act.
138. Ms Goodman submitted in effect that I could not draw the emphases that were urged upon me by Mr Stockley because at the time of Dr Assad's report 3 August 2015, Mr Ali-Ahmad continued to work and there is no suggestion that there was any incapacity arising from his psychological condition at that stage.

Discussion

139. This matter concerns an entitlement period from 16 November 2015 to 16 November 2016. The relevant question therefore is as to whether Mr Ali-Ahmad was capable of doing suitable duties during that time, and if so the extent of residual earning capacity.
140. It is of some significance that when Mr Ali-Ahmad was referred to Mr Metry for psychological counselling on 28 August 2015, Mr Ali-Ahmad had not been at work since 3 July 2015. It is also significant that the reason given by Mr Metry for the referral to him was to address Mr Ali-Ahmad's "condition and debilitating symptoms". In context, bearing in mind that

Mr Ali-Ahmad was then involved in treatment for a recalcitrant and complicated renal problem, having consulted Dr Mitterdorfer on 3 August 2015 and having been suffering from symptoms, according to Dr Assad, since May 2015 - that the reason for the depression and anxiety for which Mr Metry gave counselling and psychological treatment had nothing to do with any workplace issue, but was exclusively concerned with the understandable distress caused by a renal problem that continued to be intractable and for which seven bouts of surgery were eventually performed over the next year. The continuing psychological therapy administered by Mr Metry might well have been to treat symptoms caused by the renal problem.

141. I was not assisted by the report from Mr Albassit, whose opinion that Mr Ali-Ahmad's symptoms had been caused by "workplace bullying and harassment" was unexplained and given on 31 October 2017, some two years after the relevant events. I note that whilst he acknowledged that Mr Ali-Ahmad had also been undergoing psychological counselling from Mr Metry, he did not discuss the cause, which I have referred to above. Further, his first consultation with Mr Ali-Ahmad did not occur until 17 March 2016, and no explanation was given as to the reason.
142. Mr Ali-Ahmad was a long-term employee of the respondent, having worked there for over 38 years at the time he took his redundancy. There is no support for Mr Ali-Ahmad's contention that he was forced to take redundancy because he was being bullied and harassed. It is somewhat difficult to understand how Mr Ali-Ahmad could have been psychologically injured at work when he had not attended there for at least 12 weeks.
143. I also have considerable difficulty in accepting that the few isolated entries in the clinical notes of Dr Assad corroborate Mr Ali-Ahmad's assertion. There were only three entries before 2015 which referred to any difficulties experienced at work. There is no evidence that Mr Ali-Ahmad did any more than complain to Dr Assad on those occasions, and I am not satisfied that the referral to Mr Metry had anything to do with bullying and harassment at the workplace.
144. With regard to Dr Assad's report, I note that he certified one day off for work stress on 8 May 2012, but it does not appear that Dr Assad certified any other time off. The evidence shows that Mr Ali-Ahmad went to work for one day in early August 2015, but had been off work since 3 July 2015 with his renal problem. Dr Assad noted on 13 August 2015 that Mr Ali-Ahmad was stressed from work, and that Valium was prescribed. Dr Assad then noted that Mr Ali-Ahmad "continued to work." This was clearly incorrect, as Mr Ali-Ahmad did not work again. I have some reservations therefore regarding the weight I can place on the opinions of Dr Assad.
145. Moreover, although caution must be exercised in reviewing surveillance evidence, the overwhelming impression on all the surveillance, between 22 December 2016 and April 2018, was of an untroubled family man. He was seen going for walks with his wife around Roberts Park on two occasions, the earlier being 29 January 2017 and again on 9 July 2017. He was seen being driven by his wife on 7 April 2018. His demeanour and his interaction with other people, be it shopkeepers or his fellow worshippers gave no sign of the symptoms identified by Dr Rastogi in her report of 26 February 2018. He did not appear to be emotionally detached, aloof or in any way disconnected from his children and his wife, assuming that it was his children who are seen so often in the surveillance material coming and going from his residence. Neither did he exhibit any lack of confidence or friendliness that would perhaps denote the feeling of worthlessness and hopelessness described by Dr Rastogi.
146. It is clear from the evidence of Mr Loucas that there was some concern by Mr Ali-Ahmad about his entitlement to carers leave. I accept the evidence of Mr Loucas that a misconception had arisen amongst the respondent's employees as to that entitlement, and it may be that that was a source of frustration for Mr Ali-Ahmad. I also accept that Mr Loucas

was correct in reporting that although Mr Ali-Ahmad was one of the first to volunteer to take redundancy that it was not until after he had left the employ of the respondent that he began to make the accusations which are the subject of this claim.

147. It has not been disputed that Mr Ali-Ahmad was spoken to on a number of different occasions.
148. As to Mr Ali-Ahmad's claim for weekly payments, the evidence relating to the entitlement is scant. There are no medical certificates and the only evidence on the subject is that of Dr Rastogi in her report of 17 November 2016. Her opinion was that as of that date Mr Ali-Ahmad had no current work capacity, although in the "near future" he would have some capacity to perform suitable duties of a sedentary role.
149. As that is the only evidence available, there being no relevant evidence from the respondent, I must accept it. The report of Dr George for the respondent was concerned with Mr Ali-Ahmad's position as at 27 January 2017 and, as he was of the view that there was no psychological injury in any event, his opinion must be put to one side.

SUMMARY

150. Therefore, there will be an award in favour of the applicant on the basis that he had no current employment over the claimed period. The pre-injury average weekly earnings was agreed at \$1329.40. Accordingly, I make the following orders:
- (a) The respondent will pay the weekly sum of \$1,262.93 from 16 November 2015 to 15 February 2016 pursuant to s 36;
 - (b) The respondent will pay the weekly sum of \$1,063.52 from 16 February 2016 to 16 November 2016 pursuant to s 37;
 - (c) The respondent will pay s 60 expenses upon production of accounts, receipts and/or HIC Notice of Charge.

