WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1659/19**
Applicant: **Ali Guettaf**
Respondent: **Spotless Services Australia Ltd**
Date of Determination: **10 July 2019**
Citation: **[2019] NSWWCC 239**

The Commission determines:

1. The applicant sustained injury to right hip arising out of or in the course of his employment with the respondent on 3 May 2014.

2. The applicant's employment was a substantial and the main contributing factor to his injury.

3. The applicant did not sustain an injury to his groin/ inguinal hernia arising out of or in the course of his employment with the respondent on 3 May 2014.

4. The applicant had no current work capacity from 7 May 2014 to 17 June 2014 and from 4 July 2014 to 8 October 2014.

5. The applicant had the capacity to undertake some work for 8 hours per week earning $301.76 per week from from 18 June 2014 to 3 July 2014 and from 9 October 2014 to 3 December 2014.

6. The applicant had the capacity to undertake some work for 25 hours per week earning $893 per week from from 4 December 2014 to 30 January 2015.

7. The applicant had the capacity to undertake some work for 30 hours per week earning $1,071.60 per week from 31 January 2015 to 15 April 2016.

8. The applicant requires medical treatment as a consequence of his injury and the respondent is liable to pay reasonably necessary medical expenses in respect of his hip injury.

The Commission orders:

9. Award for the respondent in respect of the allegation of an injury to his groin/ inguinal hernia.

10. The respondent to pay the applicant weekly compensation in accordance with the *Workers Compensation Act 1987* as follows:

    (a) $1,470.82 per week from 7 May 2014 to 17 June 2014 pursuant to section 36(1)(a);

    (b) $1,169.06 per week from 18 June 2014 to 3 July 2014 pursuant to section 36(2)(a);

    (c) $1,470.82 per week from 4 July 2014 to 5 August 2014 pursuant to section 36(1)(a);

(d) $1,238.58 per week from 6 August 2014 to 30 September 2014 pursuant to section 37(1)(a);

(e) $1,250.35 per week from 1 October 2014 to 8 October 2014 pursuant to section 37(1)(a);

(f) $948.59 per week from 9 October 2014 to 3 December 2014 pursuant to section 37(3)(a);

(g) $591.79 per week from 4 December 2014 to 30 January 2015 pursuant to section 37(3)(a);

(h) $413.19 per week from 31 January 2015 to 31 March 2015 pursuant to section 37(2)(a);

(i) $424.33 per week from 1 April 2015 to 5 May 2015 pursuant to section 37(2)(a);

(j) $29.89 per week from 6 May 2015 to 30 September 2015 pursuant to section 37(2)(a);

(k) $45.31 per week from 1 October 2015 to 31 March 2016 pursuant to section 37(2)(a), and

(l) $51.45 per week from 1 April 2016 to 15 April 2016 pursuant to section 37(2)(a).

11. Liberty to the parties to apply with respect to these calculations within 14 days of this determination.

12. The respondent is to have credit for payments made during this period.

13. The respondent is to pay the applicant's reasonably necessary medical expenses in respect of the applicant's right hip injury pursuant to sections 59A and 60 of the *Workers Compensation Act 1987*.

14. No order as to costs.

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

Glenn Capel
Senior 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 GLENN CAPEL, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Ali Guettaf (the applicant) is 54 years old and commenced employment with Spotless Services Australia Ltd (the respondent) as a head chef in February 2014. His services were terminated on approximately 8 May 2014.

2. The applicant allegedly suffered an injury when he lifted a 48kg bucket of chicken on 2 May 2014. It is unclear if or when a claim form was submitted to QBE Workers Compensation (NSW) Ltd (QBE) and details of the alleged injury are unknown. There is no correspondence from QBE advising that it intended to make provisional payments or that it had accepted liability.

3. According to a list of payments, QBE paid compensation from 7 May 2014 to 3 March 2015 at the rate of $1,357.62 per week during the first 13 weeks, and then at the reduced rate of $1,143.26. This is consistent with Pre-Injury Average Weekly Earnings (PIAWE) of $1,429.07.

4. On 3 February 2015, QBE issued a notice pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), alleging that the applicant had recovered from the effects of his injury and disputed that his employment was a substantial contributing factor to his condition. It disputed that the applicant was incapacitated as a result of his work injury and that it was liable for the payment of medical expenses. It cited ss 4, 33 and 60 of the *Workers Compensation Act 1987* (the 1987 Act).

5. Proceedings were issued by the applicant in the Workers Compensation Commission (the Commission) in 2015, but these were discontinued at a telephone conference on 16 October 2015.

6. On 13 March 2017, QBE issued a notice pursuant to s 74 of the 1998 Act, disputing that the applicant had injured his hip, right groin or suffered an inguinal hernia on 3 May 2014 and that his employment was a substantial contributing factor to his condition or the main contributing factor to the onset or an aggravation of a disease. It disputed that the applicant had sustained any permanent impairment and that he required medical expenses as a result of any work injury. It cited ss 4, 4(b), 9A, 33, 59, 60 of the 1987 Act. The claim was subsequently transferred to AAI Ltd t/as GIO (the insurer).

7. On 2 October 2018, the applicant's solicitor requested that the insurer review the previous decision of QBE in its dispute notice dated 3 February 2015. No reference was made to the later dispute notice. It is unclear whether the insurer responded to this request.

8. On 18 October 2018, the applicant's solicitor served a claim for lump sum compensation on the insurer.

9. On 17 February 2019, the insurer issued a notice pursuant to s 78 of the 1998 Act, disputing that the applicant had injured his right hip on 3 May 2014 or that he aggravated of a disease. It disputed that the applicant had sustained any permanent impairment.

10. By an Application to Resolve a Dispute (the Application) registered in the Commission on 4 April 2019, and amended by consent after written submission were filed by the parties, the applicant claims weekly compensation from 4 May 2014 to 15 April 2016 pursuant to ss 36 and 37 of the 1987 Act and medical expenses pursuant to s 60 of the 1987 Act due to an injury sustained to his hip and an inguinal hernia on 3 May 2014.

PROCEDURE BEFORE THE COMMISSION

11. The parties attended conciliation conferences and arbitration hearings on 22 May 2019 and 5 June 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.

12. 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.

13. As the matter was unable to conclude on the second arbitration date, I directed that written submissions be filed. The applicant filed submissions on 13 June 2019 and 2 July 2019, and the respondent filed written submissions on 1 July 2019. The parties were informed of my intention to determine the dispute without holding a further conciliation conference or arbitration hearing.

14. These submissions raised some issues regarding the nature of the claim, the need for the applicant to seek leave to amend the Application and for the respondent to dispute the amendment. This was clarified following discussions between the parties. The Commission was informed of the agreement via email on 8 July 2019.

ISSUES FOR DETERMINATION

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

    (a) whether the applicant injured his right hip and groin/hernia – ss 4 of the 1987 Act;
    (b) whether the applicant's employment was a substantial and/or the main contributing factor to his condition – ss 4(b)(ii) and 9A of the 1987 Act;
    (c) whether the insurer made a Work Capacity Decision (WCD) on 22 July 2014 – s 43 of the 1987 Act;
    (d) jurisdiction of the Commission to make orders with respect to the alleged work capacity decision on 22 July 2014 – Cl 6 of Part 19L of Sch 6 of the 1987 Act;
    (e) extent and quantification of the applicant's entitlement to weekly compensation, – ss 35, 36 and 37 of the 1987 Act, and
    (f) the respondent's liability in respect of medical expenses – s 60 of the 1987 Act;

Documentary evidence

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

    (a) Application to Resolve a Dispute with attached documents;
    (b) Amended Reply with attached documents, excluding the report of Dr Potter dated 23 December 2014;
    (c) Applicant's wage schedule received 13 May 2019;
    (d) Respondent's wage schedule received 16 May 2019;
    (e) Letter from QBE Workers Compensation (NSW) Ltd to the applicant dated 22 July 2014 (originally located at pages 139 to 140 of the Reply) (exhibit A), and
    (f) Payslip dated 20 May 2014 (exhibit B).

Oral evidence

17. Neither party sought leave to adduce oral evidence or cross examine any witnesses.

REVIEW OF EVIDENCE

Applicant's statements

18. The applicant provided a statement on 18 June 2015. He advised that on 3 May 2014, he was lifting a pre-stacked bucket of chicken weighing approximately 45 kg onto the trolley, when he struck his right leg and took all of the weight on his thigh and hip. He felt a tearing sensation and dropped the bucket. He had experienced pain, discomfort and restriction of movement since that time.

19. The applicant stated that he immediately called his manager. He continued to work until the end of the shift and he only lasted three hours the following day. He then went home and consulted Dr Ahmed. He had an ultrasound and he was certified unfit for work. When he presented his certificate to his manager the following day, his employment was terminated.

20. The applicant stated that he was referred to Associate Professor Al Muderis, who performed an arthroscopy on his right hip in July 2014. In December 2014, he was cleared to perform a work trial. He was employed by the Chatswood Club for 16 hours per week for a period of six weeks. The position was labour intensive and caused an increase in the pain and discomfort in his hip.

21. The applicant complained that he had pain, discomfort and restriction of movement in his right hip. He also had a hernia and was awaiting approval to see Dr Samira [sic]. He had difficulty standing and he was taking medication.

22. In his statement dated 27 June 2016, the applicant described the nature of his work duties and the circumstances of his injury in more detail. He confirmed that he did not sustain an injury as he was lifting the bucket of chicken onto the trolley. Rather, he had to squat down to pull the bucket of chicken out of the shelf before placing it on the ground. As he pulled the bucket towards him, it struck his right thigh and he fell to the ground. He felt a tearing sensation in his right groin and hip area. He asked the other kitchen hands to complete the job.

23. The applicant stated that he completed the shift but he did not do any lifting. His pain became worse the following day. He was not required to work on the next two days and when he returned to work on 6 May 2014, he told his manager, John, that he wanted to go to the doctor. He could not obtain an appointment with Dr Ahmed until 7 May 2014.

24. The applicant stated that when he presented a certificate from Dr Ahmed, John told him that the regional manager wanted to meet with him. At a meeting on 7 May 2014 or 8 May 2014, the regional manager informed him that there had been complaints about his conduct and as he was still on probation, his employment would be terminated. The regional manager did not disclose who had made the complaints.

25. The applicant stated that he remained on crutches for three months after the arthroscopy. He had pain in his groin and he was still waiting to see Dr Samira. He confirmed that he did a work trial with the Chatswood Club, where the work involved light food preparation such as cutting up vegetables. He had to take an increased dosage of Targin in order to cope with his pain.

26. The applicant stated that he worked at the Platia Greek Tavern as a head chef for 30 hours per week in fairly light duties from 15 June 2015 to 30 September 2015. He was paid $30 per hour. He could not work from 1 October 2015 to 31 December 2015 because he had pain in his groin and he was unable to squat or climb stairs.

27. The applicant stated that he was employed a head chef at the York Street Deli for 30 hours per week from January 2016 to March 2016 and he was paid $30 per hour. He had to increase his dosage of Targin in order to cope with the pain in his groin and right hip.

28. On or about 16 April 2016, he found work at the Mediterranean restaurant for 30 hours per week and he was paid $700 per week. In mid-June 2016, he increased his hours to 45 to 50 hours per week and he was earning $1,400 per week. His duties involved food preparation and he was able to cope with the work because he took medication.

29. The applicant stated that since June 2016, he had been consulting a pain specialist, a psychologist and a physiotherapist. He took a lesser dose of Targin. He claimed that he would not be able to work without this medication. He was unable to do heavy lifting and used a trolley when he had to take out the rubbish. His pain impacted on his day to day activities and he had difficulty sleeping.

30. In his statement dated 18 October 2018, the applicant stated that he ceased work at the Mediterranean restaurant in approximately December 2016 and since that time, he had undertaken short term assignments. He was presently working for four nights per week.

31. The applicant stated that he had seen a number of doctors in order to get as much Targin as possible. Dr Wrigley at the Royal North Shore Pain Management clinic, prescribed morphine, then Oxy-Contin and finally methadone. His dosage has slowly decreased. He had lost some teeth due to the effects of methadone and his remaining teeth were to be extracted.

32. The applicant stated that he was unable to perform heavy lifting and he continued to have sleeping problems. He was unable to engage in physical activities, he had put on weight and he did not have intimate relations.

Clinical notes and medical certificates of the General Practitioners

33. The clinical notes of Drs Anderson, Iboyan, Pankar, Taheri, Artinian, Ho, Chong and Grove provide minimal assistance as they rarely record a history. The notes confirm that the applicant was initially prescribed Targin and Oxycontin for his chronic groin pain.

34. Dr Chong did not see the applicant between November 2013 and 10 April 2015. On that date, he recorded a history of a work-related right hip injury in May 2014. The doctor noted that the reason for the consultation was “dermatitis”. He prescribed medication and issued a Centrelink certificate.

35. A non-WorkCover certificate dated 6 October 2015 certified that the applicant was unfit for work from 1 October 2015 to 31 December 2015 due to right groin pain, compensatory low back pain and medication induced constipation. Given the terms of the certificate, the fact that it is not a WorkCover certificate and in the absence of a report from Dr Chong, little weight can be given to this.

36. In March 2016, Dr Chong referred the applicant to Dr Wrigley to assist his reducing his reliance on Targin.

37. The applicant started seeing Dr Russell in June 2017, which is well after the end of the current closed period claim. At that stage, the applicant was working for 50 hours per week and he was about to start a new job, so he wanted to try to reduce his medication intake.

38. In a report dated 11 February 2016, Dr Sheh, a pain management physician, reported that the applicant had been consulting a number of doctors to obtain Targin. The doctor recommended that the applicant consult an addiction medicine physician.

39. Dr Pankar arranged for an ultrasound on 8 August 2017. This revealed mild osteoarthritis in right hip joint, a labral tear, fat in the chondroid matrix in the neck of the femur and small joint effusion.

Reports and certificates of Dr Ahmed

40. Curiously the clinical notes of Dr Ahmed are not in evidence. Dr Ahmed saw the applicant on 7 May 2015 and in his certificate of that date, the doctor diagnosed “pain RT groin, ? Ligament injury”, which the applicant felt while lifting heavy articles at work.

41. In his letter of referral to Associate Professor Al Muderis dated 16 May 2014, Dr Ahmed noted that the applicant presented with right groin pain of five days duration that was caused when he lifted a heavy bucket weighing approximately 40kg. The applicant heard a click in his right groin, but the injury was not extremely painful and he was able to complete the shift. It became more painful on the Sunday and was centred on one spot.

42. Dr Ahmed certified that the applicant had no current work capacity from 7 May 2014 to 16 May 2014. He issued certificates that certified that the applicant had no current work capacity from 29 May 2014 to 4 July 2014 due to pain in the right groin and a partial tear in the right pectineus/adductor longus muscle origin, but this revised on 18 June 2014 when the doctor certified that the applicant had the capacity to undertake restricted duties from 18 June 2014 to 4 July 2014.

43. On 9 July 2014, Dr Ahmed issued a certificate that certified that the applicant had no current work capacity from 4 July 2014 to 15 August 2014, and he issued a similar certificate for the period from 13 August 2014 to 30 October 2014. He revised this on 8 October 2014, when the doctor certified that the applicant had the capacity to undertake some work for eight hours per week from 9 October 2014 and on 3 December 2014.

44. Dr Ahmed certified that the applicant was fit for some work with restrictions for 20 to 25 hours per week from 4 December 2014 to 20 February 2015. The doctor increased the number of hours to 30 hours per week from 31 January 2015 to 20 February 2015.

45. Dr Ahmed referred the applicant for an ultrasound of his right groin in 13 May 2014. This showed a partial tear of the right pectineus/adductor longus muscle region, and there was no other abnormality. An ultrasound dated 2 October 2014 showed hip joint effusion and fluid that was thought to be post-operative in nature.

46. An ultrasound taken on 10 February 2015 showed a small reducible indirect inguinal hernia containing fat, calcific tendinopathy of the rectus femoris origin and mild trochanteric bursitis.

Reports of Associate Professor Al Muderis

47. Associate Professor Al Muderis reported on 20 May 2014. He noted that the applicant was trying to pick up a bucket when his right leg gave way and he twisted his right groin. He experienced severe pain in his groin. The applicant had significant irritability in his hip and he was limping.

48. The Associate Professor arranged for an MRI scan of the applicant’s right hip on 28 May 2014. This showed a tear of the labrum and some tendinosis. QBE approved surgery and on 4 July 2014, the Associate Professor performed an arthroscopy for femoroacetabular impingement syndrome and he repaired a labral tear.

49. On 17 July 2014, the Associate Professor advised that the applicant was progressing well following the procedure, but he still had groin pain. He recommended physiotherapy.

50. On 2 December 2014, the Associate Professor indicated that the applicant could return to work for four to five hours per day, four days per week, avoiding lifting weights in excess of 10kg, squatting and climbing ladders. He felt that the applicant could gradually increase to his pre-injury duties over a period of 6 to 12 weeks.

51. In his reports dated 26 February 2015 and 10 March 2015, Associate Professor Al Muderis confirmed that the applicant had made progress, but he had been diagnosed with a hernia which was causing him more issues than his hip. The Associate Professor recommended conservative treatment.

52. According to the index to the Application, the report of the Associate Professor at page 76 is dated 20 August 2015, however, the year of the report has been omitted. The Associate Professor refers to a physiotherapy report dated 17 September 2015. This means that either the report was provided on 20 August 2016, or there is a typographical error in the body of the report regarding the date of the physiotherapy report.

53. In any event, the Associate Professor noted that the applicant had an ultrasound that confirmed the presence of a hernia, but he had been unable to see Dr Samira because of the cost involved. He confirmed that the applicant still had right groin pain which could be due to his hernia as well as his hip. He recommended further tests to determine the cause of his pain and a referral to a pain management specialist.

54. Associate Professor Al Muderis suspected that the injury at work caused significant damage to the hip joint and labrum. He stated that the applicant would develop arthritis and he would eventually require a total hip replacement. He indicated that the applicant was unfit for work that involved heavy lifting but he could continue to perform his current light work as a chef.

55. In his report dated 19 October 2017, Associate Professor Al Muderis advised that an MRI scan taken on 9 August 2017 showed osteoarthritis and a recurrent tear of the labrum. There was also chondroid matrix in the right femoral neck region that was not present before. Although there was no evidence of a hernia, he explained that the study did not include the proximal portion of the pelvis. He advised that inguinal hernias were often caused by heavy lifting but he did not indicate whether the applicant's hernia was caused by the work incident. He did not comment on the applicant's fitness but confirmed that the degenerative changes in his hip had worsened and would continue to do so.

56. Associate Professor Al Muderis stated that it was likely that the degenerative changes were present in the applicant's right hip prior to his work injury, and there was no doubt that the injury aggravated those changes. He disagreed with the views of Professor Myers. He stated that that osteoarthritis did not evolve uniformly and was unpredictable.

Reports and clinical notes from Royal North Shore Hospital

57. Dr Anand, a pain management specialist, reported on 30 May 2016. He confirmed that the applicant attended the pain management clinic at the Royal North Shore Hospital for treatment of his right groin pain and opioid dependence. The applicant was also troubled by depression. Despite his pain and addiction, the applicant had been able to work and he was currently working for 30 hours per week as a chef. He recommended that the applicant participate in the ADAPT pain management programme.

58. The clinical notes for the consultation on 30 May 2016 record a history that the applicant was crouching to pull out a bucket of chicken when it struck his right thigh and he suffered a groin injury. An ultrasound confirmed a labral tear, which was repaired in July 2014. The applicant complained of a single point of groin pain like a "hot knife", and the doctor suggested the possibility of a hernia or a hip injury.

59. In a report dated 26 July 2017, Dr Wrigley recorded that the applicant's groin and back pain had not changed. His workload had increased and he was working for 14 hours per day/ 6 days per week. This had made it more difficult to reduce his medication.

60. In reports dated 3 April 2017 and 26 June 2017, Dr Wrigley noted that the applicant was obtaining prescriptions from seven different doctors, reducing to three doctors by June 2017, and it was apparent that his medication use was not under control. He recommended that the applicant only obtain his prescriptions from one doctor and from one pharmacy, as well as seeking assistance from the hospital's Drug and Alcohol team.

Reports of Dr Endrey-Walder

61. Dr Endrey-Walder reported on 21 May 2015. He recorded that the applicant was squatting down and as he pulled out a 45kg bucket of chicken off a low shelf, he fell towards the right and the tub fell onto his right thigh from the side. He experienced pain in his right hip and right groin. He remained at work and then saw Dr Ahmed, who referred him to Associate Professor Al Muderis. Surgery was undertaken on 4 July 2014.

62. Dr Endrey-Walder reported that the applicant returned to work on a work trial at the Chatswood Club in December 2014. An ultrasound in February 2015 revealed a small right indirect inguinal hernia.

63. Dr Endrey-Walder diagnosed a tear of the labrum that likely caused symptoms of acetabulo-femoral impingement. There had been some improvement in the applicant's pain since the hip surgery, but his right groin pain continued.

64. Dr Endrey-Walder stated that the injury sustained on 3 May 2014 was a significant contributing factor to the applicant's condition. The applicant was fit for near full-time work in a sedentary position for 20 to 25 hours per week in light to moderate work, but preferably as a chef.

65. Dr Endrey-Walder took issue with the views of Professor Myers regarding the gradual onset of the impingement syndrome over a period of time. He also noted that the applicant had no symptoms prior to his fall. The doctor assessed 11% whole person impairment.

66. In his report dated 4 September 2018, Dr Endrey-Walder noted the applicant had worked for a number of employers for two to three months at a time since his previous examination. He was currently taking methadone.

67. Dr Endrey-Walder reported that the applicant had much the same symptoms and restriction of hip movement as had been the case in 2015. The doctor noted that the applicant had been able to work and he felt that his current workload would continue to remain within his capacity and his hours could increase. He assessed 11% whole person impairment.

Reports of Associate Professor Myers

68. Associate Professor Myers reported on 9 February 2015. He recorded a consistent history of the incident, noting that the applicant was squatting down to pull out a 45kg bucket of chicken which caused his right leg to give way and the bucket fell onto him. He experienced pain in his right hip and groin. The applicant had undergone hip surgery and he was performing work trials for four to five hours per day, four to five days per week. The applicant advised that he had no previous problems with his hips or groins and he complained of sharp pain in his groin.

69. Associate Professor Myers did not believe that the applicant suffered a specific work injury although he may have aggravated a pre-existing condition, but the aggravation had settled. He expected that the applicant's condition would continue to improve and that he would be close to being symptom-free in six months' time or thereabouts.

70. Associate Professor Myers stated that femoro-acetabular impingement syndrome developed over a period of time. He indicated that the applicant may have suffered an exacerbation of the labral tears, which he suspected were pre-existing, and some synovitis may have been aggravated. Accordingly, The Associate Professor believed that any work injury had resolved and his employment was no longer contributing or a substantial contributing factor to his condition

71. Associate Professor Myers stated that the applicant's inability to return to work was due to the underlying condition. There was no reason why the applicant could not increase his hours and return to his pre-injury duties over three to four months, although he needed to improve his general fitness and soreness that could take some time.

72. In his report dated 10 August 2015, Associate Professor Myers recorded that the applicant had ceased treatment, he had been unable to see the specialist about his hernia and he only consulted Dr Chong for medication. He had pain in his right hip and over the anterior aspect of his right thigh. He was working as a chef for 25 hours per week.

73. Associate Professor Myers described the aetiology of femoro-acetabular impingement syndrome, which could be caused by trauma to the femur but in most cases, it was congenital. There were two forms, a cam and a pincer type.

74. Associate Professor Myers stated that a cam deformity usually referred to a bony lump at the junction of the head and the neck of the femur, commonly known as a Ganz lump, and this caused impingement on the acetabular labrum and articular cartilage. The labrum can be pushed out and result in a tear. Pain can result from minor trauma.

75. Associate Professor Myers stated that based on the operative findings, the applicant had an impingement syndrome caused by a Ganz lump and a labral tear, which was secondary to the impingement but not causative of it. He stated that the applicant may have torn the labrum in the work incident, but he thought that this was unlikely. It was possible that the applicant extended the tear, but the suggestion that he suffered the tear, which in turn caused the impingement, was not sustainable.

76. Associate Professor Myers indicated that he found no clinical evidence of a small right inguinal hernia, but he considered that this would not cause significant symptoms. He stated that scientific literature no longer supported the contention that an inguinal hernia could be caused by acute straining and muscular effort. He stated that the specificity of ultrasounds in this setting was poor and hernias were often diagnosed in the absence of clinical evidence. There was no scientific evidence to suggest that a small hernia that was only detected on an ultrasound required treatment.

77. Associate Professor Myers stressed that the applicant's hip condition was a longstanding congenital condition that had deteriorated and there had been no pathological change as a result of the incident, apart from the possible labral tear. The tear had been repaired and any aggravation was only temporary in nature.

78. Associate Professor Myers stated that the applicant's employment was not a substantial contributing factor to his hip and hernia conditions. The Associate Professor stated that the Commission operated under a flawed system and it was a fallacious that because an incident occurred and a worker complained of symptoms thereafter, then all of those symptoms must be related to that incident. Accordingly, he considered that it was not feasible that the applicant's on-going symptoms were associated with any work injury.

79. Associate Professor Myers stated that the applicant was fit for fulltime work in February 2015 and he was currently fit for his pre-injury duties, although he could not be expected to carry 45kg buckets of meat. Any lifting restrictions would be due to the impingement syndrome and not the result of any work injury. The Associate Professor stated that the fact that the applicant continued to work and he did not see his doctor until after he was informed about complaints against him made it unlikely that he suffered the labral tear on 3 May 2014.

80. Associate Professor Myers rejected the views of Dr Endrey-Walder, because his opinion ignored the known pathology and aetiology of acetabular femoral impingement.

81. In his report dated 14 January 2019, Associate Professor Myers recorded that the applicant had lost 14 teeth over the previous four months due to opioid ingestion. He was currently taking methadone which assisted him to manage his hip symptoms. He was working for 12 to 16 hours per week.

82. Associate Professor Myers confirmed that the applicant may have torn the labrum in the incident, but that was unlikely, and in any event, any injury had resolved. He confirmed that the applicant had acetabular femoral impingement, but one could not say that the labral tear was caused by the injury or by the impingement syndrome in the absence of a prior diagnosis of a tear.

83. Associate Professor Myers found no clinical evidence of a hernia and he cautioned about the accuracy of the ultrasound findings. He stated that the applicant was fit to work the equivalent of 15 to 24 hours per week due to the swelling in his right leg. There was no whole person impairment arising from any work injury.

Respondent's documents

84. According to the notice of injury report, the applicant reported that he had pain in his right groin as a result of an incident on 3 May 2014 when he was lifting a tub of raw chicken from a shelf to a trolley and he felt a click in his right groin.

85. It was noted that the applicant completed the shift at 11.00 pm on 3 May 2014 and that he experienced pain when he worked the following day from 6.30 am to 6.00 pm. He was not rostered to work on 5 May 2014 and 6 May 2014. He reported his injury to the operations manager on 7 May 2014 and to John Knight on 8 May 2014. This was after he was given notice to attend head office regarding his conduct, which led to his termination whilst he was on probation. The applicant's services were terminated on 8 May 2014. The reason on the termination form was the "Termination-Probation Period".

86. Complaints were made via email by Grazia D'Amico and Shampee Barua about the applicant's aggressive and abusive conduct towards them on 25 April 2015 and 5 May 2015. Further, in an email dated 7 May 2014, John Knight, the site services manager, indicated that Flynn Elton had resigned due to constant abuse from the applicant over the weekend.

87. On 22 July 2014, QBE sent a letter to the applicant and provided details as to how his weekly payments of compensation were calculated. I will comment on this letter in more detail below.

88. Vinh Le provided a statement on 14 September 2015. He confirmed that the applicant did not mention any injury when he worked with him on 3 May 2014 and 4 May 2014.The applicant did not appear to be in any pain or discomfort. He stated that the applicant had a strong and aggressive personality and he had argued with staff members. He stated that the applicant took long lunch breaks and regular cigarette breaks. On two occasions, the applicant asked him to drive him to the pub during the shift.

89. Rob Falconer provided a statement on 14 September 2015. He confirmed that he worked with the applicant kitchen on 6 May 2014. The applicant did not mention that he had injured himself or display any signs or symptoms of pain.

90. A surveillance report dated 14 September 2015 is in evidence. This shows the applicant undertaking a variety of activities from 10 September 2015 to 12 September 2015. The applicant was observed driving, carrying a baby in his right arm and placing it in the back seat, buying cigarettes and playing a poker machine at a club. He was seen entering the Platia Greek Restaurant where he worked. Thirty minutes of video footage was obtained, but this is not in evidence.

APPLICANT'S SUBMISSIONS

91. The applicant's counsel, Mr Parker, submits that the applicant described the nature of his injury in his statement. He told his doctor that he felt pain his right groin when lifting heavy articles at work. The statements of Mr Vinh and Mr Falconer cannot be accepted as they were inconsistent with the Incident Report Form [sic]. An inference can be drawn from the absence of a statement from "John".

92. Mr Parker submits that the applicant relies on a frank injury together with an aggravation and/or exacerbation of the underlying condition. The evidence of Associate Professor Al Muderis and Dr Endrey-Walder support an injury in the form of a tear of the labrum and an aggravation of the underlying condition in the applicant's hip. The evidence of the applicant's general practitioner, Dr Wrigley and Associate Professor Al Muderis provide support for the applicant's allegation of a hernia.

93. Mr Parker submits that the evidence of Associate Professor Myers should be disregarded because he rejects the contention that inguinal hernias can ever be sustained at work and he changed his opinion regarding the applicant's hip injury after initially accepting same.

94. Mr Parker submits that the evidence of Associate Professor Myers is inconsistent with the other medical evidence and the facts. The applicant was asymptomatic prior to the accident and he sustained a frank injury that resulted in on-going and worsening symptoms.

95. Mr Parker submits that Mr Falconer was not at work on the day of the injury and Mr Le was presumably not working with the applicant and they would have had their own separate work activities. The fact that the applicant failed to complain to them is irrelevant, as he reported his injury to Mr Knight.

96. Mr Parker submits that the applicant's pre-injury duties were heavy. The respondent failed to provide suitable duties before it terminated his employment. QBE acceded that the applicant was totally incapacitated from 7 May 2014 to 3 March 2015, but it underpaid him because it used the incorrect PIAWE.

97. Mr Parker submits that the applicant's injuries and disabilities "materially contribute" to his incapacity[1]. There is no discretion under the current legislation to reduce compensation for unrelated injuries or conditions.

98. Mr Parker submits that the medical evidence is only partially useful in establishing the applicant's capacity. The general practitioner and Associate Professor Al Muderis certified the applicant as being fit and unfit for various periods of time and at varying degrees.

[1] *Murphy v Allity Management Services Pty Ltd* [2015] NSWWCCPD 49.

99. Mr Parker submits that Dr Endrey-Walder stated that the applicant was fit for 20 to 25 hours per week of light to moderate duties preferably as a chef, and fit for near fulltime work in a sedentary clerical or administrative position, but the applicant had no such experience. In his further report, he stated that the applicant could continue within his current work capacity and possibly increase his hours each week.

100. Mr Parker submits that the applicant's theoretical capacity was not reflective of his ability to work in suitable employment. He was unable to work continuously in a light and part-time role, but at times worked in excess of the hours with excessive amounts of pain medication. The applicant's actual earnings were representative of his capacity to earn in accordance with the principles in *Aitkin v Goodyear Tyre and Rubber Co (Aust) Ltd*[2] and *RCR Stelform (VRET) Pty Ltd v Palmer*[3].

101. Mr Parker submits that when one considers the provisions in s 32A of the 1987 Act, the only finding that can be made is that the applicant's actual earnings were representative of his ability to earn in suitable employment. The respondent has not been able to point to any realistic job that the applicant ought to have been able to obtain during the period of the claim.

102. Mr Parker submits that the letter dated 22 July 2014 could not be considered to be a WCD. The decisions in *Birch v Olympic Aluminium Pty Ltd*[4] and *D'Er* v *Glemby International (Aust) Pty Ltd* [5]confirm that it is not enough for an insurer to simply assert that a piece of correspondence constitutes a decision. The letter dated 22 July 2014 is not titled a WCD and does not comply with the criteria set out in the *WorkCover Work Capacity Guidelines* (the Guidelines).

103. Mr Parker submits that in the alternative, if the letter dated 22 July 2014 is found to be a WCD, the Commission has jurisdiction to deal with any WCD or dispute from 1 July 2019 in accordance with s 43 of the 1987 Act as amended by the *Workers Compensation Legislation Amendment Act 2018* (the 2018 amending Act) and the transitional provisions in cl 2(1)(c) of Part 19L of Sch 6 of the 1987 Act.

104. Mr Parker submits that the applicant's PIAWE for the first 52 weeks is $1,788.18. His initial work date was 20 February 2014 and he ceased employment on 4 May 2014. His pay advice dated 6 May 2014 disclosed gross earnings of $18,650.76 earned over 10.43 weeks, or $1,788.18 per week. There is no evidence that the applicant worked prior to 20 February 2014 and the respondent conceded that all payslips were in evidence. There is no evidence of any overpayment, and even if there was "time in lieu", such was not included in the payslip for the period ending 6 May 2014, because it was included in the payslip dated 20 May 2014.

105. Mr Parker submits that the payment summaries are business records and there is no evidence to dispute their accuracy. The payslips show the precise hours that the applicant worked each week. The failure to produce actual evidence from someone in authority means that an inference should be drawn against the employer in accordance with principles in *Jones v Dunkel*[6].

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[2] (1946) 46 SR (NSW) 20 (*Aitkin*).
[3] [2019] NSWWCCPD 6, (*Palmer*).
[4] [2016] NSWWCCPD 54, (*Birch*).
[5] [2016] NSWWCCPD 42 (*D'Er*).
[6] [1959] HCA 8; 101 CLR 298 (*Jones v Dunkel*)

RESPONDENT'S SUBMISSIONS

106. The respondent's counsel, Mr Stockley, submits that the applicant has provided varying and inconsistent accounts of his alleged injury. His evidence has not been corroborated by his co-workers. There is no contemporaneous note or record of a history of injury provided at the consultation with Dr Ahmed on 7 May 2014. The initial medical certificate refers to the first date of attendance as 7 May 2014 with the history "felt pain in RT groin while lifting heavy articles at work".

107. Mr Stockley submits that there are various accounts of the quality and timing of the applicant's initial symptoms. The applicant does not allege that he developed his symptoms over a period of several days, which would be consistent with the lay evidence. The applicant did not complain about his pain or injury until the respondent was considering his alleged misconduct/ poor performance and it made the decision to terminate his employment.

108. Mr Stockley submits that there are contemporaneous emails from John Knight regarding his assessment of the applicant's work performance between 29 April 2014 and 7 May 2014. There is no reference to a report of injury.

109. Mr Stockley submits that the weight of evidence does not support the applicant's account of injury on 3 May 2014. If it is accepted that a delayed onset of symptoms provides an explanation for the inconsistencies, it can only be done so by rejecting the reliability or truth of the applicant's account, which in turn will raise doubts about the balance of his evidence.

110. Mr Stockley submits that the detection of a hernia was an incidental radiological finding. It was not detected on examination by Associate Professors Al Muderis and Myers. This allegation of injury should be rejected.

111. Mr Stockley concedes that Associate Professor Myers supports a finding of injury in the form of an aggravation of labral tears and an aggravation of underlying femoro-acetabular impingement syndrome, but he considered that the effects of the aggravation had ceased. The Associate Professor stated that the radiology and surgery demonstrated a labral tear which was the result of the underlying condition rather than its cause. His opinion on diagnosis, causation and incapacity are consistent with the evidence.

112. Mr Stockley submits that there were other competing considerations regarding the applicant's capacity, such as his family commitments and a lack of co-operation or motivation with work trials. These are matters that challenge the proposition that the applicant's actual earnings are a reflection of the extent of his capacity. The formula in the 1987 Act probably displaces some of the considerations discussed in *Aitkin*.

113. Mr Stockley submits that the respondent relies upon Associate Professor Myers' opinion that the applicant was fit for full time work from February 2015, and whilst he revised his opinion in January 2019, this opinion post-dated the period claimed.

114. Mr Stockley submits that the applicant relies on medical certificates for 4 hours per day/ 2 days per week from 29 October 2014, up to 25 hours per week from 30 December 2014, a period when the applicant was paid weekly compensation, and 30 hours per week from 31 January 2015. There are no certificates after 20 February 2015. By 4 July 2017, Dr Russell recorded that the applicant was working 50 hours per week over 5 days, but there is no record how long he had been working in that capacity.

115. Mr Stockley submits that s 43(1)(d) of the 1987 Act is unequivocal in its terms that a decision about the PIAWE constitutes a WCD, and prima facie, QBE's letter dated 22 July 2014 was a WCD. The Commission has no jurisdiction to determine any dispute about it. Further, the respondent does not accept that there is presently a dispute about a WCD.

116. Mr Stockley submits that the 2018 amending Act, which repealed s 43(3) of the 1987 Act, contained transitional provisions. The weekly compensation claimed by the applicant to be paid or payable predates the commencement of the 2018 amendments. Clause 2 of the savings provisions means that the amendment does not apply unless otherwise provided.

117. Mr Stockley submits that the WCD dated 22 July 2014 predates the amendments and is therefore an existing WCD. Subdivision 3A applies during the transitional review period from 1 January 2019 to 30 June 2019, and the applicant has not made any application under Subdivision 3A (s 44BB (1) of the 1987 Act). Accordingly, there is no dispute about a WCD. If there was a dispute, the mechanism of obtaining relief would be in accordance with Subdivision 3A, as saved by the 2018 amending Act.

118. Mr Stockley submits that because the letter dated 22 July 2014 is a WCD, it prevails and determines the PIAWE. The applicant's submissions do no address the language of s 43 of the 1987 Act. It was always possible for the applicant to dispute the WCD but he failed to do so. If there is a dispute, the Commission has no jurisdiction.

119. In the alternative, Mr Stockley submits that ss 44C and 44D of the 1987 Act confirm that the relevant period for calculating the PIAWE in this matter is the period of continuous employment.

120. Mr Stockley submits that the determination of the PIAWE in the letter dated 22 July 2014 was not questioned until 2019. In his statement dated 18 June 2015, the applicant indicated that he was paid $1,357.32 per week inclusive of penalty rates. He has given no evidence regarding the PIAWE dispute.

121. Mr Stockley submits that the applicant commenced work on 12 February 2014, which was the first day that he was paid. This is consistent with his PAYG statement and the Centrelink PAYG certificate that shows that he was paid benefits to the same date. The respondent does not assert a payment date of 12 February 2014.

122. Mr Stockley submits that the agreement between the parties that the post 52 week PIAWE was $1,140 before indexation is also consistent with the respondent's position. This is consistent with the applicant's statements and his last payslip.

123. Mr Stockley submits that the applicant's payslip on 4 March 2014 contained wages for two weeks, namely $2,714.64 representing 76 hours. There is no evidence from the applicant that he worked 76 hours in the second week of employment.

124. Mr Stockley submits that the first date of compensation payments was 7 May 2014. A practical and fair method of calculation of the PIAWE for the period 12 February 2014 to 6 May 2014 (11.857 weeks), based on gross wages of $18,650.76, is $1,572.91 per week.

125. Mr Stockley submits that according to the applicant's wage schedule, he earned $900 per week from time to time, but how these figures have been calculated is unclear. The submission that the incapacity has resulted from the consequential abuse of prescribed medication is not supported by medical evidence or the applicant's statements. The applicant merely stated that he experienced side effects, was dependent on medication and that he went doctor shopping.

126. Mr Stockley submits that even on the most modest hourly rate, the number of hours would yield a figure in excess of 80% of the PIAWE, rather than $900 per week. The actual earnings do not appear to engage the requirements of s 35 of the 1987 Act.

127. Mr Stockley submits that even if the applicant's submissions are accepted, there would be no incapacity during the periods of actual employment and based on the non-contemporaneous medical certificates of Dr Ahmed, the applicant's best-case scenario, having regard to s 32A of the 1987 Act, could be no better than an ability to work 30 hours per week in suitable employment.

128. Mr Stockley submits that it is difficult to project Dr Ahmed's certificates beyond the date of issue because he was not provided with the history given to Dr Wrigley on 29 July 2016 (working 14 hours per day/ 6 days per week) and to Dr Russell on 4 July 2017 (working 14 hours per day/ 6 days per week). The applicant has not made out a case of incapacity beyond 20 February 2015.

129. Mr Stockley submits that on 22 July 2014, the respondent accepted liability and paid compensation based on a PIAWE of $1,429.07. Whilst the insurer may have erred, either by reference to incorrect data or a miscalculation, the figure seems consistent with the available information. The applicant did not contest the calculation when liability was declined on 13 February 2015, but he identified a figure of $1,740.74 in the Application. The correctness of the calculation in the letter dated 22 July 2014 only arose at a telephone conference.

REASONS

Did the applicant sustain injury to his right hip and an inguinal hernia? – ss 4, 4(b)(ii) and 9A of the 1987 Act.

130. Section 4 of the 1987 Act defines injury as follows:

> "In this Act-
>
> ***Injury***-
>
> (a) means personal injury arising out of or in the course of employment,
>
> (b) includes a disease injury, which means:
>
> (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and
>
> (ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease, and
>
> (c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the Workers' Compensation (Dust Diseases) Act 1942, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined".

131. In order to be satisfied that an injury has occurred, there must be evidence of a sudden or identifiable pathological change: *Castro v State Transit Authority (NSW)*[7], or as stated by Neilson CCJ in *Lyons v Master Builders Association of NSW Pty Ltd* [8], "the word 'injury' refers to both the event and the pathology arising from it".

[7] [2000] NSWCC 12; 19 NSWCCR 496.
[8] (2003) 25 NSWCCR 422, [429].

132. The issue of causation must be determined based on the facts in each case. The accepted view regarding causation was set out in *Kooragang Cement Pty Ltd v Bates*[9] where Kirby J stated:

> "The result of the cases is that each case where causation is in issue in a worker's compensation claim must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase 'results from' is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. 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."

133. Although the High Court in *Comcare v Martin*[10] raised some concerns about the common-sense evaluation of the causal chain in a matter that concerned Commonwealth legislation, the common-sense approach still has place in the application of the legislation to the facts of the case.

134. The applicant alleges an injury in the form of a labral tear in his right hip, an aggravation of an underlying femoro-acetabular impingement syndrome and an inguinal hernia. Therefore, he relies on a personal injury in terms of s 4(a) of the 1987 Act and an aggravation of a disease process in terms of s 4(b)(ii) of the 1987 Act.

135. In *Department of Education & Training v Ireland*[11], President Keating considered the principles regarding the discharge of the onus of proof. He stated:

> "The principles relevant to the discharge of the onus of proof were discussed in *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246 (16 October 2008) ('*Nguyen*') where McDougall J (McColl and Bell JJA agreeing) said at [44]–[48]:
>
> '44. A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336. His Honour's statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in *Helton v Allen* (1940) 63 CLR 691 at 712.
>
> 45. Dixon CJ put the matter in different words, although to similar effect, in *Jones v Dunkel* (1959) 101 CLR 298 at 305 where his Honour said that '[t]he facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied'. Although his Honour dissented in the outcome of that case, the words that I have quoted were cited with approval by the majority (Stephen, Mason, Aickin and Wilson JJ) in *West v Government Insurance Office of NSW* (1981) 148 CLR 62 at 66. See also Stephen J in *Girlock (Sales) Pty Limited v Hurrell* (1982) 149 CLR 155 at 161–162, and Mason J (with whom Brennan J agreed) in the same case at 168.

[9] (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*), [463].
[10] [2016] HCA 43, [42].
[11] [2008] NSWWCCPD 134 (*Ireland*).

46. It is clear, in particular from *West* and *Girlock*, that the requirement for actual satisfaction as to the occurrence or existence of a fact is one of general application, and not limited to cases where the fact in question, if found, might reflect adversely on the character of a party or witness.

47. In *Malec v JC Hutton Pty Limited* (1990) 169 CLR 638 Deane, Gaudron and McHugh JJ said at 642-643:

> 'A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain; if the probability of it having occurred is less than it not having occurred, it is treated as not having occurred.'

48. On analysis, I think, what their Honours said is not inconsistent with the requirement that the tribunal of fact be actually persuaded of the occurrence or existence of the fact before it can be found. On their Honours' approach, what is required is a determination of the respective probabilities of the event's having occurred or not occurred. There is nothing in that analysis to suggest that the determination in favour of probability of occurrence should not require some sense of actual persuasion.'"[12]

136. Therefore, in order for the applicant to discharge the onus that he sustained an injury in the incident on 3 May 2014, I "must feel an actual persuasion of the existence of that fact".

137. It is true that the two statements provided by the applicant given different versions of the mechanism of the alleged injury, but they are reasonably consistent. According to the applicant's second statement, he was squatting as he pulled a bucket of chicken from a shelf so that he could place it onto the ground before lifting it onto the trolley on 3 May 2014. When performing this task, the bucket struck his right leg and took the weight on his right thigh and he fell over. He claimed that he experienced a click and a tearing sensation in his right groin and hip.

138. Although the applicant initially indicated that he only worked for part of the following day, it seems from his second statement that he worked a full day, albeit under some difficulty, on 4 May 2014. This is consistent with the Notice of Injury form that referred to the applicant working from 6.30 am to 6.00 pm, and with the payslip dated 6 May 2014, which appears to show that the applicant was paid for a full 38-hour week.

139. The applicant claimed that he told Mr Knight on 6 May 2014 that he wanted to go to the doctor, but he could not see Dr Ahmed until 7 May 2014. This history is confusing because according to the Notice of Injury form, he did not work on 5 May 2014 and 6 May 2014 and he reported his injury to the operations manager on 7 May 2014 and to Mr Knight on 8 May 2014. The identity of the operations manager is not disclosed and it is unclear whether he is the same person referred to elsewhere as the regional manager.

140. These events allegedly occurred after the applicant was summoned to a meeting about his conduct following complaints that were made by two co-workers and the resignation of another employee. It seems that this meeting was conducted on 8 May 2014, at which time the regional manager told the applicant about the complaints and then terminated his employment.

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[12] *Ireland*, [89].

141. Significantly, there are no statements from the employees of the respondent providing any information regarding the meeting and the decision to terminate the applicant's employment. Therefore, little weight can be given to the submission that the applicant was motivated to report an injury on the background of his impending termination. Curiously, the termination document makes no reference to any allegation misconduct.

142. In my view, little weight can be given to the statements of Messrs Le and Falconer. Whilst the applicant did not mention any injury and did not appear to be in any discomfort, that does not mean that he did not suffer an injury as alleged. They are not in a position to deny that the applicant suffered an injury in the circumstances that he alleges.

143. The applicant has given a credible explanation why he did not see Dr Ahmed until 7 May 2014. Even if he motivated to do this because he was aware of his impending termination, the fact that Dr Ahmed was satisfied that the applicant had suffered an injury is persuasive and corroborates the applicant's evidence.

144. The applicant's evidence regarding his discussions with Mr Knight, the operations and/or the regional manager is unchallenged and it is remarkable that there are no statements from these employees or an explanation as to why statements were unavailable. In the circumstances, one can infer that their evidence would not have advanced the respondent's case in accordance with the principles discussed in *Jones v Dunkel*.

145. The medical certificate of Dr Ahmed dated 7 May 2014 described right groin pain caused by heavy lifting, and the referral letter dated 16 May 2014 suggested that the applicant had been troubled by right groin pain for five days after he lifted a heavy bucket weighing about 40kg on 3 May 2014. The injury was recorded as not extremely painful, which seems consistent with the fact that the applicant was able to complete the shift and work the following day.

146. Therefore, there is contemporaneous evidence that supports the applicant's claim in respect of the onset of right groin pain. The nature of that pain is another matter, particularly as there is an allegation of an injury to the right hip as well as an inguinal hernia.

147. Dr Ahmed organised an ultrasound which revealed a partial tear of the right pectineus/adductor longus muscle region. The MRI scan of the applicant's right hip on 28 May 2014 showed a tear of the labrum and some gluteus tendinosis. Therefore, there was radiological evidence of pathology in the applicant's right hip region shortly after the incident, so it is not surprising that QBE approved and paid for an arthroscopy for the femoro-acetabular impingement syndrome and the labral repair.

148. Little assistance is provided by the clinical notes of Royal North Shore Hospital and the various general practitioners. They generally confirm that the applicant was troubled by on-going severe pain and he required large doses of pain killers, primarily Targin.

149. The applicant saw Associate Professor Al Muderis within a short period of his alleged injury, so his evidence is reasonably contemporaneous. The history that he recorded differs to a degree from the applicant's statements, but it is not inconsistent in a material way.

150. According to the operation report, the Associate Professor found significant synovitis and a moderate sized Ganz bump of the femoral head, which he excised. The femoral head was reshaped to eliminate the cam effect that was causing impingement and the labral tear was repaired. Therefore, the procedure that was undertaken was not restricted to the repair of the labrum.

151. Associate Professor Al Muderis considered that it was likely that the applicant had pre-existing degenerative changes in his right hip and these were aggravated by the work incident. He did not specifically say whether the labral tear was caused by the incident or was secondary to the aggravation of the disease process. Nevertheless, the Associate Professor supports the applicant's claim regarding an injury to his right hip.

152. The history recorded by Dr Endrey-Walder is consistent with the second statement of the applicant. He diagnosed a tear of the labrum that likely "precipitated symptoms of acetabulo-femoral impingement" due to the incident at work. In other words, he supports a causal nexus between the incident and the onset of acetabulo-femoral impingement symptoms, although whether this represents an injury or an aggravation of an asymptomatic disease is not entirely clear.

153. The evidence regarding the applicant's inguinal hernia is far less persuasive. In his statements, the applicant merely referred to experiencing right groin pain described as a sharp pain, like a hot knife and located in one spot. He did not indicate that he felt or observed a lump in his abdominal region.

154. Dr Endrey-Walder did not address the alleged hernia injury. There is no report from Dr Ahmed, although he referred the applicant for an ultrasound to assess the cause of his right groin pain on 30 January 2015. The ultrasound revealed a small reducible indirect inguinal hernia, tendinopathy of the rectus femoris origin and mild trochanteric bursitis. This is the first evidence to confirm the existence of a hernia. Dr Ahmed did not suggest that the inguinal hernia was causally connected to the incident.

155. In his later reports, Associate Professor Al Muderis indicated that the applicant's right groin pain which could be due to his hernia and his hip. He explained that whilst the MRI scan showed no evidence of a hernia, the proximal portion of the pelvis had not been scanned. He commented that inguinal hernias were often caused by heavy lifting but he failed to express an opinion on the cause of the applicant's alleged hernia. Therefore, there is a lack of evidence supporting a causal connection between the work incident and the applicant's inguinal hernia.

156. The only doctor to take issue with the applicant's alleged injuries is Associate Professor Myers. In my view, there are some concerns regarding his opinion. The Associate Professor stated that there was no injury because femoro-acetabular impingement syndrome developed over a period of time and was congenital in nature, but he also conceded the possibility of an aggravation or exacerbation of pre-existing pathology, although he thought this was unlikely. Therefore, he seems to accept the possibility of an injury in terms of s 4(a) and/or s 4(b)(ii) of the 1987 Act.

157. The Associate Professor considered that there had been no pathological change as a result of the incident, apart from the possible labral tear. How he could come to that conclusion in the absence of any radiological testing taken prior to the incident is questionable. He also stated that the employment was no longer contributing nor was it a substantial contributing factor. This shows a lack of understanding of the legislation, because once there is an acceptance of an injury, employment remains a substantial and /or the main contributing factor to the injury.

158. The Associate Professor opinion that the aggravation had settled and the work injury had resolved is on the background of a history of on-going pain in a worker who was asymptomatic prior to the alleged work injury.

159. Further, some confusion arises from his comment in February 2005 that he expected that the applicant would be close to being symptom-free in about six months' time. If there was a recovery in February 2005, one would expect the applicant would have been symptom-free then and not six months later. Such a statement is illogical and is inconsistent with the applicant's evidence and the histories recorded in the treating doctors' reports. The Associate Professor has not provided a proper explanation for his conclusion.

160. It is true that Associate Professor Myers provided a better explanation for his opinion in his second report and his detailed explanation of the aetiology of the impingement syndrome is extremely helpful. He acknowledged the fact that the condition and the labral tear could be caused by trauma, a concept that he did not seem to accept in his initial report, however, he did not give any reasons why he thought that an injury was unlikely, apart from saying that the labral tear was secondary to the impingement. Of course, that is not the case that the applicant brings. Therefore, I have concerns about the evidence of Associate Professor Myers.

161. Associate Professor Myers comments regarding the absence of clinical evidence of a hernia is consistent with the other scant medical evidence. His comments regarding the findings of scientific literature in respect of hernias caused by acute straining and muscular effort carries minimal weight in the absence of the scientific literature that he refers to.

162. In summary, the applicant has the support of Dr Endrey-Walder, Associate Professor Al Muderis and Dr Ahmed in respect of an injury to his right hip. The consensus is that the applicant suffered a labral tear and an aggravation of the pre-existing, asymptomatic femoro-acetabular impingement syndrome. Of course, I am only required to determine if an injury occurred and I am not obliged to determine a diagnosis.

163. Associate Professor Myers' opinion that the applicant had recovered from the effects of any aggravation by February 2015 is inconsistent with the applicant's evidence regarding his on-going pain and the evidence of the treating doctors, who have seen the applicant on a more regular basis and who would have been in a better position to assess the extent of his symptoms and determine whether he had recovered from the effects of his injury, In the circumstances, I consider that the evidence of the applicant's doctors should be preferred.

164. Accordingly, having regard to the common-sense evaluation test in *Kooragang*, I am satisfied on the balance of probabilities that the applicant suffered an injury to his right hip arising out of or in the course of his employment on 3 May 2014. This conclusion will be subject to my comments below regarding substantial and the main contributing factor.

165. The situation in respect of the alleged inguinal hernia is somewhat different. According to *Ireland*, in order for the applicant to discharge the onus that he sustained a hernia injury in the incident on 3 May 2014, I "must feel an actual persuasion of the existence of that fact".

166. In my view, whilst there was radiological evidence of a small reducible inguinal hernia in February 2015, the evidence regarding causation of the hernia injury is not persuasive. None of the doctors have found any clinical evidence of the condition, nor have they attributed the hernia to the incident on 2 May 2014. They have merely commented on its existence or how hernias can be caused in general terms.

167. In the circumstances, I am not satisfied that the applicant has discharged the onus of showing that he that he suffered an inguinal hernia arising out of or in the course of his employment on 3 May 2014. Accordingly, there will be an award for the respondent in respect of this alleged injury.

Substantial and/or main contributing factor

168. On the basis of the manner in which the allegation of injury has been presented, the applicant must show that his employment was a substantial contributing factor to his hip injury and/or the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of a disease in his hip.

169. The applicant's medical evidence regarding the cause of the labral tear seems to differ. Associate Professor Al Muderis only refers to an aggravation of pre-existing pathology in the applicant's right hip. He did not state that the labral tear was caused by the incident or was secondary to the disease.

170. Dr Endrey-Walder indicated that the applicant suffered the labral tear as a result of the incident and this precipitated the symptoms arising from the impingement syndrome.

171. In contrast, Associate Professor Myers acknowledged the possibility that the tear may have been caused by trauma and that the pre-existing pathology may have been aggravated in the form of an extension of a labral tear and synovitis. This concession seems somewhat similar to the opinion of Dr Endrey-Walder, even allowing for the rejection of his views by the Associate Professor.

172. The evidence supports the contention that the applicant suffered a labral tear as a result of the incident, whether due to trauma or secondary to the effects of the aggravation or exacerbation of the asymptomatic femoro-acetabular impingement syndrome. Therefore, it seems that both s 4(b)(ii) and s 9A of the 1987 Act come into play.

173. Section 9A of the 1987 Act provides:

> **"9A No compensation payable unless employment substantial contributing factor to injury**
>
> (1) No compensation is payable under this Act in respect of an injury (other than a disease injury) unless the employment concerned was a substantial contributing factor to the injury.
>
> **Note.** In the case of a disease injury, the worker's employment must be the main contributing factor. See section 4.
>
> (2) The following are examples of matters to be taken into account for the purposes of determining whether a worker's employment was a substantial contributing factor to an injury (but this subsection does not limit the kinds of matters that can be taken into account for the purposes of such a determination):
>
> (a) the time and place of the injury,
>
> (b) the nature of the work performed and the particular tasks of that work,
>
> (c) the duration of the employment,
>
> (d) the probability that the injury or a similar injury would have happened anyway, at about the same time or at the same stage of the worker's life, if he or she had not been at work or had not worked in that employment,
>
> (e) the worker's state of health before the injury and the existence of any hereditary risks,
>
> (f) the worker's lifestyle and his or her activities outside the workplace…"

174. In *Badawi v Nexon Asia Pacific Pty Limited t/as Commander Australia Pty Limited*[13] and in *Van Wessem v Entertainment Outlet Pty Ltd*[14], the Court of Appeal held that the phrase "substantial contributing factor" in s 9A of the 1987 Act involved a causative element that was a different or added requirement to "arising out of" employment in ss 4 and 9 of the 1987 Act. For employment to be a "substantial contributing factor" to the injury under s 9A of the 1987 Act, the causal connection must be "real and of substance".

175. Section 9A(2) of the 1987 Act provides examples of matters to be taken into account when determining whether employment was a substantial contributing factor. Whether employment is a substantial contributing factor to an injury is a question of fact and is a matter of impression and degree to be decided after a consideration of all the evidence and is a more stringent test than that imposed by s 4 of the 1987 Act.[15]

176. The section concerns itself with whether the employment was "a" substantial contributing factor, not whether it was "the" substantial contributing factor, and it is accepted that an injury may have a number of contributing factors. In order to determine this issue, I need to consider the specific provisions in s 9A(2) of the 1987 Act.

177. The evidence that I have accepted confirms that the applicant sustained injury when he was struck on his thigh as he was pulling out a bucket of chicken from a shelf when he was working as a chef during normal working hours. This factor assists the applicant's case (ss 9A(2)(a), 9A(2)(b) and 9A(2)(c) of the 1987 Act).

178. The applicant has longstanding condition in his right hip, so he may well have suffered an injury under other circumstances, so perhaps this factor is neutral (s 9A(2)(d) of the 1987 Act).

179. There is no evidence to suggest that the applicant had any major health or hereditary problems, apart from his addiction to prescription medication following his injury, and that the applicant's lifestyle and activities when he was away from work would be of any concern. This factor is in the applicant's favour (ss 9A(2)(e) and 9A(2)(f) of the 1987 Act).

180. In accordance with *Badawi*, the relevant 'employment concerned', or what the applicant was doing in his employment at the time of his injury, was attending to his duties as a chef. The employment was real and of substance.

181. The weight of evidence that confirms that the applicant suffered a labral tear as a result of the incident. Accordingly, I am satisfied that the medical and factual evidence establishes a causal connection between the applicant's injury and his employment such that the applicant's employment was the substantial contributing factor to his injury as required by s 9A of the 1987 Act.

182. Given the claim also involves an aggravation of a pre-existing condition, the provisions in s 4(b)(ii) of the 1987 Act also require consideration.

183. What constitutes an aggravation of a disease process was discussed by Windeyer J in *Federal Broom Co Pty Ltd v Semlitch*.[16] His Honour stated:

> "The question that each poses is, it seems to me, whether the disease has been made worse in the sense of more grave, more grievous or more serious in its effects upon the patient".

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[13] [2009] NSWCA 324 (*Badawi*)
[14] [2011] NSWCA 214
[15] *Dayton v Coles Supermarkets Pty Ltd* [2001] NSWCA 153 at [29]; *McMahon v Lagana* [2004] NSWCA 164 at [32]; (2004) 4 DDCR 348 at 349.
[16] [1964] HCA 34; 110 CLR 626 (*Semlitch*), [369].

184. Prior to the 2012 amendments, s 4(b)(ii) of the 1987 Act provided that the employment had to be a contributing factor to the aggravation of a disease, and that being the case, in accordance with s 9A of the 1987 Act, it had to be a substantial contributing factor to the aggravation as opposed to the disease itself. This was confirmed by Burke CCJ in *Harpur v State Rail Authority (NSW)*[17] and in *Cant v Catholic Schools* Office[18]where he stated:

> "… the employment is required to substantially contribute to the aggravation and not the pre-existing condition other than by way of such aggravation. The frame of reference is the contribution to the aggravation not to the overall disease."

185. However, s 4(b)(ii) of the 1987 Act provides that the employment must be the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease. Therefore, as in *Cant*, the employment needs to be the main contributing factor to the aggravation of the disease rather than the main contributing factor to the disease itself.

186. In order to understand what "main contributing factor" means, one must interpret the ordinary and grammatical meaning of the text, language and structure of the legislation, the legal and historical context, and the purpose of the statute in order to come to a reasonable conclusion as to its meaning and application[19].

187. A consideration of the text can be assisted by reference to dictionary definitions of the words used in the legislation. When one has regard to the online version of the Macquarie Dictionary, "main" contributing factor can be interpreted as the "chief" or "principal" contributing factor. Such an interpretation is not dissimilar to the interpretation of "wholly or predominantly caused" used in s 11A of the 1987 Act, which has been held to mean "mainly or principally caused": *Kooragang*; *Ponnan v George Weston Foods Ltd*[20]; *Temelkov v Kemblawarra Portuguese Sports and Social Club Ltd*[21], and *Smith v Roads and Traffic Authority of NSW*[22].

188. However, the term "wholly" seems to connote "entirely" or "totally" to the exclusion of everything else, whereas the terms "mainly", "chiefly", "principally" and "predominantly" suggest a slightly lesser degree, but those terms seem to demand a level more than "substantially".

189. The evidence suggests that the applicant had a pre-existing, but asymptomatic, femoro-acetabular impingement syndrome in his right hip at the time that he sustained his alleged injury. The MRI scan undertaken following the applicant's work injury and before the surgery showed a labral tear and some gluteus tendinosis. During the operation, Associate Professor found that there was also significant synovitis and a moderate sized Ganz bump of the femoral head that was causing impingement.

190. The applicant's evidence regarding the onset of his right hip pain has been corroborated by Dr Ahmed and by Associate Professor Al Muderis, who diagnosed an aggravation of pre-existing pathology in the applicant's right hip. Dr Endrey-Walder also stated that the injury caused the labral tear, which precipitated the symptoms arising from the impingement syndrome. In other words, there was an aggravation or exacerbation of the pre-existing condition.

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[17] [2000] NSWCC 3; (2000) 19 NSWCCR 256, [79].
[18] [2000] NSWCC 37 (*Cant*), [23].
[19] *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355, [69] – [71] (per McHugh, Gummow, Kirby and Hayne JJ); *Hesami v Hong Australia Corporation Pty Ltd* [2011] NSWWCCPD 14, [43] – [44] (per Roche DP) and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* [2009] HCA 41; 239 CLR 27, [47] (per Hayne, Heydon, Crennan and Kiefel JJ).
[20] [2007] NSWWCCPD 92.
[21] [2008] NSWWCCPD 96.
[22] [2008] NSWWCCPD 130.

191. Even Associate Professor Myers acknowledged the possibility that the pre-existing pathology may have been aggravated in the form of an extension of a labral tear and synovitis. This concession seems somewhat similar to the opinion of Dr Endrey-Walder, even allowing for the rejection of his views by Associate Professor Myers.

192. In the circumstances, having regard to the common-sense test in *Kooragang* and the principles discussed in *Semlitch* and *Cant*, I accept that the applicant also suffered an injury in the form of an aggravation of a pre-existing asymptomatic disease and that the applicant's employment was the main contributing factor to that aggravation and exacerbation. The employment was the chief or principal cause of the aggravation.

Extent of Capacity

193. An assessment of the applicant's capacity involves a consideration of whether the applicant has no current work capacity or a current work capacity as defined in s 32A of the 1987 Act.

194. Section 32A of the 1987 Act defines the relevant terms as follows:

> "**current work capacity**, in relation to a worker, means 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.
>
> **no current work capacity**, in relation to a worker, 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.
>
> **suitable employment**, in relation to a worker, means employment in work for which the worker is currently suited:
>
> (a) having regard to:
> (i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and
> (ii) the worker's age, education, skills and work experience, and
> (iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and (iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and
> (v) such other matters as the WorkCover Guidelines may specify, and
>
> (b) regardless of:
> (i) whether the work or the employment is available, and
> (ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and
> (iii) the nature of the worker's pre-injury employment, and
> (iv) the worker's place of residence."

195. “No current work capacity” requires a consideration of a worker’s capacity to undertake not only his pre-injury duties, but also suitable employment, irrespective of its availability. This was confirmed by Deputy President Roche in *Mid North Coast Local Health District v De* Boer[23] and in *Wollongong Nursing Home Pty Ltd v Dewar.*[24]

196. Therefore, if the applicant has “no current work capacity”, I need to assess whether the applicant is unable to return to both his pre-injury duties and some suitable employment.

197. The determination of the extent of the applicant’s capacity requires a consideration of the evidence that primarily relates to the period of the claim from 4 May 2014 to 15 April 2016.

198. Despite the somewhat inadequate state of the evidence from the applicant’s treating doctors, there is no medical evidence to suggest that he was fit to return to his pre-injury duties in the period of the claim. The only doctor to suggest this was Associate Professor Myers, whose opinion I have rejected. Therefore, in the absence of any persuasive evidence to the contrary, I am satisfied that the applicant has at all times been unfit for his pre-injury duties.

199. The next question to consider is whether the applicant was fit for suitable employment as defined in s 32A of the 1987 Act. This requires a consideration of the nature of the incapacity and the details provided in medical information, the applicant’s age, education, skills and work experience, any return to work plan, and any occupational rehabilitation services that have been provided to him, irrespective of whether the work was available to him or of a type or nature that is generally available in the employment market. Of course, the focus will be in the period 4 May 2014 to 15 April 2016.

200. The applicant is 54 years old. According to his statement, he trained to be a police officer in Algeria, but left the course and attained his qualifications as a chef in 1980. He worked in Algeria, Paris and Barcelona. In 1982, he obtained further qualifications in Paris.

201. The applicant arrived in Australia in late 1986. He obtained a patisserie certificate in about 1994. He worked in a number of restaurants, clubs and hotels over the years before he commenced employment on a contract basis with the respondent in February 2014. He has also been employed in various restaurants since his employment was terminated in May 2014.

202. Unfortunately, the applicant’s statements offer little assistance regarding his capacity. He was on crutches for three months after his operation on 4 July 2014 and he was off work until he started a work trial at the Chatswood Club for 16 hours per week for a period of six weeks in December 2014. He worked as a head chef from 15 June 2015 to 30 September 2015 for 30 hours per week and he was off work due to his symptoms from October 2015 to 31 December 2015.

203. The applicant returned to work as a head chef and worked for 30 hours per week from January 2016 to March 2016. It seems he was then unemployed until he obtained work for 30 hours per week on 16 April 2016. The applicant claimed that he experienced on-going pain throughout the period of the claim, but he managed to work with the assistance of prescription medication.

204. I have already commented on the lack of assistance provided by the clinical notes of the treating general practitioners and the hospital, although they confirm the applicant’s evidence regarding his dependency on pain killers. Certainly, it would have also been prudent for the applicant’s solicitor to obtain copies of the clinical notes of Dr Ahmed and Associate Professor Al Muderis.

[23] [2013] NSWWCCPD 41.
[24] [2014] NSWWCCPD 55.

205. According to the certificates of Dr Ahmed, the applicant had no current work capacity from 7 May 2014 to 16 May 2014 and from 29 May 2014 to 4 July 2014. This certificate was superseded by the certificate dated 18 June 2014, when the doctor certified that the applicant had the capacity to undertake some restricted work from 18 June 2014 to 4 July 2014 without any limitation on the number of hours. He then certified that the applicant had no current work capacity from 4 July 2014 to 30 October 2014.

206. The certificates issued on 8 October 2014, 28 October 2014 and 25 November 2014 are internally inconsistent, given the reference to the capacity to work as well as no current work capacity, but it would seem that the doctor intended to certify that the applicant could work for eight hours per week from 9 October 2014 to 3 December 2014 and for 20 to 25 hours per week from 4 December 2014 to 20 February 2015. The doctor increased the hours to 30 hours per week from 31 January 2015 to 20 February 2015.

207. There are no further WorkCover certificates in evidence. A non-WorkCover certificate certified that the applicant was unfit for work from 1 October 2015 to 31 December 2015, but I have already commented about the minimal weight that can be given to this.

208. Associate Professor Al Muderis did not express an opinion with respect to the applicant's capacity until 2 December 2014, when he stated that the applicant could return to restricted work for the equivalent of 16 to 20 hours per week, gradually increasing to his pre-injury duties over a period of six to twelve weeks. He did not comment again about the applicant's capacity for work until 20 August 2015 or 2016, when he stated that the applicant could continue to perform light duties as a chef avoiding lifting or impact work.

209. When Dr Endrey-Walder reported on 21 May 2015, he indicated that the applicant was fit for 20 to 25 hours per week in light to moderate work, but preferably as a chef. In 2018, he stated that the applicant's workload was appropriate.

210. In February 2015, Associate Professor Myers reported that the applicant was working on a trial basis for the equivalent of 16 to 25 hours per week. He felt that the applicant could increase his hours and return to his pre-injury duties over three to four months. However, in his report dated 10 August 2015, the Associate Professor indicated that the applicant had been fit for his full pre-injury duties at the time of his examination in February 2015. Therefore, there is an inconsistency between his reports.

211. In August 2015, he reported that the applicant was performing light work for 25 hours per week, but he believed that the applicant was currently fit for his pre-injury duties. Of course, I have rejected the doctor's views regarding the occurrence of any injury and the recovery from same, so little weight can be given to his views.

212. Whilst it seems that the applicant worked for significant hours in 2017, as reported by Dr Wrigley, this is irrelevant as this was 12 months after the end of the period of this claim.

213. Based on an analysis of the above evidence, I am satisfied that the applicant was unfit for his pre-injury duties and he had no capacity to undertake any form of work in the period from 7 May 2014 to 17 June 2014 and from 4 July 2014 to 8 October 2014. This accords with the certificates issued by Dr Ahmed.

214. Although Dr Ahmed did not refer to the number of hours that the applicant could work in the period 18 June 2014 to 3 July 2014, having regard to the weight of the evidence, it seems that his capacity at best would reflect that number of hours in the certificates issued for the period 9 October 2014 to 3 December 2014.

215. Therefore, having regard to the definition of suitable employment in s 32A of the 1987 Act, the applicant's medical evidence as a whole, his age, education, skills, work experience and the other matters referred to in the definition, I am satisfied that the applicant was fit for eight hours per week from 18 June 2014 to 3 July 2014 and from 9 October 2014 to 3 December 2014.

216. The applicant was then fit to perform some restricted work for 25 hours per week from 4 December 2014 to 30 January 2015 and 30 hours per week from 31 January 2015 to 20 February 2015 in accordance with the certificates of Dr Ahmed. This is not dissimilar to the opinion expressed by Associate Professor Al Muderis in December 2014.

217. I do not have the benefit of any certificates after February 2015, apart from a non-WorkCover certificate from Dr Chong, which I have referred to above.

218. In May 2015, Dr Endrey-Walder recorded that Dr Chong had certified that the applicant was unfit, but the doctor felt that the applicant was fit for 20 to 25 hours per week in light to moderate work. This seems to accord with the opinion of Dr Ahmed.

219. Interestingly, in July 2017, Dr Wrigley recorded that the applicant was working for the equivalent of 84 hours per week. Of course, this history was recorded more than 12 months after the end of the closed period of the claim.

220. The applicant did a work trial for 16 hours per week for six weeks in December 2014. Therefore, given my comments above, this work trial of only 16 hours per week was not a true reflection of his capacity to work for 25 hours per week.

221. The applicant did not work again when he secured employment for 30 hours per week from 15 June 2015 to 30 September 2015, January 2016 to March 2016 and from 16 April 2016 when the claim ends. There is no medical evidence to support an inability to perform some work in the intervening periods, apart from Dr Chong's certificate, which I have discussed above.

222. Despite the absence of any certificates and the lack of comment regarding the applicant's capacity since February 2015, having regard to the totality of the evidence and the fact that he has been able to work at times since February 2015 for 30 hours per week, I am satisfied that he has had the ability to perform some restricted work as a chef for 30 hours per week from 21 February 2015 to 15 April 2016. Of course, the evidence shows that the applicant has been able to work for longer shifts since April 2016.

Work Capacity Decision and PIAWE

223. Before the applicant's entitlements can be calculated, I need to deal with the dispute regarding the alleged WCD and the PIAWE.

224. Section 43 of the 1987 Act in existence prior to the 2018 amending Act was as follows:

> "**43 Work capacity decisions by insurers**
>
> (1) The following decisions of an insurer (referred to in this Division as work capacity decisions) are final and binding on the parties and not subject to appeal or review except review under section 44 or judicial review by the Supreme Court:
>
> (a) a decision about a worker's current work capacity,
> (b) a decision about what constitutes suitable employment for a worker,

a decision about the amount an injured worker is able to earn in suitable employment,

(d) a decision about the amount of an injured worker's pre-injury average weekly earnings or current weekly earnings,

(e) a decision about whether a worker is, as a result of injury, unable without substantial risk of further injury to engage in employment of a certain kind because of the nature of that employment,

(f) any other decision of an insurer that affects a worker's entitlement to weekly payments of compensation, including a decision to suspend, discontinue or reduce the amount of the weekly payments of compensation payable to a worker on the basis of any decision referred to in paragraphs (a)–(e).

(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.

(3) The Commission does not have jurisdiction to determine any dispute about a work capacity decision of an insurer and is not to make a decision in respect of a dispute before the Commission that is inconsistent with a work capacity decision of an insurer."

225. Section 44 of the 1987 Act sets out the review provisions of WCDs and s 44A of the 1987 Act deals with work capacity assessments. Whilst an insurer is obliged to conduct work capacity assessments of injured workers when required to do so by the Act, s 44A(3) of the 1987 Act provides that an issuer does not need to do an assessment when making a work capacity decision.

226. The Guidelines, which commenced on 11 October 2013 and were superseded by the *SIRA Guidelines for Claiming Workers Compensation* on 1 August 2016, provided insurers with guidance as to how to assess and determine the work capacity of injured workers. They set out the procedures and the timeframes to be followed with reference to the relevant provisions in the 1987 Act.

227. Clause 5.1 of the Guidelines gave guidance as to when WCDs should be made and the evidence to be considered, such as the worker's pre-injury wages or current wages, certificates of capacity, and rehabilitation and medical reports.

228. The insurer was instructed to "follow a robust and transparent decision-making process with clear, concise and understandable information provided to the worker giving reasons for decisions, seek any additional information that is required to ensure the worker's current capacity for work is fully understood, provide opportunity for the worker to contribute additional information, especially if the decision may result in reduction or discontinuation of the worker's weekly payments". Further, any work capacity decision was expected to be logical, rational, reasonable and correct.

229. Clause 5.2 provided that the before the insurer made a work capacity decision that would result in a reduction or discontinuation of the weekly payments, it should give the worker at least two weeks' notice orally and in writing that it was undertaking a work capacity review and that a work capacity decision was going to be made, and advise that this might involve discussion with the employer and the treating doctor or other treatment providers. The insurer had to inform the worker of the opportunity to supply further information for consideration and advise when the decision was expected to be made.

230. Clause 5.3 directed that the insurer must inform the worker in writing and verbally that a WCD had been made. It had to provide an explanation of the outcome and the consequences, details of the information relied upon, advice regarding the internal review process and notice that a written document would be provided. The provisions relating to notice in s 54 of the 1987 Act also had to be observed.

231. Clause 5.3.1 directed that the insurer had to use plain language and communicate the decision in an appropriate fashion. Whilst the Guidelines did not provide a WCD template, clause 5.3.2 set out the requirements of the notice as follows:

> "The written work capacity decision advice must comply with any requirements of *the 1987 Act* and *Review Guidelines* and:
>
> - reference the relevant legislation
> - explain the relevant entitlement periods
> - state the decision and give brief reasons for making the decision
> - outline the evidence considered in making the decision, noting the author, the date and any key information. All evidence considered should be referred to, regardless of whether or not it supports the decision
> - clearly explain the line of reasoning for the decision
> - state the impact of the decision on the worker in terms of their entitlement to weekly payments, entitlement to medical and related treatment expenses and return to work obligations
> - advise of the relevant legislative notice requirements applicable to the decision
> - advise the date of the work capacity assessment
> - advise the date when the decision will take effect
> - detail any support, such as job seeking support, which will continue to be provided during the notice period
> - advise that any documents or information that have not already been provided to the worker can be provided to the worker on request to the insurer
> - advise of the process available for requesting review of the decision and how to access the required form, *Work capacity - application for internal review by insurer* (catalogue no. WC03304)."

232. The Guidelines also provided guidance with respect to internal and merit service reviews undertaken in accordance with ss 44A of the 1987 Act.

233. In the present matter, QBE sent a letter to the applicant on 22 July 2014 in the following terms:

> "We refer to your claim and advise that the WorkCover Certificates of Capacity on file indicate that you are approaching the end of the first entitlement period for weekly payment of benefits.
>
> The first entitlement period under *s 36 of the Workers Compensation Act of 1987* ("*the Act*") is for **13 weeks** of weekly benefits.
>
> Should you continue to be certified as having no capacity for work or a reduced capacity for work and remain in receipt of weekly benefits, it is expected that you will reach the end of the first entitlement period on 04 August 2014.
>
> After this time, your weekly benefits will be calculated in accordance with *Section 37 of the Act*. This is the second entitlement period that covers from 14 to 130 weeks where any wage benefits are paid.
>
> Under *Section 37 of the Act*, your benefits are calculated as a percentage of your Pre-Injury Average Weekly Earnings (PIAWE) according to your work capacity as follows:
>
> **No Current Work Capacity**:
>
> If you have no work capacity your weekly entitlement is the lesser of:
>
> - (AWE x 80%) - D or
> - Max – D
>
> **Current Work Capacity**:
>
> If you are certified as having a current work capacity **and** have returned to work for not **less** than 15 hours per week, your weekly entitlement is the lesser of:
>
> - (AWE x 95%) – (D+E) or
> - Max – (D+E)
>
> If you are certified as having a current work capacity **and** have returned to work for **less** than 15 hours per week, your weekly entitlement is the lesser of:
>
> - (AWE x 80%) – (D+E) or
> - Max – (D+E)
>
> **Explanation of Calculations**
>
> - Average Weekly Earnings (AWE) = Your Pre-Injury Average Weekly Earnings (PIAWE) which we have calculated as $1,429.07
> - D = Deductable amount for any non-Pecuniary benefits
> - E = current weekly earnings **OR** any amount a worker can earn in suitable employment for the certified work capacity hours
> - Max = current maximum rate payable as per *S34 of the Act* $1,948.80"

234. The calculations above are consistent with the list of payments made by QBE during the first and second entitlement periods pursuant to ss 36 and 37 of the 1987 Act from 7 May 2014 to 3 March 2015.[25]

235. Mr Parker submits that the insurer failed to give the applicant notice of its intention to undertake an assessment and make a WCD. It failed to include the relevant information that is required in accordance with the Guidelines and it did not give the applicant the opportunity to respond or seek a review.

236. Section 44A(3) of the 1987 Act provides that work capacity assessment is not necessary for the making of a work capacity decision by an insurer. Therefore, whether the insurer carried out an assessment is irrelevant. However, it is clear from a review of the letter that the insurer failed to comply with a number of the mandatory requirements in the Guidelines.

237. The insurer referred to the legislation and described how calculations were made in accordance with ss 35, 36 and 37 of the 1987 Act during the first and second entitlement periods. It identified the PIAWE of $1,429.07. Therefore, there was some compliance with the Guidelines.

238. However, the letter was not described as a notice of a WCD and it did not disclose that any work capacity decision had been made. The information that the insurer provided was in very general terms about what would happen in certain circumstances. There was no information about the impact of the decision.

239. No reasons were provided, presumably because the insurer had not made any decision. The evidence that was considered by the insurer was not identified and there was no indication how the PIAWE was calculated. The insurer did not advise when the decision would take effect, only that the applicant was nearing the end of the first entitlement period. The applicant was not offered the opportunity to provide any response and there was no offer of any assistance. Finally, the applicant was not advised of the process for seeking a review.

240. It is true that s 43(1)(d) of the 1987 Act confirms that a decision about the PIAWE constitutes a WCD, but this depends upon whether a decision has been validly made in accordance with the Guidelines. The facts in this matter suggest otherwise.

241. The failure by an insurer to comply with the Guidelines was discussed by President Keating in *Birch*. The President stated:

> "It is readily apparent that the letter dated 29 November 2012 did not comply with the requirements in Pt 5.4.2 of the Guidelines. Failures on the part of an insurer, in complying with relevant Work Capacity Guidelines, going to an alleged 'work capacity decision', were described in *Sabanayagam No. 2* as "irregularities" (at [98]). Sackville AJA at [145] of that decision described a failure by the insurer to comply with Work Capacity Guidelines as "indications that the employer was not purporting to make a decision about the Worker's current work capacity"
>
> Although not conclusive, the insurer's failure to comply with relevant Guidelines at the time, and its failure to describe the letter dated 29 November 2012 as a work capacity decision notice, are consistent with a lack of intention to make a work capacity decision..."[26]

[25] Application, p 478.
[26] *Birch*, [160] to [161].

242. In my view, the same conclusion can be drawn in the present matter. Accordingly, I am not satisfied that QBE'S letter dated 22 July 2014 was a WCD and it follows that I have the jurisdiction to deal with this claim, irrespective of the impact of the 2018 amending Act.

Quantification

PIAWE

243. The parties were unable to reach agreement regarding the applicant's PIAWE and the first date of employment. The applicant's evidence does not address his commencement date.

244. The first pay slip dated 25 February 2014 (Tuesday) represented one week's pay. However, according the applicant's second payslip, he received pay for the equivalent of two weeks on 4 March 2014 (Tuesday). There is no suggestion in the evidence that the applicant worked for 76 hours in one week. The payslip also includes two sets of penalties which could only be consistent with wages for working on two weekends.

245. It seems logical to infer that the additional payment received on 4 March 2014 was in respect of work undertaken in the week prior to the 18 February 2014 (Tuesday), suggesting that the first date of employment was 12 February 2014 (Wednesday). Therefore, I am satisfied that the applicant's first day at work was on 12 February 2014.

246. According to the evidence, the applicant worked on 3 May 2014 and 4 May 2014. He was rostered off work on 5 May 2014 and 6 May 2014 and would not have been paid for these days in any event, so his gross earnings cover a period of 12 weeks. His first date of incapacity was 7 May 2014.

247. His gross year to date earnings identified in the payslip for the period ending 6 May 2014 were $18,578.76, or $1,548.23 per week. The applicant also received a further payment of $2,205.82 on 20 May 2014, but this was after his injury and would not form part of his PIAWE.

248. Therefore, in accordance with ss 44C and 44D of the 1987 Act, the applicant's PIAWE was $1,548.23 per week. He was not in receipt of any pecuniary benefits.

249. This figure is indexed every six months in accordance with s 82A of the 1987 Act based on the Consumer Price Index (CPI). Therefore, the PIAWE increased to $1,562.94 on 1 October 2014, to $1,574.66 on 1 April 2015, to $1,596.71 on 1 October 2015, and to $1,605.49 on 1 April 2016.

Ability to Earn/ Current Weekly Earnings

250. In *Atkin*, Jordan CJ, considered s 11 of the *Workers' Compensation Act*, *1926* (the equivalent to the former s 40(2)(b) of 1987 Act) and the phrase "is earning, or is able to earn". His Honour stated:

> "The burden of proving that the incapacity established by the worker is partial only, and, if so, of proving the other facts necessary to limit the weekly payments under s 11 is upon the employer. The English section corresponding with s 11 has been considered in several decided cases ... As to the phrase 'is earning', it has been held that if the partially incapacitated worker is earning something his actual earnings must *prima facie* be taken as the basis, and the rate of compensation provided for by s 9 reduced by a calculation based on the excess of his pre-injury average weekly earnings above what he is actually earning.

> If, however, it is proved that his actual earnings are not a proper test, because there is some reason un-connected with his earning power which makes them lower than they should be, the other alternative, what he is 'able to earn,' must be adopted This is so where it is shown that he is deliberately taking lower-paid work than he could get, or is idling and on this account receiving less than he could be reasonably expected to obtain, or where his actual earnings have been compulsorily reduced by something unconnected with his injury or general earning power: *Jones v Amalgamated Collieries*; but, if the compulsory outside influence, instead of reducing, increases his actual earnings beyond what his injury would make him otherwise capable of earning, his actual earnings must be taken as the basis: *Heaney v B A Collieries*. If, however, he is not earning anything, or, for some good reason, what he is earning cannot be treated as a proper basis, regard must be had to the alternative basis provided by the section – what he is 'able to earn'."[27]

251. Section 35 of the 1987 Act explains the meaning of the abbreviations in the following sections in respect of the calculation of a worker's weekly payments. It provides:

> "**35 Factors to determine rate of weekly payments**
>
> (1) For the purposes of the provisions of this Subdivision used to determine the rate of weekly payments payable to an injured worker in respect of a week:
>
> ***AWE*** means the worker's pre-injury average weekly earnings.
>
> ***D*** (or a ***deductible amount***) means the sum of the value of each non-pecuniary benefit (if any) that is provided by the employer to a worker in respect of that week (whether or not received by the worker during the relevant period), being a non-pecuniary benefit provided by the employer for the benefit of the worker or a member of the family of the worker.
>
> ***E*** means the amount to be taken into account as the worker's earnings after the injury, calculated as whichever of the following is the greater amount:
>
> (a) the amount the worker is able to earn in suitable employment,
>
> (b) the workers current weekly earnings.
>
> ***MAX*** means the maximum weekly compensation amount…"

252. Therefore, it is clear that when calculating "*E*", one must consider a worker's ability to earn and the worker's current weekly earnings, which is defined in s 44I of the 1987 Act. The greater of these two figures then represents "*E*" in the formula.

253. I have determined that the applicant had the ability to undertake some work during various periods ranging from eight hours per week up to 30 hours per week. According to the applicant's payslips from the respondent, when he worked for a full 38-hour week, which included weekend penalties, he was paid $1,357.32. This equates to $35.72 per hour.

254. There is no restriction in the medical certificates regarding the days of the week that the applicant could work. Given that the majority of restaurants would do most of their business on weekends, I expect that he would be able to secure weekend work with the benefit of weekend shift allowances as he had in the past.

255. Therefore, I consider that $35.72 represents an appropriate hourly rate that the applicant would be able to earn in suitable employment as a chef. The next question to consider is whether the applicant's actual earnings are a true reflection of his capacity.

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[27] *Aitkin*, [22] – [23].

256. Mr Parker submits that I should accept that the applicant's actual earnings were representative of his capacity to earn in accordance with the principles in *Aitkin* and *Palmer.* However, an analysis of the evidence raises concerns as to the reliability of the evidence and whether the evidence truly reflects the applicant's ability to earn.

257. The applicant stated that he worked for 16 hours per week for six weeks from December 2014 at the Chatswood Club. The applicant has given no indication that he was paid during this work trial. I have determined that the applicant had the capacity to work for 25 hours per week at that time, so any earnings that he may have earned would not have reflected his ability to earn in suitable employment. In the circumstances, and in the absence of any evidence of his earnings, I propose to assess his entitlements during this period in accordance with s 37(3)(a) of the 1987 Act.

258. The period of the claim encompasses two financial years. There are no payslips from any of the applicant's post injury employers during the relevant period of the claim.

259. It is difficult to draw any conclusions from the 2014/2015 tax return. Therefore, the payslips from the respondent are relevant for that period. However, when one focusses on the 2015/2016 financial year, a number of conclusions can be drawn regarding the accuracy of the applicant's evidence as to his actual earnings.

260. The applicant stated that he worked at the Platia Greek Tavern as a chef from 15 June 2015 to 30 September 2015 (15 weeks and 3 days). The commencement date and his rate of pay was confirmed in a letter from the restaurant dated 18 June 2015.

261. The applicant worked on weekends, so he would have been entitled to receive weekend shift allowances. In the 2015/2016 financial year, based on his evidence that he worked for 30 hours per week and was paid $30 per hour, his earnings from 1 July 2015 to 30 September 2015 (13 weeks and 1 day) at the Platia Greek Tavern would have been approximately $11,700. This figure does not take into account any weekend or shift allowances that he might have received.

262. The applicant worked at the York Street Deli for 30 hours per week spread over five days from January 2016 to March 2016 (eight to 12 weeks) and he was paid approximately $30 per hour. If one was to allow eight weeks, this would result in gross earnings of $7,200. This also does not take into account any weekend or shift allowances.

263. The applicant stated that on about 16 April 2016, he obtained employment with the Mediterranean for about 30 hours per week and he was paid $700 per week. It seems that some weekend work was involved. Therefore, one could infer that from 16 April 2016 to about 15 June 2016 (eight weeks), he would have earned approximately $700 per week for a total of $5,600. This also does not take into account any weekend or shift allowances.

264. In mid-June 2016, the applicant increased his hours to 45 to 50 hours per week and he was earning $1,400 per week, so from 16 June 2016 to 30 June 2016 (two weeks), he would have earned $2,800. Accordingly, his gross earnings from the Mediterranean would have been approximately $8,400 without additional allowances.

265. On the basis of the applicant's evidence and these calculations, his gross earnings from these three employers in the 2015/2016 financial year would have been approximately $27,400 and possibly more, if allowances were factored in.

266. However, the applicant's 2015/2016 tax return only shows gross earnings of $9,000 and Government benefits of $9,723. There are no payslips or PAYG certificates from these employers during the relevant period and the applicant's evidence of his earnings has not been corroborated by his tax returns and assessments. His statements do not disclose the manner of payments, whether in cash, direct deposit, or by cheque.

267. Further, I do not have the benefit of any of the applicant's bank statements or other financial documents to corroborate his evidence. In the circumstances, I consider that the applicant's evidence regarding his post injury earnings is unreliable and does not accurately reflect his actual earnings or his ability to earn in suitable employment. For these reasons, his evidence should be rejected.

268. Therefore, the applicant will be entitled to an award based on the adjusted PIAWE figures discussed above and an ability to earn $35.72 per hour in some suitable employment as a chef, subject to an adjustment after 52 weeks in accordance with s 44C of the 1987 Act.

Calculation

269. In accordance with s 36(1)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the first entitlement period from 7 May 2014 to 17 June 2014 is:

    (AWE x 95%) - D =
    $1,548.23 x 95% - 0 = $1,470.82 per week.

270. I have determined that the appropriate rate is $35.72 per hour. In accordance with s 36(2)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the first entitlement period from 18 June 2014 to 3 July 2014 when he had the capacity to work for eight hours per week is:

    (AWE x 95%) – (E +D) =
    ($1,548.23 x 95%) - ($35.72 x 8) =
    $1,470.82 - $301.76 = $1,169.06 per week.

271. In accordance with s 36(1)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the first entitlement period from 4 July 2014 to 5 August 2014 is:

    (AWE x 95%) - D =
    $1,548.23 x 95% - 0 = $1,470.82 per week.

272. In accordance with s 37(1)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the second entitlement period from 6 August 2014 to 30 September 2014 is:

    (AWE x 80%) - D =
    $1,548.23 x 80% - 0 = $1,238.58 per week.

273. In accordance with s 37(1)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the second entitlement period from 1 October 2014 to 8 October 2014 is:

    (AWE x 80%) - D =
    $1,562.94 x 80% - 0 = $1,250.35 per week.

274. In accordance with s 37(3)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the second entitlement period from 9 October 2014 to 3 December 2014 is:

    (AWE x 80%) – (E +D) =
    ($1,562.94 x 80%) - ($35.72 x 8) =
    $1,250.35 - $301.76 = $948.59 per week

275. In accordance with s 37(2)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the second entitlement period from 4 December 2014 to 30 January 2015 is:

    (AWE x 95 %) – (E + D) =
    ($1,562.94 x 95%) - ($35.72 x 25) =
    $1,484.79 - $893 = $591.79 per week.

276. In accordance with s 37(2)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the second entitlement period from 31 January 2015 to 31 March 2015 is:

    (AWE x 95 %) – (E + D) =
    ($1,562.94 x 95%) - ($35.72 x 30) =
    $1,484.79 - $1,071.60 = $413.19 per week

277. According to s 44C of the 1987 Act, overtime and shift allowances are excluded from the calculation of the PIAWE after 52 weeks. The 52-week period concluded on 5 May 2015.

278. In accordance with s 37(2)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the second entitlement period from 1 April 2015 to 5 May 2015 is:

    (AWE x 95 %) – (E + D) =
    ($1,574.66 x 95%) - ($35.72 x 30) =
    $1,495.93 - $1,071.60 = $424.33 per week.

279. The parties agreed that after 52 weeks, the PIAWE was $1,140 as this was the applicant's ordinary earnings or base rate of pay disclosed in his payslips. Of course, this figure does not take into account indexation.

280. Therefore, the PIAWE calculated in accordance with s 44C of the 1987 Act, namely $1,140 as at the date of injury, increased to $1,150.83 on 1 October 2014, to $1,159.46 on 1 April 2015, to $1,175.69 on 1 October 2015, and to $1,182.16 on 1 April 2016.

281. In accordance with s 37(2)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the second entitlement period from 6 May 2015 30 September 2015 is:

    (AWE x 95 %) – (E + D) =
    ($1,159.46 x 95%) - ($35.72 x 30) =
    $1,101.49 - $1,071.60 = $29.89 per week.

282. In accordance with s 37(2)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the second entitlement period from 1 October 2015 to 31 March 2016 is:

    (AWE x 95 %) – (E + D) =
    ($1,175.69 x 95%) - ($35.72 x 30) =
    $1,115.91 - $1,071.60 = $45.31 per week.

283. In accordance with s 37(2)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the second entitlement period from 1 April 2016 to 15 April 2016 is:

    (AWE x 95 %) – (E + D) =
    ($1,182.16 x 95%) - ($35.72 x 30) =
    $1,123.05 - $1,071.60 = $51.45 per week.

284. Therefore, the applicant will be entitled to an award in accordance with the above calculations. I will allow the parties liberty to apply with respect to my calculations within 14 days of this determination.

Medical Expenses – s 60 of the 1987 Act

285. As the applicant has succeeded in his claim, I accept the medical evidence that supports the need for payment of reasonable medical, hospital and related expenses. Accordingly, there will be a general order under s 60 of the 1987 Act, but this will be subject to s 59A of the 1987 Act.

Costs

286. There will be no order as to costs.

FINDINGS

287. The applicant sustained injury to right hip arising out of or in the course of his employment with the respondent on 3 May 2014.

288. The applicant's employment was a substantial and the main contributing factor to his injury.

289. The applicant did not sustain an injury to his groin/ inguinal hernia arising out of or in the course of his employment with the respondent on 3 May 2014.

290. The applicant had no current work capacity from 7 May 2014 to 17 June 2014 and from 4 July 2014 to 8 October 2014.

291. The applicant had the capacity to undertake some work for 8 hours per week earning $301.76 per week from from 18 June 2014 to 3 July 2014 and from 9 October 2014 to 3 December 2014.

292. The applicant had the capacity to undertake some work for 25 hours per week earning $893 per week from from 4 December 2014 to 30 January 2015.

293. The applicant had the capacity to undertake some work for 30 hours per week earning $1,071.60 per week from 31 January 2015 to 15 April 2016.

294. The applicant requires medical treatment as a consequence of his injury and the respondent is liable to pay reasonably necessary medical expenses in respect of his right hip injury.

ORDERS

295. Award for the respondent in respect of the allegation of an injury to his groin/ inguinal hernia.

296. The respondent to pay the applicant weekly compensation in accordance with the 1987 Act as follows:

    (a) $1,470.82 per week from 7 May 2014 to 17 June 2014 pursuant to s 36(1)(a);

    (b) $1,169.06 per week from 18 June 2014 to 3 July 2014 pursuant to s 36(2)(a);

    (c) $1,470.82 per week from 4 July 2014 to 5 August 2014 pursuant to s 36(1)(a);

(d) $1,238.58 per week from 6 August 2014 to 30 September 2014 pursuant to s 37(1)(a);

(e) $1,250.35 per week from 1 October 2014 to 8 October 2014 pursuant to s 37(1)(a);

(f) $948.59 per week from 9 October 2014 to 3 December 2014 pursuant to s 37(3)(a);

(g) $591.79 per week from 4 December 2014 to 30 January 2015 pursuant to s 37(3)(a);

(h) $413.19 per week from 31 January 2015 to 31 March 2015 pursuant to s 37(2)(a);

(i) $424.33 per week from 1 April 2015 to 5 May 2015 pursuant to s 37(2)(a);

(j) $29.89 per week from 6 May 2015 to 30 September 2015 pursuant to s 37(2)(a);

(k) $45.31 per week from 1 October 2015 to 31 March 2016 pursuant to s 37(2)(a), and

(l) $51.45 per week from 1 April 2016 to 15 April 2016 pursuant to s 37(2)(a).

297. Liberty to the parties to apply with respect to these calculations within 14 days of this determination.

298. The respondent is to have credit for payments made during this period.

299. The respondent is to pay the applicant's reasonably necessary medical expenses in respect of the applicant's right hip injury pursuant to ss 59A and 60 of the 1987 Act.

300. No order as to costs.