WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 1469/19
Applicant: Kerry Wayne Pugh
Respondent: IKON Services (Sydney) Pty Ltd
Date of Determination: 9 August 2019
Citation: [2019] NSWWCC 272

The Commission determines:

1. Respondent to pay the applicant week payments of compensation pursuant to section 36 and section 37 of the *Workers Compensation Act 1987* from 7 March 2017 to date with such payments to continue in accordance with the provisions of the *Workers Compensation Act 1987 Act* as follows:

   (a) $1,955.19 from 7 March 2017 to 31 March 2017;
   (b) $1,980.65 from 1 April 2017 to 5 June 2017;
   (c) $1,583.65 from 6 June 2017 to 30 September 2017;
   (d) $1,599.61 from 1 October 2017 to 31 March 2018;
   (e) $1,624.98 from 1 April 2018 to 22 May 2018;
   (f) $1,702.72 from 23 May 2018 to 30 September 2018;
   (g) $1,716.24 from 1 October 2018 to 31 March 2019, and
   (h) $1,741.92 from 1 April 2019 to date and continuing.

2. Respondent to pay the applicant's medical and related treatment expenses pursuant to section 60 of the *Workers Compensation Act 1987* in respect of physical injuries and secondary psychological injury as a result of injury arising out of or in the course of employment with the respondent on 7 February 2017*.*

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

Grahame Edwards
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 GRAHAME EDWARDS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mr Kerry Wayne Pugh (the applicant) claims weekly payments of compensation from 7 February 2017 pursuant to ss 36 and 37 of the *Workers Compensation Act 1987* (the 1987 Act) and medical and related treatment expenses as a result of injury suffered in the course of employment with IKON Services (Sydney) Pty Ltd (the respondent) on 7 February 2017.

2. The respondent accepts Mr Pugh suffered a laceration injury to his occipital scalp when he slipped and fell on a roof top terrace at the premises of the Star Casino in the course of employment. The respondent disputes Mr Pugh suffered injury to his head resulting in a brain injury, including post-concussion syndrome, and injury to his left knee.

3. The respondent issued notices pursuant to 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) disputing liability dated 28 April 2017, 29 May 2019, 2 August 2017 and 21 December 2018.

ISSUES FOR DETERMINATION

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

   (a) Did the applicant suffer brain injury (hydrocephalus), including post-concussion syndrome, and injury to his left knee as a result of injury arising out of or in the course of employment on 7 February 2017 within the meaning of s 4 of the 1987 Act?

   (b) Did the applicant suffer a secondary psychology injury?

   (c) Does the applicant have some capacity for work as a result of injury?

   (d) Is the applicant entitled to medical and related treatment expenses as a result of injury pursuant to s 60 of the 1987 Act?

PROCEDURE BEFORE THE COMMISSION

5. The parties attended arbitration hearings held at Tweed Heads on 31 May 2019 and 26 July 2019. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

6. Mr Tanner of counsel, instructed by Ms Gracie, represented the interests of Mr Pugh who was in attendance at the arbitration hearings.

7. Mr Barter of counsel represented the respondent in the interests of Employers Mutual NSW Limited (EML) as agent for the Workers Compensation Nominal Insurer also known as Icare Workers Insurance.

8. The arbitration hearings were sound recorded.

EVIDENCE

Documentary evidence

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

Applicant

(a) Application to Resolve a Dispute (the Application) and attached documents;
(b) Applications to Admit Late Documents dated 17 May 2019, 15 July 2013 and 22 July 2019, and
(c) Amended wage schedule.

Respondent

(a) Reply and attached documents;
(b) Application to Admit Late Documents dated 23 May 2019, and
(c) Forensic report of Dr Ashim Majumdar dated 22 July 2019.

Oral evidence

10. No application was made by either party to adduce oral evidence. No application was made by the respondent to cross-examine the applicant.

FINDINGS AND REASONS

Issue 1 – Did the applicant suffer brain injury (hydrocephalus), including post-concussion syndrome, and injury to his left knee as a result of injury in the course of employment on 7 February 2017 within the meaning of s 4 of the 1987 Act?

Submissions

11. Mr Tanner agreed to Mr Barter's request for the respondent to make it submissions first.

Respondent' submissions

12. Mr Barter identified the following issues in dispute:

    (a) question of capacity for work following the event or incident on 7 February 2017;

    (b) whether the applicant suffered a brain injury as a result of the injury on 7 February 2017;

    (c) causation of the secondary psychological injury, and

    (d) causation of ongoing symptoms in the left knee.

13. Mr Barter submitted that by the time Mr Pugh was examined by Dr McMahon, clinical psychologist qualified by the respondent, on 27 April 2017, he was fit for work within in areas of his expertise with some allowance for the burden of headache and knee pain for which he would require breaks[1].

---

[1] report of Dr McMahon dated 27 April 2017 – Reply – p 31

14. Mr Barter submitted that Mr Pugh's task as a supervisor at the Crown Casino was to "stroll about the place" and take breaks when required in order to carry out the terms and conditions of his contract of employment.

15. Mr Barter submitted that the symptoms relating to hydrocephalus "have largely since resolved with appropriate treatment since the accident" in the opinion of Mr Pugh's treating neurosurgeon, Dr Wood[2].

16. Mr Barter submitted that Mr Pugh was not incapacitated for work from 28 February 2018 following the opinion of Dr Wood; and any incapacity for work results from something other than the injury alleged but as a result of the natural progression of the pre-existing condition of the underlying hydrocephalic state or hydrocephalus.

17. Mr Barter submitted that any psychiatric condition of generalised anxiety disorder associated with depression as opined by Dr Majumdar, psychiatrist qualified by the respondent, is as a result of the work Mr Pugh undertook as an Uber driver from May 2017 until May 2018[3].

18. Mr Barter submitted that any problems with the left knee is as a result of the work as an Uber driver because Dr Wallace, independent medical examiner qualified by the respondent, found the constitutional pre-existing tricompartmental osteoarthritis at the knee joint was not related to the injury[4].

19. Mr Barter submitted that Dr Wallace found no objective evidence that Mr Pugh suffered any injury to his left knee at the time of the fall on 7 February 2017, and any current complaints are due to the pre-existing degenerative tricompartmental osteoarthritis, which are not work related.

20. Mr Barter submitted that Mr Pugh suffered with a pre-existing degenerative condition of the left knee, and if it was aggravated by the fall then it is a personal injury within the meaning of s 4(a), but any aggravation of the pre-existing condition had resolved by the time of Dr Wallace's assessment.

21. Mr Barter submitted Dr Wallace found Mr Pugh was not incapacitated for work as a result of any work-related condition of the left knee as at 18 April 2017.

22. Mr Barter submitted that Mr Pugh suffered with childhood meningitis and as a result suffers with a propensity for hydrocephalus, which may have been aggravated by the fall, but any symptoms relating to the pre-existing hydrocephalus may have developed secondary to his severe meningitis when aged three.

23. Mr Barter submitted the pre-existing hydrocephalus is insufficient to cause any incapacity for work.

24. Mr Barter submitted that any incapacity for work that may have resulted from the aggravation of the hydrocephalus resolved with the insertion of the ventriculoperitoneal shunt by Dr Wood.

Applicant's submissions

25. Mr Tanner submitted that Mr Barter did not refer to all of the medical evidence in its submissions.

---

[2] report of Dr Wood dated 28 February 2018 – Application – p 77
[3] report of Dr Majumdar dated 22 July 2019 – pp 5-6
[4] report of Dr Wallace dated 18 April 2017 – Reply – p 11 at [5], [7] and [8]

26. Mr Tanner submitted that the opinion of Dr McMahon has little or no weight because he deferred to the opinion of a neurologist as to whether Mr Pugh suffers with a post-concussional disorder[5].

27. Mr Tanner submitted that no weight can be placed upon Dr McMahon's opinion that Mr Pugh was fit for work with allowance for headaches because he deferred questions of causation and symptoms of the post-concussional disorder and hydrocephalus to a neurologist.

28. Mr Tanner submitted that Mr Pugh's letter of engagement to commence work with the respondent in the position of General Manger at the Star Casio on 5 December 2016 with a salary of $136,875 was not a job as submitted by the respondent of merely strolling around the premises if suffering from headaches, which would be a significant obstacle to discharging the duties of his contract.

29. Mr Tanner submitted there is a casual link between the fall and the development of hydrocephalus in the letter of A/Prof Boyce[6] to Dr Wood.

30. Mr Tanner submitted the respondent's submission that Mr Pugh suffers with a constitutional condition pre-disposing him to the development of hydrocephalus which has no relationship to the fall should be rejected because he was born in 1954 and worked in a variety of responsible positions without any cognitive disorder until he suffered the head injury in the course of employment with the respondent on 7 February 2017.

31. The opinion of A/Prof Boyce that the onset of the hydrocephalus with a differential diagnosis between idiopathic normal pressure and secondary hydrocephalus consequent to a head injury should be preferred to the opinion of Dr McMahon because A/Prof Boyce and Dr Wood are of the opinion "on the balance of probability, there is an association between the fall and the hydrocephalus"[7].

32. Mr Tanner submitted that both A/Prof Boyce and Dr Wood have established on the balance of probabilities that the causation of the hydrocephalus blockage requiring the insertion of a ventriculoperitoneal shunt was as a result of the fall on 7 February 2017 within the meaning of s 4(a), and that the employment concerned was a substantial contributing factor to the injury within the meaning of s 9A of the 1987 Act.

33. Mr Tanner submitted that hydrocephalus is a serious condition resulting in incapacity for work because the prognosis is guarded with the potential for blockage of the ventriculoperitoneal shunt with a requirement to replace the shunt[8].

34. Mr Tanner submitted that Dr Wood does not doubt the head injury suffered by Mr Pugh has caused his symptoms of word finding difficulties, daily headaches and cognitive impairment[9].

35. Mr Tanner submitted that Dr Wood found a "temporal association between the work injury and the onset of Mr Pugh's symptoms of headache, cognitive decline and word finding difficulties"; and while Mr Pugh may have had a longstanding clinically occult ventriculomegaly, the accident "in some way has tipped the balance into causing symptoms"[10].

---

[5] Report of Dr McMahon dated 27 April 2017 – Application – pp 59-60
[6] report of A/Prof Boyce dated 10 July 2018 – Application – p 63
[7] report of A/Prof Boyce dated 23 March 2018 – Application – p 65
[8] supra – p 66
[9] report of Dr Wood dated 8 August 2017 – Application – p 67
[10] report of Dr Wood dated 15 February 2018 – Application – p 75

36. Mr Tanner submitted that the respondent's submission that Dr Wood would not place any restrictions on Mr Pugh's work capacity has to be considered on the basis of his opinion as to prognosis because there is no dispute he suffers with headaches and cognitive dysfunction[11].

37. In respect of causation of the hydrocephalus, Mr Tanner submitted the opinion of Dr Wood[12] should be accepted.

38. Mr Tanner submitted that A/Prof Fearnside's opinion, independent medical examiner qualified by the applicant, as to causation of the hydrocephalus with decompensation as a result of the injury should be accepted[13].

39. Mr Tanner submitted Mr Pugh has established on the balance of probabilities that the causation of the hydrocephalus is as a result of the injury within the meaning of s 4, and the employment concerned was a substantial contributing factor to the injury within the meaning of s 9A of the 1987 Act on the basis of the opinions of A/Prof Boyce, Dr Wood and A/Prof Fearnside.

40. In respect of capacity for work, Mr Tanner submitted the opinion of A/Prof Fearnside that Mr Pugh is not fit for work because of his ongoing headaches and his impaired cognitive and balance as a result of the injury[14] should be accepted with a finding that Mr Pugh has no capacity for work.

41. Mr Tanner submitted that Dr O'Sullivan, independent medical examiner qualified by the respondent, who is a neurologist, diagnosed "normal pressure hydrocephalus, which has decompensated as a result of the minor head injury"[15]; finding it unlikely that Mr Pugh would not have developed a similar neurological condition without having the fall supports the opinions of A/Prof Boyce, Dr Wood and A/Prof Fearnside.

42. Mr Tanner submitted that Dr O'Sullivan agreed with Dr Wood that the injury, on the balance of probabilities, was a "significant factor to Mr Pugh's presentation"[16].

43. Mr Tanner submitted that Dr O'Sullivan also agreed with A/Prof Fearnside's opinion that Mr Pugh's condition of normal pressure hydrocephalus with decompensation was a result of the fall on 7 February 2017[17].

44. Mr Tanner submitted that it is speculative of Dr O'Sullivan to consider the symptoms of the hydrocephalus may have developed secondary to severe meningitis when aged three because Mr Pugh's cognitive function was not impaired prior to the accident evidenced by the work history and lifestyle until the injury and, if it was asymptomatic, then the fall aggravated, accelerated, exacerbated or deteriorated the pre-existing asymptomatic condition rendering it symptomatic, which is a disease injury within the meaning of s 4(b(ii) of the 1987 Act.

45. Mr Tanner submitted that Mr Pugh suffers with a secondary psychological injury as a result of the physical injury suffered in the course of employment with the respondent.

---

[11] supra – p 76
[12] report of Dr Wood dated 28 February 2018 – Application – p 77
[13] report of A/Prof Fearnside dated 19 November 2018 – Application – pp 31-32
[14] supra – p 32 at [7.4] and [7.7] - [7.8]
[15] report of Dr O'Sullivan dated 13 May 2019 – Application to Admit Late Documents filed by the respondent dated 23 May 2019 – p 6 at (b) and (e)
[16] supra – p 7 at (f)
[17] supra – p 7 at (h)

46. Mr Tanner submitted the opinion of the nominated treating psychiatrist, Dr Panackal, that Mr Pugh suffers with a Generalised Anxiety Disorder as a result of the physical injury would be preferred to the opinion of Dr Majumdar, independent medical expert qualified by the respondent, that his psychiatric problems started during the period he was working as an Uber driver.

47. Mr Tanner submitted Dr Panackal's opinion that Mr Pugh's psychological symptoms of anxiety and associated panic attacks significantly affects his capacity to undertake the work, and that he is "realistically unemployable"[18] should be accepted.

48. Mr Tanner submitted Dr Majumdar diagnosed Mr Pugh to be suffering with Generalised Anxiety Disorder associated with Depression[19]; agreeing with the diagnosis of Dr Panackal, but considered the anxiety disorder was "caused by multiple factors"[20].

49. Mr Tanner submitted there is no evidence to support Dr Majumdar's conclusion that the psychiatric problems started during Uber driving because the psychiatric condition was secondary to the cognitive disfunction and the multiple factors as a result of the physical injury.

50. Mr Tanner submitted Dr Majumdar's opinion that Mr Pugh is unfit to return to his pre-injury duties and any form of work from a psychiatric perspective is in accordance with the opinion of Dr Panackal.

51. Mr Tanner submitted that Mr Pugh has no capacity for work as a result of his secondary psychological injury as opined by Drs Panackal and Majumdar.

52. Mr Tanner submitted Dr Wallace[21] did not take into consideration that the left knee was asymptomatic prior to the fall and whether the fall aggravated, accelerated, exacerbated or deteriorated the pre-existing or constitutional condition instead of merely concluding the pre-existing degenerative tricompartmental osteoarthritis is constitutional in origin and not work related.

53. Mr Tanner submitted that Dr Wallace did not explain or provide reasons as to why he concluded Mr Pugh has no work incapacity as a result of any work-related condition of the left knee.

54. Mr Tanner submitted the respondent's submission that the left knee condition could have been aggravated by the Uber driving should be rejected because there is no evidence to support that proposition.

55. Mr Tanner submitted that Mr Pugh also injured his back in the fall, referring to the history taken by Dr New[22], independent medical expert qualified by the applicant, which has resulted in the overall incapacity for work.

Respondent's further submissions

56. Mr Barter submitted Dr New found no permanent impairment of the back, and there was no history of back injury given to Dr Wallace.

[18] report of Dr Panackal dated 14 May 2019 – Application to Admit Late Documents filed by the applicant dated 17 May 2019
[19] report of Dr Majumdar dated 22 July 2019 – p 4
[20] supra – p 5
[21] report of Dr Wallace dated 18 April 2017 – Reply – p 11 at [5]
[22] Report of Dr New dated 22 June 2017 – Application – p 37 and p 40

57. Mr Barter submitted the back has not featured in the consideration of incapacity for work and no diagnosis of the back condition was made by Dr New.

Discussion and findings

Head injury

58. I accept Mr Pugh's evidence that he was in good health at the time he commenced employment with the respondent on 9 December 2016 evidenced by his work activities and lifestyle as set out in his statements and the medical reports other than being hospitalised for meningitis when aged three, childhood illnesses, including a fractured leg when aged eight, a lateral release of the left knee in 1977, a gastric sleeve procedure on 6 November 2015 resulting in a loss of 70kg in weight, and an umbilical hernia repair in February 2016.

59. Mr Pugh was appointed by the respondent to the position of General Manager Operations for the public area cleaning services provided to the Star Casino by the respondent. Mr Pugh was responsible for the cleaning of all public areas at the Star Casino and the supervision of 182 staff. He was also involved in the transition of staff from employment under Star Casino to the respondent.

60. On 7 February 2017, Mr Pugh was injured in the course of his employment. The circumstances of the injury are set out in his statement as follows[23]:

> "38. On 7 February 2017, I was injured whilst working at The Star Casino, at about 1.30pm. I started work that day at about 5.30am. I had eaten late in the morning and taken breaks.
>
> 39. I was conducting a cleaning inspection of the Marquee nightclub and we went out to the rooftop terrace. There were 2 people present, Mohammad Islam who is the Ikon Duty Manager, and Teresa Rodriguez, who is the supervisor of the public area cleaning for The Star in-house team, afternoon shift. I was the most senior person present, I was Mohammad's supervisor.
>
> 40. There had been a significant storm earlier in the day. There is a paved surface on the rooftop terrace, that then becomes a ground, smooth terrazzo surface, and that area was wet from the rain. Most of that area is uncovered. I slipped about a metre away from where the paved area finished and the terrazzo surface commenced. We had to walk over these surfaces to get from where we were doing the cleaning inspection to the casino proper.
>
> 41. I had not consumed any alcohol in the 24 hours prior to this injury. I do not drink alcohol and have not had a drink in excess of twenty years. I was not taking any medication at the time of this injury. I had not had any pain or injury to this body part in the days prior to accident.
>
> 42. When I fell, my feet went forward out from under me. Neither Mohammed or Teresa slipped on the surface, they were walking on each side of me, slightly in front of me.

[23] statement of the applicant dated 14 March 2017 – Application – pp 9-11

43. I was wearing a pair of leather shoes with a smooth sole. They are Windsor Smith brand. I have owned those shoes for about two years, I think I bought them from a shoe shop in Carindale, OLD. I still own them and can provide a photo of them for this report. I was not required to wear any particular type of shoes in that job.

44. I did not lose consciousness when I fell. I pulled a muscle in my right side, because I had instinctively twisted my body to minimise the impact on my head as I went down. My left knee was also injured but that was not evident at that time.

45 Mohammad and Teresa wanted me to stay where I was but I was wearing a suit and laying in a pool of water, so I asked them for their help to get me up. I thought I was okay but there was some blood on my head. When Teresa saw that, she told me it was "pretty bad" and I should see the medic.

46. I agreed and they helped me to get down from the terrace to the medic's office on level 00. I do not know the medic's name. but this is available on the incident report supplied to Ikon. She said it looked too small to stitch, showing just grazing and a bruise, and gave me some gauze to hold against it. She filled out an incident report and I took that to Pierre Mina. He asked how I was, and told him what the medic had told me.

47. I filled out the Ikon incident report myself in line with what the medic had told me. I continued to apply pressure to the wound while I sat at my desk and filled in the Ikon incident form. I gave that to Pierre. I showed him the blood on the gauze from the wound. The bleeding didn't stop, so I rang John Whale, the workplace health officer in Ikon Melbourne and told him what had happened. He said I had followed all the right procedures, and he would wait until he saw the incident form to comment further.

48. I later spoke to Bambi also and she insisted I see a doctor, so I walked across to the medical centre opposite The Star Medical Centre, at 50 Union Street, Pyrmont, where I had five stitches on the wound. The doctor recommended I have a Cat scan. returned to work at The Star about 5.30-5.45pm, I showed some of my own staff the wound, but the Ikon support staff from The Star had left."

61. Mr Pugh said he did not take any time off work but returned to the Star Medical Centre on two occasions within seven days after the accident complaining of headaches.

62. On 23 February 2017, Mr Pugh's contract of employment was terminated by the respondent for reasons which are not relevant to the determination of his workers compensation claims before the Commission.

63. On 27 February 2017, Mr Pugh returned to the Star Medical Centre. He was referred for a CT scan of his brain.

64. On 2 March 2017, Mr Pugh returned to Queensland and consulted Dr Horsburgh who referred him for an MRI scan of his brain.

65. On 5 April 2017, Mr Pugh was referred by the respondent to Dr McMahon for psychological assessment.

66. Mr Pugh reported to Dr McMahon that he had suffered daily headaches on the fontal region with more frequent left temporal than right and sometimes bilaterally across the forehead since the injury. He also reported that he suffered with constant pain in the left knee, and that he had to support his knee with a pillow if resting, and that the knee throbbed.

67. Dr McMahon conducted a number of clinical tests to determine cognitive functioning to determine the diagnosis of the head injury. While Dr McMahon considered Mr Pugh's head complaints and symptoms did not meet the criteria for Post-Concussional Disorder, he considered the symptoms met the criteria for Mild Neurocognitive Disorder, but said he would defer to the opinion of a neurologist with regard to the cause of the disorder.

68. Dr McMahon opined[24]:

> "**2. Is the worker's description of the injury consistent with your opinion on diagnosis?** (emphasis in original)
>
> The symptoms described and profile on testing are consistent with a mild neurocognitive disorder which may be caused by normal pressure hydrocephalus indicated by the radiologist Dr Leung and possibly the fall, however, in the absence of a loss of consciousness and the absence of radiological evidence of cerebral contusion I find it difficult to conclude that this condition is consequent to the fall. The headaches, while a primary symptom of a post-concussional injury, may be cervicogenic (coming from the neck) as in whiplash type injuries, or other cause, and in this regard, I defer to the opinion of neurologist.
>
> **Causation** (emphasis in original)
>
> **3. Is the stated injury reasonably attributable to the alleged incident?** (emphasis in original)
>
> Given the radiological evidence and that the symptom picture does not clearly fit with a post-concussional disorder I would defer to the opinion of a neurologist in this regard. The symptoms reported may be due to neck Injury combined with the normal pressure hydrocephalus which was an occult condition prior to the radiological examination of Dr Leung.
>
> **4. Has work been a substantial contributing factor, and if so how? Please consider the following factors:** (emphasis in original)
> - o **The time and place of the injury**
> - o **Nature of their employment and specific tasks**
> - o **The duration of the employment**
> - o **The probability that this or a similar injury would have happened around the same time in the worker's life if they had not been in employment**
> - o **The worker's situation before the injury and any predisposing, precipitating or perpetuating factors.**

[24] Report of Dr McMahon dated 27 April 2017 – Application – p 59-60

The worker's life away from the workplace.

In my opinion, this is a question best put to a neurologist, given the possibilities outlined in my response to the diagnostic questions above.

Contributions

5. Are there any other contributing factors to Mr Pugh's condition?

There is the effects of the possible normal pressure hydrocephalus alluded to by Dr Leung.

6. Is there any evidence of a pre-existing condition? If so, has this condition been aggravated/exacerbated by Mr Pugh (sic.) (emphasis in original)

There is the normal pressure hydrocephalus alluded and to by Dr Leung and I defer to the opinions of neurologists as to if the fall has aggravated or exacerbated this condition.

7. If Mr Pugh's condition is an aggravation/exacerbation of a pre-existing or degenerative condition, please advise whether the work-related aggravation has now ceased. (emphasis in original)

I am unable to provide an opinion because this conclusion would be better made by a neurologist given the possibility of neck involvement.

Fitness For Work (emphasis in original)

8. Based on your examination of this patient and review of the attached correspondence, what is Mr Pugh's current capacity for work? If fit for suitable duties, please outline the restrictions and if these are full hours or reduced hours.

In my opinion Mr Pugh is fit for work within the areas of his expertise with some allowance for the burden of headache and knee pain for which he will require rest breaks."

69. I agree with Mr Tanner's submission that little or no weight can be placed upon Dr McMahon's opinion as to causation of the hydrocephalus, although he did concede that the condition of mild neurocognitive disorder was possibly caused by the fall, deferring questions of causation and diagnosis to a neurologist.

70. I also agree with Mr Tanner's submission that little or no weight can be placed upon Dr McMahon's opinion as to capacity for work because he was not able to diagnose the symptoms, preferring to defer to a neurologist as to diagnosis.

71. Mr Pugh was referred by his general practitioner to A/Prof Boyce whom he first saw on 10 July 2017. A/Prof Boyce obtained a history of recurrent headaches since the time of the injury, problems with concentration, irritability and sensitivity to light (photophobia). A/Prof Boyce reported that a CT scan organised by Dr Horsburgh showed significant dilation of the ventricular system of the brain, and a subsequent MRI scan showed further evidence supporting a diagnosis of "communicating hydrocephalus possibly normal. Pressure hydrocephalus"[25].

[25] report of A/Prof Boyce dated 23 March 2018 – Application – p 65

72. A/Prof Boyce diagnosed the onset of hydrocephalus with a differential diagnosis between idiopathic normal pressure hydrocephalus and secondary hydrocephalus consequent to the head injury.

73. A/Prof Boyce wrote to Dr Wood on 10 July 2017[26] advising the result of the MRI scan and, in his opinion, there was a possible cause and relationship between the slip and fall and development of the hydrocephalus.

74. A/Prof Boyce in his report to Mr Pugh's solicitors dated 23 March 2018 said that he and Dr Wood were "of the opinion that on the balance of probability, there is an association between the fall and the hydrocephalus"[27].

75. Dr Wood took over the management of Mr Pugh from A/Prof Boyce upon his retirement from medical practice.

76. On 3 October 2017, Mr Pugh underwent the insertion of a ventriculoperitoneal shunt by Dr Wood at the Mater Private Hospital Brisbane.

77. Dr Wood reported to Dr Horsburgh in November 2017 that Mr Pugh was happy with the outcome of his surgery, which has resulted in a "considerable improvement in his headache frequency"[28].

78. In respect of diagnosis of Mr Pugh's condition, Dr Wood said[29]:

> "Since the time of the fall and the head injury, Mr Pugh reported that he had difficulty finding the correct words, had suffered from daily headaches, reported cognitive impairment and he felt as though he was not the same Individual that he had been prior to the Incident. The headaches were particularly troublesome. Shortly after the injury, a CT scan of the brain was performed. This did not demonstrate any evidence of intracranial bleeding but there was the presence of notable ventriculomegaly affecting the lateral and third ventricles of the brain. A subsequent MRI scan performed In April2017 confirmed the findings of ventriculomegaly and there was evidence of a hyperdynamic flow void through the aqueduct of Sylvlus, suggesting some abnormality of CSF flow. No obstructive lesion to CSF flow was seen within or external to the ventricular system."

79. In respect of causation of the hydrocephalus, Dr Wood opined[30]:

> "Clearly, there Is a temporal association between the work Injury as sustained and the onset of Mr Pugh's symptoms of headache, cognitive decline and word finding difficulties. It Is possible that the accident was the causative factor with the potential for a small amount of Intracranial bleeding causing Impaired CSF absorption. Equally possible however Is that Mr Pugh may have had a longstanding clinically occult ventriculomegaly and that the accident in some way has tipped the balance into this causing symptoms. I would consider It likely that the hydrocephalus and ventriculomegaly observed on the CT and MRI scans Is associated with Mr Pugh's symptoms."

---

[26] report of A/Prof Boyce dated 10 July 2017 – Application – p 63
[27] Application – p 65
[28] report of Dr Wood dated November 2017 – Application – p 72
[29] report of Dr Wo
od dated 15 February 2015 – Application – p 74
[30] supra – p75

80. A/Prof Fearnside, after taking a comprehensive history from Mr Pugh and reviewing the medical evidence including the special investigations taken of the brain, concluded the diagnosis was "normal pressure hydrocephalus with decompensation following minor head injury",[31] and that the symptoms complained of were consistent with the minor head injury sustained. A/Prof Fearnside said it is well recognised that even a minor head injury can cause cognitive decompensation in conditions such as compensated (asymptomatic) hydrocephalus.

81. Dr O'Sullivan agreed with A/Prof Fearnside's diagnosis of "normal pressure hydrocephalus, which has decompensated as a result of the minor head injury", and that the diagnosed condition was as a result of the fall on 7 February 2017[32]. Dr O'Sullivan also agreed with Dr Wood's opinion "that the injury, on the balance of probabilities, was a significant contributing factor to Mr Pugh's presentation".

82. In respect of causation of the hydrocephalus, Dr O'Sullivan provided the following answers to questions asked of him by the respondent[33]:

> "**(c) Do you consider the fall of 7 February 2017 caused any neurological condition? Why/Why not?** (emphasis in original)
>
> I consider the fall on 7 February 2017 caused a decompensation of what was the pre-existing normal pressure hydrocephalus, resulting in Mr Pugh developing the symptoms consistent with the diagnosis of normal pressure hydrocephalus.
>
> **(d) Do you consider the fall of 7 February 2017 was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of any underlying neurological condition?** (emphasis in original)
>
> **i. If so what is the extent of that aggravation?**
>
> I consider that the fall on 7 February 2017 was the main contributing factor to the aggravation, acceleration, exacerbation and deterioration of Mr Pugh's underlying neurological condition. It is well recognised in the neurological and neurosurgical literature that in the presence of normal pressure hydrocephalus, even though it is asymptomatic, a minor head injury, on the balance of probabilities, would result in decompensation and development of neurological symptoms.
>
> **(e) Noting your diagnosis above, do you consider that the claimant would have developed a similar neurological condition had the fall of 7 February 2017 not occurred?** (emphasis in original)
>
> **As Mr Pugh was asymptomatic prior to the fall, I consider it is unlikely that he would have developed a similar neurological condition without having the fall** (emphasis not in original). However, normal pressure hydrocephalus is well recognised to be a slowly progressive condition and later in life he may have developed symptoms relating to it without having had a fall. **However, in my opinion, as stated, the fall resulted in the decompensation causing his hydrocephalus to become symptomatic**" (emphasis not in original).

---

[31] report of A/Prof Fearnside dated 19 November 2018 – Application – p 31 at [7.2] – [7.3]
[32] report of Dr O'Sullivan dated 13 May 2019 – Application to Admit Late Documents filed by the Respondent dated 17 May 2019 – pp 6-7
[33] supra – p 6

83. The medical evidence overwhelming supports the conclusions reached by the treating neurologist, A/Prof Boyce, and the treating neurosurgeon, Dr Wood, and the forensic experts, A/Prof Fearnside and Dr O'Sullivan, that the head injury aggravated, accelerated, exacerbated or deteriorated the asymptomatic hydrocephalus resulting in the symptoms of headaches, cognitive impairment and impaired balance.

84. I find that the head injury suffered by Mr Pugh in the course of employment on 7 February 2017 aggravated, accelerated, exacerbated or deteriorated the asymptomatic hydrocephalus to become symptomatic resulting in headaches, cognitive impairment and impaired balance requiring the insertion of the ventriculoperitoneal shunt by Dr Wood.

85. I find Mr Pugh suffered a "personal injury" within the meaning of s 4(a)[34], and that the employment concerned was a substantial contributing factor to the injury within the meaning of s 9A of the 1987 Act.

86. In the alternative, I find Mr Pugh suffered a "disease injury" within the meaning of s 4(b)(ii) of the 1987 Act and that the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the asymptomatic hydrocephalus rendering the condition symptomatic resulting in symptoms of headaches, cognitive impairment and impaired balance.

Left knee

87. I accept Mr Pugh's evidence that he had no problems with left knee prior to the injury when he slipped and fell on the wet rooftop terrace landing on his right side, and that the knee condition became apparent to him later because the initial treatment was for his head injury with focus on recurring headaches and cognitive dysfunction.

88. The mechanism of the injury as recorded in the histories taken by Dr New, independent medical expert qualified by the applicant, and Dr Wallace are consistent with the pre-existing osteoarthritis being aggravated by the fall rendering the condition symptomatic.

89. I agree with Mr Tanner's submission that Dr Wallace did not consider whether the asymptomatic tricompartmental osteoarthritis and tears involving the anterior and posterior horns of the medial meniscus in the left knee as disclosed by the MRI scan dated 14 March 2017 were aggravated, accelerated, exacerbated or deteriorated as a result of the injury.

90. Dr Wallace found there was tenderness at the medial retropatellar facet with palpable retropatellar crepitus consistent, in my view, with the mechanism of the injury and the pathology revealed by the MRI scan taken only five weeks after the injury. Dr New also found on examination crepitus in the patellofemoral compartment on flexion and extension.

91. It appears Dr Wallace based his opinion on the assumption:

> "there is no objective medical evidence that Mr Pugh suffered any injury at his left knee at the time of his work fall on 7 February 2017.
>
> In particular, I note the incident report filled out on the day of his injury, which referred to only laceration at his scalp and some chat pain, but no left knee injury.

---

[34] see *Lyons v Master Builders Association of NSW Ltd* [2003] NSWWCC 422*; Rail Services Australia v Dimovski & Anor* [2004] NSWCA 267 and *Australian Conveyor Engineering Pty Ltd v Mecha Engineering Pty Ltd* (1998) 45 NSWLR 606 for a discussion as to a degenerative disease being a "personal injury" within the meaning of s 4(a) of the 1987 Act.

> Mr Pugh did not seek review with his Local Medical Officer in regard to his left knee pain until 27 February 2017, some three weeks post-injury."

without considering whether the mechanism of the injury as provided to him by Mr Pugh aggravated, accelerated, exacerbated or deteriorated the asymptomatic pre-existing degenerative condition of the knee rendering it symptomatic.

92. I prefer the opinion of Dr New to that of Dr Wallace because he considered whether the asymptomatic degenerative condition of the knee was aggravated as a result of the injury.

93. I find that the injury aggravated, accelerated, exacerbated or deteriorated the asymptomatic pre-existing tricompartmental osteoarthritis in the left knee rendering the pre-existing condition symptomatic with the aggravation continuing to the present time.

94. I am unable to accept the respondent's submission that the work of an Uber driver has aggravated the pre-existing condition in the left knee because there is no evidence or medical opinion to support this proposition.

95. I find Mr Pugh suffered a "personal injury" to his left knee within the meaning of s 4(a), and that the employment concerned was a substantial contributing factor to the injury within the meaning of s 9A of the 1987 Act.

96. In the alternative, I find Mr Pugh suffered a "disease injury" within the meaning of s 4(b)(ii) of the 1987 Act, and that the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the asymptomatic pre-existing tricompartmental osteoarthritis in the left knee rendering the pre-existing condition symptomatic with the aggravation continuing to the present time.

Psychology injury

97. Mr Barter submitted that any psychiatric condition of generalised anxiety disorder associated with depression as opined by Dr Majumdar is as a result of the work undertaken as an Uber driver from May 2017 until May 2018.

98. Mr Tanner submitted Dr Majumdar diagnosed Mr Pugh to be suffering with Generalised Anxiety Disorder associated with Depression[35]; agreeing with the diagnosis of Dr Panackal but considered the anxiety disorder was "caused by multiple factors"[36].

99. Mr Tanner submitted there is no evidence to support Dr Majumdar's conclusion that the psychiatric problems started during Uber driving because the psychiatric condition was secondary to the cognitive disfunction and the multiple factors as a result of the physical injury.

100. Mr Pugh has been under the care of Dr Panackal since 22 May 2018 after referral by Dr Aung, general practitioner. Dr Panackal has been treating Mr Pugh on a regular basis. Mr Pugh provided a history to Dr Panackal about his physical symptoms since the injury and the insertion of the ventriculoperitoneal shunt for the hydrocephalus condition.

101. Dr Panackal observed Mr Pugh to be extremely distressed about the multiple physical symptoms he has suffered as a result his injury, including severe headaches, knee pain, unsteadiness of gait and their impact on his functioning.

102. Dr Panackal diagnosed Mr Pugh to be suffering with Generalised Anxiety Disorder which affected his capacity to work as an Uber driver.

---

[35] report of Dr Majumdar dated 22 July 2019 – p 4
[36] supra – p 5

103. Dr Panackal is of the opinion that Mr Pugh is incapacitated for work because of his anxiety and mood symptoms which are compounded by his physical injuries.

104. There was no suggestion by Dr Panackal that the psychiatric condition was the result of work as an Uber driver. Dr Panackal was of the opinion that the Generalised Anxiety Disorder was caused by the psychical injuries affecting his capacity to work as an Uber driver[37].

105. In respect of causation of the psychiatric condition of Generalised Anxiety Disorder, Dr Panackal concluded that it was caused by the physical injuries resulting in his incapacity for work for the following reasons[38] :

> "In addition to his physical impediments the severity of the psychological symptoms of anxiety and the associated panic attacks significantly affects his capacity to undertake his current work duties (as a Uber driver). Another concern raised by the patient is the severe headache episodes and decline in cognitive functioning."

106. Dr Majumdar agrees with the diagnosis of Generalised Anxiety Disorder but found there were "significant number of depressive symptoms but the criteria are not met for specific depression diagnosis"[39].

107. Dr Majumdar is of the opinion that Mr Pugh's Generalised Anxiety Disorder was caused by "multiple factors", finding "one of these factors has been trauma at work and losing functionality"[40].

108. Dr Majumdar considered the psychiatric problems started during the time Mr Pugh was working as an Uber driver, but one of the "multiple factors" causing the psychiatric condition was "loss of functional ability". Dr Majumdar, in my view, was referring to the consequences of the head injury when he said: "loss of functional ability", although he could have been referring to the knee injury as well.

109. While Dr Majumdar recorded a history that the psychiatric symptoms started during the period Mr Pugh was working as an Uber driver, he did not opine that the causation of the symptoms was as a result of that work as submitted by the respondent. Dr Majumdar found the Generalised Anxiety Disorder was caused by "multiple factors" including "trauma at work and losing functionality".

110. If the onset of the psychiatric symptoms commenced while Mr Pugh was working as an Uber driver as recorded by Dr Majumdar, they were the manifestation of the evolving psychiatric disorder of generalised anxiety caused by the physical injuries as opined by Dr Panackal.

111. I am satisfied on balance of the unbroken causal link or chain between the psychological condition of generalised anxiety and the physical injuries on a common sense evaluation of the evidence[41].

112. I find that Mr Pugh suffers with a secondary psychological injury which arose as a consequence of, or secondary, to his psychical injuries.[42]

---

[37] report of Dr Dr Panackal dated 14 May 2019 – Application to Admit Late Documents filed by the applicant dated 17 May 2019 – p 4
[38] supra
[39] report of Dr Majumdar dated 22 July 2019 – p 5
[40] supra
[41] *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 at p 462F
[42] s 65A(5) of the 1987 Act

Capacity for work

113. I am unable to accept Dr McMahon's opinion that Mr Pugh was fit for suitable duties "within areas of his expertise with some allowance for the burden of headache and knee pain for which he will require rest breaks" because he deferred questions of causation and diagnosis to a neurologist.

114. I am also unable to accept Dr Wallace's opinion as to capacity for work because his opinion was based upon his conclusion that the left knee condition was not work related, which was rejected for the reasons I have given.

115. I agree with Dr New's opinion that Mr Pugh had some capacity for work when he assessed the left knee condition, although he considered the long-term prognosis to be poor with the likelihood of a total knee replacement in the future.

116. I agree with Mr Tanner's submission that Mr Pugh suffered a head injury causing cognitive impairment and impairment balance a result of the aggravation of the hydrocephalus with the requirement to undergo the insertion of the ventriculoperitoneal shunt by Dr Wood.

117. I also agree with Mr Tanner's submission that it is necessary to consider all of the evidence to determine the issue of capacity for work.

118. I reject Dr McMahon's opinion that Mr Pugh was fit for suitable duties when he assessed him in April 2017 because he deferred questions of diagnosis and causation to a neurologist.

119. While Dr Wood opined in February 2018 that the symptoms related to the hydrocephalus "have largely resolved with appropriate treatment", he said the "prognosis is unclear" and "there may be persisting impairment function that may impact upon his ability to perform work for which he is trained"[43].

120. A/Prof Boyce opined in March 2018 that the prognosis of the hydrocephalus condition was guarded for the following reasons[44]:

> "There is the potential for blockage of the ventriculoperitoneal shunt and an exacerbation of the problem and the requirement to replace the stunt. Clearly, he should remain under the care of a neurosurgeon on a six-monthly basis and with continuing review. It may be prudent to obtain an opinion for a neuropsychologist as to any cognitive impairment as a consequence of the hydrocephalus."

121. A/Prof Fearnside found Mr Pugh had no capacity for work when he assessed him in November 2018 because of ongoing headaches, cognitive impairment and impaired balance. A/Prof Fearnside said the treatment has not yet been optimal as the ongoing headaches are likely due to intracranial hypotension, and the prognosis is guarded[45].

122. A/Prof Fearnside is of the opinion that Mr Pugh is "realistically unemployable on the open labour market at this time".

123. Dr O'Sullivan provided no opinion as to capacity for work or prognosis of the hydrocephalus condition.

---

[43] report of Dr Wood dated 15 February 2018 – Application – p 76
[44] report of A/Prof Boyce dated 23 March 2018 – Application – p 66
[45] report of A/Prof Fearnside dated 19 November 2018 – Application – p 32

124. Dr Majumdar's opinion that Mr Pugh is unfit for his pre-injury duties and "unsuitable to return back to any form of work"[46] because of his psychiatric condition accords with the opinion of Dr Panackal that Mr Pugh has no capacity for work until recovery from his psychiatric condition[47].

125. I agree with Mr Barter's submission that while Dr New took a history of back complaint as a result of the injury, it did not feature in the consideration of incapacity for work with no diagnosis made with an assessment of nil whole person impairment of the lumbar spine.

126. I am unable to accept Mr Tanner's submission that the back condition has resulted in the "overall incapacity for work" because Dr New made no diagnosis of the back condition and found nil permanent impairment of the lumbar spine, although he took a history of "some pain in his back". Dr New did not provide an opinion as to whether the back condition results in any incapacity for work.

127. I find that Mr Pugh had no capacity for work as a result of his physical injury (head (hydrocephalus) and left knee) and the secondary psychological injury from 7 March 2017 to date and continuing except for the period 6 June 2017 to 22 May 2018 when he had some capacity for work whilst working as an Uber driver.

128. Mr Pugh filed an amended wage schedule setting out the periods of no capacity for work and some capacity for work from 7 March 2017 to 26 July 2019 (the date of the second arbitration hearing). The wage schedule shows Mr Pugh's earnings as an Uber driver during the period 6 June 2017 to 22 May 2018 when he had some capacity for work as a result of his injuries.

129. I find that the pre-injury average weekly (PIAWE) earnings exceeded the maximum statutory rate provided by s 34 of the 1987 Act at all relevant times, and that Mr Pugh is entitled to 95 per cent of the maximum statutory rate as he had some current capacity for work during the period 6 June 2017 to 22 May 2018[48] as the evidence establishes he returned to work during that period for not less than 15 hours per week[49].

130. The respondent has not challenged Mr Pugh's evidence that he had returned to work for not less than 15 hours during the period he had some capacity for work as a result of his injuries, or that the PIAWE at all relevant times exceeded the statutory amount prescribed by s 34 of the 1987 Act.

131. I propose to make orders for the respondent to pay Mr Pugh weekly payments of compensation pursuant to ss 36 and 37 of the 1987 Act at the rates set out in the amended wage schedule.

Medical and related treatment expenses

132. Mr Pugh claims medical and related treatment expenses as particularised at Pt 5.3 of the Application.

133. Mr Pugh seeks a general order pursuant to s 60 of the 1987 Act.

---

[46] report of Dr Majumdar dated 22 July 2019 – p 6
[47] report of Dr Panackal dated 14 May 2019 – Application to Admit Late Documents filed by the applicant dated 17 May 2019 – p 5
[48] s 37(2)(a) of the 1987 Act
[49] Applicant's statement dated 14 March 2019 – Application – p 22 at [38]

134. As I have found that the head injury resulted in aggravation of the hydrocephalus resulting in symptoms of headaches, cognitive impairment and impairment of balance, I find that the insertion of the right sided ventriculoperitoneal shunt by Dr Wood for treatment of the ventriculomegaly affecting the lateral and third ventricles of the brain and hypo-dynamic flow through the aqueduct of the Sylvlus[50] were reasonably necessary as a result of injury within the meaning of s 60 of the 1987 Act[51].

135. I proposed to make an order that the respondent pay Mr Pugh's reasonably necessary medical and related treatment expenses as a result of his physical injuries (head (hydrocephalus), back and left knee) and the secondary psychological injury pursuant to s 60 of the 1987 Act.

[50] reports of Dr Wood dated 8 August 2017 and 15 February 2018 – Application – p 67 and p 75
[51] see *Diab v NRMA Ltd* [2014] NSWWCCPD 72 at [76] – [90] as to the meaning of "reasonably necessary as a result of injury"