WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**2625/19**
Applicant:	**Charles Usher**
Respondent:	**Lend Lease Project Management & Construction (Australia) Pty Limited**
Date of Determination:	**3 March 2020**
Citation:	**[2020] NSWWCC 61**

The Commission determines:

1. The applicant sustained injury to his back and right knee arising out of or in the course of his employment on 29 March 2000.

2. The applicant sustained injury to his left knee arising out of or in the course of his employment on 21 September 2005

3. The applicant's employment was a substantial contributing factor to his injuries.

4. On 16 March 2001, the respondent's insurer made a proactive offer to resolve the applicant's entitlement to lump sum compensation in respect of his injuries sustained on 29 March 2000.

5. On 31 May 2007, the respondent's insurer made a proactive offer to resolve the applicant's entitlement to lump sum compensation in respect of his injury sustained on 21 September 2005.

6. The proactive offers of the respondent's insurers were made before the introduction of the threshold in section 66(1) of the *Workers Compensation Act 1987* by the *Workers Compensation Amendment Act 2012*.

7. Valid claims for lump sum compensation were made on 16 March 2001 and 31 May 2007.

8. The applicant was assessed by a Medical Appeal Panel as having 17% loss of use of the right leg at or above the knee including any loss below the knee and 20% permanent impairment of the back due to injury sustained on 29 March 2000 and 13% whole person impairment of the left lower extremity (knee) due to injury sustained on 21 September 2005.

9. The applicant is entitled to lump sum compensation for pain and suffering arising from the injuries sustained on 29 March 2000 and 21 September 2005.

10. The applicant is entitled to lump sum compensation for pain and suffering in the amount of $20,000 representing 40% of a most extreme case for the injury sustained on 29 March 2000 pursuant to section 67 of the *Workers Compensation Act 1987.*

11. The applicant is entitled to lump sum compensation for pain and suffering in the amount of $17,500 representing 35% of a most extreme case for the injury sustained on 21 September 2005 pursuant to section 67 of the *Workers Compensation Act 1987.*

The Commission determines:

12. The respondent to pay the applicant $20,000 representing 40% of a most extreme case for the injury sustained on 29 March 2000 pursuant to section 67 of the *Workers Compensation Act 1987*.

13. The respondent to pay the applicant $17,500 representing 35% of a most extreme case for the injury sustained on 21 September 2005 pursuant to section 67 of the *Workers Compensation Act 1987*.

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.

Ann Macleod
Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Charles Usher (the applicant) is 69 years old and commenced employment with a prior entity of Lend Lease Project Management & Construction (Australia) Pty Limited (the respondent) in 1984. Over the years, he was employed as a labourer, leading hand, safety officer, foreman and site officer. During that time, he suffered a number of injuries.

2. There is no dispute that the applicant sustained an injury to his back and right knee on 29 March 2000 when he jumped from an unstable ladder during the course of his employment with the respondent. He also suffered an injury to his left knee on 21 September 2005 when he was struck by a steel section of a lift shaft.

3. Liability was accepted by HIH Workers Compensation (NSW) Ltd (HIH) in respect of the injury on 29 March 2000 and it seems that it paid weekly compensation and medical expenses until 2017. Precise details are unknown.

4. On 16 March 2001, HIH made a proactive offer to settle the applicant's claim in the sum of $7,500 in respect of 10% loss of use of the right leg at or above the knee including any loss below the knee pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act), based on the assessment made by Dr Vote in his report dated 2 March 2001. The applicant did not respond to this offer.

5. Liability was accepted by CGU Workers Compensation NSW Ltd (CGU) in respect of the injury on 21 September 2005. Details of any weekly compensation and medical expenses that were paid are unknown.

6. On 31 May 2007, CGU made a proactive offer to settle the applicant's claim in the sum of $2,500 in respect of 2% whole person impairment of the left lower extremity pursuant to ss 66 and 67 of the 1987 Act, based on the assessment made by Dr Noll [sic] in his report dated 23 April 2007. This report is not in evidence.

7. On 28 November 2007, the applicant's solicitor requested relevant documentation from CGU's file including copies of medical reports, and the documents were provided on 6 December 2007. It seems that the applicant did not respond to the settlement offer.

8. On 5 September 2018, the applicant's solicitor served a notice of claim on Employers Mutual Ltd (EML) for lump sum compensation in respect of 25% permanent impairment of the back and 25% loss of use of the left leg at or above the knee pursuant to s 66, and $25,000 for pain and suffering pursuant to s 67 of the 1987 Act due to injury sustained on 29 March 2000.

9. On 5 September 2018, the applicant's solicitor served a notice of claim on AAI Ltd t/as GIO (GIO) for lump sum compensation in respect of 15% whole person impairment of the left lower extremity pursuant to s 66, and $15,000 for pain and suffering pursuant to s 67 of the 1987 Act due to injury sustained on 21 September 2005.

10. A third notice of claim was served on the respondent's solicitor on 5 September 2018, which apparently amended a previous claim made on 9 March 2018. The applicant sought 37% whole person impairment due to all of the injuries sustained during the course of his employment, with a deemed date of 9 March 2018, being the date of the claim.

11. On 8 October 2018, EML as the lead agent for these claims, issued a notice pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), disputing that the applicant could aggregate his injuries in order to claim 37% whole person

impairment. It declined liability in respect of the injuries sustained on "December 2010 nature and conditions".

12. EML disputed that the applicant was entitled to lump sum compensation in respect of the injuries sustained on 21 September 2005 because his assessments did not pass the threshold in s 66 of the 1987 Act. Further, it denied that the applicant had inured his neck, back right leg and left leg on 29 March 2000, 21 September 2005, 17 August 2007 and 15 December 2009, and that his employment was a substantial contributing factor to his alleged injuries.

13. Finally, EML disputed that the applicant was entitled to lump sum compensation for pain and suffering due to the injury sustained on 29 March 2000 because the applicant did not pass the threshold under ss 66 and 67 of the 1987 Act It cited ss 4, 9A, 66 and 67 of the 1987 Act.

14. On 8 October 2018, EML offered to resolve the applicant's claim in respect of 5% permanent impairment of the back due to injury sustained on 29 September 2000, 15% whole person impairment of the right lower extremity (knee) due to injury on 17 August 2007 and 11% whole person impairment of the cervical and lumbar spines due to injury sustained on 15 December 2009.

15. On 25 October 2018, the applicant's solicitor served notices of claim on the respondent's solicitor, EML and GIO for medical expenses pursuant to s 60 of the 1987 Act as a result of injuries sustained on 29 March 2000, 21 September 2005 and 15 December 2009. The respondent's solicitor requested substantiation of the expenses on 7 November 2018.

16. The applicant's solicitor sought a review of EML's decision and the respondent's solicitor advised on 20 November 2018 that EML maintained its position.

17. On 25 February 2019, the applicant accepted EML's offers in respect of 15% whole person impairment of the right lower extremity (knee) due to injury on 17 August 2007 and 11% whole person impairment of the cervical and lumbar spines due to injury sustained on 15 December 2009. Complying Agreements were executed on 10 May 2019.

18. An Application to Resolve a Dispute (the Application) was registered in the Workers Compensation Commission (the Commission) on 29 May 2019 for lump sum compensation pursuant to ss 66 and 67 of the 1987 Act for injuries sustained to the applicant's back and right knee on 29 March 2000 and to his left knee on 21 September 2005.

19. The applicant's claim was referred to an Approved Medical Specialist (AMS), Dr Harvey-Sutton, who provided a Medical Assessment Certificate (MAC) on 15 July 2019. She assessed 20% permanent impairment of the back and 25% loss of use of the right leg at or above the knee including any loss below the knee in respect of the injury sustained on 29 March 2000, and 15% whole person impairment of the applicant's left lower extremity due to injury sustained on 21 September 2005.

20. The MAC was the subject of an appeal to a Medical Appel Panel (MAP). In an amended decision dated 31 January 2020, the MAP revoked the MAC and issued its own certificate for 20% permanent impairment of the back and 17% loss of use of the right leg at or above the knee including any loss below the knee in respect of the injury sustained on 29 March 2000, and 13% whole person impairment of the applicant's left lower extremity due to injury sustained on 21 September 2005.

21. At a telephone conference on 6 February 2020, I issued a Certificate of Determination – Consent Orders (COD) as follows:

> "The respondent to pay the applicant lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* as follows:

1. Date of Injury: 29 March 2000

    (a) $12,750 in respect of 17% loss of use of the right leg at or above the knee including any loss below the knee.

    (b) $12,000 in respect of 20% permanent impairment of the back.

2. Date of Injury: 21 September 2005

    (a) $17,000 in respect of 13% whole person impairment of the left lower extremity.

PROCEDURE BEFORE THE COMMISSION

22. 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.

ISSUES FOR DETERMINATION

23. The following issues remain in dispute:

    (a) Whether the applicant complied with ss 260 and 282 of the 1998 Act and whether he is entitled to receive lump sum compensation for pain and suffering pursuant to s 67 of the 1987– ss 260 and 282 of the 1998 Act, s 67 of the 1987 Act (in existence prior to the *Workers Compensation Amendment Act 2012*) (the 2012 amending Act) , Div. 3 Cl 15 of Sch 6 of the 1987 Act and Cl 10 of Sch 8 of the *Workers Compensation Regulation 2016* (the 2016 Regulation), and

    (b) Quantification of the applicant's entitlement to lump sum compensation for pain and suffering – s 67 of the 1987 Act (in existence prior to the 2012 amending Act).

EVIDENCE

Documentary evidence

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

    (a) The Application and attached documents;
    (b) Reply and attached documents;
    (c) MAC of Dr Harvey-Sutton dated 15 July 2019;
    (d) Amended Decision of the MAP in M1-265/19 Dated 13 January 2020, and
    (e) COD dated 6 February 2020.

REVIEW OF EVIDENCE

Applicant's statement

25. The applicant provided a statement on 11 September 2018. He provided details of his past work injuries, symptoms and treatment which can be summarised as follows:

    (a) 5 September 1987– minor left knee injury with full recovery;
    (b) Various knee injuries – left knee arthroscopy in about 1992 by Dr O'Brien with full recovery. Surgery fees paid by the insurer;

(c) 29 March 2000 – right knee and back injury when jumped down from a ladder. Back settled but right knee pain persisted;
(d) 15 August 2000 – right knee arthroscopy and medial meniscectomy by Dr O'Brien. Surgery fees paid by the insurer on 2000 claim. Mostly recovered, significant improvement but still had pain at times;
(e) April 2003 and June 2004 – left knee injury while on the scaffolding stairways. Pain went away, reported injury, no time off and no claim made;
(f) 21 September 2005 – left knee injury when fell against a wall;
(g) 9 December 2005 – left knee arthroscopic meniscectomy and chondroplasty by Dr O'Brien. Surgery fees paid by CGU on 2005 claim. Return to work on light duties then full work;
(h) March 2006 – left knee Synvisc injections;
(i) 2 January 2007 – fall at home due to left knee giving way. Multiple occasions since 2005;
(j) February 2007 – fall when alighting from a bus. Right shoulder injury treated with anti-inflammatory medication;
(k) 17 August 2007 – right knee injury when slipped on wet staircase;
(l) 15 December 2009 – head and back injury at L2/3 when slipped on a wet floor;
(m) 2009 – severe anxiety due to dealings with tenants and owners of properties;
(n) April 2010 to June 2010 – long service leave to rest and help stress;
(o) 28 August 2010 – diagnosed with extremely high blood pressure;
(p) 19 November 2010 – treatment for stress and anxiety. Certified unfit;
(q) 7 December 2010 – diagnosed with Major Depression due to work stress. Prescribed medication;
(r) Late 2011 – medical retirement due to psychological injury;
(s) 7 March 2012 – total left knee replacement by Dr Brooks. Surgery fees paid by CGU on 2007;
(t) 14 November 2012 – total right knee replacement by Dr Brooks. Surgery fees paid by CGU on 2007 claim. Slow recovery for my right knee. Physiotherapy and hydrotherapy treatment.

26. The applicant stated that he continued to experience numbness, stiffness, instability and clicking in his right knee following surgery. He had an injection and aspiration of the right knee due to continuing pain on 24 January 2017, but this only provided temporary relief.

27. The applicant stated that he sees Drs Jander and Moss for treatment of the pain in his knees, back and neck. He has pain and restriction of movement in his back, neck and shoulders. He experiences pain and stiffness in his knees, particularly the right knee, with pain which radiates to his foot and hip. He has more pain when standing, sitting, bending and walking, and at times uses a use a walking stick and straps his knees. He has difficulty walking on uneven ground, and most of the household tasks were performed by his wife, but he still does some gardening. He takes painkillers for his symptoms.

Reports of Dr O'Brien

28. Dr O'Brien reported on 13 July 2000 and 15 August 2000. He confirmed that the applicant injured his right knee on 29 March 2000. He indicated that he previously performed an arthroscopy of the applicant's left knee eight years earlier with a good result. The doctor suspected that the applicant had suffered a meniscal tear and he recommended an arthroscopic meniscectomy and chondroplasty. The procedure was carried out on 15 August 2000. In his operation report, the doctor advised that the "end stage management for this problem would be a total knee replacement".

29. On 25 January 2001, the doctor reported that the applicant had residual symptoms which were mainly associated with the patellofemoral joint and early arthritic changes.

30. In a report dated 4 October 2005, Dr O'Brien recoded that the applicant had injured his left knee about four weeks earlier. The doctor suspected that the applicant had a lateral meniscus tear, but an MRI dated 11 October 2005 showed medial and lateral compartment arthritis, and a tear of the posterior horn of the medial meniscus. The doctor performed an arthroscopic meniscectomy and chondroplasty on the left knee on 9 December 2005.

31. In reports dated 5 September 2006 and 26 September 2005, Dr O'Brien advised that he treated the applicant's left knee pain with Synvisc injections in March 2006. He stated that when he operated on the applicant's right knee in August 2000, he found evidence of joint surface erosion, so he considered that the injury in March 2000 caused damage to the joint surface and meniscus.

32. The applicant had a CT scan of his lumbar spine on 9 May 2006. It was noted that he was troubled by left sciatica. The scan revealed degenerative changes at L5/S1 and mild facet joint degeneration at L4/5.

33. Dr O'Brien reported on 11 September 2007 and 19 December 2007. He noted that the applicant had been troubled by pain in his left knee, and he had pain in the medial compartment of his right knee following a recent fall down some stairs. The applicant had remained at work.

34. Dr O'Brien arranged for an MRI scan which showed marked degenerative changes and a large radial tear in the medial meniscus and cartilage deficiency, patella-femoral erosion and a degenerative cruciate ligament with a possible tear. The doctor recommended Synvisc injections.

35. In his report dated 23 July 2008, Dr O'Brien noted that the applicant had bilateral knee problems, with the right knee worse than the left knee. He had increased disability, particularly when walking down stairs. He again recommended injections and stated that there were no present surgical options. The injections were administered to both knees in around September 2008 and these provided the applicant with symptomatic relief.

36. On 20 October 2009, Dr O'Brien reported that the applicant had been experiencing several episodes of left knee pain. The knee tended to give way and there was a fixed flexion deformity. The applicant's right knee was not as severely affected. The doctor organised further Synvisc injections.

37. On review on 26 October 2011, Dr O'Brien reported that the applicant's activity level was declining, and he had pain at rest. His left knee was worse than his right knee and he had issues walking down stairs. X-rays showed advanced left medical compartment arthritis and moderately severe medical compartment arthritis in the right knee. The doctor recommended a left total knee replacement and referred the applicant to Dr Brooks.

Reports of Dr Brooks

38. Dr Brooks reported on 16 December 2011. He noted that the applicant had significant pain in his arthritic knees. The knees were stiff, and he had difficulty walking. He recommended a left total knee replacement. This procedure was performed on 7 March 2012.

39. On 19 April 2012, Dr Brooks reported that the applicant was making good progress following surgery and he was able to walk unaided. He was having regular physiotherapy. On 31 May 2012, the doctor reported that the applicant's left knee pain was improving, but he still had some pain from time to time.

40. On 12 October 2012, Dr Brooks reported that the left knee was more comfortable, but the applicant was experiencing increased pain in his right knee. The doctor recommended a right total knee replacement, and this was performed on 14 November 2012.

41. On 8 February 2013, Dr Brooks reported that the applicant was making slow and steady progress following his surgery, and the applicant still complained of right knee pain in April 2013.

42. In a report dated 4 November 2013, Dr Brooks noted that the applicant was able to walk, but he still had some sensitivity and discomfort near the patella of his right knee. There was no swelling and the knees felt stable. On 27 April 2014, the doctor reported that the applicant had numbness. Dysesthesia, stiffness and a clicking sensation in his right knee.

43. On 18 November 2014, Dr Brooks reported that the applicant had no symptoms in his left knee, but he was still troubled by dysesthesia on the lateral aspect of the right patella, as well as clicking and instability. The doctor suspected that there was some cutaneous nerve sensitivity following his surgery.

Clinical notes of Vale Medical Centre

44. The clinical notes of the Vale Medical Centre commence on 13 November 2000 and conclude on 23 October 2017. Unfortunately, the entries rarely record the reasons for the attendances, the nature of the complaints or the clinical findings.

45. Dr Jander recorded a detailed history on 28 July 2011, but there was only a brief reference to the applicant's knee injuries. The applicant suffered several health problems following an injury to his head in December 2009. The applicant also had work-related stress.

46. The doctor recorded details of the applicant's knee surgery and recorded that the applicant was having problems with his left knee in April 2012 and May 2012, but there was improvement in June 2012.

47. In July 2012, the doctor noted that the applicant's right knee was causing problems. In August 2012, he travelled to Hawaii and he had a "great trip". On 18 October 2012, Dr Jander recorded that the applicant's back was "killing him". She noted that the applicant's knees were going well in January 2013, and the swelling in the right knee had improved in March 2013.

48. On 28 August 2013 and 25 September 2013, Dr Jander reported that the applicant's left knee was perfect, but he still had irritating numbness, aching and pain in his right knee. The applicant described his right knee as "lousy" on 23 October 2013.

49. On 21 November 2013, the applicant told the doctor that his right knee was causing issues with his right hip and he had back pain. It was tender and unstable at the consultation on 16 January 2014. The applicant travelled to Turkey in May 2014. The applicant complained of a burning sensation and instability in the right knee on 23 October 2014. In late 2014 and early 2015, the applicant had acupuncture treatment on his right knee and back.

50. There were only a few brief references to the applicant's right knee throughout 2015. He complained of stabbing low back pain on 31 July 2015. On 5 January 2016, Dr Jander reported that the applicant had issues with his right knee and back.

51. On 10 November 2016, Dr Jander recorded that the applicant was staggering on his knee. This consultation was conducted after the applicant had been overseas to Malta, Dubai, Italy and the Greek Islands for four weeks.

52. On 24 January 2017, the applicant had an ultrasound guided infrapatellar bursa aspiration and injection. In March 2017, he went on a cruise to Suva and he then spent 10 days in China.

Reports of Dr Conrad

53. Dr Conrad reported on 9 January 2018 and 12 February 2018. He recorded a brief history of each work injury and noted that after the injury on 29 March 2000, the applicant experienced on-going niggling pain in his right knee and back. On 21 September 2005, the applicant injured his left shoulder and knee when he fell against a wall.

54. Dr Conrad noted that the applicant had some stiffness in his shoulders, and pain in his back. He had pain and stiffness in the right knee and to a lesser extent in his left knee. His symptoms were worse when he was standing, sitting, bending or walking.

55. Dr Conrad diagnosed injuries to the applicant's neck, shoulders knees and back. He had on-going back pain and was symptomatic in both knees. The doctor assessed 7% whole person impairment of the cervical spine, 5% whole person impairment of the lumbar spine, 15% whole person impairment of the left lower extremity (knee) and 15% whole person impairment of the right lower extremity (knee) and 1% whole person impairment for scarring (TEMSKI) for a total of 37% whole person impairment due to the accident as and the conditions of the applicant's employment.

56. In his supplementary reports dated 12 February 2012, Dr Conrad assessed 25% permanent impairment of the back and 25% loss of use of the right leg at or above the knee including any loss below the knee due to injury on 29 March 2000. He did not provide an assessment in respect of the injury sustained to the left knee on 21 September 2005.

Reports of Dr Bodel and Dr Vote

57. Dr Bodel reported on 4 August 2000. He noted that the applicant injured his right knee and back when he fell from a ladder on 29 March 2000. He remained at work and his back injury recovered within seven to ten days. His right knee pain was severe, and he used crutches. Surgery had been recommended by Dr O'Brien. He diagnosed a medial meniscus tear and recommended that the applicant have an arthroscopy.

58. Dr Vote reported on 2 March 2001. He noted that the applicant injured his right knee, but he was more concerned about his back. His back condition settled, but he had on-going discomfort and instability in the knee. He did not seek treatment for two to three weeks and eventually had an arthroscopy in August 2000. This had not relieved his symptoms. He had constant aching and occasional giving away, and he had difficulty descending stairs.

59. Dr Vote diagnosed chondromalacia patellae and an underlying groove lesion. He accepted that the work incident precipitated symptoms. He assessed 10% loss of use of the right knee.

Reports of Dr Breit

60. Dr Breit reported on 8 May 2018, 29 May 2018 and 11 September 2018. He recorded a history of four frank incidents in which the applicant injured his right knee, back, left knee, right shoulder and neck. His back pain had not settled, and he had required surgery on his knees. He had physiotherapy and remedial massage on a regular basis, and he consulted his general practitioner.

61. The applicant complained of localised low back pain with radiation into the buttocks and thighs. He had intermittent knee pain on the right and a number of episodes of giving way. He experienced pain when walking for more than an hour the pain and when negotiating stairs and he tends to be quite careful. There was only minimal left knee pain.

62. Dr Breit diagnosed bilateral knee arthritis and replacements on a background of pre-existing arthritis. The injuries to the left and right knee led to a permanent aggravation of this pathology.

63. Dr Breit stated that the that x-rays taken in 2000 showed evidence of significant pre-existing degenerative disease in the applicant's right knee. Accordingly, he assessed 4% loss of use of the right leg at or above the knee after a one third deduction, and 5% permanent impairment of the back due to injury sustained on 29 March 2000.

64. Dr Breit assessed 7% permanent impairment of the back, with 1% due to the injury on 17 August 2007 and 5% due to the injury in March 2009. He assessed 15% whole person impairment of the right lower extremity, with 10% due to the injury on 21 September 2005 and 5% due to the injury on 17 August 2007.

65. Dr Breit stated that the that an MRI scan taken in 2005 showed significant pre-existing degenerative disease in the applicant's left knee. Therefore, he concluded that the previous surgery and the disease contributed to the applicant's current impairment of at least one third. Accordingly, he assessed 10% whole person impairment of the left lower extremity due to injury sustained on 21 September 2005.

66. Finally, Dr Breit assessed 5% whole person impairment of the cervical spine and 6% whole person impairment of the lumbar spine due to injury sustained on 15 December 2009, after a one seventh deduction for the pre-existing back injury, for a total of 11% whole person impairment.

Medical Assessment Certificate and Medical Appeal Panel Decision

67. Dr Harvey-Sutton provided a MAC on 29 July 2019 in respect of the injuries sustained on 29 March 2000 and 21 September 2005. She reported a consistent history and noted that the applicant had on-going stiffness in his back and right knee pain following the incident on 29 March 2000. He had surgery and mostly recovered, although he had pain in his right knee at times. Eventually, he had a right total knee replacement. He had continued to experience pain in his right knee

68. Dr Harvey-Sutton reported that the applicant injured his left shoulder and knee on 21 September 2005. Tests confirmed the presence of a medial meniscal tear and osteoarthritis, and he came to surgery on 9 December 2005. He had a left total knee replacement on 7 March 2012.

69. Dr Harvey-Sutton reported that the left knee replacement was successful and the pain in the knee did not interfere with his usual domestic and recreational activities. The right knee remained painful, from moderate to severe, and it also collapses, resulting in falls. It restricted his ability to undertake his daily activities and impacted on his sleep. He experienced stiffness and tightness in his back, and aching when engaged in activities. There was a knot-like feeling in the knee, burning and knife-like pain that could be referred into the right hip and down the right leg. He had pain in his left knee, but it did not interfere with his usual daily activities.

70. Dr Harvey-Sutton diagnosed a right knee on 29 March 2000, an arthroscopy and medial meniscectomy performed in August 2000, and a total right knee replacement in 2012. The applicant injured his left knee on 21 September 2005 and had similar procedures. This was on a background of a left knee injury in 1987 and arthroscopy in 1992, but the applicant indicated that he had fully recovered from that injury.

71. Dr Harvey-Sutton assessed 25% loss of use of the right leg at or above the knee including any loss below the knee and 20% permanent impairment of the back due to injury sustained on 29 March 2000 and 15% [sic] whole person impairment of the left lower extremity due to injury sustained on 21 September 2005.

72. On appeal, a MAP determined that the AMS failed to make an appropriate deduction for a pre-existing injury or abnormality in respect of the applicant's knees, so it revoked the MAC and determined that the applicant had 17% loss of use of the right leg at or above the knee including any loss below the knee and 20% permanent impairment of the back due to injury sustained on 29 March 2000 and 13% whole person impairment of the left lower extremity due to injury sustained on 21 September 2005, after a one third deduction in respect of each knee assessment.

APPLICANT'S SUBMISSIONS

73. The applicant's counsel, Ms Grotte, submits that the applicant was assessed by a MAP as having 17% loss of use of the right leg at or above the knee including any loss below the knee and 20% permanent impairment of the back due to injury sustained on 29 March 2000 and 13% whole person impairment of the left lower extremity due to injury sustained on 21 September 2005.

74. Ms Grotte submits that these assessments would have satisfied the threshold requirement for an award of lump sum compensation for pain and suffering pursuant to s 67 of the 1987 Act in existence prior to the 2012 amendments.

75. Ms Grotte submits that as a result of the provisions in cl 10 of the 2016 Regulation and cl 15 of Div. 3 of Sch 6 of the 1987 Act, the applicant is entitled to lump sum compensation for pain and suffering for each injury as proactive offers were made by the insurers and those claims were not resolved before 19 June 2012. The amendments do not apply to a claim that specifically sought compensation under section 66 or 67 of the 1987 Act. This was confirmed in *Woolworths Ltd v Wagg*[1].

76. Ms Grotte submits that the applicant was 50 years old when he suffered injury and he is now almost 70 years old. He has had surgery on his knees and has suffers from disabilities and impairment. He described the nature of his injury and treatment in his statement. Although the applicant was able to return to work after his injuries, he continues to have pain in his knees, and he suffers falls due to instability. His condition deteriorated and he required bilateral total knee replacements. He has numbness in his right knee and the knee was aspirated in 2017. He has on-going low back pain and stiffness and uses a walking stick on occasions.

77. Ms Grotte submits that the applicant's pain and suffering when compared to a most extreme case is in the order of 30% to 35% in respect of the injury sustained on 29 March 2000, and 30% to 35% in respect of the injury sustained on 21 September 2005.

78. In reply, Ms Grotte submits that when the insures made the proactive offers, they believed that they had sufficient relevant particulars. The questions of injury impairment and previous injuries were addressed by Dr Vote. One cannot assume that Dr Vote did not have a medical file, but one can assume the contrary.

79. Ms Grotte submits that is not necessary to following the reasoning in *Hobson*, and greater weigh can be given to *Wagg*. The AMS and MAP determined the degree of whole person impairment in respect of the injuries sustained in 2000 and 2005, but there was no evidence regarding the effect of the subsequent injuries.

[1] [2017] NSWWCCPD 13 (*Wagg*).

RESPONDENT'S SUBMISSIONS

80. The respondent's counsel, Mr Doak, concedes that proactive offers were made to the applicant in 2001 and 2007, and there is no requirement for him to specifically claim lump sum compensation pursuant to s 67 of the 1987 Act.

81. Mr Doak submits that if one accepts that the arbitral decisions such as *Halloran v Rail Corporation NSW*[2], *White v Royal Society for Prevention of Cruelty to Animals t/as RSPCA*[3], and *Eaton v Kerry Ingredients Pty Ltd*[4]are correct, then the present matter can be distinguished on the facts. In the alternative, these decisions were wrongly decided.

82. Mr Doak submits that the facts in *Halloran* were similar to the present matter. Senior Arbitrator Snell, as he then was, considered the requirements for making a claim in ss 260 and 282 of the 1998 Act and the Guidelines. He observed that the information that was within the possession of the respondent when it made the proactive claim exceeded the information that would be required under the legislation and the Guidelines, so the Senior Arbitrator was satisfied that Ms Halloran had made a claim prior to 19 June 2012, so her claim was not caught by the 2012 amendments.

83. Mr Doak submits that in this matter, HIH made a proactive offer on 16 March 2001, based on the report of Dr Vote dated 2 March 2001. The doctor did not refer to any other medical reports and it is unclear what medical file, if any, he had.

84. Mr Doak submits that this was important, because Dr Vote raised an issue of longstanding changes and he referred to an aggravation. It was confirmed in *Halloran* that there is a requirement under s 282(1)(c) of the 1998 Act to provide particulars regarding a previous injury or condition so that an insurer to make a proper assessment of a worker's claim. He submits that the offer itself cannot constitute a proactive offer by an insurer to a worker if the worker has not provided all the details that constitute a claim.

85. Mr Doak submits that the report of Dr Noll [sic] relied upon by CGU in 2005 is not in evidence, so it is unclear what information that insurer had in its possession. Therefore, one cannot accept that s 282 of the 1998 Act was satisfied.

86. Mr Doak submits that the authorities are only decisions of arbitral decisions are not strictly binding. Clause 10 of the 2016 Regulation refers to action to be taken by a worker, which is consistent with the practice of a claim being made by a worker on an insurer. Section 4 of the 1998 Act defines a claim as a claim for compensation or work injury damages that a person has made or is entitled to make. It is something that is done by a workers and if it is not made, then there is no entitlement to lump sum compensation pursuant to s 67 of the 1987 Act.

87. Mr Doak submits that ss 260 and 282 of the 1998 Act require that a claim be made, and the Guidelines confirm that an insurer is obliged to make an offer. The applicant was obliged to take positive steps, but he made no such claim, so there has been a failure to comply with cl 10 of the 2016 Regulation.

88. Mr Doak submits that in *Hobson v CGI Technologies & Solutions Australia Pty Ltd*[5], there was a change in the level of the worker's impairment as a result of surgery after the proactive offer was made by the insurer. The arbitrator was not satisfied that the insurer had full particulars, so the worker failed in his claim.

[2] [2013] NSWWCC 85 (*Halloran*).
[3] [2013] NSWWCC 28 (*White*).
[4] [2015] NSWWCC 21 (*Eaton*).
[5] [2015] NSWWCC 299 (*Hobson).*

89. Mr Doak submits that in this matter, the applicant had surgery, which resulted in a change in the level of impairment after the offers by the insurers, so it could not be said that the insurers had sufficient particulars.

90. Mr Doak submits that for the purposes of the degree of pain and suffering resulting from an injury, one must take into account the actual experiences of the applicant, both past and future, when compared to a most extreme case. The evidence shows that the applicant achieved a good outcome from the right knee surgery in 2001 and he did not have a great deal of pain in his left knee after the surgery in 2005. The arthroscopic procedures wryer not significant.

91. Mr Doak submits that according to Dr Harvey-Sutton, the applicant's right knee remains painful and when he walks too far, he needs to sit down, but his left knee is not as bad. The AMS did not make any deduction for a previous injury or abnormality, but this was addressed by the MAP. The applicant was 50 years of age when he sustained injury, so this is a relevant factor and would result in a lower assessment.

92. Mr Doak submits that the applicant's statement does not address his activities of daily living in any detail, and no weight can be given to his complaints of a psychological condition in the absence of medical evidence that attributed this to this injury rather than employment issues.

93. Mr Doak submits that the applicant previously settled claims in respect of 15% whole person impairment of the right lower extremity (knee) due to injury sustained on 17 August 2007 and 11% whole person impairment of the cervical and lumbar spines due to injury sustained on 15 December 2009. These injuries need to be considered, but the applicant's evidence does not address the distinction between the pain and suffering in respect of each of his injuries.

94. Mr Doak submits that the applicant's injury of 17 August 2007 resulted in 15% whole person impairment, and this was apparent before the examination by the AMS. This is a significant assessment. The report of Dr O'Brien confirmed the presence of arthritis at the time of the operation in 2001. In 2007, the applicant had pain in the medial compartment of his right knee after a fall, and his pain persisted after the injury in December 2007. There is an overlap between the injury in 2007 and these subject injuries.

Legislation

Workers Compensation Act 1987

95. Section 66 of the 1987 Act provides:

> "**66 Entitlement to compensation for permanent impairment**
>
> (1) A worker who receives an injury that results in a degree of permanent impairment greater than 10% is entitled to receive from the worker's employer compensation for that permanent impairment as provided by this section. Permanent impairment compensation is in addition to any other compensation under this Act.
>
> **Note.**
>
> No permanent impairment compensation is payable for a degree of permanent impairment of 10% or less.
>
> (1A) Only one claim can be made under this Act for permanent impairment compensation in respect of the permanent impairment that results from an injury…"

96. Section 67 of the 1987 Act, in existence prior to the 2012 amendments, provided:

"**67 Compensation for pain and suffering**

(1) A worker who receives an injury that results in a degree of permanent impairment of 10% or more is entitled to receive from the worker's employer as compensation for pain and suffering resulting from the permanent impairment an amount not exceeding $50,000. Pain and suffering compensation is in addition to any other compensation under this Act.

Note.

Section 65A provides that pain and suffering compensation for permanent impairment arising from psychological injury is not payable unless the injury is a primary psychological injury (as defined in that section) and the degree of permanent impairment arising from the injury is 15% or more.

(1A) (Repealed)

(2) Because there is a distinction between injury and impairment resulting from an injury (and compensation is payable under this section only for pain and suffering resulting from impairment), the pain and suffering for which compensation is payable does not include pain and suffering that results from the injury but not from the impairment.

(3) The maximum amount of compensation under this section is payable only in a most extreme case and the amount payable in any other case shall be reasonably proportionate to that maximum amount having regard to the degree and duration of pain and suffering and the severity of the permanent impairment.

(3A) (Repealed)

(4) The amount of compensation payable under this section in any particular case shall, in default of agreement, be determined by the Commission.

(4A) (Repealed)

(5) Compensation under this section is not payable after the death of the worker concerned.

(6) If an amount mentioned in this section at any time after the commencement of this Act:

(a) is adjusted by the operation of Division 6, or

(b) is adjusted by an amendment of this section,

the compensation payable under this section is to be calculated by reference to the amount in force at the date of injury.

(7) In this section:

pain and suffering means:

(a) actual pain, or

(b) distress or anxiety,

suffered or likely to be suffered by the injured worker, whether resulting from the permanent impairment concerned or from any necessary treatment.

97. Clauses 3 and 15 of Div.1 of Pt 19H of Sch 6 of the 1987 Act provide:

"**3 Application of amendments generally**

(1) Except as provided by this Part or the regulations, an amendment made by the 2012 amending Act extends to:

(a) an injury received before the commencement of the amendment, and

(b) a claim for compensation made before the commencement of the amendment, and

(c) proceedings pending in the Commission or a court immediately before the commencement of the amendment.

(2) An amendment made by the 2012 amending Act does not apply to compensation paid or payable in respect of any period before the commencement of the amendment, except as otherwise provided by this Part."

"**15 Lump sum compensation**

An amendment made by Schedule 2 to the 2012 amending Act extends to a claim for compensation made on or after 19 June 2012, but not to such a claim made before that date."

Workplace Injury Management and Workers Compensation Act 1998

98. Section 4 of the 1998 Act defines the term "claim" as follows:

"**4 Definitions**

(1) In this Act:

claim means a claim for compensation or work injury damages that a person has made or is entitled to make…".

99. The manner of making a claim is set out in s 260 of the 1998 Act. It provides:

"260 How a claim is made

(1) A claim must be made in accordance with the applicable requirements of the Workers Compensation Guidelines.

(2) The Workers Compensation Guidelines may make provision for or with respect to the following matters in connection with the making of a claim:

(a) the form in which a claim is to be made,
(b) the manner in which a claim is to be made,
(c) the means by which a claim may be made,
(d) the information that a claim is to contain,
(e) requiring specified documents and other material to accompany or form part of a claim,
(f) such other matters as may be prescribed by the regulations.

(3) Without limiting this section, the Workers Compensation Guidelines can require that a claim be accompanied by a form of authority signed by the claimant and authorising a provider of medical or related treatment, hospital treatment or workplace rehabilitation services to the claimant in connection with the injury to which the claim relates to give the insurer concerned information regarding the treatment or service provided or the worker's medical condition or treatment relevant to the claim.

(4) The Workers Compensation Guidelines can also provide for any of the following matters in connection with the making of a claim:

(a) waiving the requirement for the making of a claim in specified cases (such as cases in which notice of injury has been given or provisional weekly payments of compensation have commenced),
(b) providing for the time at which a claim is taken to have been made in any case in which the requirement for the making of a claim has been waived,
(c) providing for the time when a claim is taken to have been made in a case in which requirements of the Guidelines with respect to the making of the claim have been complied with at different times.

(5) The failure to make a claim as required by this section is not a bar to the recovery of compensation or work injury damages if it is found that the failure was occasioned by ignorance, mistake or other reasonable cause or because of a minor defect in form or style.

(6) Except to the extent that the Workers Compensation Guidelines otherwise provide, an insurer can waive a requirement of those Guidelines with respect to the making of a claim on the insurer.

(7) The Workers Compensation Guidelines can require an insurer to notify a worker of any failure by the worker to comply with a requirement of those Guidelines with respect to the making of a claim, and can provide for the waiver of any such failure by the worker if the insurer fails to give the required notification."

100. Section 282 of the 1998 Act sets out what constitutes relevant particulars about a claim. It provides:

"282 Relevant particulars about a claim

(1) The ***relevant particulars about a claim*** are full details of the following, sufficient to enable the insurer, as far as practicable, to make a proper assessment of the claimant's full entitlement on the claim:
(a) the injury received by the claimant,
(b) all impairments arising from the injury,

(c) any previous injury, or any pre-existing condition or abnormality, to which any proportion of an impairment is or may be due (whether or not it is an injury for which compensation has been paid or is payable under Division 4 of Part 3 of the 1987 Act),
(d) in the case of a claim for work injury damages, details of the economic losses that are being claimed as damages and details of the alleged negligence or other tort of the employer,
(e) information relevant to a determination as to whether or not the degree of permanent impairment resulting from the injury will change,
(f) in addition, in the case of a claim for lump sum compensation, details of all previous employment to the nature of which the injury is or may be due,
(g) such other matters as the Workers Compensation Guidelines may require.

(2) If the employer requires the claimant to submit himself or herself for examination by a medical practitioner provided and paid for by the employer, the claimant is not considered to have provided all relevant particulars about the claim until the worker has complied with that requirement.

(3) The insurer is not entitled to delay the determination of a claim under this Division on the ground that any particulars about the claim are insufficient unless the insurer requested further relevant particulars within 2 weeks after the claimant provided particulars."

Workers Compensation Regulation 2016

101. Clauses 10 and11 of Sch 8 of the 2016 Regulation provide:

"**10 Lump sum compensation**

(1) The amendments made by Schedule 2 to the 2012 amending Act extend to a claim for compensation made before 19 June 2012, but not to a claim that specifically sought compensation under section 66 or 67 of the 1987 Act.

(2) Clause 15 of Part 19H of Schedule 6 to the 1987 Act is to be read subject to subclause (1).

11 Lump sum compensation: further claims

(1) A further lump sum compensation claim may be made in respect of an existing impairment.

(2) Only one further lump sum compensation claim can be made in respect of the existing impairment.

(3) Despite section 66 (1) of the 1987 Act, the degree of permanent impairment in respect of which the further lump sum compensation claim is made is not required to be greater than 10%.

(4) For the purposes of subclauses (1) and (2):

(a) a further lump sum compensation claim made, and not withdrawn or otherwise finally dealt with, before the commencement of subclause (1) is to continue and be dealt with as if section 66 (1A) of the 1987 Act had never been enacted, and

(b) no regard is to be had to any further lump sum compensation claim made in respect of the existing impairment:

(i) that was withdrawn or otherwise finally dealt with before the commencement of subclause (1), and

(ii) in respect of which no compensation has been paid, and

(c) section 322A of the 1998 Act does not operate to prevent an assessment being made under section 322 of that Act for the purposes of a further lump sum compensation claim.

(5) The following provisions are to be read subject to this clause:

(a) section 66 of, and clause 15 of Part 19H of Schedule 6 to, the 1987 Act,

(b) section 322A of the 1998 Act,

(c) clauses 10 and 19 of this Schedule.

(6) In this clause:

existing impairment means a permanent impairment resulting from an injury in respect of which a lump sum compensation claim was made before 19 June 2012.

further lump sum compensation claim means a lump sum compensation claim made on or after 19 June 2012 in respect of an existing impairment.

lump sum compensation claim means a claim specifically seeking compensation under section 66 of the 1987 Act."

WorkCover Guidelines for Claiming Compensation Benefits (27 October 2006)

102. Part 5 of the *WorkCover Guidelines for Claiming Compensation Benefits (27 October 2006)* (the Guidelines), which were in existence at the time of the insurers' offers, give some guidance as to the manner in which an insurer is to deal with a lump sum claim. It provides:

"**PART 5 MAKING AND HANDLING A CLAIM FOR LUMP SUM COMPENSATION (PERMANENT IMPAIRMENT AND PAIN AND SUFFERING)**

To claim lump sum compensation, a worker must have sustained an injury, as defined in section 4 of the 1998 Act, that resulted in permanent impairment, as referred to in section 66 of the 1987 Act, and made a claim related to that injury. If the insurer is satisfied that an injury has resulted in permanent impairment and has reached maximum medical improvement, the insurer may initiate an assessment of permanent impairment which may lead to a subsequent payment pursuant to a complying agreement.

1. Minimum Information Required to Make a Claim

To make a claim a worker must compete a permanent impairment claim form which is available from the employer's insurer for workers compensation purposes. The claim form must be completed fully. In making a claim, the worker must provide all reports and documents that they rely upon, as soon as possible after that information is received, in making the claim to either:

- the employer from whom they are claiming workers compensation benefits,
- the insurer responsible for providing the employer's workers compensation insurance."

103. Clause 2 of the Part 5 of the Guidelines provides that a claim must include relevant particulars about the claim and describes the requirements with reference to s 282 of the 1998 Act.

REASONS

Did the applicant comply with ss 260 and 282 of the 1998 Act and the Guidelines?

104. The notice issued by EML on 8 October 2018 disputed that the applicant was entitled to lump sum compensation for pain and suffering in respect of the injury sustained on 29 March 2000 and because he failed to pass the threshold under ss 66 and 67 of the 1987 Act in respect of the injury on 21 September 2005. Precise reasons were not provided.

105. The focus of the submissions made by Mr Doak is whether the applicant provided full particulars so that he is entitled to bring a claim for pain and suffering pursuant to s 67 of the 1987 Act in existence prior to the 2012 amendments.

106. Therefore, the first issue I need to determine is whether the applicant complied with ss 260 and 282 of the 1998 Act and the Guidelines when the insurers made proactive offers on 29 March 2000 and 21 May 2007.

107. Ms Grotte submits that the actions of the insurers and the evidence that they obtained satisfied the requirement for the provision of sufficient particulars of the claim in terms of s 282 of the 1998 Act.

108. In contrast, Mr Doak submits that proper particulars were not provided by the applicant and it was unclear what evidence Dr Vote had before him.

109. In *Halloran*, Senior Arbitrator Snell, as he then was, considered the principles of a "claim" in circumstances where the insurer had made a lump sum offer before the 2012 amendments came into effect. A claim form was submitted, and the insurer advised Ms Halloran that liability had been accepted. Medical evidence provided details of the incident, Ms Halloran's symptoms, treatment and work history. There was correspondence regarding Ms Halloran's obligation to attend the appointment with an IME, if she wanted the degree of whole person impairment to be assessed. Finally, the insurer had a report from an IME, Dr Breit, upon whose opinion the lump sum offer was based.

110. The Senior Arbitrator concluded that the information in the respondent's possession exceeded the information that would be required to constitute relevant particulars for the purposes of s 282 of the 1998 Act and the Guidelines when the proactive offer was made. He noted that s 260 of the 1998 Act did not impose any specific requirements regarding the procedures to make a claim. The section allowed for the making of Guidelines and gave the insurer the power to waive compliance with the Guidelines, provided that it was not inconsistent with the Guidelines.

111. The Senior Arbitrator noted that Dr Breit had provided an assessment of whole person impairment in accordance with the *WorkCover Guides for the Evaluation of Permanent Impairment*. The doctor provided an opinion that maximum medical improvement had been reached, whether there was any pre-existing condition or abnormality and a statement that there were no supervening injuries or conditions. The Senior Arbitrator stated that from the time that the insurer was in possession of Dr Breit's reports, the definition of a claim in s 4 of the1998 Act was satisfied and Ms Halloran was entitled to make a claim for lump sum compensation.

112. The Senior Arbitrator was satisfied that Ms Halloran took an active step to satisfy the claim requirements when she attended Dr Breit's appointment, provided a history and allowed Dr Breit to examine her. This enabled the doctor to assess the degree of whole person impairment and this satisfied the requirements of s 282 of the 1998 Act and the Guidelines. Therefore, the Senior Arbitrator concluded that the applicant made a claim for lump sum compensation prior to 19 June 2012 and was not caught by the 2012 amendments.

113. A similar situation arose in *White*. In that matter, Arbitrator Caddies noted that the insurer had determined the claim and put an offer based on an IME report. Therefore, it was satisfied that the relevant particulars had been provided in accordance with s 282 (1) of the 1998 Act. It complied with s 281(3) of the 1998 Act and the Guidelines, when it made a proactive offer to Ms White. In doing so, it waived the requirements in s 260 of the 1998 Act.

114. The Arbitrator stated that the determination of the claim by the insurer and the expiration of the offer gave rise to the right to commence proceedings prior to 19 June 2012, and the later notice of claim was irrelevant. He concluded that Ms White was entitled to lump sum compensation for pain and suffering pursuant to s 67 of the 1987 Act. The reasoning in *White* and *Halloran* was followed by Arbitrator Edwards in *Eaton*, by Arbitrator McDonald, in *Newbold v Bi-Lo Pty Ltd*[6]and by me in *Bianco v ANZ Banking Group Ltd*[7].

115. In *Hobson*, Arbitrator Wynyard considered whether Mr Hobson was entitled to receive lump sum compensation for pain and suffering.

116. Mr Hobson suffered a recurrence of a prior back injury in August 2008, and following a request for information by the insurer, the treating specialist, Dr Giblin, indicated that surgery might be necessary if Mr Hobson continued to suffer recurrences. The doctor did not consider that surgery would make much of a difference. A similar opinion was provided by a neurosurgeon, Dr Kam, although it was unclear whether the insurer was provided with a copy of his report. Dr Pierides noted in his report that Dr Kam had advised that surgery might be necessary, but should be avoided if at all possible.

117. The insurer organised for an appointment with Dr Giblin and it requested that he provide an assessment of whole person impairment. The doctor assessed 14% whole person impairment. He indicated that surgery was not anticipated in the immediate future, but Mr Hobson might require a spinal fusion.

118. The insurer asked Dr Giblin to reconsider his opinion. The doctor advised that 25% of Mr Hobson's impairment was due to the 2008 injury and the balance to a pre-existing condition. Upon receipt of this report, the insurer made an offer to the applicant of $5,500 in respect of four per cent whole person impairment, such offer to remain open for 21 days. There was no response to the offer and the insurer closed the file.

[6] [2014] NSWWCC 310 (*Newbold*).
[7] [2016] NSWWCC 257 (*Bianco*).

119. Mr Hobson's condition deteriorated, and he had back surgery. In February 2014, Mr Hobson was examined by an IME, Dr Bodel, who assessed 24% whole person impairment. A notice of claim was served, and proceedings were issued in the Commission for lump sum compensation pursuant to ss 66 and 67 of the 1987 Act. An AMS and a MAP assessed Mr Hobson as having 18% whole person impairment. The employer disputed that Mr Hobson was entitled to lump sum compensation pursuant to s 67 of the 1987 Act.

120. Arbitrator Wynyard distinguished the cases of *White* and *Halloran*, because there had been no change in the worker's condition after the proactive offer was made. He observed that in *Newbold*, there was an additional claim in respect of a gastrointestinal condition, and in *Eaton*, the worker had already undergone two operations.

121. Arbitrator Wynyard was not satisfied that sufficient particulars had been provided to enable a proper assessment of the full entitlement to be made, as the information held by the insurer did not indicate that any higher assessment was expected. He stated that the insurer should not have included a buffer in its offer for future surgery as there was no certainty that the surgery would be undertaken. He commented:

> "…There was no certainty that surgical treatment would be undertaken, notwithstanding that there was a suspicion that it might be needed. An insurer could not be expected to responsibly resolve a claim based on the occurrence of a future event which may or may not occur."[8]

122. The Arbitrator observed that there was no other information within the insurer's knowledge other than that provided by Dr Giblin. Therefore, it could not be said that the insurer was in receipt of sufficient particulars in September 2009 to make an informed decision about the condition at the time that the notice of claim was made in March 2014.

123. A claim is not validly made until relevant particulars are provided that are sufficient to enable the insurer, as far as practicable, to make a proper assessment of the claimant's full entitlement. This was confirmed in *Goudappel v ADCO Constructions Pty Limited & Anor*[9], when President Keating stated:

> "I accept the applicant's submission that a separate claim form is not required to initiate a claim for lump sum compensation. However, that is merely a matter of form. In substance, a claim for lump sum compensation is not validly made until the requirements of s 282 of the WIM, and the particulars and supporting documents required by the Guidelines, are provided."[10]

124. The High Court in *ADCO Constructions Pty Ltd v Goudappel*[11] confirmed that an injured worker, who has made a concluded claim for permanent impairment prior to 19 June 2012, was not precluded from making one further claim after 19 June 2012 (cl 10 and cl 11 of the 2016 Regulation, and cl 15 of Pt 19H of the 1987 Act).

125. Further, an injured worker who made a claim before 19 June 2012, which was withdrawn or otherwise was not finally dealt with, is not precluded from bringing that claim after 19 June 2012 and will still be able to bring that claim as well as one further claim for permanent impairment. In these circumstances, s 66(1A) of the 1987 Act does not apply.

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[8] *Hobson*, [70].
[9] [2012] NSWWCCPD 60 (*Goudappel No 1*).
[10] *Goudappel No. 1*, [150].
[11] [2014] HCA 18 (*Goudappel No.2*).

126. President Keating considered the effect of the transitional provisions in *Wagg*. Ms Wagg injured her right knee in January 2008. In September 2010, she made a claim for lump sum compensation in respect of 7% whole person impairment, but that claim was not pursued because she required surgery. In January 2014, she was assessed as having 19% whole person impairment, so she made a claim for lump sum compensation pursuant to ss 66 and 67 of the 1987 Act.

127. The insurer declined liability because maximum medical improvement had not been reached due to the proposed surgery. Ms Wagg had a total right knee replacement in August 2014. In December 2015, Ms Wagg's solicitor served an amended claim for 20% whole person impairment. A claim was also made for pain and suffering pursuant to s 67 of the 1987 Act.

128. In proceedings filed in the Commission in 2016, the parties entered into a Complying Agreement in respect of 19% whole person impairment pursuant to s 66 of the 1987 Act. The claim for compensation pursuant to s 67 of the 1987 Act was contested.

129. Arbitrator Dalley determined that Ms Wagg was entitled to compensation for pain and suffering pursuant to s 67 of the 1987 Act as her rights had been preserved by cl 11 of Sch 8 of the 2010 Regulation (currently cl 10 of the 2016 Regulation).

130. On appeal, the President determined that that the 2012 amendments did not apply to Ms Wagg because she had made a claim that "specifically sought" compensation pursuant to s 66 of the 1987 Act before 19 June 2012 and this had remained unresolved. He indicated that whether the threshold for an entitlement to compensation pursuant to s 67 of the 1987 Act was reached before or after 19 June 2012 was irrelevant. This was consistent with the reasoning of the High Court in *Goudappel No.2.*

131. His Honour stated:

> "In *Goudappel*, identifying the purpose of cl 11 (as it then was), the plurality (French CJ, Crennan, Keifel and Keane JJ) held (at [29]):
>
> > 'The purpose of cl 11 ... was clear enough. It applied the new s 66 to entitlements to permanent impairment compensation which had not been the subject of a claim made before 19 June 2012 that specifically sought compensation under the old s 66.'
>
> Their Honours did not limit the exclusion from the operation of cl 10 (cl 11 as it then was) to one set of proceedings for s 66 compensation, but expressed the exclusion as occurring when there has been *a* claim before 19 June 2012.
>
> Having regard to the plurality's view of the purpose of cl 10, it is plain enough that, as Mrs Wagg made a claim that "specifically sought" compensation under s 66 before 19 June 2012, the amendments to ss 66 and 67 made by the amending Act do not apply to her. It follows that she is entitled to have her claim for s 67 benefits determined without the restrictions imposed on lump sum compensation by the amending Act. That conclusion is consistent with the parties' acceptance that Mrs Wagg was entitled to lump sum compensation under s 66 from the combined effects of the of the two pleaded injuries, as evidenced by the s 66A complying agreement."[12]

132. His Honour rejected the submission that the injury pleaded in the amended claim was a new claim, because the claim for lump sum compensation pursuant to s 66 of the 1987 Act had been validly made before 2012. The claim remained unresolved, so it was capable of being amended.

[12] *Wagg*, [70] - [72]

133. This principle was applied By President Phillips in *Yildiz v Fullview Plastics Pty Ltd* [13], where it was held that the worker was not entitled to lump sum compensation pursuant to s 67 of the 1987 Act because the claim made prior to 19 June 2012 was resolved and was not capable of being amended to preserve the right to the former benefits.

134. Deputy President Roche considered the effect of cl 11 of the 2010 Regulation (now cl 10 of the 2016 Regulation) in *Frick v Commonwealth Bank of Australia*[14] as follows:

> "The text of cl 11 is tolerably clear and "there is little room for debate about" its construction (*Goudappel No 2* at [25], per French CJ, Crennan, Kiefel and Keane JJ). By operation of cl 11, the effect of which is to "override cl 15" (*Goudappel No 2* at [42], per Gageler J), the amendments made by Sch 2 to the 2012 amending Act extend to "a claim for compensation made before 19 June 2012, but not to a claim that specifically sought compensation under section 66 or 67 of the 1987 Act". On this point, the meaning of cl 11, it does not matter that *Goudappel No 2* concerned an injury received after 1 January 2002. The fact that *Goudappel No 2* did not differentiate between the various amendments in Sch 2 does not advance Mr Frick's position. The issue of differentiating between the various amendments did not come up.
>
> As Mr Frick claimed compensation before 19 June 2012, but had not specifically sought compensation under s 66 or s 67 prior to that date, the amendments introduced by Sch 2 to the 2012 amending Act apply to him, unless there is a sound reason why they should not. The critical amendment is the repeal of s 67. Mr Frick therefore has no entitlement to compensation under that section because, by the time he made his claim for that compensation, the section had been repealed and he does not come within any of the applicable exemptions."

135. The Deputy President continued:

> "As explained in *BHP Billiton Ltd v Bailey* [2015] NSWWCCPD 48 (*Bailey*), the entitlement to compensation for pain and suffering under s 67 continues where an exception is made. Such an exception is made in cl 11 of Sch 8. However, that exception only applies where a claim was made before 19 June 2012 that specifically sought compensation under s 66 or s 67. That does not apply here. (As to the operation of the exception in cl 11 generally, see *Cram Fluid*.)"[15]

136. In the present matter, the "proactive offers" of the insurers were not finally dealt with. The decisions of *Halloran*, *White*, *Eaton*, *Newbold* and *Bianco* confirm that a "proactive offer" can be regarded as an alternative to a lump sum claim being made by a worker. This has not been disputed by the legal representatives of the parties. I do not accept Mr Doak's submissions that the decisions of five arbitrators, including myself, may be wrong. He provides no logical reasons for this submission.

137. There is no dispute that the applicant injured his right knee and back on 29 March 2000 and his left knee on 21 September 2005. Although there are no claim forms in evidence, it is apparent from the applicant's evidence that the insurers opened claim files, accepted liability and paid for arthroscopies and total knee replacements.

138. Medical reports were provided to the insurers by the treating specialist, Dr O'Brien, as confirmed at the bottom of each report. Drs Bodel and Vote were qualified and provided reports to HIH. Some of the reports were addressed to CGU. Dr Bodel cautioned against making any assessment as this depended on the surgical findings. His examination was only a matter of days before the right knee arthroscopy.

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[13] [2019] NSWWCCPD 24 (*Yildiz*)
[14] [2016] NSWWCCPD 6 (*Frick*).
[15] *Frick*, [54].

139. Unfortunately, Dr Noll's report is not in evidence, so one can only speculate what evidence he had in his possession and what he recorded in his report. However, I consider that the comments that I make regarding this issue applies equally to both the insurers and the medical evidence.

140. I do not accept Mr Doak's submission Dr Vote might not have had a medical file to review. The insurers would have had the reports of Dr O'Brien. It would be remarkable if a scheme agent did not provide a medical file to a qualified specialist. I also expect that Dr Noll would have been provided with a medical file, and it would be inappropriate for counsel to submit otherwise in the absence of Dr Noll's report. This is pure speculation.

141. The medical reports of Dr O'Brien provided details of the work incidents in 2000 and 2005 and the doctor described the applicant's symptoms, treatment and history. The applicant attended appointments arranged by the insurers, so presumably the insurers advised him of his obligation to attend. After receiving reports from Drs Vote and Nall, offers were made to the applicant.

142. In his report dated 15 August 2000, Dr O'Brien indicated that the end stage of treatment for the applicant was a total knee replacement. Dr Vote also reported that Dr O'Brien had told the applicant that he would need further surgery, but this should be deferred for as long as possible.

143. Nevertheless, Dr Vote was satisfied that the applicant had reached maximum medical improvement and he provided an assessment, even though surgery was a possibility in the future. He did not suggest that there would be any change in the degree of impairment, otherwise he would have mentioned this in his report. Surgery was not anticipated in the short term. Indeed, the need for total knee replacements did not manifest until March 2012 and November 2012.

144. Dr Vote was aware of the past left knee injury and surgery. He recorded that the applicant had no prior right knee or back problems. He also had access to some arthroscopic pictures and diagrams, and he thought that there may have been a pre-existing lesion in the right knee.

145. Therefore, there is compelling evidence that the insurers were fully appraised of the circumstances and the nature of the applicant's injury before they made their offer, so there would seem to have been ample compliance with ss 281(1)(a), 281(1)(b) and 281(1)(c) of the 1998 Act.

146. The insurers complied with their obligations under the Guidelines and determined the lump sum compensation payable. In effect, they also complied with s 281(1)(a) of the 1998 Act, although no lump sum claim had been made by the applicant at that stage.

147. Whilst it is true that the Guidelines and cl 10 of the 2016 Regulation refer to action to be taken by a worker, and s 4 of the 1998 Act defines a "claim" as a claim for compensation that a person has made or is entitled to make, I am satisfied that by making offers to the applicant, the insurers waived the applicant's obligations under the legislation and the Guidelines with respect to the making of a claim, as they were entitled to do in accordance with s 260(6) of the 1998 Act.

148. I agree with the reasoning in *White* and *Eaton* that the determination by the insurers and the expiration of the offers triggered the applicant's entitlement to commence proceedings in the Commission.

149. The insurers offered the applicant lump sum compensation in accordance with the assessments of Drs Vote and Noll. In doing so, one can infer that they were satisfied that the applicant had sustained an injury that resulted in permanent impairment and that he had reached maximum medical improvement, otherwise no offer would have been made. Significantly, HIH did not seek further particulars from Dr Vote about the applicant's medical status. The same might also apply to CGU, but there is no way of knowing this in the absence of the report of Dr Noll.

150. The facts in this matter mirror those in *Halloran, White*, *Eaton*, and *Newbold,* although in those matters, no surgical procedures were undertaken after the proactive offers were made.

151. The applicant had surgery after the proactive offers were made by HIH and CGU, so the facts are similar to those in *Hobson* and *Bianco.* In *Bianco*, I indicated that I was not bound by the reasoning in *Hobson*, and I am still of that view.

152. In *Hobson*, the insurer had no information other than that provided by Dr Giblin, whereas in *Bianco* and in this matter, the insurers had reports from treating and qualified doctors. If HIH and CGU were not satisfied, they could have quite easily requested further information from the treating doctors, Dr Vote and Dr Noll. They could have refrained from making any offers until any uncertainties were clarified.

153. Claims are often made, determined and resolved where surgery is a possibility. Prior to the 2012 amendments, it was open to an injured worker to make a further claim for lump sum compensation, if there was deterioration in his or her condition. Had the applicant accepted the offers in 2001 and 2007, he still could have made further claims before 19 June 2012, and one claim after the 2012 amendments came into effect.

154. The fact that someone might have surgery does not mean that there will be a higher assessment of whole person impairment. Generally operative treatment is undertaken to relieve symptoms and if it is successful, it is feasible that there could be a lesser degree of whole person impairment post-surgery. If parties were concerned about the prospect of future surgery, no lump sum offers would ever be made to injured workers. Following the 2012 amendments, injured workers have had to be more cautious as to when to make a lump sum claim.

155. It may well be that the insurers made the offers in 2001 and 2007 in order to comply with their statutory obligations in the knowledge that the applicant could make a further claim, if his condition deteriorated and he had surgery. Nevertheless, proactive offers were made.

156. The insurers could not speculate about the future and they could not resolve a claim based on the occurrence of a future event which may or may not occur. If they were concerned about the future, they could have easily refrained from making offers, wait to see what happened and sought further material.

157. In the circumstances, I am satisfied that there was compliance with s 282 of the 1998 Act at the time that HIH and CGU made their proactive offers on 16 March 2001 and 21 September 2005. It follows that a valid claim was made prior to 19 June 2012 which was not resolved.

158. In accordance with the principles discussed by President Keating in *Wagg*, the applicant is entitled to claim lump sum compensation for pain and suffering pursuant to s 67 of the 1987 Act due to the provisions in cl 15 of Div.1 of Pt 19H of Sch 6 of the 1987 Act and cl 10 of Sch 8 of the 2016 Regulation.

Quantification of the entitlement to lump sum compensation - s 67 of the 1987 Act

159. Section 67(7) of the 1987 Act in existence prior to the 2012 amendments provides:

> "(7) In this section-
>
> ***pain and suffering*** means-
>
> (a) actual pain, or
> (b) distress or anxiety,
> suffered or likely to be suffered by the injured worker, whether resulting from the permanent impairment concerned or from any necessary treatment."

160. Commissioner Wright in *Tyler v Marsden* Industries[16]discussed the matters to be considered in assessing an injured worker's pain and suffering. The principles in *Tyler* were cited with approval by President Keating in *NSW Police Service v Snape*[17], by Deputy President Roche in *Ilic v Aldus Engineering Pty* Limited[18]and *New South Wales Police Force v Cursley [19],* and by Acting Deputy President Snell (as he then was) in *Brewster v Proline Pumping Ltd[20]*.

161. In *Tyler*, Commissioner Wright set out his views as follows:

> "● Pain and suffering awards under s 67, unlike the objective criteria in s 66 awards for physical loss impairment, must take into consideration the actual individual experiences of the claimant, as to his or her past and future pain and suffering.
>
> ● The measure of the most extreme case must be compared with the measure of ***a*** *most extreme case* and does not need to make a comparison with ***the*** most extreme case.
>
> ● The pain and suffering must result from the loss or impairment not merely the injury (s 67(1A)): see *Scrimshaw v SAR Wood Pty Ltd* (1997) 14 NSWCCR 335 (*Srimshaw*).
>
> ● Pain may be compensated even if the extent of the loss and its effects are not assessable until a later date; see *Selimovic v Airfoil Registers Pty Ltd* [1999] NSWCC 29; (1999) 18 NSWCCR143.
>
> ● Pain and suffering is compensable from the date of the compensable injury and not merely from the date on which the loss or impairment is crystallised: see *Rico Pty Ltd v Road Traffic Authority* (1992) 8 NSWCCR 515; *Corporate Ventures Pty Ltd v Borovac* (1995) 12 NSWCCR 84; *Bohanna & Appleton v Bohanna* (1996) 13 NSWCCR 724.
>
> ● There is no necessary relationship between the loss or impairment and the intensity and duration of the pain and suffering. If an award is excessive upon a review of all the circumstances, an award may be overturned on the basis of falling outside the range of a sound discretionary judgment: see *Ainsworth Nominees Pty Ltd v Crouch* (1995) 11 NSWCCR 640.

[16] (2001) 22 NSWCCR 644 at 650 (*Tyler*).
[17] [2008] NSWWCCPD 89 (*Snape*).
[18] [2006] NSWWCCPD 157 (*Ilic*).
[19] [2010] NSWWCCPD 66 (*Cursley*).
[20] [2010] NSWWCCPD 32 (*Brewster*).

- The age of the claimant is relevant. In *Regal Paints Pty Ltd v Wasson* (1993) 9 NSWCCR 301, the Court of Appeal observed (Priestley JA at 306C) that the younger a person is at time of injury (loss) the greater is the chance that the worker would get into an extreme case category but each case has to be looked at on its own merits due to the potential for the same injury to affect different workers differently. The Court of Appeal reiterated in *Ainsworth Nominees Pty Ltd v Crouch* (Kirby A–CJ at 652F) that age was a relevant consideration because age at injury had implications for the expected duration of any pain and suffering.

- Distress caused by interference with social activities (*Department of School Education v Boyd* (1996) 13 NSWCCR 289) or by the effects of the compensable injury on a worker's relationships including marriage (*Pacific Dunlop Ltd v Krivec* (1996) 13 NSWCCR 353) can be relevant.

- Objective factors may include the type of surgical procedures undergone, the nature of the convalescent process and any complications flowing therefrom, as well as the need for medication and difficulty with sleeping (*Dubbo Base Hospital v Harvey* (1996) 13 NSWCCR 545)."

162. There is no automatic correlation between the impairment found in s 66 of the 1987 Act and the proportion of the maximum sum awarded under s 67 of the 1987 Act, but one must also have regard to the subjective pain, distress or anxiety suffered and to be suffered by the applicant.[21]

163. Further guidance is provided by Deputy President Roche in *Cursley*:

> "Determining quantum under section 67 involves 'in a sense, a value judgment' (*Alvorac General Engineering Pty Limited v Arlotta* (1993) 29 NSWLR 734 (at 739A). Its resolution involves 'questions of fact and degree, matters of opinion, impression, speculation and estimation calling for the exercise of common sense and judgment (*Dell v Dalton*)' (*Galley v Pasminco Mining Limited* (1993) NSWCCR 288 at 297)."[22]

164. Ms Grotte submits that the applicant was 50 years old when he suffered injury. He has had surgery on his knees and impairment. He continues to have pain in his knees and his condition has deteriorated. He suffers falls due to instability. He has pain and numbness in his right knee and low back pain and stiffness. The applicant's pain and suffering when compared to a most extreme case is in the order of 30% to 35% in respect of each injury.

165. Mr Doak submits that the applicant achieved a good outcome from the arthroscopies in 2001 and 2005. The AMS reported that the applicant's right knee was painful, but his left knee is not as bad. His age warranted a lower assessment. The other injuries sustained by the applicant to his right knee in August 2007 and to his neck and back in December 2009 need to be considered, but the applicant's evidence does not assist. The assessment of 15% whole person impairment of the eight lower extremity due to injury on 17 August 2007 was a significant assessment.

166. The fact that the applicant continued to work until late 2011 does not mean that he was not suffering pain in his back and knees. He claimed that he fully recovered from the left knee injury that he sustained in 1987 and the arthroscopy in 1992. Dr O'Brien confirmed that the applicant achieved a good outcome from the first left knee arthroscopy. This evidence is unchallenged.

[21] *NSW Police Service v Wrestling* [2008] NSWWCCPD 99 (Candy ADP, [44]).
[22] *Cursley*, [47].

167. The applicant indicated that following his injury on 29 March 2000, his back pain settled but his right knee pain persisted. His right knee symptoms improved following surgery in August 2000, but he still had pain at times. Dr O'Brien reported complaints of pain in January 2001.There were work-related episodes of left knee pain in 2003 and 2004, but he took no time off work and the pain soon disappeared.

168. Dr O'Brien performed an arthroscopy three months after the applicant injured his left knee in September 2005. Although the applicant seemed to have a good outcome, he had on-going issues and a number of falls when the left knee gave way. This resulted in lacerations to both legs and an injury to his right shoulder. He had a series of injections in March 2006. The applicant had a CT scan on his back in May 2006, when he complained of sciatica, so he was still suffering symptoms in his back and knees.

169. The applicant suffered his final injury to his right knee on 17 August 2007, and at the time, Dr O'Brien reported symptoms in both knees. He had injections in both knees in 2008 and to the left knee in 2009. At the time of his retirement in 2011, his left knee was causing the greatest problems.

170. When Dr Brooks took over the applicant's treatment in 2011, he recorded that the applicant had significant pain and stiffness in his knees. The applicant continued to have left knee pain throughout 2012 following the total knee replacement in March 2012. This was also confirmed by Dr Jander, who reported on-going, but improving, symptoms.

171. In 2012, the applicant's right knee symptoms increased, so a total knee replacement was performed in November 2012. In December 2012, Dr Jander recorded that the applicant had significant back pain, and in late 2013, the doctor described the left knee as perfect, but the applicant's right knee and back were causing problems. The applicant subsequently had acupuncture treatment on his right knee and back.

172. In November 2014, Dr Brooks reported that the applicant had no symptoms in his left knee, but he was still troubled by right knee symptoms. The doctor's evidence does not assist with the applicant's symptoms since 2014.

173. Little assistance is provided by the reports of Drs Bodel, Vote, Conrad and Breit regarding the extent of the applicant's symptoms. Dr Bodel recorded that the applicant's back injury recovered, but he had severe right knee pain before the arthroscopy in 2000. A similar history was recorded by Dr Vote, who noted that the right knee arthroscopy had not relieved his symptoms. Dr Breit recorded that the applicant's back pain had not settled. He also accepted that the applicant injured in back on 29 March 2000 (5% permanent impairment), 17 August 2007 (1% WPI) and in December 2009 (6% WPI).

174. Dr Harvey-Sutton reported that the left knee replacement was successful and the pain in the knee did not interfere with his usual domestic and recreational activities. She did not record that the applicant was pain-free. The applicant's right knee collapsed at times and his pain remained moderate to severe. He had stiffness, tightness and aching in his back.

175. According to the applicant's evidence, he has continued to experience numbness, stiffness, instability and clicking in his right knee. His right knee was aspirated to relieve pain in January 2017, but this was of limited benefit. He has continued to consult with his general practitioners, and he suffers pain and stiffness in his knees. His right knee pain is worse, and it radiates to his foot and hip. His symptoms impact on his ability to undertake his daily activities. It is true that he has undertaken extensive travel since he retired, but a number of those trips involved cruises, which would have placed less stress and strain on his back and knees. He continues to take pain killing medication.

176. Whilst it is true that the effects of this injury to the right knee in August 2007 and the settlement of his lump sum entitlement for 15% whole person impairment should be considered when assessing the applicant's pain and suffering, the fact that the applicant did not have any further surgery at the time of his injury in August 2007 would seem to suggest that this incident had a minimal effect on the applicant's pain and suffering. I am also mindful that although Dr Breit assessed 15% whole person impairment, this only included 5% due to the injury on 17 August 2007.

177. Further, the AMS and the MAP were aware of Dr Breit's assessment of 6% whole person impairment of the lumbar spine due to the injury on 15 December 2009, when they assessed 20% permanent impairment of the back due to injury sustained on 29 March 2000. The evidence is largely silent as to the effect of the back injury in December 2009. I am also mindful that there were injuries to two different parts of his body on 29 March 2000.

178. I am not obliged to determine an overall assessment of pain and suffering and then apportion between the various injuries. According to *Scrimshaw*, the pain and suffering must result from the loss or impairment, not merely the injury. Therefore, I need to focus my attention on the pain and suffering caused by the loss or impairment arising from the injuries sustained on 29 March 2000 and 21 September 2005. Further, applying the principles discussed in *Cursley*, I am required to make a value judgment by using common sense.

179. The applicant was relatively young at the age of 49 years at the time of the right knee and back injury in March 2000. He was 55 years old when he injured his left knee in 2005. Despite his injuries and symptoms, he continued to work in his full duties. His pain continues and he has issues with both knees, and to a lesser degree, his back. His injury, the subsequent treatment and the impairment arising from the injury have undoubtedly caused him pain and suffering.

180. The applicant had an arthroscopy on each knee and eventually came to bilateral total knee replacements. These latter procedures are major operations and the road to recovery is often prolonged and difficult. The applicant has indicated in his evidence that he continues to experience symptoms. This has been corroborated to some degree by this treating doctors and the other doctors who have examined him.

181. The applicant has been assessed as having 17% loss of use of the right leg at or above the knee including any loss below the knee and 20% permanent impairment of the back due to the injury in 2000. He also has been assessed as having 13% whole person impairment of the left lower extremity due to the injury in 2005. These significant impairments and their effects must to be considered.

182. It is true that at times, the applicant's left knee has been pain-free, but there is no denying that fact that he had symptoms before and after each of his operations. Whilst he may have achieved a good outcome, the most recent evidence from the AMS confirms that he still has some pain. The question that I need to deal with is the applicant's pain and suffering arising from the whole person impairment when compared to a most extreme case.

183. There is no evidence to suggest that the applicant has been totally pain-free or is not suffering any restrictions. There is little doubt that the pain and suffering will continue in the future. The applicant cannot do daily activities around his property without experiencing pain and discomfort in his right knee. His left knee and back are also symptomatic. This has resulted in an increased reliance on his wife. He can no longer attend to household duties and maintenance, although he can still spend time in his garden. The psychological issues that the applicant experienced before he retired can be disregarded as these were caused by matters unrelated to his physical injuries.

184. Taking all of these factors into consideration, I am satisfied that the applicant has and will continue to experience pain and suffering arising from his impairments. I have taken into account the evidence and submissions of both counsel.

185. In the circumstances, I am of the view that in relation to the injury sustained on 29 March 2000, the applicant falls within the range of 35% to 45% of a most extreme case, and in respect of the injury sustained on 21 September 2005, the applicant falls within the range of 30% to 40% of a most extreme case.

186. Therefore, the applicant will be entitled to an award of $20,000 for pain and suffering representing 40% of a most extreme case in respect of the injury sustained on 29 March 2000, and $17,500 for pain and suffering representing 35% of a most extreme case in respect of the injury sustained on 21 September 2005.

FINDINGS

187. The applicant sustained injury to his back and right knee arising out of or in the course of his employment on 29 March 2000.

188. The applicant sustained injury to his left knee arising out of or in the course of his employment on 21 September 2005.

189. The applicant's employment was a substantial contributing factor to his injuries.

190. On 16 March 2001, the respondent's insurer made a proactive offer to resolve the applicant's entitlement to lump sum compensation in respect of his injuries sustained on 29 March 2000.

191. On 31 May 2007, the respondent's insurer made a proactive offer to resolve the applicant's entitlement to lump sum compensation in respect of his injury sustained on 21 September 2005.

192. The proactive offers of the respondent's insurers were made before the introduction of the threshold in section 66(1) of the 1987 Act by the *Workers Compensation Amendment Act 2012*.

193. Valid claims for lump sum compensation were made on 16 March 2001 and 31 May 2007.

194. The applicant was assessed by a Medical Appeal Panel as having 17% loss of use of the right leg at or above the knee including any loss below the knee and 20% permanent impairment of the back due to injury sustained on 29 March 2000 and 13% whole person impairment of the left lower extremity (knee) due to injury sustained on 21 September 2005.

195. The applicant is entitled to lump sum compensation for pain and suffering arising from the injuries sustained on 29 March 2000 and 21 September 2005.

196. The applicant is entitled to lump sum compensation for pain and suffering in the amount of $20,000 representing 40% of a most extreme case for the injury sustained on 29 March 2000 pursuant to section 67 of the 1987 Act.

197. The applicant is entitled to lump sum compensation for pain and suffering in the amount of $17,500 representing 35% of a most extreme case for the injury sustained on 21 September 2005 pursuant to section 67 of the 1987 Act.

ORDERS

198. The respondent to pay the applicant $20,000 representing 40% of a most extreme case for the injury sustained on 29 March 2000 pursuant to s 67 of the 1987 Act.

199. The respondent to pay the applicant $17,500 representing 35% of a most extreme case for the injury sustained on 21 September 2005 pursuant to s 67 of the 1987 Act.