WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **2566/20**
Applicant: **RICKY SPANGLER**
Respondents: **DOWNER EDI MINING PTY LIMITED**
Date of Determination: **27 AUGUST 2020**
Citation: **[2020] NSWWCC 289**

The findings of the Commission are as follows:

1. The applicant in the course of his employment with the respondent on 26 November 2017 suffered primary psychological injury ("injury") within the meaning of section 65A and section 4 (b) (i) of the *Workers Compensation Act (NSW) 1987*, as amended (1987 Act).

2. The applicant since 26 November 2017 has suffered incapacity which results from injury within the meaning of section 33 of the 1987 Act.

3. At all material times since 26 November 2017, the applicant has had no current work capacity within the meaning of section 32A of the 1987 Act.

4. Since 26 November 2017, the applicant has incurred medical and/or other associated treatment expenses within the meaning of section 60 of the 1987 Act.

5. Since 26 November 2017, the respondent has made certain payments of weekly and other compensation to, for and/or on behalf of the applicant.

The determination of the Commission is as follows:

6. Award in favour of the applicant against the respondent for payments of weekly compensation on the basis of no current work capacity as follows:

    (a) from 27 November 2017 to 25 February 2018 pursuant to section 36 of the 1987 Act at the rate of $1,475.50 per week, and

    (b) from 26 February 2018 to 27 May 2020 at the rate of $1,242.53 per week.

7. The respondent is to be given credit for payments of weekly and other compensation already made during the above periods.

8. A general order is made in favour of the applicant pursuant to section 60 of the 1987 Act limited to medical, hospital and associated treatment expenses in connection with the applicant's psychological injury.

9. To the extent necessary, there will be an award in favour of the respondent in respect of the applicant's allegations of physical injury.

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

PHILIP YOUNG
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 PHILIP YOUNG, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Ricky Spangler (the applicant) alleges that in the course of his employment with Downer EDI Mining Pty Limited (the respondent) on 26 November 2017 he suffered:

    (a) "… personal injury, namely heat stress related condition and primary psychological injury…as a consequence of exposure to extreme heat conditions…", alternatively

    (b) "heat stress related condition…as a consequence of exposure to extreme heat conditions…and consequential psychological condition."

2. The applicant seeks awards as follows:

    (a) pursuant to section 36 of the 1987 Act for weekly payments of compensation from 27 November 2017 to 25 February 2018 at the rate of $1,475.50 per week;

    (b) pursuant to section 37 of the 1987 Act for weekly payments of compensation from 26 February 2018 to 27 May 2020 at the rate of $1,242.53 per week, and

    (c) a general order for payment of medical and associated treatment expenses pursuant to section 60 of the 1987 Act.

3. The respondent maintains in relation to physical injury that the evidence does not support the applicant's statement that he was in fact working below ground in temperatures of up to 55 degrees Celsius; further, on subsequent admission to Cobar Base Hospital the applicant's condition and temperature was normal except for muscle aches and a questionable brewing viral infection; several brain MRI scans in 2018 and 2020 were normal; the applicant's general practitioner Dr Palmqvist on 18 December 2017 noted no evidence of heat stress; the applicant presented in January 2018 with an elevated C-reactive protein on blood testing, suggesting infection.

4. As to psychological injury, the respondent has asserted inter alia that the medical evidence compels the conclusion that any psychological injury (which is disputed) followed if at all the applicant's physical exposure, but because there was no physical injury in the pathological sense, any claim concerning a consequential psychological condition cannot succeed.

ISSUES FOR DETERMINATION

5. The issues are:

    (a) did the applicant suffer a primary physical injury and/or a primary psychological injury? (sections 4 (a) and/or (b) 1987 Act);

    (b) did the applicant suffer a primary physical injury and a consequential psychological condition? (sections 4 (a) and/or (b) 1987 Act);

    (c) if the applicant suffered a disease, was his employment the main contributing factor? (sections 4 (b) (i) and/or (ii) 1987 Act);

    (d) did incapacity result from injury within the meaning of section 33 of the 1987 Act;

(e) to what extent, if at all, is the applicant's psychological and/or physical harm and/or incapacity for work a result of the applicant's history of drug use? (sections 4 (a) & (b) and section 33 1987 Act), and

(f) was the applicant's psychological injury, if any, a primary or a secondary psychological injury (section 65A 1987 Act).

PROCEDURE BEFORE THE COMMISSION

6. This matter came for conciliation and arbitration hearing on 9 July 2020. Mr C Tanner of Counsel instructed by Mr D Twohill Solicitor appeared for and with the applicant. Mr A Combe of Counsel instructed by Mr N Marhaba appeared for the respondent and Mr M Vickers was present.

7. The parties engaged in discussions through a conciliation process but those discussions were not successful. I am satisfied that I have used my best endeavours to achieve resolution of the matter but settlement could not be achieved.

8. The applicant's pre-injury average weekly earnings were agreed at $1,553.16.

EVIDENCE

Documentary evidence

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

(a) Application to Resolve a Dispute (Application) dated 12 May 2020 and attachments;

(b) Reply dated 2 June 2020 and attachments;

(c) Application to Admit Late Documents by the respondent dated 3 July 2020 and attached payments schedule.

10. Written submissions were filed by the parties:

(a) by the applicant 30 July 2020;

(b) by the respondent in addition to chronology 6 August 2020, and

(c) by the applicant in reply 14 August 2020.

Oral evidence

11. No oral evidence was given.

SUBMISSIONS

12. It is unnecessary to summarise in detail the submissions provided in this matter as both parties prepared written submissions.

DISCUSSION, FINDINGS AND REASONS

Particularisation of the "injury"

13. At the conciliation and arbitration hearing on 9 July 2020, an initial issue arose concerning the particularisation of injury adopted by the applicant.

14. In summary, the respondent submitted that the applicant pleaded a personal injury in the nature of "heat stroke". The applicant had not produced any evidence concerning the diagnosis of this condition, whether it was indeed a pathological condition and whether there was any employment contribution in terms of "main contributing factor"[1] or any evidence of aggravation (etc) of a disease condition.

15. The respondent pointed to a hydration report concerning the mine site at the date of alleged injury namely 25 and 26 November 2017 as well as the treating neurologist's report of Dr Willcourt. Dr Willcourt mentioned that heat stroke occurs when a core body temperature is in excess of 40 degrees Celsius and heat exhaustion occurs at 38.3-40 degrees Celsius. There is no evidence that the applicant suffered body temperature to this extent.

16. The respondent's issue with the pleadings was that the applicant had alleged firstly a "heat stress related injury" and then "psychological injury" on 26 November 2017, alternatively the same heat stress related condition and a "consequential psychological condition". It was suggested that in the absence of any pathological diagnosis of "heat stress related condition" all allegations which follow concerning consequential psychological injury or condition respectively must fail.

17. This Commission is not bound by strict pleadings[2] but is to act "according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms"[3]. That is not to say that procedural fairness no longer remains a paramount consideration[4]. For these reasons, although the Application to Resolve a Dispute as originally pleaded was arguably slightly ambiguous and the respondent might have sought particulars, the Commission thought it fair to the respondent that a Direction for Particularisation of the applicant's case should be filed and served within seven days. That particularisation was provided by the applicant on 16 July 2020. It enabled the parties to then direct their submissions to issues which were more clearly understood.

18. I am satisfied by the respondent's extensive submissions that it has had ample opportunity to meet the application's allegations of injury and accordingly leave is granted to the applicant to plead injury as set out in the applicant's Particularisation dated 16 July 2020.

The clause 44(4) issue

19. The respondent has questioned the extent to which the applicant may rely on the reports of Dr Ash Takyar, Ms Pamela Wakefield-Semmens and Dr Colin Field because of clause 44 of the Workers Compensation Regulation 2016 (NSW). In submissions in Reply, the applicant has pointed out that Ms Wakefield-Semmens is the applicant's treating psychologist and Dr Field is the neuropsychologist to whom the applicant was referred by his general practitioner, Dr Khan. In the circumstances, the only forensic medical report relied upon by the applicant is that of Dr Takyar. The clause is not, in my view, offended.

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[1] 1987 Act definition of "injury" section 4 (b) (i) and 4 (b) (ii).
[2] *Far West Area Health Service v Radford* [2003] NSWWCCPD 10.
[3] 1987 Act section 354 (3).
[4] *Inghams Enterprises Pty limited v Zarb* [2003] NSWWCCPD 15 at [25].

The respondent's late documents

20. Included in the respondent's late documents are statements given by the respondent's Superintendent in Mining, Mr Nelson Hearn, dated 30 July 2020 and the insurer's (EML's) Mr David Lawrence Gatt, also dated 30 July 2020.

21. The respondent suggests that Mr Gatt's conversation with the applicant in about November 2017 is relevant and supports the respondent's argument that the applicant was not injured, just "unwell" at this time. Whilst allowing this statement into evidence, I have great difficulty in affording any real weight to it. First, the statement was given over two and a half years after the suggested conversation and the detail of the alleged conversation and Mr Gatt's memory recollection is incredibly remarkable. Second, the statement does not say that it is prepared by reference to contemporaneous notes. In fact, Mr Gatt's inability to fix a date for the conversation[5] strongly suggests that no contemporaneous records of any such conversation exist. Third, use of the word "unwell" by a worker such as the applicant, even if that word was used, does not automatically mean there was no "injury" within the meaning of the 1987 Act. Many workers feel "unwell" only to subsequently discover that the cause of their feeling may have been work related. This is particularly so when considering the nature of the applicant's likely condition. It is not a readily observable traumatic fracture, for example.

22. The respondent suggests that the statement of Mr Hearn confirms that the applicant on 6 December 2017 told Mr Hearn that he was "prepared to come back to work"[6]. The statement contains information which is of assistance to the Commission, in particular:

    (a) how the applicant felt on 6 December 2017 during his discussions with Mr Hearn[7];

    (b) confirmation of the applicant's visit to his doctor that day[8];

    (c) confirmation that the applicant needed assistance (staying with his mum)[9];

    (d) confirmation that the applicant was "keen to come back to work"[10], and

    (e) confirmation that the applicant was "a good employee"[11].

23. Because of the assistance this statement provides to the Commission, it is in my view probative. It has the advantage also of having been prepared from notes in Mr Hearn's diary.[12] I allow the statement of Mr Hearn into evidence.

24. In my view, the applicant's comment to Mr Hearn that he was "keen to come back to work" is quite another proposition to the applicant being, as the respondent put it, "prepared to come back to work". The former position is consistent in my view with the applicant wishing he could come back to work soon, the latter with the applicant fit and ready now to come back to work. Mr Hearn's statement, therefore in my view, should be afforded little weight in this regard.

[5] Statement Mr D Gatt 30 July 2020 at paragraph 10.3.
[6] Statement Mr N Hearn 30 July 2020 paragraph 1.18.
[7] Ibid paragraph 1.14.
[8] Ibid paragraph 1.15.
[9] Ibid paragraph 1.16.
[10] Ibid paragraph 1.18.
[11] Ibid paragraph 1.22.
[12] Ibid paragraph 1.19.

Preliminary factual matters

25. A number of facts in this matter are not seriously in dispute. These include that on 26 November 2017, whilst approximately two kilometres underground in the Cobar mine the applicant whilst working noticed intense pain and pulsating in his head and body.[13] Second, it is not disputed that equipment which would ordinary be available was not present in assisting in cooling the applicant down.[14] Third, the applicant finished his shift at 7:00 am, drank Gatorade and water and at 12:00 pm attended Cobar District Hospital.

26. During his attendance at Cobar Hospital the applicant reported feeling unwell, presenting with "generalised lethargy" and aching "all over".[15] The applicant was discharged at 8.21 pm that evening and made a new claim notification of "heat stroke" on 29 November 2017.

Medical evidence and discussion

27. Although the applicant's general practitioner, Dr Palmqvist diagnosed "heat stroke" on 18 December 2017, she suggested the applicant could return to full time work after five days.[16] By 16 January 2018, Dr Islam had certified the applicant fit for pre-injury duties. On 19 and 20 January 2018, Dr S Kafataris reported to the insurer that the applicant was fit for pre-injury duties.

28. On 31 January 2018, general practitioner Dr A Crossman of Broken Hill indicated that blood tests revealed isolated C-Reactive Protein suggesting only infection and/or inflammation.

29. The applicant underwent a normal brain MRI scan on 7 February 2018 and Dr Kafataris again reported to EML on 20 February 2018,[17] with focus on potential autoimmune disease, infections and vascular disease but no significant or serious brain injury.

30. It is significant in my view that for several of the initial months following 26 November 2017, the applicant's doctors were focussed on the possibility of physical pathology. The applicant was sent for various physical testing. Because this testing reported essentially normal results, it is not in my view surprising that during these initial months post-injury the applicant's doctors would regard him as fit for pre-injury duties. The additional significance is that the focus on a physical pathological explanation for the applicant's condition at this time meant that potential psychological influences in relation to causation were not closely considered (according to the medical reports at least) during this initial period of time.

31. The introduction of a potential psychological diagnosis seems to arrive in May 2018, about six months after the applicant's work on 26 November 2017. By 29 May 2018 psychologist Dr J Gurr was wondering whether the applicant's past crystal methamphetamine addiction may have caused him some mental damage.[18] By 7 June 2018 the applicant's general practitioner was referring the applicant to Ms P Wakefield-Semmens (psychologist) with a diagnosis of "severe anxiety/ depression and PTSD" referable to the work incident and "his family issues".[19]

32. As the submissions in this matter unfolded, there was no serious suggestion by the parties, nor indeed any real or probative evidence, of "family issues" impacting upon the nature nor extent of the applicant's injury and/or incapacity.

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[13] Applicant's statement [13]-[24].
[14] Ibid.
[15] Emergency documentation Cobar District Hospital at Reply pages 34ff.
[16] Application pages 110-113.
[17] Reply page 47.
[18] Application page 135.
[19] Ibid page 123.

33. By August 2018, the applicant was claiming:

> "heat stress related injury and psychological injury as a consequence of prolonged exposure to extreme heat conditions including consequential psychological condition with deemed dated of injury 26/11/2017".[20]

34. Medical evidence throughout the remainder of 2018 departs from any major emphasis on psychological injury and returns to yet another potential examination of physical injury, namely "heat stroke". On 6 August 2018, the applicant saw neurologist Dr M Willcourt who took a history concerning "heat stroke" and the applicant underwent a further brain MRI scan which revealed no sinister pathology. Dr Willcourt then reported to the applicant's general practitioner on 20 September 2018, noting no evidence of structural damage, a normal MRI scan and no evidence of the applicant's core body temperature (cbt) as at 26 November 2017. That position (no structural damage, normal MRI and no evidence of cbt escalation) led Dr Willcourt to suggest that there may well be a "functional neurological cause." [21]

35. The medical evidence which then followed concentrated more so (again) on the "functional" aspect mentioned by Dr Willcourt. I take it, although this is not entirely clear, that the suggestion of a "functional" cause means a potentially psychological component which may be causing or contributing to the applicant's symptoms. Dr A Takyar on 30 January 2019 noted the applicant's prior drug dependence but also believed that the applicant's psychological condition occurred following his physical injury and symptoms.[22]

36. On 19 March 2019, Dr J Davis, occupational physician, diagnosed "chronic heatstroke".[23] As pointed out by Mr Combe, the precise pathological nature of that (general) diagnosis is unexplained by the medical evidence. About three weeks later, on 8 April 2019, Dr K Pincombe, treating psychiatrist, suggested the applicant may have suffered an acute cerebral insult due to overheating in the context of prior heavy polysubstance abuse. However, Dr Pincombe cautioned that there was not much in the way of evidence and the applicant's PTSD may be caused by multiple stressors, including work.[24]

37. By 25 May 2019, the applicant's general practitioner had referred the applicant to Dr C Field, neuropsychologist. Dr Field noted inconsistencies in the applicant's presentation and thought the applicant had a "mood related response" to a "traumatic event". The respondent pointed out that Dr Field did not provide any diagnosis of psychological injury. [25]

38. The reference just mentioned to Dr Field's report was relied upon by the respondent to suggest that because there was no diagnosis of psychological injury, but simply a "mood related response", Dr Field's opinion could not support the applicant. In my view, it may be that a formal DSM V diagnosis can be of assistance in establishing the existence of psychological injury. But the existence of a diagnosis of psychological injury in this jurisdiction does not depend totally on whether DSM V is satisfied. Roche DP in *Wicks*[26] put the matter as follows:

> "I accept that the (DSM IV) is only a guide that is subject to clinical judgment, and that adherence to the diagnostic criteria is not mandatory but advisory."

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[20] Ibid page 23.
[21] Ibid pages 151-152.
[22] Ibid pages 78-79.
[23] Ibid pages.87-88.
[24] Ibid pages 162-166.
[25] Application pages 153-158 and respondent's chronology at page 6.
[26] *Transfield Services (Aust) Pty Limited v Wicks* [2011] NSWWCCPD 63 (*Wicks*) at [109].

39. In my view, Dr Field's approach concentrates upon seeking a scientifically direct and faithful diagnosis in accordance with DSM V. In the absence of the specific criteria of DSM V being satisfied, Dr Field does not then sufficiently explore whether this mood related response is of sufficient severity to constitute a genuine psychological condition in the sense contemplated by various case authorities. The applicant must simply prove that a physiological effect[27] results from what Dr Field accepts was a "traumatic event". This is to be found in my view in the applicant's evidence of how he was feeling and the expert opinion of Ms Wakefield-Semmens and Dr Takyar.

The physiological effect

40. Ms Wakefield-Semmens saw the applicant on a number of occasions and diagnosed "speech problems, severe anxiety and depression" and PTSD.[28] The reference to PTSD seems to read as an addendum to her diagnosis but I do not think much turns on this because anxiety and depression is diagnosed and this diagnosis at the least is supported by most (if not all) of the other medical opinion.

41. There is significant evidence that the applicant thought that his head was going to "explode" and that he felt he was affected by his exposure to work in extreme heat conditions. It matters not, in my view, for that matter, whether the heat conditions were "extreme", simply whether there were real events in terms of the applicant's exposure which caused him to **perceive** that (in this case) he was under threat.[29] He said he thought he would die.

42. In summary, regardless of whether any scientific analysis of the level of heat exposure could reasonably (actually) cause a pathological physical condition, there is in my view sufficient evidence that the applicant at the very least experienced a severe physiological and psychological reaction to the conditions of his work on 26 November 2017. The manifestation of the condition is evidenced by the bodily symptoms of which he complained and his doctors took into account. The applicant was not, historically, a complainant about anything.[30]

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43. In terms of Dr Takyar's report of 30 January 2019, the respondent has made much of the opinion of Dr Takyar by saying that the applicant can only have suffered a consequential psychological condition as a result of physical injury and symptoms. The argument is that there being no recognised physical injury or symptoms, there can be no consequential psychological condition.

44. I do not see the matter as being a consequential psychological condition following physical injury. This is because I accept that the sudden physiological effects which were complained of by the applicant were factually contemporaneous with the traumatic exposure of 26 November 2017 and were not transient, nor temporary in nature. That the symptoms were not temporary is evidenced by the ongoing consultations sought by the applicant because of the continuity of his symptoms as recorded in various consultation notes and reports since late 2017 through to present complaints, consultations and ongoing attempts at treatment.

45. It is clear that various doctors continued to regularly see the applicant and hear those complaints on an ongoing basis and the evidence demonstrates that many of the doctors were struggling to obtain an accurate diagnosis. There was in my view a struggle by the doctors to decide in terms of medical diagnosis whether this was a primary pathological injury/condition supported by observable pathology results, or something else such as a "functional" (I interpret psychological) condition? A chronological review of the medical evidence is contained in Mr Combe's chronology helpfully attached to the respondent's

[27] See, for example, *Stewart v NSW Police Service* (1998) 17 NSWCCR 202 at [6], [206].
[28] Ibid page 138.
[29] *Attorney General's Department v K* [2010] NSWWCCPD 76.
[30] See Statement Mr N Hearn 30/7/2020.

submissions. For some time after November 2017, the medical evidence waxes and wanes between physical and psychological diagnoses at various degrees, respectively.

46. The applicant's complaints variously included exhaustion, headaches, intolerance to heat, nightmares, anxiety, emotional anger, no concentration, frustration, memory impairment, speech problems, lost weight and the like. It is understandable that there were differences in opinion among the doctors regarding the proper diagnosis, bearing in mind of course that medical diagnosis is almost always a scientific analysis rather than a determination on the "balance of probabilities".

47. I do not accept that Dr Takyar's verbal reference to "injury" must necessarily be a direct reference to the definition of injury in the 1987 Act. In my view, Dr Takyar's reference to "psychiatric condition that formed *subsequent to* his injury" (emphasis added) is consistent with the applicant's immediate psychological response to physical symptoms he experienced on 26 November 2017. The applicant experienced "a pulsating feeling in his head and body" and pain that was so intense he thought his head was going to "explode"[31] as the precipitating experience suffered by him in the course of his employment which was the genesis of his psychological condition. The evidence confirms that the work conditions instilled fear in him. The symptoms reported by the applicant at this time were a result of his psychological condition, rather than the cause, or instigator, of it.

48. I am, accordingly, comfortably satisfied that on 26 November 2017, the applicant in the course of his employment with the respondent suffered a primary psychological injury, namely PTSD, severe anxiety and depression as diagnosed by Ms P Wakefield-Semmens and Dr C Field. I so conclude because of the definition of "primary psychological injury" in section 65A of the 1987 Act and the immediacy of the physiological effect upon the applicant through fear which occurred during and contemporaneous with his exposure to hot conditions at work.

Main contributing factor

49. Having concluded that the applicant suffered primary psychological injury and that this prima facie constituted injury within the meaning of section 4 (b) (i) of the 1987 Act, the next issue is whether the applicant's employment was the main contributing factor to contracting this disease.

50. It has been held that the applicant's employment must be the main contributing factor to the event giving rise to the disease, rather than the main contributing factor to the disease itself.[32]

51. In this matter, the contraction of the applicant's psychological condition resulted contemporaneously from fear he experienced because of the hot conditions in which he felt he was exposed at work on 26 November 2017. Viewed in this way, the triggering event which gave rise to his disease was his perception and fear at being exposed to such hot conditions. There is no evidence concerning prior events such as might be in any way of any moment in causing or materially contributing to this fear. The statement of Mr Hearn supports the fact that the applicant was a good employee who was able to attend to his work in an affable way and without prior complaint. The circumstances in which the applicant was placed were part of his employment and clearly these circumstances (finding himself in hot conditions in which he suffered fear) were the main contributing factor to the contraction of his disease.

[31] Application page 69.
[32] *King v Commissioner of Police* (2004) 2 DDCR 416 per Neilson J citing *Rootsey v Tiger Nominees Pty Limited* (2002) 23 NSWCCR 725 and *Cant v Catholic Schools Office* (2000) 20 NSWCCR 88.

52. I would add that neither party made specific argumentative written submissions concerning this issue.

Incapacity and capacity for work

53. The respondent suggests that it made weekly payments of compensation and section 60 payments from 26 November 2017 to 12 February 2018.[33] It is suggested that Dr Islam certified the applicant fit for pre-injury duties before 12 February 2018.[34] As against this submission stands opinions of Dr Takyar, Ms Wakefield-Semmens and various treating general practitioner notes.

54. The respondent points to the applicant's history of drug abuse and the suggestion is that his mental condition has been permanently scarred because of this abuse. Support for this argument is received from Mr J Gurr, psychologist, who expressed the opinion that the applicant's previous use of "ice" had caused mental damage.[35] Additionally, the issue of drug abuse was mentioned by Dr Pincombe, treating psychiatrist on 8 April 2019 where he says:

> "This is a very difficult interview due to the complexity of the situation, the past histories of both what may have been an acute cerebral insult with overheating, but in the setting of prior heavy polysubstance abuse. There was limited information other than the letter from one neurologist, who seemed to be hedging his diagnosis. There is also the possibility that there may have been a degree of damage from prior heavy substance abuse which may have been exacerbated by his experience down the mines, but this is all conjecture without much in the way of evidence. There are also elements suggestive of post-traumatic stress disorder there, which may well be due to multiple chronic deficits and previous history of polysubstance abuse which would also place him at risk of these."[36]

55. It is clear that the highest that Dr Pincombe takes the matter is to acknowledge how complex the diagnosis is and how there are a number of elements which may have contributed to post-traumatic stress disorder. Assuming for the moment that Dr Pincombe's reference is to pre-existing heavy drug use which may have been exacerbated by the applicant's work experience in the mine, that would support an argument that the applicant is entitled to compensation pursuant to section 4 (b) (ii), namely aggravation (etc) of a pre-existing disease condition. I do not, however, raise that possibility as any preferential explanation for determination of the applicant's entitlement, because I prefer the view that the medical evidence supports a diagnosis of anxiety and depression and potentially PTSD which occurred directly because of the events of 26 November 2017.

56. In arriving to this conclusion I am comforted by the statement of Mr N Hearn dated 30 July 2020, specifically paragraphs 1.21-1.22. The superintendent's comments reinforce the view that the applicant was at no time attempting to embellish or exaggerate his response to the events which occurred in the course of his employment. The superintendent's comments were as follows:

> "1.21. I confirm that Ricky never reported any issues with working in the heat to me directly, prior to his claim. Ricky never told me that he was too unwell to work in hot conditions prior to lodging his claim. Ricky never reported any psychological injury to me and never informed me when we discussed his injury that he had any psychological symptoms. I also never heard anything from any other colleagues to that effect, and no one ever reported to me that Ricky had

[33] Respondent's submissions at [28].
[34] Ibid.
[35] Application page 35.
[36] Ibid page 165.

informed them that he was suffering any psychological symptoms or that he was having difficulty working in the heat"…

"1.22. Prior to his workers compensation claim, Ricky was a good employee. He always had a smile on his face and was interactive with myself and other colleagues, based on my observations. Ricky never complained to me about any issues he had with his duties or his role with Downer. Prior to 25 and 26+ November 2017, I cannot recall Ricky ever reporting that he felt unwell in relation to an exposure to heat. After Ricky lodged his claim, he never said to me that he couldn't return to work because it was too hot, and he never indicated that he was suffering from any mental health or psychological symptoms."

57. In terms of the extent to which the applicant's prior drug abuse affected his capacity for work I wish to make some brief observations. First, there is no evidence either in the above extract from Mr Hearn's statement, nor offered by the respondent otherwise, that prior to 25 and 26 November 2017 the applicant lost time off work, was other than a good employee, reported any feelings of unwellness in his work, complained of the nature of his work nor indicated any psychological symptoms. Second, the respondent advances a case concerning "prior mental damage" through previous ice use on the strength largely it seems, of a psychologist Mr Gurr and a possible opinion of Dr Pincombe.

58. One might have thought that in a matter such as this the respondent might have obtained its own medico-legal evidence dealing with this issue, especially in circumstances where between 2018 and 2020 the applicant underwent three MRI scans of the brain, none of which showed any abnormal pathology. Ideally, the Commission would have been assisted by some expert medical opinion concerning whether or not the applicant may have sustained "mental damage" from pre-existing drug abuse in circumstances where brain MRI scans in years after 26 November 2017 were entirely normal.

59. There is reference in the evidence to the applicant having been examined on behalf of the insurer by Dr Ewers but no report has been filed and the appropriate inference is that Dr Ewers' opinion would not assist the respondent's case[37].

60. On a separate matter, at the least, the Commission would have expected to be assisted by some pre-26 November 2017 evidence of the effect of the alleged drug abuse by the applicant at the time of the applicant's attendances at work, performance of work, performance appraisals, reports to and recorded cautions by supervisors including Mr Hearn, records of absenteeism, unsatisfactory attitude or conflict at work, inability to meet work targets, to name a few considerations. Mr Hearn's statement in my view is not consistent with any negative view whatsoever of the applicant in that regard.

61. In the circumstances I am satisfied that the applicant has had no capacity for work for the period claimed in the sense that he is not fit for any suitable employment having regard to the nature of his psychological condition. I am also satisfied that the applicant having established a psychological injury is entitled to an award pursuant to section 60 the 1987 Act in respect of reasonable medical and treatment expensing relating to that psychological injury. I am not satisfied that the applicant suffered any physical injury arising out of or in the course of his employment on 26 November 2016. Therefore, the award in respect of section 60 expenses does not extend to the applicant's physical injuries, if any.

[37] *Jones v Dunkel* (1959) ACA 8.

Conclusion - Findings and Awards

62. The findings of the Commission are as follows:

(a) The applicant in the course of his employment with the respondent on 26 November 2017 suffered primary psychological injury within the meaning of section 65A and section 4 (b) (i) of the 1987 Act ("injury").

(b) The applicant since 26 November 2017 has suffered incapacity which results from injury within the meaning of section 33 of the 1987 Act.

(c) At all material times since 26 November 2017 the applicant has had no current work capacity within the meaning of section 32A of the 1987 Act.

(d) Since 26 November 2017, the applicant has incurred medical and/or other associated treatment expenses within the meaning of section 60 of the 1987 Act.

(e) Since 26 November 2017, the respondent has made certain payments of weekly and other compensation to, for and/or on behalf of the applicant.

63. The determination of the Commission is as follows:

(a) Award in favour of the applicant against the respondent for payments of weekly compensation on the basis of no current work capacity as follows:

(i) from 27 November 2017 to 25 February 2018, pursuant to section 36 of the 1987 Act at the rate of $1,475.50 per week, and

(ii) from 26 February 2018 to 27 May 2020, at the rate of $1,242.53 per week.

(b) The respondent is to be given credit for payments of weekly and other compensation already made during the above periods.

(c) A general order is made in favour of the applicant pursuant to section 60 of the 1987 Act limited to medical, hospital and associated treatment expenses in connection with the applicant's psychological injury.

(d) To the extent necessary, there will be an award in favour of the respondent in respect of the applicant's allegations of physical injury.