WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **5227/19**
Applicant: **Bevan Lex Stuart**
Respondent: **State of New South Wales (NSW Police Force)**
Date of Determination: **6 January 2020**
Citation: **[2020] NSWWCC 5**

The Commission determines:

FINDINGS

1. The applicant suffered a fall down stairs on 6 or 7 July 2014 as a result of the compensable injury sustained in the course of his employment with the respondent on 19 June 2014.

ORDERS

1. The Application to Resolve a Dispute is amended by replacing the name of the respondent wherever it appears with "State of New South Wales (NSW Police Force)".

2. The respondent is to pay the applicant's reasonably necessary medical expenses arising from injury on 19 June 2014, including the injuries sustained in a fall down the stairs on 6 or 7 July 2014.

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

Gerard Egan
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 GERARD EGAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Bevan Stewart (the applicant) claims compensation for medical expenses incurred as a result of injury during the course of his duty as a police officer on 19 June 2014 with the New South Wales Police (the respondent). On that day, he was assaulted by an offender involving, inter alia, a punch or punches to his head. The respondent does not dispute that he sustained a head injury in that event.

2. However, on 6 or 7 July 2014, (as it is immaterial to the case, I will assume for the purpose of these reasons that it occurred on 7) the applicant fell down some stairs at his home sustaining further serious injury. The respondent says that the injury sustained on 19 June 2014 had "resolved" prior to the fall and, as a result, disputes that any injury sustained in the fall "resulted from" the work-related injury on 19 June 2014.

ISSUES FOR DETERMINATION

3. The respondent agrees that the medical expenses claimed would be reasonably necessary as a result of the injury on 19 June 2014 if the applicant establishes that the fall down the stairs on 7 July 2014 resulted from the subject injury.

4. That is the only issue for me to determine is that injuries sustained in the fall "resulted from" the work-related injury on 19 June 2014. If the applicant succeeds on that point, an order for payment of reasonably necessary medical expense will follow.

5. As part of that process, the respondent argues that I am required to determine whether or not the applicant suffered a traumatic brain injury in the assault on 19 June 2014.

6. The parties came to an agreement that although some of the physical injuries (not including the head injury or brain injury) resulting from the fall down the stairs on 6 or 7 July 2014 are not formally considered by the respondent, the only issue requiring determination is whether the applicant's fall down the stairs resulted from the head injury sustained in the assault on 19 June 2014.

PROCEDURE BEFORE THE COMMISSION

7. The matter proceeded to hearings in Coffs Harbour on 18 December 2019. The applicant was represented by Mr Grant of counsel, instructed by Mr Jones. Mr of Young of counsel appeared for the respondent.

EVIDENCE

Documentary evidence

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

    (a) Application to Resolve a Dispute;
    (b) Reply, and
    (c) Report by Dr Michael Robertson, toxicologist dated 4 December 2019.

9. The respondent attempted to tender a medical report by Dr Ross Mellick dated 17 December 2019 (one day prior to the hearing). The applicant objected to the commission receiving that report into evidence and submissions were made. I declined to accept the report and gave oral reasons on the day. In brief, the reasons included: the lateness of the report compared to the examination on 27 November 2019; the lack of any explanation for the delay; and the failure to comply with my Direction on 5 December 2019.

10. There was no oral evidence.

BACKGROUND AND THE EVIDENCE

The applicant's evidence

11. The applicant has filed four separate statements of evidence, dated 13 August 2014, 3 November 2014, 3 February 2018 and 4 October 2019.

12. In the August 2014 statement, the applicant describes the original incident. He and fellow Officer Kennedy, after receiving a radio message, came across a person wanted for two outstanding arrest warrants, Mr Buccanan. They approached another person's house where the offender was expected to be. The applicant was familiar with the owner of that house and he was admitted while Officer Kennedy went to the rear of the house in case of attempted escape. He came across the offender and told him he was under arrest. As the offender attempted to escape the applicant described the events as follows:

> "I grabbed him with my left hand on his clothes above his chest-line. (The offender) then punched me twice in the left temple. I felt dazed, lost my balance and stumbled. (The offender) started yelling 'Stab the copper cunt now, get him now, we got him'.
>
> I pulled the firearm and put it at his head with finger on the trigger. I was dazed and feared for my life that someone was going to stab me. I said, 'I get stabbed, you get shot'. I then looked to around [sic] to see if anyone was coming out of the rooms or towards him to stab him [sic]. I replaced my gun in my holster and tried to secure (the offender), I grabbed both his arms, yelled out to Jimbo, 'Come in here, he is in here'. I still felt fuzzy in the head, dazed, wobbly on my feet.
>
> There was then further scuffles and confrontation with the other people present resulting in capsicum sprays."

13. The applicant continues:

> "While I was writing up the charge I remember my vision and thoughts were blurry. (Another Senior Constable) helped me write up some of the facts for the charge as it was a bit jumbled up and I felt confused. After this it is all a bit of a daze, but I know this is when the headaches started. I remember my left side of my head really hurt.
>
> I had headaches all the time after the hit to the left side of the head until I fell down the stairs at home more than two weeks later. I had a sore head around the left temple area where I was punched twice. I was taking Panadol on a regular basis in the days after the assault but they were not doing a very good job.
>
> The last four to five days before the fall I had really bad headaches which I never had before. So bad to the point I had to buy Nurofen Plus and was taking tablets about every six hours in accordance with the directions. I felt anxious and stress because of the assault. I was concerned about my partner (Officer Kennedy) who was involved in the assault who got spat in the mouth, and was now in a waiting situation of whether he had contacted [sic] any diseases."

14. The applicant concedes that he did not see a doctor. He was rostered on five night shifts and completed those. He then had an obligation to drive a bus for an "Aboriginal nation's knockout football competition" at Dubbo and was due to leave on Tuesday 8 July 2014.

15. During this period his wife left home to visit her father for about two weeks in Victoria during school holidays. The applicant was then at home by himself.

16. Before the planned trip to Dubbo, the applicant described the occurrences occurring on 6 July 2014 (the day before the fall) as follows:

> "My wife Gillian was in Victoria visiting her father for about 2 weeks during the school holidays and I was home by myself. On Sunday 6 July 2014 I finished night shift at 1.30 am after a 3.30 pm start on the Saturday afternoon and after driving home I slept till about 10 am. After getting out of bed on the Sunday morning I felt hazy in the head and thought it was just the effect of all the 5 night shifts I had just finished. I just didn't feel right and I had a headache.
>
> On that Sunday I was invited to a lunch commencing at 11.30 am to celebrate my sister's 80th birthday party in Nambucca Heads. I went to where I thought the party was at the Nambucca Heads Bowling Club and had a light beer and there was no one there. I received a phone call from my nephew after about an hour asking where I was and saying they were at the Nambucca Heads Golf Club. I must have got the venue mixed up.
>
> I drove to the Golf Club, grabbed a light beer and sat with my sister who was celebrating her birthday it and I spent the afternoon with my family chatting until a few of the family decided to go to the Star Hotel at Macksville for dinner. I drove my Mini with my nephew as a passenger to Macksville.
>
> All day l just didn't feel right I was hazy in the head and was suffering from a headache. At the Star Hotel I had a big meal of Surf and Turf with my nephew Darren and his wife Alyson Grave and niece Jessica and her partner Alex. I also spoke with some good friends, one being Terry Booth who is the Tow Truck Driver for the area. I left about 10 o'clock and drove home. In the period from leaving home on the Sunday morning until I returned home I estimate that I had consumed about 8 schooners of light beer, I do not drink full strength beer as a general rule. I did not feel affected by the beer I had consumed and was confident that I was fit to drive my car home.
>
> I got home at about 10.30 pm, I was still feeling hazy. I put everything where I normally put things Wallet on the fridge, glasses and phone on the table I then went upstairs to the bedroom, got undressed to go I bed. That the last thing I remember, until I woke up on the floor at the bottom of the stairs, it was still dark. I am not sure of the actual time and I suspect that the actual fall may well have occurred in the early hours of Monday 7 July 2014. I woke up with 2 blankets near me. Have no idea how they got there. My legs were burning and I couldn't get up. I thought I was dreaming and that I was having a dream. I got on my hands and knees and crawled up the stairs into bed. I woke up next day and my head, neck and back was really sore I got up to go to the toilet, I think it was 12 o'clock. midday. I fell back onto the bed about 12 times as my legs were still burning.
>
> I managed to finally get to the toilet and after I finished and I turned and looked in the mirror and I noticed I had blood all over my face. I then realised I hadn't been dreaming about having the fall or waking up the floor and I knew I had to get some help. I was very weak, I decided to go back to bed as I felt very weak to build up energy to get back downstairs as that where the phones were. I had blurred vision and was seeing double. I got back out of bed just as it was staring to get dark I felt giddy I knew I had to get down stairs as I was crook, aching all over I got down stairs by hooking my arm into rail so I would not fall again I don't know how I bloody did it. I then got the phone book so I could phone some friends John and Lorraine Quinn who live just up the road. I was seeing double I knew the first five numbers, I got the other three numbers by closing one eye."

17. As the ongoing effects on the applicant's state of health following the fall down the stairs is not in dispute, I will not go into the medical detail thereafter.

18. In the November 2014 statement, the applicant recounted with less detail the circumstances of the original injury. He reiterated that he noticed ongoing headaches and goes into more detail regarding what happened on the day prior to the stairway fall on or about 6 or 7 July 2014. He says on that day he was still suffering the effects of the injury and the assault including headaches. He points out that he went to the Nambucca Heads Bowling Club instead of the golf club and only discovered the error when his nephew telephoned him. After arriving at the golf club about 12.30 pm he says he had three schooners of mid-strength beer over the five hour period till 5.30 pm. When some of the party moved to the Star Hotel at Macksville he says he met a friend of his. He points out that Mr Adam Partridge is the publican of the Star Hotel and it appears that he came in contact with Mr Partridge as well (see Mr Partridge's evidence below). He says he then, from about 6.00 pm, had about four further mid-strength beers over the 3.5 hours to 9.30 pm, during which time he also ate a meal of "surf and turf". He then continues:

> "I was not affected by alcohol and I drove home. Whilst driving home I had a feeling of blackness in my head. I am not quite certain what caused the sensation.
>
> When I arrived home, I prepared myself for bed.
>
> At some time during the evening, I am not sure when, I fell down the stairs and impacted the wall. As a consequence of this I sustained injury to my head, neck, right wrist, right shoulder and right ear. I also had abrasions and my vision has been affected."

19. The applicant then describes attending Coffs's Harbour Health Campus via ambulance and subsequently his General Practitioner Dr Smith and Neurologist Dr Andre Loiselle.

20. In the February 2018 statement the applicant recounts the effects of the fall in general terms. He notes the finding of the MRI scan on 9 July 2014 (after the fall) indicating organic irregularities in parts of the brain including afocal haemorrhage indicating axonal injury. The medical evidence on this point is not in dispute.

21. The applicant again recounts the severe headaches, light-headedness, dizziness, intermittent blurred vision and emotional instability which occurred after the assault on 19 June 2014 and the fall on or about 6 or 7 July 2014.

22. He has seen Corinne Roberts, Senior Clinical Neuropsychologist at the Mid-North Coast Brain Injury Rehabilitation Service on two occasions in September 2014, who has prepared a report for clinical purposes which is attached to the application to resolve a dispute.

23. Following the fall, the applicant reports right wrist injury preceding to surgery by Dr Meads in 2014. He also reports persistent fatigue and neck pain with reduced movement and reduced strength in his right arm.

24. In investigating the jaw, the applicant says he was referred by his general practitioner (GP) to Dr Hill, Dentist, and was subsequently referred to Dr Scott David, and from there to Dr Russell Vickers, Oral Facial Maxillary Surgeon. He reports continuing jaw pain along with numerous other symptoms and disabilities which are not the subject of dispute.

25. In the October 2019 statement the applicant discloses coming under of the care of Dr Rosalyn Avery, Rehabilitation Physician, who is seen approximately annually. He also refers to consultations with Maxville Eye Care as a result of vision problems. He also refers to osteopathic, chiropractic and physiotherapeutic treatment. He refers to persistent anti-depressant medication as well and ongoing painkilling medications.

26. He continues to receive weekly payments of compensation based on an accepted injury of Post-Traumatic Stress Disorder PTSD as a result of the initial assault.

27. Statement of Lorraine Joy Quinn dated 11 October 2014. Ms Quinn has known the applicant for about 20 years and was aware of the assault at work on 19 June 2014. She says that prior to the assault she would have described him as a very humorous person with an easy-going disposition. He was obliging and "nothing was a problem".

28. Ms Quinn cleans the applicant's house each Tuesday and recounts the following encounter:

> "Shortly after Bevan's assault I was at his home when he said to me, 'I don't feel well today. I got king hit at work the other day. He was a skinny little bugger but he could pack a punch.'
>
> I noticed that Bevan's eyes were glazed and he told me that he was having a headache and that he didn't feel well. He told me that he wasn't quite sure if he wanted to have something to eat for breakfast. I suggested that he have a cup of tea and he could decide what he wanted to have to eat later.
>
> Following his conversation Bevan remained on the lounge for the remainder of the time that I was at the property. This was very much out of character for Bevan. I was concerned that Bevan may have had a head injury. I am aware of head injuries as I have had two sons who have played football and my husband has previously been involved in boxing."

29. Ms Quinn then describes receiving a call from the applicant on 7 July 2014 when he told her that he had "had a fall". He said the phone made a loud clunk as if the phone had been dropped and Ms Quinn and her husband went to the applicant's property. She described the scene, relevant to which she noticed the applicant had congealed blood on the right side of his head around his face and ear. There was a strong smell of faeces. She said five stairs had faeces and blood on them. She noticed damaged to the stairs.

Statement of John Anthony Quinn dated 11 November 2014

30. Mr Quinn also described the applicant's personality as outgoing and "a very easy-going person and can be relied upon at all times". He was aware of the assault upon the applicant in June 2014 and said that he had seen the applicant earlier in the day prior to the assault. Several days after the assault he complained of a headache and the applicant told him of the blow to the temple sustained in the assault.

31. Mr Quinn and the applicant went to the applicant's shed and described his observations as follows:

> "We remained outside the shed and we talked for a considerable period of time. think we talked for approximately three to four hours. During this time Bevan told me about his history of service within the police force and about a number of incidents he had been involved in. I get the feeling that Bevan was trying to get these things 'off his chest'. I found Bevan's disclosure of things to be very much out of character. At that stage I was concerned Bevan was continuing to suffer the effects of the assault both physically and emotionally.
>
> I noticed that Bevan was lethargic and other occasions when I saw him he was vague and easily tired."

32. Mr Quinn then described the events in the morning following the fall and the exchanges between ambulance officers and the applicant about "his drinking". He said the applicant disclosed he "had a few mid-strength beers over a long period of time and a couple of meals". Mr Quinn said he could not smell alcohol on the applicant and had never seen him drunk in the 20 years he had known him.

Statement of Adam Partridge (undated)

33. Mr Partridge is the hotelier of the Star Hotel and confirmed the applicant's attendance on the evening of 6 July 2014. He said he arrived at approximate 7.00 pm, correlating near enough to the applicant's own estimate of 6.30 pm. He met the applicant on arrival. Although he did not observe the applicant eat a meal, he did recall that the applicant was drinking mid-strength beer whilst those with him (the applicant's niece and nephew) were drinking mixed drinks and normal strength beer. He said the applicant was having one mid-strength beer to each of his companions' two normal drinks and said during the time at the hotel the applicant consumed "no less than three schooners and no more than four schooners of XXXX Gold, leaving at about 9.30pm". He said he was not concerned that the applicant was affected by alcohol and believed that he was okay to drive. He said his eyes were not bloodshot, speech was not slurred and he was not fumbling with his wallet or keys or unsteady on his feet.

34. In the Brooksight Investigations Report, the following information is either attached or transcribed following conversations with the investigator:

    (a) **Letter from Terence Byrne (undated).** A letter from Mr Byrne is attached to an investigation report from Brooksight Investigations Pty Ltd dated 14 August 2014. He described meeting the applicant on 23 June 2014 where they "exchanged news for approximately 30 minutes". The applicant reported that he had been assaulted at work. Upon asking him if he was okay, the applicant said he thought so. Mr Byrne continued:

        > "He was quite vague and a little stunned-looking and was very upset at the way a so-called long term friend of his (the assailant) who took part in the assault, or played a part in it."

    (b) **Gillian Stewart, the applicant's wife**. The applicant's wife noted changes in her husband after the assault. The days following the assault, the applicant complained about headaches and how sore his left head was. She saw him rubbing that side of the head and the temple was "red and raised". There is personality changes such as becoming teary, shaky voice, irritability, negative attitudes and being "obsessed about staying at work and going out to Dubbo". She reported confusion, drowsiness and feeling sluggy as well as light-headedness, dizziness, being off-balance and having vision issues. Headaches were constant. The applicant's wife also recorded:

        > "He was teary when he spoke about the assault, kept complaining about headaches, he seemed to be a bit off balance, refocusing his eyes by rubbing them a lot. He really did seem different. Rubbing his left side of his head constantly."

    (c) The conversations with Mr and Mrs Quinn were of similar effect to the statements described above.

    (d) **Statement from Mr Stephen Foote, electrician**. A statement from Mr Foote noted that he had known the applicant for eight years and was familiar with him and his personality traits and behaviours. He noted the applicant's wife was departing (for the Victorian trip) on 27 June 2014 and said that the applicant's wife had asked him to do some electrical work at a property and "stay with Bevan whilst she was away in Melbourne – she was concerned for his wellbeing". He described his observations whilst staying with the applicant as follows:

> "Whilst staying with Bevan for three days I noticed (like Gillian) that he had become withdrawn and quiet. This observation felt quite strange, as previous times spent with Bevan have always seen him bright and cheerful. It was out of character to see him tired and his attention to detail seemed impaired, again, quite disturbing to see as this is not Bevans character."

(e) There are further observations by other associates of the applicant including a Will Cartwright who was asked to keep an eye on the applicant by his wife also because she was "concerned about his health and wellbeing".

(f) **Letter from Faye P Stuart, applicant's sister-in-law**. Faye Stuart talks about the gathering at the Nambucca Golf Club on 6 July 2014 and the fact that the applicant went to the wrong venue. She also recounted a conversation with the applicant regarding a book by a certain author. The applicant was confused about the author apparently being involved in a car accident, when the accident involved someone else.

(g) The report itself also records the fact that Faye Stewart was "very surprised at how muddled (the applicant) seemed on the day. . ." which was very out of character.

The medical evidence

35. There is no suggestion by the applicant that he sought medical attention after the assault and prior to the fall down the stairs. There is therefore no contemporaneous medical records of his presentation during this period.

36. Potentially of relevance, however, subsequent histories provided to treating practitioners regarding the applicant's self-reported state during the period between the assault and the fall.

Dr Mark Smith, General Practitioner

37. I will not review all of the evidence from Dr Smith that is before me. Of significance, however, I consider a letter dated 12 August 2014 referring to a "head injury review". Concerning the period between the assault and the fall, he said this:

> "We discussed his post assault balance disturbance which continues to improve, his vision with very little diplopia. The prescription grasses provided with Eye C have been of great value. He Is having persisting occipito-cervical headaches on a daily basis, He is getting some benefit from attending to osteopath Barb McCormack for this.
>
> ….
>
> Of note is that Bevan was seen by me today with his wife Gill, who reports that when Bevan turned up to his sisters 80th birthday that he In fact turned up to the wrong address and was waiting for an hour and a half before it dawned on him that he may be at the wrong place. She also confirms that other witness' have come forward to talk about changes in behaviour and concentration, attention, memory and cognitive performance in Bevan after the original HOD assault injury and before he fell down the stairs"

38. Dr Smith also mentioned numerous other physical consequences of the fall down the stairs which are not matters in dispute.

Corrine Roberts, Neuropsychologist, report dated 10 September 2014

39. Ms Roberts reviewed the Coffs's Harbour Health Campus clinical records, noting the brain radiological findings. She noted in particular that the applicant reported that he had been punched in the temple during an arrest on 19 June 2014 without loss of consciousness, "but after he had headaches, felt 'fuzzy' in the head and according to his wife he was more emotional than usual". She reviewed Port Macquarie Brain Injury records from 29 July 2014 reporting "continued to suffer ongoing dizziness, blurred vision, cognitive 'fuzziness' and fatigue", resulting in the referral to Ms Roberts for neuropsychological assessment.

40. Ms Roberts said the applicant was upset about the fact that people thought that he fell because he was drunk. When dealing with the period after the assault and prior to the fall she recorded as follows:

> "He sustained a punch to the head but there was no LOC and he had clear recall of events. In the interval between this incident and the fall he experienced ongoing headaches, dizziness, blurred vision, fatigue, anxiety, hazy thinking and forgetfulness. His wife described behavioural changes consistent with him being in significant psychological distress including increased irritability, emotional distance, negative thinking and mood, tearfulness, and lack of interest in his usual activities."

41. After performing a series of neuropsychological tests, Ms Roberts concluded that the results were consistent with the effects of traumatic brain injury of mild to moderate severity. She also thought that there was likely ongoing psychological factors at play.

Dr I S Bruce, Consultant Physician

42. On 24 October 2014 Dr Bruce reported of his consultation regarding head injury from the fall down the stairs. He noted that the report was that "he had drunk six to eight light beers over the preceding ten hours", before recounting the fall and the immediate consequences. By way of history, Dr Bruce also noted the assault at work on the left temporal region of the applicant's head saying he felt stunned and had ongoing headaches. He noted his wife, friends and colleagues noticed that he was vague and emotional, and that he went to the wrong venue for the birthday party on 6 July 2014. He noted that he decided to continue working despite feeling unwell as he only had a few shifts to do before the planned drive to Dubbo for the NSW Indigenous Nation's Knockout.

43. Dr Bruce concluded:

> "It appears to me very likely that post-concussion symptoms from a previous head injury when he was assaulted two weeks earlier were a pre-disposing factor for the fall or possible seizure."

Dr Andre Loiselle, Neurologist

44. On 16 January 2015 Dr Loiselle reviewed the applicant in the company of his wife. He noted the incident on 19 June 2014. He recorded the nature of the assault and the onset of headaches for the following fortnight with slight dizziness and unsteadiness. He noted the birthday party, recording that the applicant drank eight light beers over a period of 10 hours, calculating that he was well under the limit to drive home at about 10.00 pm, prior to the fall down the stairs. He obviously then recorded in detail the effects of the investigations and his examination which are not in issue.

45. His impression was that the applicant "suffered a mild concussion as a result of the initial assault. The combination of the concussion and post-traumatic stress would have been the major contributor to the subsequent fall down the stairs".

46. Dr Loiselle said even with eight standard drinks over 10 hours it is unlikely that there was significant blood alcohol level leading to the fall, acknowledging that retrograde amnesia means that this can't be certain. However, there was other evidence to corroborate the applicant's state as he left the Star Hotel, as outlined above.

Dr Doug Andrews, Consultant Psychiatrist

47. Dr Andrews treated the applicant from 6 May 2015. On 11 August 2015 he reported to the respondent he noted symptoms of post-traumatic stress disorder involving the assault but also some events during his previous police career. Concerning the subject assault, Dr Andrews said that it was "very likely" that the applicant suffered a concussion at the time.

Toxicologist Opinions: Dr R Drew dated 29 June 2015 and Dr Michael Robertson dated 4 December 2019

48. Dr Drew was provided with the statements of the applicant dated 3 November 2014, as well as the statements of Mr and Mrs Quinn and Adam Partridge which I have reviewed above. The Brooksight Investigations report was provided as were the ambulance and hospital records amongst other clinical notes. He noted the intake of about seven schooners of mid-strength beer over a period of about nine hours, and the meal sometime before 8.00 pm.

49. Based on those assumptions, Dr Drew considered the likely blood alcohol content was 0.012g/dL and the maximum predicted was 0.024g/dL. He concluded that the likely effects of alcohol upon the applicant were "minimal" and it was "very unlikely" his motor coordination or balance would be noticeably affected. The probable effects were "confined to mild relaxation and mild disinhibition".

50. Dr Robertson had a letter of instruction from the respondent's solicitor and the Application to Resolve a Dispute. He refers to the applicant's statement dated 13 August 2014 and 3 November 2014 concerning the amount of alcohol consumed. He also noted Mr Partridge's evidence. The doctor assumed the fall occurred at 1.00 am on 7 July 2014 and that the applicant had consumed eight schooners of XXXX Gold between 11.30 am on 7 [sic], 6 July 2014 and 1am on 7 July 2014, ceasing drinking at about 9.30 pm on 6 July. He estimated the likely blood alcohol content at the time (I infer, at the time of cessation of drinking) as 0.02%. He concluded the likely blood alcohol concentration at the time at 1.00 am would have been in the range of 0, or up to 0.06% if he was a slow metaboliser of alcohol. If the concentration was close to 0 it was not likely that the alcohol materially effected risk-taking behaviour, his balance or reaction times. If it was 0.06% it was likely that care and caution was reduced and "possibly resulting in risk-taking behaviour", but it was not likely balance or reaction times were materially affected. Overall, Dr Robertson concurred with Dr Drew that the effects of alcohol at the time of the fall may have included an amount of relaxation and disinhibition.

Dr Robin B Fitzsimons, Neurologist and Adjunct Professor at University of Sydney Medical School, report dated 6 July 2015

51. Dr Fitzsimons interviewed the applicant in the company of his wife. The history he recorded was consistent with the applicant's description of the assault and the onset of subsequent symptoms. The applicant's wife told the doctor that the applicant became "completely different", being "inflexible, stubborn, distant and withdrawn. . . reticent in talking and couldn't be persuaded to go to a doctor".

52. He noted the onset of "massive headaches" which were bifrontal and throbbing. The doctor recounted the incident involving the birthday party and the consumption of subsequent beers throughout the day.

53. The applicant reported that his sister was concerned about him at the party as he was “misinterpreting information”. The applicant added that after the head injury he had double vision with some difficulty focussing.

54. Dr Fitzsimons recorded the applicant as saying that when he returned home on the evening of 6 July 2014, the applicant felt “a sense of what he described as blackness coming over him”, and later waking at the foot of the stairs, naked, having struck his temple with evidence of defecation and urinary incontinence. He noted the associated physical injuries and right wrist surgery. He also noted the absence of any epileptic fits since the fall.

55. The applicant continued to see the brain injury rehabilitation unit.

56. Dr Fitzsimons reviewed the radiology including the report of diffuse axonal brain injury and multiple haemorrhages involving the frontal lobe and elsewhere. He reviewed the lay evidence statements and the medical reports reviewed above, amongst others.

57. Dr Fitzsimons concluded:

> “The history given of the assault, with two extremely forceful and deliberate blows to the left temple, was evidently a very serious injury. The available evidence, including that cited above, is that following this injury Mr. Stuart sustained, at very least, post concussive symptoms including dizziness, massive headaches, difficulty concentrating and a sense of dizziness.
>
> A second head injury occurred, after his sister's wedding, and after having consumed beer to a level which, it is contended, was not sufficient to cause intoxication.
>
> It is a persuasive argument that if Mr. Stuart had been so ‘drunk’ that he fell down the stairs in the middle of the night, he certainly would not have been able to drive a car along a main road or to have conversed, without evidence of intoxication, to individuals such as a the publican.
>
> Being drunk would be very unlikely on its own account for his amnesia for the events following the second head injury, as it would signify a degree of intoxication not readily compatible with having driven a car along a highway not long beforehand.
>
> It therefore appears probable that the fall down the stairs was a consequence of the head injury sustained two weeks earlier. This could either have been because of the general "dizziness" associated with the concussion, or it might have been be because he had had an epileptic fit.
>
> Either an epileptic fit or the second head injury (if it was severe enough to cause evidence of axonal shearing), could have resulted in his amnesia for the event. It has been reasonably surmised, reportedly by Dr. Loiselle [neurologist], that he may have had an epileptic fit. This would be consistent with his having defecated and passed urine. It would also be consistent with having sustained axonal shearing in the accident two weeks earlier.
>
> This earlier accident was reportedly also associated with redness and swelling over the left temple. It may well have been a variant of a ‘king hit’.
>
> The timing would be consistent with a post-traumatic fit. Appropriately, his driving licence was therefore temporarily suspended.

Although it is impossible to be certain which of the two head injuries resulted in the axonal shearing, this is not material to my conclusion that by one or other mechanism, the initial head injury was responsible for the changes seen on the MRI scan, either by way of brain damage in the first accident, or by causing a significant fall, with a head injury in the second accident.

Given the deliberate and forceful nature of the first injury, and the reported changes in personality which were observed after it, I am inclined to the view that the first scenario is the more likely, with a subsequent epileptic fit.

The timing is not that normally associated with epileptic fits due to alcohol consumption which typically occurs more than about twelve hours after alcohol consumption has ceased."

SUBMISSIONS

58. Both counsel made detailed submissions on the evidence which is largely summarised above and will not be repeated. I will only set out the substance of the submissions here, as they were recorded.

59. The parties agree that because the applicant claims injuries or conditions that result from a fall which itself is said to result from the compensable injury, statutory considerations relating to "injury" do not arise. Accordingly, common law principles as to causation and establishing factual evidence on the balance of probabilities apply.

Applicant's submissions

60. Mr Grant suggested that there are two issues:

    (a) whether alcohol played a part in the fall, and

    (b) whether the fall can be said to have resulted from the head injury and/or the brain injury on 19 June 2014.

61. Accordingly, the evidence regarding the applicant's condition after the assault and before the fall down the stairs is important. He reviewed the lay evidence in this regard, pointing out the evidence regarding the applicant's fuzziness, difficulty writing reports, personality changes, headaches and confusion such as attending the wrong venue for the party on the day before the fall. He also pointed to the evidence contained in the earlier medical reports confirming and corroborating the history of these changes prior to the fall.

62. Mr Stuart pointed to the expert evidence on the likely effects of alcohol to the effect that it would have had little or no affect on the applicant's balance or movements.

63. Mr Stuart says the fact that Mrs Quinn noticed faeces and blood on the stairs, which the expert evidence attributes to an epileptic fit, confirms that a fit occurred prior to the fall and the conclusion would be that the epileptic fit caused the fall.

64. Dr Fitzsimons supports this ultimate conclusion on the balance of probabilities, and that the epileptic fit was likely induced by the effects of the initial assault, and based on the expert evidence, not due to alcohol consumption.

Respondent's submissions

65. The respondent disputes that there was traumatic brain injury in the assault. It is submitted that the changes in demeanour and presentation are also consistent with the applicant's undoubted and accepted psychological condition resulting from his anger and disappointment in having been assaulted by a person he considered a friend.

66. The respondent argues that the applicant's case is based on the existence of an epileptic fit and that the psychological symptoms are not pressed as a cause of the subsequent fall.

67. Mr Young submits that the opinion of Dr Fitzsimons is quite equivocal using words such as that he was "inclined" to one view and that the scenario which he prefers was "more likely" this is understandably said because of the difficult and confusion of the evidence in that regard. The doctor was not able to say whether the changes on the MRI scan was caused by the fall or the first incident (this even though he was "inclined" to the first scenario).

68. Mr Young points out the fact that the applicant did not seek medical attention between the assault and the fall and there is no contemporaneous corroboration regarding his symptoms and complaints in medical records.

69. Ultimately Dr Fitzsimons does not say with clarity what caused the fall but presents the commission with two options:

    (a) That the probable post-concussion syndrome caused it, or
    (b) An epileptic fit caused it.

70. Mr Young submits that I, for the applicant to succeed, need to find one or the other and a finding in the alternative is not open.

71. Mr Young submits that there is even doubt whether an epileptic fit occurred because there is no history of epilepsy before the assault, leading up to the fall, and has been no epileptic fits since then (resulting only in a suspicion of epilepsy and the subsequent re-granting of the applicant's driver's license). However, Mr Young did concede that there was no other evidence as to why there was defecation and urinary incontinence during the fall down the stairs.

72. Mr Young also submits that an inference is available that a third scenario may be implicated: that is, that even though the alcohol alone would not be the cause of the fall in a healthy individual, it may be that the alcohol, combined with the effects of the assault was a cause of the applicant's fall down the stairs. Obviously this submission is made in the alternative because it assumes that the applicant continued to suffer from the effects of the assault. Mr Young says there is no expert evidence regarding this point but it creates an inference that is equally available to that made by Dr Fitzsimons and would undermine the force of the applicant's evidence in discharging his onus.

73. Mr Young said an inference that fatigue was a contributing factor is available and there is no evidence about that either, making the same submission as to the applicant's onus.

74. Whilst these inferences are available, the applicant has not obtained any expert evidence from a neurologist regarding these points and this creates a "hole" in the applicant's evidence. Mr Young specifically confirmed that he was not making a submission based on *Jones v Dunkel* [1959] HCA 8.

FINDINGS AND REASONS

75. When secondary effects of an injury condition are claimed (the fall and its consequences) , the cause of it is a question of fact: *March v E & MH Stramare Pty Ltd* [1991] HCA 12; 171 CLR 506 per Mason CJ at [16]. It falls to be determined on a simple common sense test in accordance with *Kooragang Cement Pty Limited v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*). I must feel actual persuasion of the occurrence or existence of the fact in issue before it can be found: *NOM v* DPP [2012] VSCA 198 at [124]. See also Dixon J in *Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336.

76. The Court of Appeal in *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246 (*Nguyen*) summarised the approach as follows:

> "(1) A finding that a fact exists (or existed) requires that the evidence induce, in the mind of the fact-finder, an actual persuasion that the fact does (or at the relevant time did) exist;
>
> (2) Where on the whole of the evidence such a feeling of actual persuasion is induced, so that the fact-finder finds that the probabilities of the fact's existence are greater than the possibilities of its non-existence, the burden of proof on the balance of probabilities may be satisfied;
>
> (3) Where circumstantial evidence is relied upon, it is not in general necessary that all reasonable hypotheses consistent with the non- existence of a fact, or inconsistent with its existence, be excluded before the fact can be found; and
>
> (4) A rational choice between competing hypotheses, informed by a sense of actual persuasion in favour of the choice made, will support a finding, on the balance of probabilities, as to the existence of the fact in issue." (at [55])

77. When reading the expert reports I acknowledge the passage by Spigelman CJ (Giles and Ipp JJA agreeing) in *Australian Security and Investments Commission v Rich* [2005] NSWCA 152 at [170] (*Rich*), where he said: "[a]n expert frequently draws on an entire body of experience which is not articulated and, is indeed so fundamental to his or her professionalism, that it is not able to be articulated".

78. However, inferences may only be drawn from acceptable evidence. Inferences cannot be used to create evidence: *Hevi Lift (PNG) Ltd v Etherington* [2005] NSWCA 42; *Conargo Shire Council v Quor* [2007] NSWWCCPD 245; *Rodger W Harrison and Peter L Siepen t/as Harrison and Siepen v Craig* [2014] NSWWCCPD 48 (*Craig*). Findings must be based on the evidence, or reasonable inferences open to be drawn from the evidence, not on the judge's knowledge (*Strinic v Singh* [2009] NSWCA 15 at [60]).

79. In *Luxton v Vines* [1952] HCA 19; (1952) 85 CLR 352 (*Luxton*), at 359, it was held in that:

> "[The element of causation would not be established] where it is 'quite impossible to reconstruct from any materials' the manner in which the accident occurred and where that 'can be done only by conjecture' but where 'a number of conjectures is open, equally plausible'".

80. In *Flounders v Millar* [2007] NSWCA 238 (*Flounders*), Ipp JA said at [35]:

> "…it remains for the plaintiff, relying on circumstantial evidence, to prove that the circumstances raise the more probable inference in favour of what is alleged. The circumstance
>
> es must do more than give rise to conflicting inferences of the equal degree of probability for plausibility. The choice between conflicting inferences must be more than a matter of conjecture. If the court is left to speculate about possibilities as to the cause of the injury, the plaintiff must fail".

81. I am comfortably satisfied that the following factual findings may be made on the lay evidence, corroborated by the histories taken by medical evidence reasonably contemporaneous to the events in question. Further, where expert evidence is relied upon to make findings of a medical nature, I will identify the basis upon which I so conclude:

> (a) As a result of two forceful blows to his left temple in the assault on 19 June 2014, the applicant suffered a probable traumatic brain injury. As the effects of that incident constitute an "injury" for the purpose of the legislation, I must identify the injurious event and the pathology associated with the injury: *Lyons v Master*

Builders Association of NSW Pty Ltd (2003) 25 NSWCCR 422. I base this finding upon an acceptance of the evidence of numerous lay witnesses in direct statements and as presented in the Brooksight Investigations report, corroborated on numerous occasions in histories taken by subsequent treating practitioners including Corrine Roberts, Dr Smith, Dr Bruce and others. This evidence establishes clear symptoms such as headaches, blurred vision, dizziness and "fuzziness" which Dr Fitzsimons accepts fits the conclusion that the applicant suffered, at the very least, a concussion in that assault, resulting in post-concussion syndrome. While corroborative medical records may add comfort to a finding, and in some cases be of significant weight, there is no requirement for corroboration in a civil case: *Chanaa v Zarour* [2011] NSWCA 199 at [86]. Subsequently, experts have assumed a state of affairs between the assault and the fall that is persuasively established by the lay evidence, and provide expert opinion supporting my conclusion.

(b) I find that the applicant suffered the injury, the pathology which was concussion, and continued to suffer from post-concussion syndrome up until the fall occurred some weeks later.

(c) I accept the opinion of Dr Fitzsimons that the applicant most probably suffered an epileptic fit causing him to fall. I further accept his conclusion that the fit was consistent with a post-traumatic fit, linked to the post-concussion syndrome from the assault. I also take Dr Fitzsimon's conclusion as to the cause of the axonal shearing discovered on the MRI scan after the fall as a correct statement of the task that I face. That is, having established that he suffered post-concussion syndrome from the assault, and as a result of that suffered the fall, it is not necessary to determine whether or not the axonal shearing was part of the pathology of the injury, or a consequence of the fall resulting from the injury. Either way, the condition is compensable. However, I note the expert conclusion that he was inclined to the view that given the deliberate forceful nature of the first injury it probably arose then with the subsequent epileptic fit occurring.

(d) I also accept Dr Fitzsimon's opinion, consistent with both toxicology reports, that the alcohol was unlikely to have played a part in the epileptic fit based on the usual delay of about 12 hours after ceasing drinking, and the amount consumed was not sufficient to be associated with the fit in any event.

82. It follows that I do not accept the respondent's submissions that there was no traumatic brain injury in the assault. While some the changes in demeanour and presentation may be consistent with psychological condition, it does not account for the vision difficulties, dizziness, headaches and other physical symptoms. It is the symptoms that I consider indicate the existence of brain trauma. However, it is not absolutely necessary for the applicant to establish a traumatic brain injury for the fall to result from the assault. If the applicant had suffered a lesser "head injury", the associated symptoms are comfortably established and their contribution to the form is accepted on the balance of probabilities.

83. Criticism of the language used by Dr Fitzsimons as being equivocal is not accepted. It is clear that the facts must be put together and the relevant conclusions be reached on the balance of probabilities. Dr Fitzsimons is clearly alive to the difference between scientific proof and the discharge of legal onus.

84. The occurrence of an epileptic fit as part of the post-concussion syndrome is accepted by the neurological evidence. The existence of faeces on the stairs indicates that the fit occurred either prior to the fall or immediately after the applicant fell. The applicant does not claim to experience ongoing epilepsy. The fact that there is only one epileptic fit is adequately explained on the evidence.

85. Mr Young's submission that an inference regarding a third scenario (that alcohol combined with the effects of the assault was a cause of the applicant's fall) is available is acknowledged. However, I disagree that this inference is of "equal degree of probability or plausibility" (*Flounders*). The assumptions underpinning the inference were available to all treating doctors and experts. None of them have offered the scenario as a plausible alternative. Clearly, all experts knew that alcohol had been consumed. Toxicologists are of the view that the likelihood that alcohol played a part in the fall was low. I consider for me to rely upon such an inference would not be available without expert consideration of the matter.

86. The same can be said for Mr Young's submission concerning possible fatigue.

SUMMARY

87. For the foregoing reasons I find that the injuries sustained by the applicant in a fall down stairs on 6 or 7 July 2014, resulted from the accepted work injury on 19 June 2014.