WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**830/20**
Applicant:	**Jake Sinitsky**
Respondent:	**Workpac Constructions Pty Ltd**
Date of Direction:	**13 May 2020**
Citation:	**[2020] NSWWCC 152**

The Commission determines:

Findings

1. The applicant's pre-injury average weekly earnings are:

    (a) $1,947.86 in the first 52 weeks; and

    (b) $1,398.02 after 52 weeks.

2. The applicant had no current work capacity from 24 November 2017 to 22 February 2018, current work capacity at $750 per week from 23 February 2018 to 4 March 2019 and no current work capacity from 5 March 2019 to date and continuing.

Orders

3. The respondent pays the applicant weekly compensation as follows:

    (a) $1850.47 per week pursuant to s 36(1) of the *Workers Compensation Act 1987* (1987 Act) from 24 November 2017 to 22 February 2018 based on no current work capacity;

    (b) $808.29 per week pursuant to s 37(3) of the 1987 Act from 23 February 2018 to 31 May 2018;

    (c) $1,100.47 per week pursuant to s 37(2) of the 1987 Act from 1 June 2018 to 31 August 2018;

    (d) $808.29 per week pursuant to s 37(3) of the 1987 Act from 1 September 2018 to 23 November 2018;

    (e) $368.42 per week pursuant to s 37(3) of the 1987 Act from 24 November 2018 to 4 March 2019;

    (f) $1,180.42 per week pursuant to s 37(1) of the 1987 Act from 5 March 2019 to date and continuing pursuant to s 37 of the 1987 Act based on no current work capacity.

4. The respondent has credit for previous payments of weekly compensation.

JOHN HARRIS
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 JOHN HARRIS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

Background

1. Mr Jake Sinitsky (the applicant) was employed by Workpac Constructions Pty Ltd (the respondent) and suffered a compensable injury on 24 November 2017.

2. This is a claim for weekly compensation from 24 November 2017 to date and continuing.

3. On 17 May 2019, Senior Arbitrator Bamber published reasons concerning the applicant's claim for surgery in respect of this injury.[1] The Senior Arbitrator relevantly ordered:

> "The surgery proposed by Dr Mark Ross in the form of removal of plates from the distal radius and arthroscopic debridement and neurectomy/ wrist denervation, and associated expenses, is reasonably necessary treatment as a result of injury to the right wrist in the course of the applicant's employment with the respondent on 24 November 2017."

4. The matter was listed for a telephone conference on 17 March 2020 when the only remaining issues were agreed as:

    (a) The calculation of the applicant's pre-injury average weekly earnings (PIAWE) noting that the applicant had concurrent employment with the Great Centrel Hotel; and

    (b) The extent of the applicant's capacity.

5. The matter was listed for an arbitration hearing on 2 April 2020. Mr Steiner of counsel appeared for the applicant and Mr Russell appeared for the respondent. The matter did not conclude on that day and I ordered written submissions.

6. The difficulty with the calculation of the applicant's PIAWE related to the fact that he was employed with the respondent for approximately 30 hours per week and had concurrent employment, paid in the form of free accomodation and food, at the Great Centrel Hotel.

7. Written submissions were filed by the parties generally in accordance with the timetable. The applicant's lawyers filed primary submissions. After the termination of their retainer, the applicant in person filed submissions in reply after being provided with an extended time period.

Evidence

8. The documentation admitted into evidence was:

    (a) Application; and

    (b) Reply.

9. There was no objection to any document and no application to adduce oral evidence.

[1] *Sinitsky v Workpac Constructions Pty Ltd* [2019] NSWWCC 175

CALCULATION OF PIAWE

Common submissions

10. The applicant stated that the "backgrounds facts not in contention"[2] were that:

    (a) Ordinary earnings based on 29.8 hours per week with the respondent were $839.39;

    (b) Allowances/overtime with the respondent were $549.84 per week;

    (c) Gross average weekly earnings from concurrent employment were $770 in exchange for services of 32.5 hours provided in the form of accomodation and food; and

    (d) The applicant has been in receipt of weekly compensation from the date of injury.

11. The respondent accepted the applicant's analysis of earnings with the respondent[3] and that the arrangement in the concurrent employment amounted to $770 per week.[4]

Submissions

12. The applicant referred to ss 44C, 44E and Item 8 of Schedule 3 of the *Workers Compensation Act 1987* (1987 Act). The applicant submitted that the free accomodation and food from the Great Centrel Hotel be treated as a fringe benefit and the value be calculated in accordance with s 44F, that is $770 x (1/ 1 - .47) totalling $1452.83.

13. The applicant provided a simple addition of the earnings with the respondent and the monetary value of the earnings with the Great Centrel Hotel to arrive at a combined figure of $2,842.04 per week.

14. The applicant provided an alternative calculation based on Item 8 of Schedule 3 of the 1987 Act by averaging the value of these earnings over 38 hours and adding overtime with the respondent for the first 52 weeks.

15. The respondent noted that the non-pecuniary benefits received in the concurrent employment do not relate to the applicant's employment with the respondent.[5] It however made submissions[6] based on the amended version to the 1987 Act and not the version in force as at the date of the applicant's injury.

16. The respondent accepted that the PIAWE over the first 52-week period was $2,159.21.[7] It submitted, without reference to figures, that the calculation had to be reduced after the initial 52-week period due to the fact that overtime and allowances were not included.[8]

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[2] Applicant's submissions, paragraph 1
[3] Respondent's submissions, paragraph 3
[4] Respondent's submissions, paragraph 6
[5] Respondent's submissions, paragraph 15
[6] Respondent's submissions, paragraphs 9 - 15
[7] Respondent's submissions, paragraph 18
[8] See s 44C of the 1987 Act

Reasons

17. The amendments to PIAWE and related provisions made by the *Workers Compensation Legislation Amendment Act 2018* do not apply to injuries received before 21 October 2019.[9] The respondent's submissions[10] referred to the legislation enacted for injuries on and after 21 October 2019 and do not apply to the applicant's injury.

18. Accordingly, references to the 1987 Act are to sections in force and saved by the transitional provisions for injuries occurring before 21 October 2019.

19. Section 44E relevantly provides:

> "1) Subject to this section, in relation to pre-injury average weekly earnings, the ***ordinary earnings*** of a worker in relation to a week during the relevant period are:
>
> (a) if the worker's base rate of pay is calculated on the basis of ordinary hours worked, the sum of the following amounts:
>
> (i) the worker's earnings calculated at that rate for ordinary hours in that week during which the worker worked or was on paid leave,
>
> (ii) amounts paid or payable as piece rates or commissions in respect of that week,
>
> (iii) the monetary value of non-pecuniary benefits provided in respect of that week, or
>
> (b) in any other case, the sum of the following amounts:
>
> (i) the actual earnings paid or payable to the worker in respect of that week,
>
> (ii) amounts paid or payable as piece rates or commissions in respect of that week,
>
> (iii) the monetary value of non-pecuniary benefits provided in respect of that week."

20. The applicant's submissions referred to Item 8 of Schedule 3 of the 1987 Act. That provision applies to a worker employed by two or more employers and provides:

> "The worker's pre-injury average weekly earnings are the worker's average ordinary earnings expressed as an amount per hour for all work carried out by the worker for all employers multiplied by:
>
> (a) the prescribed number of hours per week, or
> (b) the total of the worker's ordinary hours per week,
>
> whichever is the lesser."

[9] 1987 Act, Sch 6, Pt 21, cl 7.
[10] Respondent's submissions, paragraphs 10-14

21. The calculation of ordinary earnings includes the non-pecuniary benefit as defined and calculated pursuant to s 44F. Accepting the applicant's submission that the monetary value of all earnings be calculated in accordance with ss 44E and 44F, the meaning of "ordinary hours" as defined in Item 8 of Schedule 3 must be given application.

22. In the current circumstances the non-pecuniary benefit paid to the applicant in the form of free accomodation and food was in return for working an average of 32.5 hours with the Great Centrel Hotel. The benefit was not in addition to the payments made by the respondent and was the applicant's remuneration for the concurrent employment with the Great Centrel Hotel.

23. There is no inconsistency between ss 44C and 44E and Item 8 of Schedule 3. Section 44E provides that the monetary value of non-pecuniary benefits are included in the meaning of "ordinary earnings". However, as the applicant's ordinary earnings are derived from employment with two employers, the ordinary earnings are to be recalculated in accordance with Item 8 of Schedule 3, that is, an averaging to obtain the earnings for 38 hours.

24. The general provision for the calculation of "ordinary earnings" in s 44E must give way to the specific provision in Item 8 of Schedule 3 as to the application of prescribed hours where a worker is employed by two or more employers and working more than the prescribed hours: *Commissioner of Police v Eaton* [2013] HCA 2 at [21].

25. Whilst I have accepted the applicant's submission as to the calculation of the value of the provisions of accomodation and food by reference to s 44F, the total hours worked for both employers clearly exceed the number of "prescribed hours" in Item 8 of Schedule 3.

26. The alternative construction proposed by the applicant treated the earnings from the concurrent employment as payment for the hours worked.

27. I accept the applicant's alternative submission as to the value of the provision of accomodation and food based on the monetary value as provided by s 44F of the 1987 Act. However, Item 8 of Schedule 3 provides that where a worker is employed by two or more employers then the worker's "average ordinary earnings" is to be averaged over the prescribed number of hours. In that respect the applicant's alternative submission, which I accept, is that the prescribed number of hours is 38.

28. There was no dispute in the written submissions that the applicant's overtime and shift allowances were $549.84. Accordingly, the applicant is entitled to that additional sum for the first 52 weeks. I therefore treat the earnings with the concurrent employment on the basis as set out in the applicant's alternative submissions[11], that is ordinary earnings of $1398.02 per week and overtime/shift allowances of $549.84.

29. The respondent's concession of a greater figure[12] is based on the amended legislation applicable to injuries after 21 October 2019 and cannot be considered.

30. I otherwise observe that the respondent made no contrary submission for the correct figure for the post 52-week period. Accordingly, I accept the applicant's alternative submission that the PIAWE in the first 52 weeks is $1,947.86 and the amount of $1,398.02 after 52 weeks.

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[11] Applicant's submissions, paragraphs 11 - 12
[12] Respondent's submissions, paragraph 18

CAPACITY

Submissions

31. The applicant submitted that he was unable to engage in suitable employment or earn any income and had no current work capacity.

32. It was submitted that there is no evidence that the applicant was suffering from any incapacity from the previous right wrist injury and that any incapacity for employment is solely attributable to the work injury.

33. Somewhat inconsistently, the applicant submitted that he was at least partially incapacitated from the time of the injury in 2017 until three months after the surgery in 2019 and thereafter remained incapacitated as a result of both the physical condition and the psychological condition of secondary depression.[13]

34. The applicant referred to the certification from Dr Ivers and Dr Mergard, general practitioner. It was noted that Dr Ivers in reports dated 2 April 2019 and 12 November 2019 certified the applicant fit for "light or sedentary" work. Reference was also made to the opinion of Dr Lotz, psychiatrist that the applicant was suffering secondary depression as a result of injury.

35. The applicant submitted that he was certified fit for light or sedentary work but was unable to work as an electrician, especially as an apprentice, because the work required repetitive work involving the limbs.

36. The applicant was "a willing participant in a return to work program organised by the Respondent's insurer and he undertook a work-placement for 3 or 4 months in 2018, as an electrical trades assistant, however, he was unable to secure permanent employment." The applicant was therefore unable to perform suitable employment having regard to his age, education, skills and work experience.[14]

37. Further, the applicant's wrist injury has exposed him to "substantial risk of further injury if he returns to electrical /trades type work because if he sustains impact or experiences twisting forces on his right wrist, a further injury is highly likely".[15] It was therefore submitted that s 47 of the 1987 Act provided that the applicant was deemed to be incapacitated for employment of that kind.

38. The respondent submitted that there was a paucity of direct evidence from the applicant addressing his capabilities which might be assessed with reference to s 32A of the 1987 Act.[16]

39. The respondent referred to the report of Dr Ivers dated 2 April 2019[17] where the doctor opined that the applicant could undertake light or sedentary work. That opinion was confirmed in the doctor's supplementary report when he did not place a limit on the number of hours per week in such work.[18] Reference was also made to a variety of reports from Dr Mergard, general practitioner which noted a prior depressive condition and ongoing drug use which, he submitted, "ought to be considered in relation to assessments of capacity".[19]

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[13] Applicant's submissions, paragraph 18
[14] Applicant's submissions, paragraph 23.2
[15] Applicant's submissions, paragraph 23.3
[16] Respondent's submissions, paragraph 19
[17] Application, p 73
[18] Respondent's submissions, paragraph 27
[19] Respondent's submissions, paragraph 23

40. The respondent also referred to certificates of capacity in early 2019 certifying the applicant for suitable duties and the report of Dr Lotz that the applicant was working from June to September 2018 and since September 2018 was “looking for work”.[20]

41. The respondent submitted that from a physical perspective, the applicant was fit for full time work in suitable duties.[21] It was further submitted that the assessment of “total incapacity must be tempered with specific regard to the diagnosis in Axis 1 of Substance Abuse Disorder” and any formulation of capacity would suggest an ability to perform work, if not on a fulltime basis, then certainly on a part-time basis.

42. In reply, the applicant asserted that “the respondent made no request to the applicant to be assessed for his current functional capacity”. In a somewhat unclear submission, it was asserted in the absence of a “formal current functional capacity assessment” the “NSW workers compensation Act of 1987 should be adhered to”.[22]

43. The applicant referred to the opinion of Dr Lotz who stated that the applicant had no capacity for employment and that Dr Mergard “supports this claim”. Dr Mark Ross otherwise opined that the right-hand capacity was lifted to 10 kilograms.

Reasons

44. The applicant bears the onus of proof on the balance of probabilities.[23]

45. “Current work capacity” is defined in s 32A of the 1987 Act as “a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment”.

46. “Suitable employment” is defined in s 32A of the 1987 Act as “employment in work for which the worker is currently suited:

    (a) having regard to:

        (i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and
        (ii) the worker's age, education, skills and work experience, and
        (iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and
        (iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and
        (v) such other matters as the Workers Compensation Guidelines may specify, and

    (b) regardless of:

        (i) whether the work or the employment is available, and
        (ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and
        (iii) the nature of the worker's pre-injury employment, and
        (iv) the worker's place of residence.”

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[20] Respondent’s submissions, paragraphs 24-25
[21] Respondent’s submissions, paragraph 28
[22] Applicant’s submissions in Reply, paragraph 14
[23] *Nguyen v Cosmopolitan Homes (NSW) Pty Ltd* [2008] NSWCA 246 per McDougall J at [44]- [55], McColl and Bell JJA (as their Honours then were) agreeing; *Chen v State of New South Wales (No 2)* [2016] NSWCA 292 per Leeming JA at [33]-[34]; McColl JA agreeing at [1].

47. The relevant test is whether incapacity results from injury (s 33 of the 1987 Act). It is a basic principle that the injury does not have to be the sole cause of incapacity.

48. In a unanimous decision in *Calman v Commissioner of Police*[24] (*Calman*), the High Court stated:[25]

> "39. Whether incapacity results from injury is a question of fact. Upon the findings in this case, however, the answer to that question could admit of only one answer. As a matter of law, the Tribunal was bound to find that the incapacity of the appellant resulted from injury within the meaning of s 33 of the Workers Compensation Act. Although the incapacity would not have arisen but for the appellant being told that he was to be transferred, there would have been no incapacity but for the existence of his underlying anxiety disorder. The incident, which was the immediate cause of his incapacity, merely exacerbated the underlying anxiety disorder which continued to exist, notwithstanding that immediately before the incident it manifested no symptoms. In those circumstances, the injury was a contributing cause to the incapacity. As Jordan CJ pointed out in *Salisbury v Australian Iron and Steel Ltd* [20]:
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> > 'It is not necessary that the employment injury should be the sole cause of disability. It is sufficient if it is a contributing cause[21]. It may be the catalyst which precipitates disability in a medium of disease. But when the stage is reached at which the employment injury ceases to produce effects and could therefore no longer be a contributing cause to any incapacity which may then exist, the right to compensation ceases.'
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> 40. In the present case, the underlying anxiety disorder continued and was capable of producing serious effects if exacerbated or aggravated, as the Tribunal's findings showed. That being so, the Tribunal was bound to find as a matter of law[22] that the appellant's incapacity resulted from injury within the meaning of s 33 of the Workers Compensation Act."

49. *Calman* was referred to in *McCarthy v Department of Corrective Services*[26] when Roche DP made observations concerning the appropriate test on causation for establishing an entitlement to weekly compensation. In particular, the Deputy President stated:[27]

> "It is trite law that a loss can result from more than one cause (*ACQ Pty Ltd v Cook* [2009] HCA 28 at [25] and [27]; [2009] HCA 28; (2009) 83 ALJR 986). The authority of *Calman* is also instructive on this issue. The Court held (at [38], excluding footnotes):
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> Once the appellant established that his underlying anxiety disorder was an injury within the meaning of the Workers Compensation Act, he was entitled 'to compensation ... under [that] Act' upon proof that his total or partial incapacity for work resulted from that injury. The question then for the Tribunal was whether the appellant's incapacity was causally connected to the underlying anxiety disorder. It has long been settled that incapacity may result from an injury for the purposes of workers' compensation legislation even though the incapacity is also the product of other - even later - causes. Indeed, death or incapacity may result from a work injury even though the death or incapacity also results from a later,

[24] [1999] HCA 60; (1999) ALR 91
[25] at [39]-[40]
[26] [2010] NSWWCCPD 27
[27] at [148]-[149]

non-employment cause. Thus, in *Conkey & Sons Ltd v Miller*, Barwick CJ, with whose judgment Gibbs, Stephen, Jacobs and Murphy JJ agreed, held that it was open to the Workers' Compensation Commission to find from the medical evidence in that case 'that the death by reason of myocardial infarction when it did ultimately occur, 'resulted' from the work-caused injury of the first infarction, even if it could not be said that the final infarction was itself caused by work-caused injury."

50. The respondent's submissions refer to a prior drug and psychological condition and the applicant submitted that the work injury "solely" caused the work incapacity. The relevant question is whether the effects of the work injury materially contributed to the incapacity.

51. I agree with the respondent's submissions that the applicant's evidence did not address the matters in s 32A of the 1987 Act. However, relevant matters pertaining to the applicant's skills, education and experience are set out in the histories contained in the various medical reports. Given the manner in which the case was presented, it is necessary to set out the histories recorded by the doctors and the opinions in some detail.

52. The applicant was born in 1986 and asserts that in a statement dated 7 June 2019 that he has "no work capacity for any type of employment" due to his work injuries.[28] He asserted that he suffered from "night terrors" and was "mentally … not fit to make a coffee for [his] own breakfast".[29]

53. In December 2017, Dr Robin Diebold, Orthopaedic Surgeon, noted a marked irritable and stiff wrist.[30] In January 2018 Dr Diebold noted that the wrist may settle down in a couple of months when he may be fit for light duties.[31] In February 2018 the doctor noted further improvement.[32]

54. A certificate of capacity completed by Dr Ross and dated 23 March 2019 certified the applicant unfit for work from 23 March 2019 to 21 July 2019. It was noted that surgery was booked for surgery on 4 July 2019.[33]

55. A further certificate dated 3 July 2019 completed by Dr Ross certified the applicant unfit from 2 July 2019 to 16 July 2019.[34] The certificate referred to surgery on 2 July 2019.

56. Clinical notes of Dr Mergard dated 19 December 2018 recorded PTSD since the applicant's military days and a long-term battle with amphetamines with the development of severe depression following the work injury.[35]

57. A note dated 8 January 2019 referred to the applicant suffering a recent accident and being unfit for work due to major depression, left foot injury and right hand/wrist injury.[36]

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[28] Application, p 9
[29] Application, p 9
[30] Reply, p 40
[31] Reply, p 42
[32] Reply, p 48
[33] Application, p 89
[34] Application, p 92
[35] Application, p 96
[36] Application, p 99

58. On 15 January 2019, Dr Mergard recorded that the applicant was offered a new job "doing electronics" and was given a clearance for suitable duties at his request.[37]

59. A note dated 25 January 2019 referred to increasing pain following an examination with an insurance company doctor.[38]

60. Dr Mergard noted a lifting restriction of 2.5 kgs on 6 February 2019.[39] On 13 February 2019, he recorded that the "insurance at hosted employment wasn't able to accept him".[40]

61. On 5 March 2019, Dr Mergard diagnosed an adjustment disorder.[41] Subsequent consultations revealed a mood disorder, sleeping problems with ongoing methamphetamine use.[42] On 6 June 2019 Dr Mergard recorded that the applicant was "unfit for work based on depression ongoing".[43]

62. Dr Mergard provided certificates dated 15 January 2019[44] and 13 February 2019[45] stating that the applicant was fit for restricted duties.

63. On 5 March 2019, Dr Mergard certified that the applicant had no work capacity based on the right wrist injury and adjustment disorder/depression.[46] At that time the applicant was referred to Dr Joyce Arnold.[47]

64. Dr Mergard provided certificates dated 2 April 2019[48], 8 May 2019[49] and 6 June 2019[50] certifying the applicant unfit for any work due to psychological and physical symptoms.

65. In late 2018, Dr Subramaniam Purushothaman, Psychiatrist, diagnosed the applicant with major depressive disorder and substance abuse.[51]

66. Dr Joyce Arnold, Psychiatrist provided a report dated 7 June 2019 to the general practitioner, diagnosing the applicant with mood disorder, recurrence of major depression against a history of paranoid personality disorder and illicit drug use.[52]

67. Dr Robert Ivers, Orthopaedic Surgeon, provided a report dated 2 April 2019.[53] The doctor noted a background history that the applicant was a 33-year-old electrical and plaster worker for most of his life who was a member of the Royal Australian Navy from 2002 to 2004. He reported that the applicant was educated to year 10 and held a Certificate III as an electrical technician.[54]

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[37] Application, p 101
[38] Application, p 102
[39] Application, p 103
[40] Application, p 104
[41] Application, p 105
[42] Application, p 106
[43] Application, p 108
[44] Application, p 123
[45] Application, p 125
[46] Application, p 126
[47] Application, p 127
[48] Application, p 129
[49] Application, p 131
[50] Application, p 136
[51] Application, p 190
[52] Application, p 265
[53] Application, p 73
[54] Application, p 78

68. Dr Ivers noted that the applicant obtained "host employment as an electrical technician for two weeks about two months ago" performing restricted duties with lifting restrictions. The applicant was reported as saying "he coped with this work, though a position was not found for him".

69. Past medical history included a right wrist injury in 2015 from which the applicant underwent surgery involving open reduction and internal fixation of the distal radial fracture. The applicant sufficiently recovered such that he was performing his usual duties with full power.

70. The history of treatment following the subject work injury included the application of a brace, hand therapy and review by Dr Ross and Dr Ryan. The applicant underwent steroid injection into the wrist with no avail and complained of continuing pain. Dr Ross has recently recommended arthroscopic debridement of the wrist and removal of the metal work.

71. Current complaints included pain at rest on a level of 2 or 3 out of 10, increasing to level 10 when lifting objects above 10 kgs. The applicant stated that he had difficulty with "fine work using his right hand".

72. Dr Ivers diagnosed a forced rotation injury of the right wrist with aggravation of degenerative changes. The doctor opined that the applicant was not able to return to work of a heavy nature including his pre-injury duties but was fit for work of a light or sedentary nature such as electrical bench work.[55]

73. Dr Ivers provided a further report dated 12 November 2019.[56] The doctor noted a reasonable result following surgery and repeated his comments concerning capacity for lighter work.

74. Dr Trevor Lotz, Psychiatrist, was qualified by the applicant and provided a report dated 17 October 2019.[57] The doctor recorded a subsequent history of attending "film school" in December 2017 for three months and work at "J1 Led" from June to September 2018.

75. Dr Lotz noted a history of increasing illicit substance use since December 2017. Current psychological symptoms included feelings of helplessness, hopelessness and depression.[58]

76. Dr Lotz diagnosed a major depressive disorder resulting from the work injury. He opined that the applicant was "unable to hold employment" since the work accident although he noted that the applicant worked for three months with J1 Led. The doctor considered the applicant "had no capacity for employment with regard to his age, education, skills and work experience".

77. The doctor recommended that the applicant have psychological treatment which would assist in having some future capacity.

78. A functional capacity assessment report from Mr Hess dated 14 March 2018 noted psychological factors inhibiting a return to work and recommended a pain management program and psychological assessment.[59]

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[55] Application, p 80
[56] Application, p 295
[57] Application, p 287
[58] Application, p 289
[59] Reply, p 28

79. Dr Anthony Smith, Orthopaedic Surgeon, provided a report dated 12 February 2019.[60] The doctor noted a subsequent work history of 12 weeks employment with J1 Led doing selected duties on a full-time basis and recent “unpaid” work.

80. Based on this evidence, my conclusions regarding the applicant’s capacity for work is as follows.

81. I am satisfied that the applicant was unfit for his pre-injury duties at all times because those duties required heavy lifting. By reason of injury, the applicant is unable to perform those duties.

82. The applicant had an initial period of no current work capacity following the injury based on the opinion expressed by Dr Diebold. The condition steadily improved in accordance with the reports of Dr Diebold in early 2018 which established that there had been gradual improvement in the applicant’s symptoms.

83. I am satisfied that the applicant had a period of no current work capacity until 22 February 2018.

84. Based on Dr Diebold’s opinion on the slow improvement in the applicant’s condition, I am satisfied that the applicant had some capacity for work from around 22 February 2018.

85. I am not satisfied that the applicant had no current work capacity from 23 February 2018 until early 2019. During this period the applicant worked for a period of three months performing light duties work although it is unclear what remuneration he received during that three-month period. The circumstances that the applicant was in paid employment for approximately three months is taken from the histories in the medical reports and otherwise referred to in the applicant’s written submissions.

86. I do not accept that part of Dr Lotz’s opinion that the applicant had no current work capacity at all times given that this opinion is simply inconsistent with the fact that the applicant was employed for a period of approximately three months. I was not assisted by a statement from the applicant detailing the nature of this work and how much he was paid.

87. During this period, I am satisfied that the applicant had some capacity for lighter work as contained in the subsequent opinion from Dr Ivers. Given the absence of critical evidence that should have been led by the applicant such as the nature of the work that was undertaken, it is difficult to assess the extent of the incapacity. However, I am satisfied that during this period the applicant’s capacity for employment was of a lighter nature, and, given his skills and age, was in the order of $750 per week.

88. I accept the medical evidence, particularly the certification from Dr Mergard, that there was a deterioration in the applicant’s psychological condition in early 2019. That deterioration is clear from the clinical notes and the change in the certification issued by the general practitioner. Dr Ross also certified that the applicant had no work capacity around this time.

89. Whilst I accept the respondent’s submission that there were clear underlying psychological issues and illicit substance abuse, that does not detract from the clear medical opinion that there was a deterioration in the applicant’s psychological condition around early 2019 caused by the work injury.

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[60] Reply, p 34

90. The applicant does not need to establish that the work injury was the “sole” cause of incapacity. Consistent with the opinions of the psychiatrists and the general practitioner, I accept that in early 2019 the psychological condition was aggravated by the work injury.

91. By reason of both the applicant’s physical condition and deteriorating psychological condition, I accept that the applicant had no current work capacity since early 2019. In this respect I accept that part of Dr Lotz’s opinion, that the applicant then had no work capacity.

92. I note that Dr Lotz opined in September 2019 that the applicant should improve with appropriate medical treatment.

93. The applicant made an ancillary submission, set out at paragraph 37 herein, that he is deemed to be incapacitated for certain work due to the operation of s 47 of the 1987 Act. That submission was made in the absence of any evidence and is otherwise contrary to the opinion expressed by Dr Ivers that the applicant was fit for light sedentary work. That submission is rejected.

CONCLUSIONS

94. The applicant had no current work capacity from 24 November 2017 to 22 February 2018, current work capacity at $750 per week from 23 February 2018 to 4 March 2019 and no current work capacity since 5 March 2019.

95. The applicant’s PIAWE in the first 52 weeks is $1,947.86 and $1,398.02 thereafter.

96. The applicant is entitled to 95% of the PIAWE for the first 13 weeks and at 80% of the PIAWE thereafter, save for the period of approximately three months when the applicant was working at least 15 hours per week with J1 Led.

97. During the period of employment with J1 Led, the applicant’s entitlement increases to 95% of the PIAWE less $750 per week pursuant to s 37(2) of the 1987 Act. Based on the history in the reports[61] and the applicant’s concession in his submissions[62], I have estimated this three-month period to be from 1 June 2018 to 31 August 2018.

98. The findings and orders are set out in the Certificate of Determination.

[61] See Application p 292 and Reply p 35
[62] Applicant’s submissions, paragraph 23.2