



New South Wales

Personal Injury  
Commission

## CERTIFICATE OF DETERMINATION OF MEMBER

**CITATION:** **Stewart v State of New South Wales (NSW Police Force) [2021] NSWPIC 133**

**APPLICANT:** Jason Stewart

**RESPONDENT:** State of New South Wales (NSW Police Force)

**MEMBER:** Mr Paul Sweeney

**DATE OF DECISION:** 21 May 2021

**CATCHWORDS:** WORKERS COMPENSATION- Police officer paid weekly compensation in respect of an accepted psychological injury from 2010 to the present; claims a separate award of compensation in respect of an incapacity resulting from earlier physical injuries; assessment of compensation in accordance with the former section 40; *Held-* acceptance that but for injury the applicant would have been promoted to the rank of Detective Sergeant; consideration of principles in *Cordina Chicken Farms Pty Ltd v Thoa Hong Le* and *J C Ludowici & Sons Ltd v Cutri*; application of the section 40 discretion to reduce the applicant's entitlement to weekly compensation for physical injury by 75% during total incapacity caused by psychiatric injury; no reduction during concurrent partial incapacities as respondent did not press argument at the arbitration hearing; order that the parties bring in short minutes reflecting the Commission's findings.

### DETERMINATIONS MADE:

1. The applicant suffered injury arising out of and in the course of employment as follows:
  - injury to his low back and neck December 2001;
  - injury to his left ankle on April 2002;
  - injury to his low back 14 March 2005, and
  - injury to his right knee on 16 February 2006.
2. As a result of these injuries the applicant was partially incapacitated for work from 1

- July 2010 to date and continuing.
3. Prior to 3 April 2019 the applicant had a dependent wife and two children and thereafter a dependent wife and one dependent child.
  4. The applicant would have been promoted to the rank of detective sergeant by 1 July 2010 but for injury.
  5. The applicant's probable weekly earnings for the purposes of section 40(2)(a) of the *Workers Compensation Act 1987* (the 1987 act) is the loaded rate applicable to that position from time to time plus an above award payment of 10%.
  6. The applicant's ability to earn in some suitable employment from time to time for the purposes of section 40(2)(b) of the 1987 Act is as follows:
    - the loaded earnings of a detective senior constable from 1 July 2010 to 30 June 2016;
    - the sum of \$1,500 from 1 July 2016 to 14 January 2021, and
    - the sum of \$1,709.40 from 15 January 2021 to date and continuing.
  7. In the exercise of the discretion granted by section 40 of the 1987 Act reduce the compensation payable in the period between 1 July 2010 and 30 June 2016 by 75%.
  8. Liberty to apply in respect of the above calculations.
  9. If it has not already been done applicant to lodge a copy of his statement dated 7 April 2021 with the Commission under cover of an Application to Admit Late Documents.
  10. Order the parties to lodge short minutes setting out the agreed award to which the applicant is entitled on the basis of the above findings bearing in mind that the compensation under the award, the weekly payment the applicant is receiving in respect of his psychological injury and his ability to earn/actual earnings must not exceed his probable weekly earnings but

for the injury.

## STATEMENT OF REASONS

### INTRODUCTION

1. Jason Stewart (the applicant) was appointed as a police officer in 1995. He was discharged from the NSW Police Force (the respondent) on medical grounds on 15 April 2010. At that time he was a detective senior constable.
2. The respondent accepted that the medical condition for which the applicant was discharged constituted a psychological injury for the purposes of the *Workers Compensation Act 1987* (the 1987 Act) and paid him weekly payments of compensation. These payments have continued to the present.
3. As a result of his psychological injury, the applicant was unable to work for several years. In 2016, he returned to work as a general assistant with the Parramatta Eels Football Club. He was made redundant from this position on 11 November 2020. In January 2021, he was employed by the NSW Department of Education as a youth outreach worker at the Ajuga School at Glenfield.

### PROCEDURE BEFORE THE COMMISSION

4. By these proceedings, the applicant claims an award for weekly compensation from 1 July 2010 to date and continuing. He alleges that the incapacity which entitles him to an award of compensation results from physical injuries to his spine, right knee and left ankle in the course of his employment on 14 March 2005, 28 December 2001, 8 April 2002 and 16 February 2006.
5. The applicant alleges that if he had remained in the notional employment of the respondent, he would have been promoted to detective sergeant in 2010 and to the rank of inspector in 2015. His probable weekly earnings but for injury should be ascertained by reference to the earnings of police officers of those ranks in the notional employment of the respondent.
6. The respondent did not specifically dispute any aspect of this claim by serving a s 78 Notice. On 6 January 2021, the respondent's solicitors informed the applicant's solicitors by letter that they were now instructed to act for the respondent. A Reply was filed in due course. It did not, however, specify any particular grounds of dispute.
7. When the matter came on for telephone conference on 5 March 2021, Mr Bourke, solicitor represented the applicant and Mr Jeppesen, solicitor represented the respondent. I was informed that the parties were in the midst of settlement negotiations. There was, however, general discussion of the criteria for two awards, or two discrete payments of weekly compensation, articulated by Deputy President Roche in *Cordina Chicken Farms Pty Ltd v Thoa Hong Le* [2008] NSWCCPD 125 (24 October 2008) (*Cordina Chicken*). Mr Bourke also referred me to a recent decision of Arbitrator Edwards which considered *Cordina, Gary Smurthwaite v State of New South Wales* [2019] NSWCC 214 (17 June 2019) (*Smurthwaite*).
8. By its Reply, the respondent adduced no evidence in respect of any of the issues which arose from the applicant's claim or the evidence attached to the Application to Resolve a Dispute (the Application). At the telephone conference, it did not seek leave to adduce evidence on any material issue.
9. When the matter came on for conciliation and arbitration on 13 April 2021, Mr Hammond, of counsel, represented the applicant and Mr Gaitanis, of counsel, represented the respondent. The matter was heard over the telephone.

10. During conciliation I was informed by counsel that the parties were unable to reach a mutually satisfactory resolution of their dispute. I am satisfied that the parties, who were represented by experienced lawyers, had ample opportunity to consider settlement.
11. At the commencement of the hearing, Mr Hammond pointed out that the respondent had not lodged a s 78 Notice and that much of the applicant's case was, therefore, undisputed. That is probably not an entirely accurate characterisation of the matters raised at the telephone conference. Nonetheless, it is true that the respondent had not sought to specifically raise issues. Rather, it had generally relied upon the pre-conditions for two awards set out by Deputy President Roche in *Cordina Chicken*.
12. As the applicant could point to no prejudice, I gave the respondent leave to raise the following factual issues:
  - (a) whether the applicant would have been promoted to a detective inspector in 2015 or at all;
  - (b) the extent of the applicant's ability to earn by reason of his physical injuries, and
  - (c) the manner in which the s 40 discretion should be exercised in the circumstances of the case.
13. In my opinion these issues largely fall within the categories of issues raised by *Cordina Chicken* and were clearly telegraphed as being in dispute at the telephone conference.
14. As both counsel addressed in general terms on issues arising from s 40 of the 1987 Act, at the conclusion of the submissions I directed the parties to lodge a further schedule setting out their assertions as to the applicant's probable weekly earnings but for injury and his actual earnings/ability to earn but for injury.
15. In response to this Direction, the respondent lodged documents from the applicant's "Transfer/Promotions File" on 30 April 2021, which recorded circumstances relevant to his promotion in the Police Force in 2004. Based on this material, the respondent submitted that the applicant would not have attained the rank of sergeant if he had remained a police officer. Unsurprisingly, the applicant objected to this evidence.
16. At a further telephone conference on 7 May 2021, at which each party was represented by his solicitor, I ruled that paragraphs 6, 7 and 11 of the additional submissions made by the respondent and the annexures to those submissions should not be received in evidence. My Direction of 13 April 2021 was not intended to elicit further evidence from the parties but to address the monetary consequences of their arguments.
17. More importantly, the assertion made by the respondent in its submission dated 30 April 2021 was totally inconsistent with the submission made by counsel for the respondent at the arbitration hearing. At that time, Mr Gaitanis had conceded that the applicant was entitled to an award of compensation for his physical injuries from the date of his medical discharge and that the evidence established on the balance of probabilities that he would have been promoted to the rank of sergeant at about that time. Thus, the additional evidence sought to be tendered from the Promotion/Transfer File could only have been received if the respondent sought leave to resile from the submission made at the arbitration hearing and the applicant had been permitted to call further evidence addressing the issue.
18. In circumstances where the respondent had deliberately chosen not to adduce any evidence on any material issues raised in the case throughout the course of the matter, it would be absurd to permit further evidence to be adduced several weeks after the close of argument and after I had commenced to write these reasons. It is possible that the tender of the file may have some bearing on the inferences that might otherwise be drawn from the

respondent's failure to adduce evidence. As this was not argued, however, it is unnecessary to dwell on the point.

19. While I have admitted the balance of the wages schedule prepared by the respondent, I find it incomprehensible as it does not appear to address s 40 of the 1987 Act.

## **EVIDENCE**

20. The documents in evidence before the Commission are as follows:

- (a) Application and the documents attached;
- (b) Reply and the documents attached;
- (c) Application to Admit Late Documents dated 7 April 2021 containing an additional statement of the applicant;
- (d) Supplementary statement of the applicant dated 7 April 2021, and
- (e) Applications to Admit Late Documents dated 18 April 2021 and 30 April 2021 containing earnings calculations save for paragraphs 6, 7 and 11 of the respondent's additional submission which has been excluded from the evidence.

21. Other than these paragraphs, there was no objection to the documentation referred to above. There was no application at the arbitration hearing to adduce further oral or written evidence.

## **SUBMISSIONS**

22. The submissions of the parties are recorded and I do not propose to reiterate those submissions in these short reasons. I record, however, the general thrust of counsel's arguments.
23. Mr Hammond submitted that the applicant's probable weekly earnings but for injury in respect of his physical injuries should be calculated by reference to the earnings of a detective sergeant to 2015 and a detective inspector thereafter. His ability to earn should be determined by reference to the part-time work he had performed after leaving the police force. Alternatively, it should be determined by reference to the base or "loaded" earnings of a senior constable without allowance for overtime, shift work, or other benefits.
24. Mr Hammond argued that it was clear from the medical evidence and the payment of compensation by the respondent that the applicant had a discrete and significant incapacity caused by his physical injuries before the onset of psychiatric condition. Reduction of compensation by exercise of the s 40 discretion during the period of the applicant's probable total incapacity due to psychiatric injury should be attenuated by reason of the severity of the physical condition and the magnitude of the applicant's earnings.
25. By the wages schedule lodged in accordance with my Direction, the applicant submitted that the actual earnings during the period prior to his employment at the Parramatta Eels Football Club should reflect the base earnings of a non-operational detective constable working four days a week.
26. Mr Hammond submitted that the applicant was a witness of truth and that his uncontradicted evidence should be accepted without reservation. As I understand that submission, I should prefer the applicant's evidence that his capacity resulting from his physical injury limits him to four days a week in semi-sedentary work to that of Dr Anderson who opined that he was fit for full time work with restrictions.

27. Mr Gaitanis submitted that the evidence in respect of the applicant's promotion to inspector was vague and unsatisfactory. He submitted that there was no medical evidence which supported the applicant's contention that he was only fit for part-time sedentary/clerical/administrative work. He submitted that during the applicant's total incapacity by reason of his psychological injury, the Commission should exercise its discretion to significantly reduce the applicant's entitlement to an award of compensation in respect of his physical injuries bearing in mind the fact that he was in receipt of weekly payments for his psychological injury.
28. Before attempting to resolve the issues in dispute, it is necessary to set out the applicant's evidence and the evidence of the lay witnesses in the applicant's case. What follows is not intended to be a comprehensive survey of the evidence. Rather, I set out the salient points of the evidence so that the way in which the Commission has determined the matter can be more readily understood.

### **The applicant**

29. The evidence of the applicant is primarily contained in his statements dated 1 December 2020, 11 March 2021 and 7 April 2021. Each of these statements contain paragraphs which recite his opinion in respect of issues in dispute including his promotion to the position of sergeant and the position of detective inspector had he remained a police officer. These paragraphs were not objected to at the arbitration hearing. The applicant's opinion in respect of promotion, however, is of doubtful probative value and is of little weight.
30. By his initial statement, the applicant says that he was appointed by the respondent in 1995 at 24 years of age. He recounts his experience as a detective at suburban police stations in Sydney and at the Tactical Operations Unit of the State Protection Group. He specifically refers to the following injuries:
  - (a) on 28 December 2001 he was involved in a motor vehicle incident when he suffered injuries to his back and neck;
  - (b) on 8 April 2002 he twisted his left ankle during the course of carrying out a normal patrol;
  - (c) on 14 March 2005 he injured his back while lifting a tip bag for a training session with the State Protection Group;
  - (d) on 2 November 2005 he injured his neck when a car that he was driving hit a wall, and
  - (e) on 16 February 2006 he injured his right knee jumping off a fence while pursuing offenders.
31. The applicant says that over the years following these incidents he experienced neck and back pain while "wrestling, pushing, throwing, rolling, climbing and grasping and holding activities during the course of my duties as a Police Officer".
32. He also says that he has aggravated his right knee injury on numerous occasions since 16 February 2006 but "always tried to live with the pain and discomfort as best I can". He says he has continued to experience constant aches in his neck and back. He has also experienced "flare-up" of his ankle pain which he has treated by pain relief or modifying his activities.
33. In respect of his right knee, he says that:

“My right knee has caused the greatest impact on my life. Prior to my knee injury I used to run most days. Since then I have not had any long runs and I have had to start new exercise routines to accommodate my knee.

The pain I feel in my knee is now fairly constant and it does impact on what I do on a daily basis. Whilst I still try to walk most days there is never ever a time when my knee does not cause pain and discomfort. It is now just something I try my best to put up with.”

34. The applicant says that by 2006 he was on permanently restricted duties due to his physical injuries being largely confined to station duties. While so confined he was rendered unfit for work by PTSD .

35. The applicant says that he continues to experience symptoms of PTSD including ongoing nightmares and an inability to concentrate. He says that he remains hypervigilant, suffers from low motivation, and irritability, and sees a psychiatrist every 12 weeks. He continues:

“My PTSD certainly makes me totally unemployable as a police officer due to the constant triggering of symptoms that would occur if I had to carry out the usual duties of a General Duties Officer.

However, I think I would have the (psychological) ability to work in other areas where I could avoid stressful triggers.”

36. The applicant says that he commenced work as a general assistant at the Parramatta Leagues Club in 2016. Subsequently his role extended to “wellbeing”. He says that he earned \$40,000 to \$50,000 a year depending on the changing nature of this role.

37. The applicant relates a plethora of physical disabilities arising from his injuries. He says that he is only able to stand for “approximately 30 minutes”, sitting is painful, his right knee injury precludes him from performing a large range of physical activities including on rough and uneven ground.

38. The applicant says that he undertakes daily exercises. Nonetheless, by reason of his back, neck and right knee injuries, he is excluded from lifting, carrying, typing and pulling/pushing activities and other duties. He says that obtaining “any sort of employment other than my current employment with the Parramatta Rugby League Club would be very difficult.”

39. The applicant then addresses a large number of job classifications that he asserts he would be unable to perform by reason of his physical disabilities or his psychological disabilities or a combination of both. They include security consultant, insurance investigator, law clerk, social security assessor, liaison officer, occupational health and safety officer, training and development professional, facilities manager, sales representative/shop assistant, customer service operator, nursing home attendant, supermarket/night fill, factory work and cleaner.

40. The applicant says that he has seen a number of his former colleagues go on to become sergeants, inspectors and superintendents:

“There is no doubt that my knee has significant effect on my ability to get promoted, particularly when I was also struggling with neck problems, ankle problems and lower back issues. I probably could have done virtually any role if only I had one physical injury because I would have been able to carry it but having the combination of 4 physical injuries made it difficult to carrying out the full range of General Duties required of most non-desk/admin/ managerial positions within the Police Force.

The emerging PTSD would have prevented me working in any non-operational or non-physical role.”

41. The applicant says that he would have “aced the sergeant’s exam” and would have proceeded to postings as sergeant by 2010 “at the absolute latest” He continues:

“I am very confident that within 4-5 years’ experience under my belt as a detective sergeant I would have been eligible for promotion to detective inspector”.

The applicant opines that he has no doubt that he would have been able to secure one of the many increased positions as detective inspector by 2014/2015/2016 “at the absolute latest”.

42. The applicant also addresses a report of Dr Anderson, an occupational physician qualified by his solicitor, dated 1 September 2020. Contrary to the opinion of Dr Anderson, he states that he would not be able to work in a full-time administrative position because his back would not cope with a lot of sitting. He states that he would not be able to resume work in the plumbing industry in a managerial role as he had not worked in the industry for 25 years. He continues:

“Working in admin full-time, with absolutely no pulling, pushing, bending, twisting or lifting, really is a bit of a pipedream. Not only would I have a lot of trouble with my back, sitting all day, and my neck typing all day or sitting on the phone all day but my knee really doesn’t cope with sitting down holding my knee in a flexed position for too long”.

43. He says that if his employer at the time, Parramatta Football Club offered him an administrative role, he would not be able to do it. He states that even if he received compensation for his physical injuries he would still be “well short of the earnings he would have made if I had been able to stay in the police force”.

44. By his statement dated 11 March 2021, the applicant states that he obtained employment with the Ajuga School operated by the NSW Department of Education in January 2021. He states that he was offered a commencing salary of \$88,889 per year based on a 35-hour week. He continues:

“The combination of walking around on my injured knee every day and the difficulties which PTSD brings combine .... that I really don’t feel comfortable working more than 4 days per week”.

45. He says, after being offered the job he spoke to the Headmaster at Ajuga and agreed that he would work 4 days each week. This translates into a weekly income of \$1,366.93. He says the job is not a “particularly physical one” and he is able to sit and move around when the need arises.

46. By a supplementary statement dated 7 April 2021, he says that in the financial year ending 30 June 2021 his earnings excluding a redundancy payment paid to him by the Parramatta Football Club would amount to \$52,645.86 comprising \$22,573.40 from the Parramatta Football Club and \$30,072.46 from the Ajuga School.

47. The applicant says that “it is my firm conviction” that he would have been promoted to sergeant no later than 1 July 2010 and to inspector no later than 1 July 2015, if he had not suffered injuries in the employ of the respondent.

### **Chief Inspector Scott Glynn**

48. Inspector Glynn joined the respondent in 1995. He is a friend and work colleague of the applicant. He successfully gained promotion to sergeant in 2004, to senior sergeant in 2007 and to inspector in 2009. He states:

“I am well aware of the requirements to become promoted to sergeant, senior sergeant and that of inspector.”

49. Inspector Glynn states that he worked with the applicant for a period of 5 years at the Merrylands Police Station and formed the view that the applicant was extremely capable and had the “skills, ability and temperament to move into a leadership role”. He continues:

“In my professional opinion Jason had the maturity and experience to perform the role of sergeant or even inspector within the NSW Police.

It is my opinion that Jason would most likely have been able to obtain the rank of sergeant by about 2008 at the latest if he hadn't suffered a combination of a serious knee injury and then PTSD. I am confident in saying this as promotion was something that we had discussed on a regular basis. Jason, while focused on progressing through the ranks wished to prove himself in his chosen career path in the specialist area of criminal investigation and the tactical operations unit, before seeking to promote himself into a management position.

It is my opinion that after approximately 5 years in the role as sergeant he likely would have been able to seek promotion to the rank of inspector.”

50. Inspector Glynn also states that with the exception of commissioned officers it is the almost unvarying experience for police officers to receive 10% above their salary from a combination of overtime, shift penalties and other activities.

#### **Simon Last**

51. Simon Last is a detective sergeant who joined the respondent in 1996. He applied and was promoted to detective sergeant in 2012. He states:

“The promotion process involved a computer-based examination, a written application process. If your application was successful, you would proceed to an assessment phase where you were judged on several different tasks associated with the role of a sergeant. From this you were given a score from the entire promotion process being ranked on to a list of other officers seeking promotion.”

52. Sergeant Last states that he worked with the applicant at the Merrylands Police Station between 1997 and 2000 and at Castle Hill Detectives between 2006 to 2009. He considered him a competent and capable police officer. He continues:

“In my professional opinion Jason had the maturity, leadership skills and experience to perform the role of sergeant or even inspector in the NSW Police.

I am confident that Jason would have been promoted to the rank of sergeant by about 2010 at the latest, if he hadn't suffered a combination of a serious knee injury and then PTSD.”

53. He says that his assessment of the applicant's knee injury was that it would have been sufficient by itself to prevent the applicant from carrying out operational roles for the respondent. That meant that he would have been unable to continue with the Tactical Operations Unit or State Protection Group after that.

54. Sergeant Last also states that:

“Every single police officer that has any sort of ambition can usually earn another 10% on top of their later salary from a combination of shift penalties, a reasonably basic amount of overtime, doing special events ... or other events or activities”.

## Kevin Fitzgerald

55. Mr Fitzgerald is also a work colleague of the applicant. He joined the police force in August 1975 and retired in September 2010. He applied for promotion in 1990 to the position of detective sergeant. He says that he retired in 2010 as a detective sergeant with over 35 years overall police experience.

56. Mr Fitzgerald said that he also observed the applicant to be a high performing officer with significant investigative and interpersonal skills. He states that he was a more than competent and capable police officer. He continues:

“In my professional opinion Jason had the maturity and experience to perform the role of sergeant or even above had he continued his service with the NSW Police. His qualifications and experience placed him in an enviable position where few would have been in the position to display greater merit in a competitive field.”

57. He says that he has no doubt that the applicant would have attained the rank of sergeant had he been injury-free. He says that he is aware that the applicant’s knee injury was serious enough for him to be taken off active duty and confined to station duties during the time that he supervised him. He says that he does not know whether that information is correct but, if it is, the knee injury would have been sufficient to prevent the applicant from carrying out operational roles within the police force.

## Matt Browne

58. Mr Browne is a retired senior constable of police. He joined the respondent in 1997 and resigned from the police force in 2011.

59. Mr Browne worked with the applicant at the Holroyd Local Area Command and at the State Protection Group for many periods. He says the applicant had high rates of arrest, high rates of conviction and “Street Smarts”:

“In my professional opinion Jason had what it takes to be promoted to sergeant had he continued his service with the NSW Police.

He had good communication skills, was well respected by his superior officers and well-liked within the various commands.

I believe Jason had the skills and qualities to be promoted to detective sergeant, if not detective inspector.”

60. He expressed the opinion that the applicant would have easily been able to pass the sergeant’s exam. He also says that the non-commissioned police officers generally earned 10% above the award rate.

## DISCUSSION AND FINDINGS

61. As the applicant’s entitlement to compensation in respect of his physical injuries is for partial incapacity, it is to be assessed in accordance with the weekly payment’s provisions of the 1987 Act as enacted immediately before the introduction of the new weekly payments regime by the *Workers Compensation Legislation Amendment Act 2012*. At that time, s 40 was as follows:

“(1) **Entitlement** The weekly payment of compensation to an injured worker in respect of any period of partial incapacity for work is to be an amount not exceeding the reduction in the worker’s weekly earnings, but is to bear such relation to the amount of that reduction as may appear proper in the circumstances of the case.

**Note—**

Section 35 limits the maximum weekly payment of compensation under this section.

**(2) Calculation of reduction in earnings of worker—general**

The reduction in the worker's weekly earnings is (except as provided by this section) the difference between:

- (a) the weekly amount which the worker would probably have been earning as a worker but for the injury and had the worker continued to be employed in the same or some comparable employment, and
- (b) the average weekly amount that the worker is earning or would be able to earn in some suitable employment, from time to time after the injury.

**Note—**

The difference between (a) and (b) is the maximum amount of compensation payable to the worker. It is not a limit on the combined total of compensation and earnings."

**Two awards**

62. In *Cordina Chicken*, Deputy President Roche discussed the circumstances in which a worker is entitled to two awards of weekly compensation against the one employer and how a member of the Commission should ascertain the compensation in such a case. After an extensive survey of the case law in NSW and in the United Kingdom, including an analysis of *Bieglemann v Eglo Engineering Pty Ltd* [1979] 2 NSWLR 522 (*Bieglemann*), *Sydney City Council v Ince* (1989) 16 NSWLR 690 (*Ince*) and *Holmes v Civil & Civic Pty Ltd* (1972) SR (NSW) 583 (*Holmes*), the Deputy President stated at [59] and [60] the following:

"The effect of the above authorities may be summarised as follows:

- (a) a worker who has received two injuries that have resulted in two separate and distinct incapacities may, in the appropriate case, supported by relevant evidence, recover two concurrent awards of weekly compensation regardless of whether the second injury has resulted in total or partial incapacity (*Doudie, Holmes and Ince*);
- (b) the two injuries do not have to be received with different employers in order for the worker to be entitled to two awards (*Ince* at 701D and *Holmes* at 592);
- (c) whilst a finding of a total incapacity, subsequent to a finding of partial incapacity, will not eliminate the liability for the initial partial incapacity, the calculation of compensation payable under section 40 for the initial partial incapacity calls for the application of the discretion in section 40(1) (*Holmes* at 592) in determining the amount of compensation that is 'proper in the circumstances of the case' (*Australian Wire Industries Pty Ltd v Nicholson* (1985) 1 NSWCCR 50). The proper application of the discretion in such a case (where the subsequent incapacity is total) may well result in the award for the initial partial incapacity being reduced to a nominal amount because the subsequent total incapacity will have eliminated the workers ability to earn in any event. The exercise of the discretion may also be relevant in a situation where the subsequent incapacity is partial, but the precise impact on the initial partial incapacity will depend on the facts of the particular case, and
- (d) an entitlement to two awards is subject to the following limit on the quantum of compensation that may be awarded. The combined compensation under the two

awards, plus the worker's residual earning capacity, must not exceed the amount the worker would have earned had he or she remained uninjured (*Alcan Australia Ltd v Jordan* (1995) 11 NSWCCR 475 at 482E ('*Jordan*'). This does not offend section 40(5) of the 1987 Act, which restricts the compensation payable for 'any period of partial incapacity' as a result of an injury (see section 33 of the 1987 Act) but says nothing about the quantum of compensation payable in respect of multiple awards resulting from multiple injuries.

The determination of whether two injuries have resulted in separate and distinct incapacities is not done in the abstract, but is done by looking at the labour market in which the worker is working or may reasonably be expected to work or to look for work. It will be a question of fact in each case and it should not be assumed that it will be the norm for two injuries to result in two incapacities."

### **Incapacity resulting from psychological injury**

63. The evidence establishes that the applicant was totally incapacitated for work by reason of his psychological injury until he commenced employment with the Parramatta Leagues Club in 2016. He was assessed by Dr Baker, a psychiatrist and Approved Medical Specialist, for the purpose of resolving a permanent impairment dispute on 18 October 2013. Dr Baker diagnosed the applicant as suffering from post-traumatic stress disorder. Dr Baker recorded that the applicant had not worked since leaving the respondent in 2010. Two different rehabilitation agencies had tried to find work for him, but he was not successful and he had been told that "he had too many symptoms to be able to work again".

64. Dr Baker completed a Psychiatric Impairment Rating Scale form (PIRS). In the category of Employability, he recorded:

"Mr Stewart stated that he did not participate in any voluntary work or role as he was unable to organise himself and assist as he had in the past."

Dr Baker recorded that he was "unlikely to be able to work more than 1 or 2 days, his capacity to re-train was restricted and his attendance at work would be erratic due to his psychiatric symptoms".

65. The applicant's employability was also diminished by his inability to perform functions in the other PIRS categories. He was unable to travel outside his local area alone. He was only able to travel to the assessment with Dr Baker with the assistance of his wife. In respect of concentration, he had "read nothing" since the cessation of his employment. He could not follow a game of NRL. He had been unable to concentrate to complete two rehabilitation attempts in the past as he found the tasks too complex.

66. It is unlikely, in my opinion, that the applicant would have been able to perform any real job on the open labour market given the findings of Dr Baker. While there may have been some gradual improvement in the following years, the first indication in the evidence that the applicant had a capacity to work in selected employment by reason of his psychological injury is his commencement of work with the Parramatta Eels Football Club. I have arbitrarily assigned 1 July 2016 as the commencement date of that employment. I do not understand either party to suggest that the applicant was other than totally incapacitated for employment prior to that date.

### **Probable weekly earnings but for physical injuries**

#### **Promotion**

67. In order to determine the applicant's probable weekly earnings but for his physical injuries for the purposes of the former s 40 of the 1987 Act, it is necessary to determine the rank he

would have obtained should he have remained notionally employed by the respondent after 2010.

68. It is unnecessary to consider all the evidence in respect of the applicant's progression from senior constable to sergeant during this period as the respondent conceded at the arbitration hearing that but for injury the applicant would have been promoted to the rank of sergeant by the date of the commencement of the claim for weekly payments in respect of physical injuries. On the evidence, that concession was properly made as there is a good deal of lay evidence from members and former members of the NSW Police Force that the applicant would have obtained the position of detective sergeant.
69. Chief Inspector Scott Glynn who joined the Force in 1995 expressed the opinion that the applicant had the maturity and experience to perform the role of sergeant. There is other evidence to the same effect. There is no countervailing evidence.
70. Evidence in respect of promotion to the role of inspector is not as persuasive. Inspector Scot Glynn states that after 5 years in the role of sergeant the applicant would "likely have been able to seek promotion to the rank of inspector". He does not state that the applicant would have been appointed to that role. The other witnesses who addressed the issue of promotion in the applicant's case do not state that the applicant would have obtained the rank of inspector, although each of them expresses confidence that he would have obtained the rank of sergeant.
71. While the evidence addresses the merit-based system of promotion to sergeant, there is meagre evidence on the prerequisites for appointment as an inspector. Thus, it is difficult to draw an inference that the applicant would have achieved the criteria for promotion to the rank of inspector.
72. It is not evident from the evidence of Detective Sergeant Last that all sergeants progressed to the position of inspector. Detective Sergeant Last obtained his current rank in 2012. Eight years later, at the time of signing his statement, he had not progressed beyond that rank. Of course, there may be reasons other than merit why an officer does not progress. These may include lack of desire for advancement, retirement, supervening illness or simply bad luck.
73. Surprisingly, the respondent has adduced no evidence at all on the issue of promotion in circumstances where it undoubtedly had access to a great deal of statistical material relevant to the prospects of an officer's promotion as well as the applicant's personnel file. It did not attempt to adduce evidence of the latter until after the conclusion of the proceedings. Its failure to adduce evidence of the former obviously makes the applicant's path to proof on the balance of probability on this issue easier. On the other hand, it is still necessary for the applicant to adduce sufficient evidence for a finding to be made on the balance of probabilities. I am not persuaded that the evidence of the applicant's lay witnesses achieves this standard.
74. Certainly, the applicant states that it is his "firm conviction" that he would have been promoted to the rank of inspector no later than 2015. That is merely his opinion, however, and while an opinion may be admissible evidence in the Commission, it can have little probative value in the circumstances of this case.
75. Accordingly, I am satisfied on the balance of probabilities that should he have remained in the notional employment of the respondent, the applicant would have obtained the rank of detective sergeant by 1 July 2010. He would have received the annual salary increments available progressing to the high point of this rank.

#### **Ability to earn in some suitable employment**

76. It is the applicant's evidence that his physical injuries interfere with all aspects of his life and would curtail or diminish his capacity to perform many jobs on the open labour market

including sedentary and semi-sedentary work. Curiously, given the significant complaints in respect of his spine and right knee, there is no evidence that he has sought treatment or undergone investigations in the decade since he ceased work with the respondent.

77. On the other hand, the applicant has entered into complying agreements with the respondent in respect of each of the body parts which it is accepted he injured in the course of his employment with the respondent. The fact of the complying agreements probably suggests a degree of permanency in respect of each of the injuries. Certainly, it is open to the Commission to draw that inference in the absence of evidence to the contrary. I should add that I do not understand the respondent to dispute that the applicant has experienced continuing symptoms in his back, neck, left ankle and right knee. In the absence of evidence on the issue, it is not open to it to contest the issue.
78. There seems little doubt that the applicant suffered a significant injury to his right knee in 2006. Following the injury of 16 February 2006, the applicant was referred to Dr Michael Johnson, an orthopaedic surgeon, who diagnosed an osteochondritic lesion in the medial femoral condyle. He undertook arthroscopic treatment of this lesion in the knee.
79. Subsequent to the surgery, the applicant saw Dr Jun Nagamori, another orthopaedic surgeon who specialises in the treatment of knee injuries, on 7 September 2006. Dr Nagamori recorded that:

“Jason’s current symptoms are minimal and only noticeable after extensive exercise. He is able to perform all activities of daily living without pain and is able to sit for long periods with only minor discomfort. He is able to manage stairs with only minor difficulty and is able to jog on treadmills”.

Dr Nagamori indicated that he would not consider further surgical intervention “unless his knee becomes problematic”.

80. On 23 May 2008, the applicant saw Dr Raymond Wallace, an orthopaedic surgeon, at the request of his then solicitors, Taylor & Scott. Dr Wallace expressed the opinion that the applicant had suffered intra-articular chondral damage at the right knee as a result of the work injury. He expressed the opinion that it would require operative intervention in the form of arthroscopic debridement at the joint “within the next 5 years”. Otherwise, his rather gloomy prognosis was that the applicant would develop premature osteoarthritic degeneration of the right knee, which would eventually necessitate a total right knee replacement. In respect of work, he said this:

“Mr Stewart remains unfit to return to his pre-injury duties at work as a tactical operations unit police officer. He would not be fit for activities requiring repetitive bending, squatting, crouching or kneeling at his right knee, sitting or standing in one position for prolonged periods, repetitive lifting above 10 kilos, working in confined spaces, at heights or on ladders or prolonged periods of walking on uneven ground or stair climbing.

He is currently fit to continue work at full-time light duties with due consideration given to his restrictions on his activities as detailed above.”

81. On 19 November 2008, Dr Nagamori saw the applicant again at the request of his general practitioner, Dr Hung. He recorded that the applicant had returned to work “with some restriction in his activities”. He recorded the following:

“He has also returned to quite high levels of physical activity including cycling up to 50km on weekends along with training and boxing. His current symptoms include activity-related aching which has changed little recently. There is occasional aching at night which may awake him. He is no longer able to push a lawnmower down an incline and has not returned to running. There is occasional medial knee pain.”

On examination, Dr Nagamori found that there was no effusion and a full range of movement at the knee. He noted that the ligaments were stable and quadriceps bulk was excellent. He elicited some patellofemoral crepitus and some mild joint line tenderness.

82. Dr Nagamori expressed the opinion that the applicant had returned to relatively high levels of function and further chondral grafting was not likely to improve his condition. He thought that he should continue with further non-operative management. He was to review the applicant again if his level of function decreased.

83. There is then a significant gap in the applicant's medical record in respect of his physical injuries until 1 September 2020, when he saw Dr Tim Anderson, an occupational physician at the request of his present solicitors. The doctor had no up-to-date radiology or other investigations in respect of the applicant's injuries. On examination, he elicited complaints of pain in the applicant's neck and back, but no neurological signs to suggest disc pathology. In respect of the applicant's knee, he recorded the following:

"There was pain and tenderness over the anterior joint-line of the right knee. There was a lot of crepitus. There was no swelling or retropatellar tenderness. The ligaments were firm."

84. Dr Anderson thought that the applicant suffered an osteochondral defect of the knee which was "gradually deteriorating". He expressed the opinion that the applicant had suffered strains of the left ankle, cervical spine, and lumbar spine but offered no real explanation for the longevity of the symptoms in the applicant's spine.

85. In respect of capacity, he expressed the following opinion:

"Mr Stewart is very definitely not fit for physically arduous activities of the type he was doing in the State Protection Group. He would, however, be quite easily fit to work on normal hours in an office-based setting, provided he had the opportunity of altering his postural position as he felt the need."

86. He expanded on this opinion in answer to a series of questions posed by the solicitors. He responded that the applicant could not run, chase and wrestle with felons and his ability to move rapidly on his feet was compromised by his right knee and left ankle injuries. He continued:

"Nevertheless, he would (quite easily) be able to work in an administrative field. This could easily have been for the police or any other organisation. The only proviso for this would be that he should have the opportunity of being able to alter his postural position whenever he felt the need".

87. In conclusion, Dr Anderson expressed the following opinion:

"The only restrictions are to avoid any occupation which necessitates heavy lifting, frequent lifting, holding himself in a fixed postural position, pulling, pushing, frequent bending and twisting. If these factors are avoided (in other words, if he is working in an office-based occupation), then he would be able to work on full-hours of the day and full days of the week provided he has the opportunity of altering his postural position as he feels the need."

As the applicant did not earn between 2010 and 2016, It is necessary for the Commission to make findings on the balance of probabilities as to the applicant's theoretical career path assuming he had not suffered a psychiatric injury. This is not a case where it is appropriate to look to the applicant's actual earnings in assessing the worker's post injury earning capacity. As Kirby P (Sheller and Handley J JA agreeing) said in *J C Ludowici & Sons Ltd v J C Ludowici & Sons Ltd v Cutri* 1992 8 NSWCCR 219 (28 May 1992) at 236:

“The amount that the worker ‘is earning’ will be the best measure of that capacity unless it is shown that what is earned is an inadequate reflection of the ability to earn. In that event only the alternative measure is substituted.”

88. The fact that the applicant did not earn at all for a period of six years is not a reflection of his diminished capacity to earn by reason of his physical injuries. His earnings thereafter reflect both his physical and his psychiatric incapacity, although for reasons that I will address below his duties at his most recent employment at the Ajuga School may be a true reflection of his physical capacity since the injury.
89. In the absence of any contemporaneous medical evidence or certification in respect of physical capacity, conclusions in respect of the effect of his physical injuries on his employment between 2010 and 2016 must involve a degree of speculation. It is apparent from the brief review of the specialist medical evidence above that Dr Wallace was extremely pessimistic in respect of the prognosis of the applicant’s knee. He thought that it would restrict him significantly in respect of physical activities and result in the need for further operative intervention.
90. At least in respect of the need for treatment, the opinion of Dr Wallace does not appear to be borne out by subsequent events. Dr Nagamori expressed a guarded but more optimistic view of the applicant’s prognosis. He recorded that the applicant was able to engage in a fair range of vigorous activities: a relatively “high level of function”. He thought that the applicant should be reviewed if his condition deteriorated. As far as I am aware, the applicant has not sought further specialist opinion in respect of the condition of his knee.
91. The applicant has argued for three alternative career trajectories in his submission. First, that had he not suffered a supervening psychiatric injury, he would have ceased employment as a police officer by reason of his physical injuries and obtained employment similar in nature and remuneration that at the Parramatta Eels Football Club. Secondly, that he would have remained in the Police Force but not progressed beyond the rank of senior constable and not been able to earn above his loaded salary. The third argument involves the same assumptions but with the qualification that he would only have been able to work four days each week.
92. The respondent’s submissions also assumed that the applicant would have ceased to be a police officer between 2010 and 2020 as it submitted that the applicant’s evidence that he could only work four days each week at the Ajuga School should not be accepted and that his earnings in full-time employment were a proper reflection of his earning capacity. It was not suggested that I should project the earnings of a police constable beyond 2016 in determining what the applicant would earn in suitable employment.
93. There is little doubt in my mind that the applicant could have performed many of the duties of a detective constable if he had not been injured. The last report of Dr Nagamori records that the applicant was undertaking physical activities consistent with a significant physical capacity. On the other hand, it is evident that the applicant may not have been able to perform critical aspects of his role including arresting offenders where mobility is an imperative. Whether this would have resulted in a medical discharge on physical grounds is difficult to determine on the present evidence.
94. Guided by the submissions of the respondent, I have concluded, rather arbitrarily, that the applicant would have continued in the employ of the respondent as a largely deskbound senior constable until 30 June 2016. Thereafter, his inability to perform all aspects of police work would have resulted in his discharge or resignation. In reaching this conclusion I am adopting the approach of both parties to the applicant’s theoretical employment after 2016.
95. The applicant asserts that he would only be able to work four days a week in semi-sedentary work. That self-assessment is not consistent with the Dr Nagamori’s examination in 2008.

More importantly, it is not consistent with the evidence of the only medical practitioner who has commented on this issue in the last decade. Dr Anderson is an occupational physician who is skilled in assessing physical capacity. I prefer his evidence on issue of the applicant's employability. In my opinion, at all material times the applicant was not precluded from working five days per week in semi-sedentary work by his physical injuries.

96. I do not believe that the earnings from his employment at the Parramatta Eels Football Club in 2016 properly reflect his capacity to earn by reason of his physical injuries. That employment was obtained at the time that the applicant was in the process of partial recovery from his significant psychological injury. In my opinion, the evidence suggests that the applicant's capacity from 1 July 2016 was that of a man who was capable of working in semi-sedentary work. The work the applicant subsequently obtained for the Department of Education, where the wage is commensurate with moderately complex clerical/administrative work is an appropriate reflection of his capacity to earn. The lay evidence suggests that the applicant had extensive skills in his roles as a police officer which would permit him to perform many roles within the administrative or clerical spheres in government or in the private sector. Of course, some allowance must be made to reflect differing wage rates in 2016 and the possible temporary unavailability of such work.
97. I appreciate that there are jobs within this category that the applicant may not be able to perform by reason of his psychiatric condition. But he receives compensation for that injury. My enquiry is to determine whether he has a discrete incapacity by reason of his physical injuries.

#### **Discretion**

98. At the arbitration hearing, both counsel addressed the exercise of the s 40 discretion. Mr Gaitanis argued for a swingeing reduction of the applicant's entitlement to compensation. Mr Hammond argued that it should be modest in the circumstances of the case.
99. During argument I put to Mr Gatanis that the applicant's entitlement to weekly compensation should be reduced by the exercise of the s 40 discretion during the total incapacity caused by his psychiatric injury but not thereafter. Mr Gatanis accepted this proposition and did not submit that the difference between the applicant's probable weekly earnings but for injury and his ability to earn should be reduced by the exercise of the discretion beyond the period of total incapacity. On rereading *Cordina Chicken*, I doubt whether the approach I suggested is correct. Nonetheless, as the respondent made no submission that the applicant's weekly payments after he found work should be reduced in the exercise of the discretion, it would be unfair to make such a reduction as the applicant has not had the opportunity to address the issue.
100. In my opinion, the difference between the applicant's probable weekly earnings but for injury and his ability to earn in some suitable employment by reason of his physical injury must be further reduced to reflect what is proper in the circumstances of this case for the reasons given by DP Roche in *Cordina Chicken*. The applicant's total incapacity as a result of his psychiatric injury completely eliminated his ability to work between 2010 and 2016. The determination of the applicant's probable weekly earnings and his ability to earn in this period is totally fictitious. He would not have been earning, he would not have been promoted, and he would have suffered no monetary loss by reason of his physical injury. The purpose of the discretion is to inject an element of reality into the assessment. It permits the Commission to award compensation which more readily reflects the financial "injury" sustained by the worker as a result of his incapacity.
101. In *Cordina Chicken* the learned Deputy President suggested that a supervening payment for total incapacity may reduce an award for partial incapacity based on an earlier injury to a nominal figure. It is difficult to envisage any circumstance which might call for a greater reduction between probable weekly earnings for injury and the earnings in suitable

employment than the existence of a concurrent total incapacity during a period of partial incapacity. The reduction of the compensation payable is not punitive. Rather, it enables the Commission to approximate the worker's actual loss thus injecting an element of fairness in the outcome. I propose to reduce the difference between the applicant's probable weekly earnings but for his physical injury and what he could earn in suitable employment between 2010 and 2016 by 75%.

102. I have found it difficult to calculate the award on the information provided by the parties. I propose to make the following findings:

- (a) The applicant suffered injury arising out of and in the course of employment as follows:
  - injury to his low back and neck December 2001;
  - injury to his left ankle on April 2002;
  - injury to his low back 14 March 2005, and
  - injury to his right knee on 16 February 2006.
- (b) As a result of these injuries the applicant was partially incapacitated for work from 1 July 2010 date continuing.
- (c) Prior to 3 April 2019 the applicant had a dependent wife and two children and thereafter a dependent wife and one dependent child.
- (d) The applicant would have been promoted to the rank of detective sergeant by 1 July 2010 but for injury.
- (e) The applicant's probable weekly earnings for the purposes of s 40(2)(a) of the 1987 Act is the loaded rate applicable to that position from time to time plus an additional 10%.
- (f) The applicant's ability to earn in some suitable employment from time to time for the purposes of s 40(2)(b) of the 1987 Act is as follows:
  - the loaded earnings of a detective senior constable from 1 July 2010 to 30 June 2016;
  - the sum of \$1,500 from 1 July 2016 to 14 January 2020, and
  - the sum of \$1,709.40 from 15 January 2020 to date and continuing.
- (g) In the exercise of the discretion granted by s 40 of the 1987 Act reduce the compensation payable being the difference between the probable weekly earnings and the ability to earn in the period between 1 July 2010 and 30 June 2016 by 75%.
- (h) Liberty to apply in respect of the above periods or calculations.

103. I order the parties to lodge short minutes setting out the agreed award to which the applicant is entitled bearing in mind that the compensation under the award, the weekly payment the applicant is receiving in respect of his psychological injury and his ability to earn/actual earnings must not exceed his probable we earnings (*Jordan*).