CITATION:	*Khail v RTA and Contitech* [2023] NTWHC 4
PARTIES:	*Sayed Khail* v *RTA Gove Pty Ltd* *And* *Contitech Australia Pty Ltd*
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	WORK HEALTH
FILE NO(s):	2020-02625-LC
DELIVERED ON:	31 March 2023
DELIVERED AT:	Darwin
HEARING DATE(s):	1 – 9 September 2022 14 and 18 November 2022
DECISION OF:	Judge Fong Lim

CATCHWORDS:

Work Health - Notice of Cancellation- Psychological Sequelae – Post traumatic stress disorder - Most profitable employment

Return to Work Act 1986 (NT)

Laminex Group Ltd v Joanne Claire Catford [2021] NTSC 92
Newton v Masonic Homes Inc [2009] NTSC 51
Lee v MacMahon Contractors Pty Ltd (2018) 41 NTLR 168
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28
Corbett v Northern Territory of Australia [2015] NTSC 45

REPRESENTATION:

Counsel:

Worker:	Mr Doyle
First Employer:	Mr W Roper SC
Second Employer:	Mr McConnell SC

Solicitors:

Worker:	Tindall Gask Bentley
First Employer:	Minter Ellison
Second Employer:	Hunt and Hunt

Decision category classification	A
Decision ID number	2023 NTWHC 4
Number of paragraphs:	188

IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 2020-02625-LC

BETWEEN:

Sayed Khail

Worker

AND:

RTA Gove Pty Ltd

First Employer

Contitech Australia Pty Ltd

Second Employer

REASONS FOR DECISION

(Delivered 31 March 2023)

JUDGE Fong Lim

1. Mr Khail ("the Worker") suffered an injury to his back on 5 September 2019 while in the employment of the Second Employer ("Contitech"). At the time of the injury, Contitech had contracted with the First Employer ("RTA") to provide belt splicing services at the Gove mine site.

2. The back injury occurred when the Worker and co-Worker were pulling 80-100 kilograms of rubber belt off the back of a Ute, and the Worker felt a sharp pain to the left hand side of his back which radiated down through his buttocks and left leg. His claim for compensation for that back injury was accepted by RTA.

3. After his back injury, the Worker was flown to Mackay to undertake light duties in the office of Contitech and to be closer to services for treatment on his back. On 19 November 2019, while undertaking light duties at the Mackay office, the Worker was subjected to inappropriate behaviour by his supervisor which he claims caused him a mental injury and he has not worked since that date. The Worker's claim for mental injury was originally accepted by Contitech with the proviso that they were accepting a claim for an aggravation of the Worker's post-traumatic stress disorder ("PTSD") but not his pre-existing PTSD nor for any psychological sequelae, for example adjustment disorder and depression and anxiety, arising out of the original back injury.

4. On 22 May 2020 RTA served a Notice pursuant to section 69 of the *Return to Work Act* ("the Act") upon the Worker cancelling his benefits. That Notice was supported by a certificate of Dr Phillips. The Doctor certified the Worker was no longer incapacitated for work arising out of his back injury. That Notice was quickly followed by a letter and a section 69 Notice from Contitech on 22 July 2020 cancelling the Worker's benefits attributable to his psychiatric claim.

5. The Worker has appealed both section 69 Notices and claims to continue to be totally incapacitated for work in relation to both his back injury, a psychological/psychiatric sequelae and in the alternative a psychiatric injury arising out the incident on 19 November 2019.

Issues

6. The issues raised on the pleadings are:

    a. Is the section 69 notice served by RTA valid and effective?

    b. Was the Notice served by Contitech valid and effective?

    c. Does the Worker's back injury continue to cause an incapacity to work?

    d. Did the Worker's back injury lead to and adjustment disorder or PTSD?

    e. Does the psychological sequelae arising from the back injury result in the Worker continuing to be totally incapacitated for work?

    f. Did the incident on 19 November 2019 cause the Worker's PTSD or aggravate his pre existing PTSD?

    g. If the Worker continues to be incapacitated for work what is his most profitable employment and does he have a limited or any ability to earn?

Background

7. The Worker was born in war-torn Afghanistan and among other traumas he saw his father's body after he was shot by the Taliban in front of his house. The Worker fled the country when he was 17 years old travelling through Pakistan, Malaysia and Indonesia finally making his way to Australia by boat. It took him three attempts by boat from Indonesia before he was successful in reaching Australia. He was detained at the Christmas Island, Port Hedland and the Baxter detention centres over a period of four years. He obtained his release in Perth and immediately commenced employment.

8. Before his back injury the Worker had worked as a belt splicer and rubber technician working on industrial conveyor belts mainly in the mining industry, obtaining work mostly through labour hire companies. Leading up to his present claim, the Worker has had other claims arising out of work injuries and an assault in 2014. From 2014 to the present day, the Worker has consulted with many doctors and psychologists with varying opinions and treatment regimens for his physical injury and mental health condition.

Evidence

9. The Court received a trial book of three volumes which consisted of the pleadings, medical reports relied upon by the parties, medical notes, psychologist's notes, hospital and clinical notes, and other documents relating to the Worker's claim for compensation for his previous injuries. The Worker gave oral evidence and Drs Hundertmark, Cook, Spear, Tavasoli, Ng, Slinger and Sahoo as well as psychologist Ms Kate Elliott were all made available for cross examination on their notes and reports. The Court also heard evidence from Ms Zenman in support of the RTA's counterclaim that the Worker, even if suffering any incapacity to earn, has a most profitable employment which results in him having no loss of earning capacity.

Medical Evidence

10. The Court received reports from several medical witnesses and allied health professionals and some of those witnesses were called to give oral evidence. The evidence addressed the physical injury and the mental injury. The witnesses were a mixture of treating doctors and those who saw the Worker for the purposes of a medico–legal reports. The Court was also referred to medical notes of the Worker's past attendances on different medical practices in relation to his past claims for compensation regarding different incidences and injuries over some years.

11. **Dr Cook,** the Worker's GP has been treating the Worker since December of 2019. He opines the Worker has continuing pain from his back injury and is presently not able to return to work because of his back injury and mental health issues. Dr Cook started to treat the Worker for an adjustment disorder with mixed anxiety and depression.[1] He also certified the Worker as suffering PTSD[2] and continues to treat him for that condition in concert with his treating psychiatrist. In his reports Dr Cook states the Worker is deeply affected by the incident on 19 November 2019 and that his current mental health issues were due to the work incident.

12. In his notes and his oral evidence, Dr Cook describes the Worker as a difficult and demanding patient expecting a lot of the doctor's time, nonetheless he consistently supported the Worker in his claim that his present mental health issues, PTSD, was brought on by the incident on 19 November 2019. He assessed the Worker's mental health as having deteriorated since that date compounded by the fact of his intermittent homelessness and the ongoing litigation.[3]

13. Of note Dr Cook recorded that for a period over March to May 2020, the Worker had been regularly requesting Dr Cook for a certification that he was totally and permanently disabled for the purposes of getting access to his superannuation. The doctor refused because he was not of the opinion that the Worker was permanently disabled[4] and wasn't prepared to complete the form untruthfully. On 15 April 2020, Dr Cook discussed with the Worker alternative work at which stage the worker expressed he couldn't do any work because of his "mental issues".

14. Dr Cook deferred to specialist orthopaedic surgeon and psychiatrists in their diagnoses of the Worker's conditions.

15. Dr Cook remains hopeful that once the Court proceedings are complete the Worker will be able to return to work in some form. The doctor encouraged the Worker to consider other work on several occasions accepting that return to work with the Employer may not be an option and the Worker met those suggestions with a negative response.

Physical Injury

16. **Dr Slinger** is an orthopaedic surgeon who saw the Worker on 16 June 2020 for a medico-legal report. The doctor's view was the Worker's description of his symptoms was consistent with the injury as described and his presentation at the time of the examination. His diagnosis was that the Worker had a "soft tissue injury, musculoligamentous in nature to the lumbar spine".[5]

17. The doctor noted no radiculopathy, pain, weakness or numbness, due to a nerve compression in the spine.

[1] See page 66 of trial book Dr Cook's report of 7 January 2020.
[2] See trial book page 71 Dr Cook's medical certificate for Centrelink dated 10 November 2020.
[3] See trial book page 73.
[4] See trial book pages 298-316 – Dr Cook's notes.
[5] See page 135 trial book Dr Slinger's report of 17 June 2020.

18. He expected the Worker to improve but noted because of the lapse of time and the continued symptoms the prognosis of improvement was compromised. He accepted the Worker as authentic in his presentation and although he found him unsuitable for work as a belt slicer he accepted he had some capacity to work in particular a car park attendant as long as he could sit and stand at his discretion.

19. **Dr Phillips** is a consultant orthopaedic surgeon who assessed the Worker by video conference on 15 April 2020. He had viewed the CT and MRI scans of the Worker's spine and agreed that he had an acute disc protrusion.[6] He also accepted the Worker to be genuine in his presentation of pain, however opined that the expected prognosis for such an acute disc protrusion was "resolution".[7] It was suggested by Dr Phillips that there were significant psychosocial issues which have led to the Worker developing "fear avoidance behaviour" although he did accept that was not his area of expertise.

20. In his report of 22 April 2020 in answer to the question "is he totally or partially incapacitated for work as a result of the injury?", Dr Phillips answers "in my opinion he is partially incapacitated" but that a precise assessment was difficult because of the "associated psychological issues." Previously in the report Dr Phillips opines:

> "I believe he is physically fit to return to the workforce and that he needs to understand pushing through some pain barriers is necessary."

21. He then goes on to say that he would expect an increasing capacity to undertake all physical activities but realistically did not believe that was ever going to happen.[8]

22. In a conversation with the solicitors on 1 May 2020, Dr Phillips confirmed his view that he believed that Worker was physically fit for work[9] and then on 6 May 2020, Dr Phillips signed the certificate which was relied upon by the RTA to cease the Worker's weekly benefits. The Worker submitted that certificate did not reflect that which was set out in the report and therefore the section 69 notice must be invalid and the Worker's payments restored to him.

23. **Ms Sanja Zenman** is an occupational therapist who was tasked by RTA to assess the Worker's capacity to undertake work. She was referred to all of the medical reports which were in existence at the time of her assessment. After a functional assessment of the Worker, Ms Zenman opined subject to the resolution of his psychiatric condition he had the capacity to work as a carpark attendant on a full time basis earning $1,024 per week.

24. **Dr Bowles** is a consultant occupational physician who examined the Worker on 18 February 2022 and had the opinion that there was no evidence of a continuing physical restriction in the Worker's back even though he reported pain. The doctor opined that the pain reported was more a result of biopsychosocial factors rather than a physical injury. He intimated that the compensation environment encourages the Worker to remain injured rather than be proactive in getting back to work.[10]

[6] See trial book page 157 Dr Phillips report of 15 April 2021.
[7] See page 157 of the Trial book.
[8] See page 158 of the Trial book.
[9] See page 160 of Trial Book – notes of conversation with Dr Phillips (supplemental report).
[10] See pages 224 & 225 of the Trial book, Dr Bowles report of 18th February 2022.

Mental State

25. **Dr Tavasoli** is the Worker's treating psychiatrist who has been treating him since the referral from the Worker's general practitioner Dr Cook on 22 May 2020. Upon the initial consultation he diagnosed the Worker's presentation as consistent with PTSD.[11] He observed the Worker to be "fixated on the idea that he can never return to work"[12]. Dr Tavasoli suggested that the fixation of the Worker was based in his distrust of others and having to work with other people.

26. In his report of 12 August 2020,[13] Dr Tavasoli opined the "main precipitating factor for Mr Khail's PTSD should be considered as the workplace harassment and bullying". He was of the view that the history of trauma in Afghanistan, detention centres, bullying in other workplaces and the assault in 2014 all contributed to the Worker's vulnerability and predisposition to a more severe episode of PTSD following workplace harassment.

27. On 11 of December 2020, Dr Tavasoli wrote a letter to Centrelink in support of the Worker's application for disability pension on the bases that the Worker was continuing to suffer from debilitating symptoms of PTSD.[14]

28. Dr Tavasoli continues to be of the view that the Worker is still suffering from severe PTSD and remains totally incapacitated to return to work in the foreseeable future.

29. **Dr Mander** is a consultant psychiatrist whose report of 20 February 2019 was tendered by consent and the Doctor was not required for cross-examination. Dr Mander saw the Worker on 5 of February 2019 (nine months before the incident on 19 November 2019) for the purpose of assessing the Worker's mental state arising from bullying on site for a previous employer which culminated in the Worker being threatened. Dr Mander opined that although the Worker had reported being a "bit anxious with occasional shaking",[15] avoidant of people, a bit depressed and feeling tired thinking he should not be at work, the Worker did not have a diagnosable psychiatric condition. He assessed the Worker as having "low level psychiatric problems for many years"[16] and concluded there was no impairment for work.

30. Dr Mander's opinion of prior low level psychiatric disorders does not accord with evidence that the Worker had previously been treated for acute episodes of PTSD by medication and a previous suicide attempt while in detention.[17]

31. **Ms Bale** is a clinical psychologist who consulted with the Worker over early 2020 through to about mid 2020[18] at the recommendation of Dr Cook. She reported that the Worker was very distrustful at first and required a lot of work to get him to trust her enough to create a therapeutic relationship. She was puzzled by his presentation and deferred to a psychiatrist for a diagnosis before she was willing to suggest treatment.[19] After several consultations Ms Bale produced a report of 10 February 2020[20] in which she suggested the Worker may be responding to internal stimuli and may require in-patient care. She was the first person to suggest the Worker may have been suffering some psychotic symptoms. In March of 2020,

[11] See page 78 of Trial book Dr Tavasoli's report of the 22nd May 2020.
[12] See note 4.
[13] See page 85 of the Trial book.
[14] See page 88 of Trial Book.
[15] See page 105 of the Trial book.
[16] See page 107 of the Trial Book.
[17] See Dr Doucas 6 November 2014 diagnosed "major depression and anxiety" and "post-traumatic stress disorder" pages 247 and 390 trial book, Dr Lutton 9 April 2021 reported having seen the worker in 2009 and diagnosed "chronic post-traumatic stress disorder" page 481A and B of the Trial Book.
[18] See Trial Book 490 - 545 clinical notes and reports of Ms Bale.
[19] See Trial Book 490 report of the 7th January 2020.
[20] Trial Book page 497.

Ms Bale provided a further report which mentioned the Worker's use of recreational drugs, and after that report their relationship broke down because of the Worker's aggressive behaviour towards Ms Bale.

32. **Dr Adegboye** was the Worker's treating psychiatrist from January 2020, and he provided a report to Dr Cook on 30 March 2021.[21] He treated the Worker for PTSD with major depressive disorder and was in agreement with Ms Bale that in-patient care should be considered. Dr Adegboye's relationship with the Worker broke down as well because of the Worker's mistrust of the doctor.

33. **Dr Spear** is a consultant psychiatrist who saw the Worker on 16 January 2020 for the purpose of a medico-legal report for Contitech. Dr Spear confirmed the reported symptoms the Worker was suffering were consistent with PTSD[22]. At that time the Worker reported he was motivated to return to work but had no specific goal except to say he would not return to work for the employer. The Doctor was certain that the symptoms described by the Worker fit him into the DSM-5 diagnosis for PTSD. He opined that while the Worker has had previous incidences of PTSD and those episodes had resolved within six months, which was not the case for the Worker this time. He was of the view that there had been an aggravation of the Worker's PTSD caused by the incident of 19 November 2019 but that had not yet resolved.

34. In his report of 26 March 2020, Dr Spear recommended the cessation of the use of any sedation medications and increase in regular psychotherapy,[23] which he expected would assist the Worker's return to full time work at an alternate employer by the end of 2020.

35. **Dr Ng** is a consultant psychiatrist who saw the Worker on 27 January 2021 for the purpose of a medico–legal report. The doctor agreed with Dr Spear that while the Worker previously had episodes of PTSD, those episodes had resolved and the present episode was a "relapse" rather than a "recurrence" of the condition. He opined that there was "no significant pre-existing and well established PTSD[24]. He based his observation on the belief the Worker had not previously had treatment for the condition and he had been able to work in the 10 years before the incident in November 2019. Dr Ng's statement that the Worker had not previously been treated for PTSD is incorrect,[25] and that premise upon which he bases his opinion is flawed.

36. Unlike Dr Spear, Dr Ng recommended continued use of antidepressants and a minor tranquilizer. He was of the view that both the back injury and PTSD contributed to the Worker's total incapacity to work.

37. Dr Ng disagreed with Dr Hundertmark's and Dr Sahoo's point of view that the Worker was describing his symptoms as if he was reading from a textbook. Dr Ng did not suspect the Worker as being contrived. He emphasised the Worker's ability to work for 10 years prior to 19 November 2019 incident as an indication that his PTSD while present was dormant until triggered by the physical injury and consequent bullying in November of 2019.

38. **Ms Kate Elliott** is the Worker's treating psychologist who began consulting with him shortly before the incident on 19 November 2019. He started consulting with her because of his low mood during his recovery from his back injury. In his initial consultation with her he described crying all the time, irritated by noises and was complaining about others at work treating him badly calling him "Sayed" and not "Jack" as he preferred. She agreed there were no references to racism or bullying at that time. She also liaised with the insurer's representative with a view

[21] Trial Book page 380.
[22] See page 115 of trial book Dr Spears report of 28th January 2020.
[23] See pages 129 and 130 of the trial book Dr Spear's report of the 26th March 2020.
[24] See page 148 of the Trial book Dr Ng's report of the 21st January 2021.
[25] See footnote 15.

to encourage the Worker back into work with a different employer the inference being she was of the view he had the psychological capacity to return to work albeit not with the Employer.

39. Ms Elliott was then contacted by the Worker after the incident on 19 November 2019 and her notes recorded the Worker being scared and depressed but did not indicate any mention of suicide. Arising from her consultations with the Worker after 19 November 2019, Ms Elliott diagnosed the Worker as having an "adjustment disorder with mixed anxiety and depression" and that was consequent upon the incident of 19 November 2019.[26]

40. She explained her diagnosis preferring adjustment disorder to PTSD because the actual incident which had triggered his reaction was not "life threatening or horrific or sexually violent". She also explained that there can be a trigger that is the "straw that breaks the camel's back" when there are underlying trauma, and that trigger could bring all those post trauma symptoms to the fore, but did not think the 19 November incident was such a trigger.[27]

41. Ms Elliott continues to treat the Worker via telehealth.

42. **Dr Hundertmark** is a consultant psychiatrist who saw the Worker for the purpose of a medico-legal report. He assessed the Worker on 11 August 2020 via video conference. The Worker reported to Dr Hundertmark that he had told his treating psychologist that he was going to self-harm after the incident on 19 November 2019 and since then has not been able to face the idea of going back to work for fear he may suffer further racial discrimination and bullying.

43. Dr Hundertmark was very clear that the Worker had been diagnosed with PTSD in the past which was understandable given the traumas he went through in Afghanistan, his journey as a refugee and his detention as a refugee when in Australia. He was equally clear that it was his view that the incident on 19 November 2019 was not the cause of his present mental health symptoms,[28] and even though he accepts that the Worker would have been distressed by the incident, he is of the opinion that the Worker now magnifies his symptomology[29].

44. The Doctor was also of the view that the Worker was compensation focussed and had the ability to go back to work if he did not have focus on his compensation. The Doctor explained his method in assessing a person and in particular looking at a pattern of behaviour which might suggest a person is more compensation focussed than another.[30]

45. Dr Hundertmark emphasised his view that the Worker was only reporting to him a history which pointed to the incident of 19 November 2019 being the sole cause of his present mental health condition.

46. When challenged on whether he accepted the previous diagnosis of PTSD, Dr Hundertmark confirmed he accepted that the Worker had previously had a diagnosis of PTSD but could not confirm the past diagnosis because the Worker had not wanted to discuss his past experiences with the doctor. He did not accept the Worker was suicidal after the incident of 19 November 2019 and characterised that to be an example of his symptom magnification. He based this view on the fact that the majority of people who have suicidal thoughts by hanging unfortunately succeed and that the incident was not significant enough to trigger such a response.

[26] See transcript page 535 Dr Elliott's response to question in cross examination by counsel for RTA.
[27] See page 535 of the Transcript.
[28] See page 240 of the Trial book Dr Hundertmark's report of the 11 August 2020.
[29] See page 157 of transcript of 2nd September.
[30] See page 143 of transcript of 2nd September.

47. When asked if he did not accept the Worker was telling the truth he answered "yes". He also emphasised as a forensic psychiatrist he does not necessarily accept anything a patient may tell him as the truth and relies on his clinical examination in concert with whatever information the patient provides to him to inform his diagnosis.

48. The doctor was asked whether he had considered a diagnosis of adjustment disorder for the Worker. He said the Worker did not present with any symptoms in particular did not complain of pain or physical disability during their consultation. Clinically the Worker did not display symptoms of adjustment disorder therefore the Doctor did not consider such a diagnosis. In relation to this diagnosis the doctor has clearly relied on the clinical examination of the Worker with the knowledge that he had suffered a back injury in 2019.

49. **Dr Sahoo** is a consultant psychiatrist who reviewed the Worker for a medico-legal report. The examination was conducted over telehealth on 26 February 2021. He very succinctly opined that the Worker was displaying abnormal illness behaviour focussed on compensation. Dr Sahoo described the Worker as uncooperative and distrustful of him as a professional, this is consistent with the Worker referring to the Insurers and those who work for them as "evil" people. He stated the Worker avoided giving him any history of his previous trauma and was focussed on only describing the incident that occurred 19 November 2019. This avoidance was one of the factors the doctor took into account when assessing the Worker's presentation.

50. Dr Sahoo was clear that while he had notice of the Workers' past trauma through the documents he was provided with by the lawyers, the fact that the Worker was unwilling to discuss those traumas and the distrust the Worker demonstrated supported his opinion that the Worker was not, at the time of his examination, suffering a mental illness. He did not accept the incident of 19 November 2019 was serious enough to trigger PTSD, and opined that the Worker was describing symptoms which he had learned were symptoms of PTSD throughout the years using technical terms such as "anhedonic" and "fatiguability" which were terms used in textbooks.[31]

51. Dr Sahoo specifically described the Worker as deliberately uncooperative,[32] which supported his view that the Worker had abnormal illness behaviour.

The Worker

52. A common thread in the evidence of all of the experts is that they rely on the history relayed to them by their patients, without that history it is not possible to diagnose or treat a person and that particularly applies to mental health conditions and chronic pain.

53. The Worker's credibility was the focus of cross examination, and the Second Employer submitted if the Court finds the Worker to be exaggerating his symptoms and lying about his history to the medical practitioners then those medical opinions must be considered in that light of those exaggerations.

54. I will discuss the Worker's evidence later in this decision.

55. The Second Employer submitted I should find the Worker to be exaggerating his symptoms to his treating doctors and psychologist and any medical practitioner arranged by his solicitors, and therefore their conclusions cannot be relied upon and the court should prefer the opinions proffered by the experts put forward by the Employers, because they were not convinced of the Workers genuineness in his reported symptoms.

[31] See page 654 of transcript of 18 November.

[32] See Exhibit 31 note of telephone call between Contitech's counsel and Dr Sahoo 8 November 2022.

56. Even if I find the Worker to be less than truthful in his dealings with the medical professionals and willing to lie to his own advantage, I will first consider whether the evidence supports findings in the Worker's favour regarding the validity of the section 69 notices served upon him by the First and Second Employer.

Validity of the First Employers section 69 notice

57. If the Court rules that the section 69 notice is invalid then the first employer, RTA, must reinstate the Worker's benefits back dated to the day the weekly benefits were ceased, until this Court makes a declaration in the Employer's favour. If the Court then finds that the Worker no longer suffers an incapacity to earn because of his back injury then his benefits will cease from the date of that ruling.

58. It is the Employer's onus to prove on the balance of probabilities the certificate served complies with section 69 and that circumstances have changed since the original acceptance of liability. In particular has the Worker's injury resolved and as at the date of the notice did not contribute to the Worker's incapacity to work.

59. The notice served by RTA on 22 of May 2020 stated that the Worker's benefits were cancelled because:

> "*1. You are no longer incapacitated as a result of your injury*
> *2. Any total or partial incapacity you may be suffering is no longer as a result of your employment with your employer and your injury on or around the 30th September 2019.*
> *Particulars*
> *(a) to be entitled to compensation you must among other things suffer incapacity as a result of your injury*
> *(b) on or about 5th September 2019 you sustained a lower back injury in the course of your employment (injury);*
>
> *(c) You made a claim for compensation in respect of the injury on or about 30 September 2019*
> *(d) Liability for your claim was accepted and compensation paid pursuant to the Return to Work Act*
> (e) *You were examined by Dr Fred Phillips on the 15thApril 2020*
> *(f) Dr Phillips has issued a certificate certifying that you had ceased to be incapacitated as a result of your lower back injury. Enclosed is a copy of Dr Phillips Certificate dated 6th May 2020*
> *(g) Accordingly your weekly benefits in respect of the injury are cancelled 14 days from your receipt of this notice "*

60. Attached to that notice was a certificate dated 6 May 2020 which stated:

> *"STATEMENT OF FITNESS FOR WORK (final certificate)*
>
> *I Dr Frederich Phillips, Medical Practitioner, hereby certify that:*
> *(a) I examined Mr Sayed Khail (DOB 21/12/82) on the 15th April 2020 in relation to his work related lower back injury which he sustained on or about 5 September 2019 and*
> *(b) in my opinion, Mr Sayed Khail has ceased to be physically incapacitated for work as a result of that injury".*

61. The Worker submitted that the section 69 notice served by RTA falls foul of the requirement in section 69(4) of the *Return to Work Act* that is the statement accompanying the notice shall:

> "*Provide sufficient detail to enable the Worker to whom the statement is given to understand fully why the amount of compensation is being cancelled or reduced"*

62. It is the Worker's case that the words contained in that notice were confusing because:

    a. Dr Phillips certificate did not reflect the opinion in his report *of the 22 of April 2020.* And

    b. The inclusion of the date 30 September 2019 in the second paragraph of the notice is confusing even though the particulars refer to the injury of the 5 September 2019.

63. In relation to the dates in the notice it is my view that while the dates contained in that notice could be confusing the particulars make it clear that the 30th September refers to the date the claim was made for the injury of the 5th September. Even though the Worker speaks and reads English as a second language, given his history of claims over the years and his involvement with the legal system and lawyers I am satisfied on the balance of probabilities he understood the notice to be referring to his back injury on 5 September 2019.[33]

64. Section 69 of the Return to Work Act 1986 (in its many iterations) has been the subject of many judicial determinations and the most recent being *Laminex Group Ltd v Joanne Claire Catford* [2021] NTSC 92 (Catford).

65. In *Catford*, Chief Justice Grant considered an appeal from a decision of this Court on a number of matters. One of the challenges in that case was that the section 69 certificate did not comply with the section 69(4). The Work Health Court found reading the section 69 notice with other documents made it unclear to the Worker what the Notice was conveying. His Honour applied the reasoning adopted by the Court of Appeal in *Lee v MacMahon Contractors Pty Ltd*[34] and found that the Work Health Court had erred in its approach. He found it erred in considering the notice in conjunction with the report served with the notice in its deliberations about the clarity of the notice. His Honour found that the notice ought to be considered as a standalone document and in that case could not be clearer.[35]

66. Following that reasoning, I can be satisfied that the section 69 notice served by the first employer to be valid as it is clear read as a standalone document with the appropriate certificate that the Worker's benefits were being cancelled on the basis that the Worker was no longer incapacitated for work as a consequence of his back injury. However I must also consider whether it is clear in relation to the Worker's claim for incapacity arising from psychological sequelae that should only be taken into account if at the time of the section 69 notice the Worker had notified the RTA of the sequelae.

67. It is not clear on the evidence when the Worker gave notice of his claim for psychological sequelae on RTA. The Court was not referred to any notification separate and apart from his claim for aggravation of PTSD or PTSD arising from a further injury inflicted on him by the incident of 19 November 2019. The sequelae referred to in the Amended statement of claim is an adjustment disorder between late October and early November 2019. While the Worker claims there was no formal determination of this part of his claim it cannot be expected that a determination be made when no claim has been made. The claim for psychological /psychiatric injury was made by claim form dated 19 November 2019[36] and that claim form only referred to mental injury arising out of the incident on 19 November 2019.

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[33] Applying the reasoning of Mildren J in Newton v Masonic Homes (which was endorsed by Court of Appeal in Lee v MacMahon Contractors Pty Ltd (2018) 41 NTLR 168.

[34] [2018] 41 NTLR 168.

[35] See Laminex Group Ltd v Joanne Claire Catford at paragraphs 19-20.

[36] See pages 45-47 Trial Books.

68. Having found the section 69 notice was valid, I must then consider Worker's claim that he continues to be incapacitated due to his back injury and the psychological sequelae. I must also consider RTA's counterclaim that even if the back injury (and the psychological sequelae) is still affecting the Worker and his capacity to do certain tasks, his most profitable employment equates to no loss of earning capacity.

69. Before I undertake that exercise, I will consider the second employer's notice of cancellation of benefits.

Validity of the Second Employer's cancellation of benefits

70. The second employer's cancellation of benefits is a little more problematic. Contitech, through CGU, had accepted the mental injury arising out of the incident on 19 November 2019, that letter of acceptance was on 13 February 2020. Despite the acceptance, Contitech never paid any benefits arising out of that injury because RTA were paying the Worker his benefits relating to the back injury up to the time of the service of their section 69 notice. The acceptance was for a "mental injury described as an aggravation of the Worker's pre-existing posttraumatic stress disorder"[37]. The letter was also clear that it was not accepting responsibility for a pre-existing PTSD nor for the possible psychological sequelae arising out of the work related back injury for which RTA was responsible.

71. Contitech did not commence payment of weekly benefits after RTA cancelled their benefits instead sent the letter on 16 June 2020 cancelling benefits and then a Notice of Decision on 10 July 2020,[38] which stated that Contitech:

> "Cancels payments of compensation under Subdivision B of Division 3 of Part 5 of the Return to Work Act".

72. The Notice of Decision also details the acceptance of liability but the non-payment of weekly benefits by Contitech because the Worker was being paid by the Employer for the back claim, and the subsequent cancellation of weekly payments of compensation by that Employer.

73. The reasons for decision not to pay benefits by CGU were expressed in the following terms:

> *"5. The Employer by its insurers has reviewed the information available to it regarding the PTSD claim and is not satisfied that you sustained an injury in the nature of an aggravation of PTSD that arose out of or in the course of your employment with the Employer on or about 19th November 2019;*
>
> *6.Further and in the alternatively, if you did suffer an injury in the nature of an aggravation of PTSD the aggravation was temporary and any aggravation of PTSD materially contributed to by your employment has ceased;*
>
> *7.Further and alternatively, any incapacity for work is no longer the result of the aggravation of your PTSD but is the result of :*
>
> *(a) the medical treatment that you are currently receiving which is contraindicated for aggravation of PTSD ; and /or*
>
> *(b) recreational /personal illicit drug use of marijuana and methamphetamine*"

[37] See page 54 of the Trial book.
[38] See page 58-59 of the Trial book.

74. The questions arising from the service of this notice are;

    a. If Contitech never commenced payments to the Worker is the service of a section 69 notice the appropriate process to advise Worker they no longer accept liability?

    b. As Contitech has accepted liability should it be responsible to pay compensation until it has served a valid notice under section 69?

75. The appropriateness of the processes under section 69 has also been the subject of judicial adjudication most recently in *Laminex v Catford*[39] in which Chief Justice Grant adopted the reasoning by Justice Mildren in *Newton v Masonic Homes Inc*[40] in which his honour found:

> *In my opinion, the test is an objective one, and does not depend on the level of education or intelligence of the Worker. Nor is it invalid if written in English where the Worker is unable to read, either at all, or in the English language. An objective test recognises that there will be many occasions where Workers will need to consult a solicitor before being able to fully understand why the compensation is being reduced or cancelled, particularly as the provisions of the Act are complex and likely to be difficult for a layman to comprehend.*

76. The present situation is one where the consultation with legal advisers would have been necessary for the Worker to understand the effect of the section 69 notice as served. The fact that Contitech had not paid compensation arising out of the accepted liability adds a complication to the process. The overlap between the incapacity to earn from the physical injury and any psychological sequelae and the claimed discreet psychiatric injury of the onset or aggravation of the Worker's PTSD also adds to the complexity of the situation.

77. On first principles once an employer accepts liability then it is liable to pay the Worker benefits[41] until either the benefits are cancelled or reduced through the operation of section 69, or there is an order of the Court[42]. Once RTA ceased payment arising out of the physical injury Contitech ought to have commenced weekly benefits until it served either a valid section 69 notice, or this Court determined an application to the Court for a declaration that the Worker did not suffer a compensable injury whilst working for Contitech or no longer is incapacitated for work.

78. The fact that Contitech never commenced weekly payments cannot be relied upon to avoid the operation of section 69. Section 69 applies to the cancellation or reduction of "compensation payable". *"Compensation" is defined as:*

> *"means a benefit, or an amount paid or payable, under this Act as the result of an injury to a Worker".*

79. Section 69 not only applies to weekly compensation for loss of earning capacity but also any treatment prescribed or recommended by medical professionals to address the Worker's injury.

80. The Return to Work Act is beneficial legislation and when there are two possible interpretations to the provisions of that Act they shall be read in a manner applying all of the rules of interpretation, in a way which promotes the purpose of the Act[43] and gives fair and liberal interpretation.

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[39] [2021] NTSC 92

[40] [2009] NTSC 51

[41] Section 85(2) Return to Work Act.

[42] Section 69(2)(d).

[43] Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28 at 78, "*the duty of a Court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have".*

81. The objects of the Return to Work Act are set out in section 2 of the Act and includes:

> "(a) to provide for the effective rehabilitation and compensation of injured Workers."

82. If section 85 of the Act requires an Employer to pay the benefits within three days of the acceptance of liability, then an employer in default of that obligation cannot rely on that default to claim processes for cancellation of those benefits do not apply to them. The question is, what is the appropriate process for Contitech to now deny liability?

83. There is no process to deny liability once the employer has accepted liability except under section 69 (1) or by application to the Court under section 69(2). Both of those subsections refer to the "cancellation or reduction of benefits". In the present circumstances weekly benefits have not been paid by Contitech and there are no benefits to cancel or reduce except for treatment costs.

84. In my view the only option is for Contitech to make an application to the Court for a declaration that the Worker did not suffer a compensable injury while in the employment of Contitech, or does not continue to suffer an incapacity arising out of a compensable injury. That application could be made under section 104(1) of the Return to Work Act for such a declaration which I note Contitech has applied for in paragraph 35 of its counterclaim.

85. The attempts by Contitech to use section 69 to deny liability for a work injury which had previously been accepted cannot be sanctioned by this Court. To promote the objects of the Act it is clear in Division 5 of the Return to Work Act that the impost on the Employer is to make a decision on liability quickly so that the Worker, once they have notified their Employer of an injury, is provided with the benefits they are entitled to under the Act without delay. The benefits and payment of benefits is to continue until properly cancelled or reduced pursuant to section 69 of the Act.

86. In the present case the only benefits which could have been cancelled or reduced by section 69 notice is the benefits paid for treatment of the Worker's mental health condition.

87. Given Contitech did not commence weekly benefits as they were obliged to do once RTA ceased paying, they cannot rely on section 69 process to now deny liability for the mental injury previously accepted. They can only use section 69 to cancel or reduce benefits because of a change of circumstances.

88. If I am wrong about that then the form of notice served on the Worker needs to be scrutinised.

89. Contitech's section 69 notice was served after they had sent a letter to the Worker claiming to cease payments.

90. The notice purported to give the Worker notice that the Employer *"Cancels payments of compensation under subdivision B of Division 3 of Part 5 of the Return to Work Act"*.

91. The notice sets out a short history of the Worker's claim including his physical injury and confirms that Contitech originally admitted liability for the Worker's and aggravation of PTSD[44]. And then goes on to acknowledge that compensation for the back injury had ceased.

[44] This is distinguishable from the circumstances in Lee v MacMahon Contractors [2018]41 NTLR 168 as the injury in the present matter is claimed as a separate injury against the Contitech not a psychological sequelae.

92. Next the notice states:

> *"5. The Employer by its insurer has reviewed the information available to it regarding the PTSD claim and is not satisfied that you sustained an injury the nature of an aggravation of PTSD that arise out of or in the Court of your employment with the Employer on or about 19 November 2019.*
>
> *6. Further and alternatively, if you did suffer an injury in the nature of an aggravation of PTSD the aggravation was temporary and any aggravation of PTSD materially contributed to by your employment has ceased;*
>
> *7. Further and alternatively, any incapacity for work is no longer the result of the aggravation of your PTSD but is the result of:*
>
> *(a) the medical treatment that you are currently receiving which is contra-indicated for aggravation of PTSD ; and/or*
>
> *(b) recreational/personal illicit drug use of marijuana and methamphetamine"*

93. The notice did not have attached to it a certificate nor a medical report to support the decision to cancel benefits. The notice served by Contitech seems to be a hybrid of a section 85 notice used for denying, accepting or deferring liability and a section 69 notice for the cancellation or reduction of benefits.

94. If the notice was served pursuant to section 69 it must have a medical certificate accompanying it from a medical practitioner certifying that the person has ceased to be incapacitated for work.[45] The notice must also provide sufficient detail to enable the Worker to understand fully why the compensation is being cancelled or reduced.[46]

95. The judicial adjudication on the service of such notice have been consistent in their characterization of the cancellation or reduction of benefits under section 69, that is as the section allows for the unilateral cancellation or reduction of compensation and the requirements of that section must be complied with strictly.[47]

96. The notice from Contitech to the Worker does not comply with the requirements of section 69 and is not valid as a notice to cancel benefits.

97. Further, the use of the notice to deny liability once liability has been accepted is not a process available to Contitech. Once a Worker makes a claim an Employer has to either accept, defer or dispute the liability within ten days of the claim.[48] If an Employer fails to make a decision within the specified time (including within a deferral period) then the Employer is deemed to have accepted liability.

98. Once liability has been accepted the only avenue open to the Employer to then deny liability for payment of benefits to the Worker is by order of this Court. The Notice is therefore ineffective as a notice to deny liability and consequentially the Worker is entitled to be paid his weekly benefits by the second employer until such time this court finds otherwise.

[45] Section 69 (3) Return to Work act.
[46] Section 69(4) Return to Work Act.
[47] See Newton v Masonic Homes Pty Ltd.
[48] See section 85(1) Return to Work Act.

99. Contitech is therefore required to pay the Worker weekly benefits for his mental injury of an aggravation of his PTSD (as originally accepted by Contitech) until this Court rules otherwise or they serve a valid section 69 notice.

100. Having found that the RTA's section 69 notice is valid and Contitech's is not valid, I must now look to the Worker's claim for a psychological sequelae arising from his physical injury and the Employers' counterclaims.

Worker's claim for the psychological sequelae and the First Employer's counterclaim

101. RTA submitted that there is very little evidence to support a claim that the Worker suffers from a psychological sequelae arising from his physical injury. The only evidence that supports a diagnosis of adjustment disorder consequent to the physical injury is the report of Ms Elliott.

102. Ms Elliott is the only mental health practitioner the Worker saw in relation to his mental health before the incident of 19 November 2019. While she recorded the Worker's complaint that his co–workers had been rude to him since the back injury she did not provide an opinion as to the Worker's psychological condition until after the incident of 19 November 2019. In her report on 23 November 2019, she proffered a diagnosis of Adjustment Disorder with mixed anxiety and depression[49]. In her oral evidence she referred to the incident of 19 November 2019 as predicating the Worker's mental health issues. She stated she had preferred the diagnosis of Adjustment Disorder as opposed to PTSD as she was of the view that the incident was not a life threatening event.[50]

103. Dr Hundertmark also dismissed an adjustment disorder arising from the physical injury because in his consultation with the Worker he did not discuss his physical injuries, the Worker did not talk to the doctor about his pain or his disability.[51] The doctor's opinion was that if there was an adjustment disorder from the pain arising from the physical injury it would have arisen in the consultation and it did not.

104. While there is some evidence that the Worker had some psychological issues between the time of his physical injury and the incident of 19 November 2019 which necessitated his first contact with Ms Elliott, I cannot be satisfied on the balance of probabilities that the Worker suffered an adjustment disorder arising from his physical injury. The Worker may have been having some depressive symptoms at the time he first consulted Ms Elliott; and his treating GP accepted the Worker had mental health issues which could amount to an adjustment disorder, however it is of note the consultation with Dr Cook was subsequent to the incident of 19 November 2019.

105. In relation to his continuing disability arising from his physical injury the Worker has the support of his treating GP Dr Cook who, despite finding the Worker to be a demanding and difficult patient,[52] continues to treat him for back pain (through medication and referrals for physiotherapy). Dr Cook believes the Worker to be genuine in his reporting of symptoms and was protective of the therapeutic nature of their relationship. Nonetheless Dr Cook was also of the opinion that once the compensation proceedings were finalised it was more likely the Worker would be able to return to work.[53]

106. Dr Slinger accepted a continued soft tissue issue however expected an improvement.

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[49] Trial Book page 96-100 Dr Elliott's report of the 23 November 2019.

[50] Trial book page 102 notes of conversation between Dr Elliott and solicitor for the Worker this was confirmed by Dr Elliott in her oral evidence.

[51] Transcript page 167 -168 Dr Hundertmark's cross examination.

[52] Trial book page 356 at one stage Dr Cook considered terminating his relationship with the Worker.

[53] Trial Book page 72-73 notes of conversation Workers' solicitor with Dr Cook on the 13 September 2021.

107. Dr Bowles opined there to be no physical reason the Worker may still be suffering any physical restriction and that his restrictions are psychosocial in nature.

108. In any event, the Worker accepts his physical injury alone is not significant enough to "render him totally incapacitated for work at any material time subsequent to 16 June 2020 cancellation of his weekly benefits".[54]

109. Given I have found there is insufficient evidence to support a finding of an adjustment disorder as a psychological sequelae to the physical injury and relying on the evidence of Ms Zenman (which is largely unchallenged), I am led to the inevitable conclusion that in relation to the physical injury the Worker is not totally incapacitated for work and has the ability to work full time as a car park attendant.

110. Accepting RTA's calculation of the Worker's normal weekly earnings (NWE) and the evidence of the weekly income from the identified job of a car park attendant, I find the Worker does not suffer any loss of earning capacity and his claim against RTA must fail.

111. Of course this finding must be made with a caveat that the worker may still have an incapacity to earn arising from the mental injury incurred whilst working for Contitech.

The Second Employer's Defence and Counterclaim

112. Having found the Worker's benefits payable by the second employer were wrongfully cancelled after liability had been accepted by Contitech, it is for the second Employer to prove to the necessary standard that the Worker did not suffer a compensable injury arising out of the incident of 19 November 2019 as they have claimed in their counterclaim.

113. The Worker's claim for a psychiatric injury against Contitech is particularised as PTSD or aggravation of pre-existing PTSD[55] after the incident on 19 November 2019 and continuing. Contitech impresses upon the Court this claim must be considered in light of the Worker's proven tendency to lie for his own advantage which must lead the Court to the conclusion that the Worker is an unreliable historian.

The Worker

114. There is no doubt the Worker has suffered many traumas in his life not in the least having seen his father's dead body who had been killed by the Taliban before he fled the country through Pakistan, Malaysia and Indonesia until he landed on Australian shores by boat. He spent four years in detention which he described as "torture" and during which he says he was subjected to racist abuse.

115. In examination in chief the Worker presented as a person with a keen sense of justice. He often referred to the way he has been treated since his arrival as a refugee as unfair, and made general statements of the rest of the white Australians of racist behaviour towards him and Muslims in particular. He also protested against the treatment of the indigenous peoples of Australia.

116. His description of the how he hurt his back was straightforward and not embellished. His claim from compensation for that back injury was originally accepted. He then says he was abused by a fellow worker about putting in a claim "we are going to lose the contract because of you" and additionally, after being flown to Mackay, was the subject of racist comments from a co-Worker which "broke his heart". When describing this incident the Worker became emotional and at times having to collect himself before he described how it made him feel. In cross

[54] The Worker's written submissions paragraph 20.

[55] See paragraph 14 of the further amended statement of claim.

examination when questioned extensively about the incident he seemed to break down and required a break.

117. The offending comments were a reference to him having a bomb in his bag like a terrorist. He claimed that "broke his heart" as his father had been killed by terrorists. He says he immediately went back to his accommodation and made preparations to hang himself but desisted when he realised it would not work. He claims he now is unable to work because of his mental illness (either PTSD or adjustment disorder) and that he doesn't do any of the activities he used before his work injury. He does not play soccer, go to the gym, frequent shopping centres (except to get food and medication) and doesn't go to the movies or socialise.

118. The Worker was heavily cross examined about his claims history and it became clear he was a person who felt entitled to "justice" which equated to compensation when he felt he had been wronged. There are comments about justice all the way through his oral evidence and he also stated on many occasions that he had been subjected to racism over the years since arriving in Australia.

119. The Worker is no stranger to making claims for compensation.

120. In 2009 he lodged a claim for compensation against the Australian Government for his time in detention.

121. In 2013 he made a claim for compensation for an ingrown toe and subsequent infection and received compensation for that injury.

122. In 2014 he was assaulted, king hit from behind which is believed was racially motivated (although there was no evidence of why he thought it was racially motivated). He filed a victims of crime (VOC) claim with Victims Assist Queensland as well as a common law damages claim arising out of that same incident. He was granted some compensation for medical expenses and for the airfares to move from Mt Isa to Brisbane.

123. In October 2016 he got some metal to his eye when working for REEMA and received compensation for that injury.

124. In 2018 he made a claim against Prime Recruitment for psychological injury arising from workplace bullying. He did not pursue that claim once the insurer refused the claim on the basis of Dr Mander's report[56].

125. Then in 2019 he commenced the present claim.

126. The Second Employer submitted throughout his claims history the Worker had acted in a way which demonstrated his willingness to lie and exaggerate to get payments which he believed he deserved.

127. Some examples highlighted by the Second Employer are the worker's dealings with the Queensland Victims of Crime agency (VOC) in 2014-2015, his denial of his use of recreational drugs, and his communications with an employer in 2018 when he claimed to have been offered a managerial job with another firm which he accepted was untrue, and his claim to have been suicidal immediately after the comments made on 19 November 2019.

128. **The Victims of Crime claim in 2014.** It is well established that the Worker made a claim for compensation arising out of the assault upon him in Mt Isa in 2014. He made claim on VOC as well as a common law claim from the offender.

[56] Trial book page 104 Dr Mander's report of the 14th February 2019.

129. During the period of the VOC procedure the Worker travelled to Pakistan for two reasons, to support his sick mother and to get treatment for his mental health with the support of his family.

130. He stayed in Pakistan for some time over late 2014 to March of 2015. Throughout his time in Pakistan, the Worker was in constant contact with VOC agency for reimbursement for his medical expenses in Pakistan and the airfares to Pakistan. Some of those claims were paid to him on an interim basis.

131. His claims were subject of a lot of correspondence which culminated in advice from VOC agency that he would not be paid for the airfares to Pakistan on the basis that he could receive the necessary treatment in Australia.[57]

132. When challenged about his insistence to be paid for airfares in his VOC claim the Worker suggested that perhaps he had misunderstood what had been represented to him by Mr Murray. However it is clear in the emails and correspondence from VOC that those airfares to and from Pakistan would not be included in any compensation claim.[58]

133. The email correspondence between the Worker and VOC shows him to be continually appealing to be paid money because he needed it for treatment and to save his family from eviction. This correspondence was continued into the period of time when he was back in Perth and working for REEMA earning a significant amount of money.[59]

134. The Worker was referred to some emails between him and VOC about this issue, and while he accepted the emails as his, he did not accept the imputation the Employer's counsel put on them. He claimed not to remember having written the emails but accepted as they were written he must have sent them. When it was put to him that at the time he was claiming financial hardship at the end of 2015 to February 2016 when he was already back in Australia and earning a good wage with REMAA[60] he became evasive and non-responsive in his answers.

135. Throughout cross examination the Worker became evasive when asked questions about the various claims for compensation he had made in the past. While he accepted the basic facts he did not remember any of the detail and that could be understandable given the passage of time.

136. The Worker also demonstrated he was willing to threaten to go to extreme lengths to get others to comply with his demands. His threats to "do something to himself"[61] and the later threat to do a hunger strike outside the Victim Assist Queensland[62] are an example. When put to him, this was an attempt to put pressure on VOC to pay him immediately and a ploy the Worker answered "now as a human being I was sure they could help me" - his answer was largely unresponsive.

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[57] See page 1019A016 Trial book Notice of Decision from VOC 17 March 2015.

[58] *See pages page 1019 -A016* Notice of decision 17 March 2015 confirming reimbursement of airfares refused and the right to ask for a review within a month (such review not requested).

[59] See page 964 of Trial book email sent 24 February 2016 the Worker pleading for further payments from VOC.

[60] See exhibit E30 REEMA payment summary showing gross payments of $89,100.00 for the period 17 July 2015 to 30 June 2016 and page 201-205 transcript defendant's responses.

[61] See page 949 of the Trial Book internal emails at Victims Assistance Qld.

[62] See page 901 of the Trial Book internal emails.

137. There was also some question of his claims for treatment he received in Pakistan as the invoices from the doctor in Pakistan were for treatment which he cannot have received because he had already returned from Pakistan[63]. Given the Worker also claimed he would not have received the treatment unless he had prepaid for it[64] makes it all the more questionable he had actually received the treatment.

138. When asked difficult questions about his motives of certain actions and the timing of his claims, the Worker became evasive and often attempted to deflect the line of questioning. For example, when being cross examined about his interaction with Dr Doucas relating to a medical certificate for his victims of crime claim, he was referred to two letters by Dr Doucas which had slightly different wordings. The second was lodged in support of his claim and certified the Worker would not be fit for work a year or two. The Worker was asked if he had asked the doctor to amend his original letter to support the Worker's claim for loss of earnings from VOC because the loss of earnings claim under that particular scheme was limited to two years. His answer "can you ask your doctor to do things like that" and "were you there?"[65] *was* evasive and non-responsive.

139. **Application for work in 2018.** Another example of the Worker willing to tell untruths to his advantage is his dealings with VLI in 2018. He was asked a series of questions about his interaction with VLI regarding his reemployment and admitted he lied about having another job offer. He stated:

> *"There is two different types of lies. One is lies when you can hurt or you can damage something with the hurt with a lie, and there is a lie which is good for your safety and good for your benefits. So, I think there is two different types of lies."*[66]

140. **Suicide attempt in 2019.** The Worker's claim of being suicidal after the incident on 19 November 2019 was also the subject of intensive cross examination and was submitted by the Second Employer to be demonstrative of the Worker's willingness to lie to his advantage.

141. The Worker claimed to have reported his suicidal thoughts immediately to his psychologist and lawyers at the time.[67]

142. In her oral evidence Ms Elliott could not remember the Worker speaking to her about his suicidal ideation in his conversation with her on 19 November 2019, and accepted had he mentioned suicide then she would have written it down. Her notes of that telephone conversation do not make any mention of suicide. The Second employer submitted the lack of reference to suicide in Ms Elliott's notes must lead to a strong inference that the Worker did not tell her of the suicide attempt. The Worker submitted this lack of a note could be explained by the fact it was a phone conversation and not face to face and therefore Ms Elliott could have missed out on facial cues, this was not an explanation put forward by Ms Elliott and in my view fanciful. She was clear that if a patient had called her distressed and reporting suicidal ideation she would have made a note of it.

[63] See transcript page 39 & 40 Workers examination in chief where he admits to having returned to Australia in March/April 2015 and then page 192 of transcript where accepted the documents showed he returned to Perth on 7 March 2015.

[64] See transcript page 197-199 and Trial book 996.

[65] See pages 121 -122 of the transcript of 2nd September.

[66] See page 352 of transcript.

[67] See page 554 of Trial Book Dr Elliott's notes of her telephone attendance on the Worker.

143. It should be noted that the Worker has since persisted with his claim to have been suicidal on that day when talking with other medical practitioners including a doctor he saw the next day, Dr Hasan of the Sydney street Medical practice. The notes of that visit recorded "fleeting thoughts of hanging by fan".[68]

144. The possible invention of a suicide attempt or ideation is particularly significant in the Worker's claim that he has suffered a psychiatric injury on that day being PTSD or an aggravation of his existing PTSD. If the worker is lying about an attempted suicide on that day (or had suicidal ideation on that day) then the opinions of the doctors who accepted that the worker had attempted suicide are in question.

145. Of course the severity of the Worker's reaction to an offensive and inappropriate comment could be an example of a reaction of someone particularly vulnerable to such comments and whose underlying vulnerabilities were the basis of that severe reaction[69]. If the Worker is accepted as a reliable and honest historian of events then the reports of the doctors who do not accept the comment to be serious enough to cause the mental injury as claimed by the Worker are in question.

146. The Worker was also cross examined on his possible recreational use of drugs such as Cannabis and Methamphetamine.

147. His explanation of how Methamphetamine came to be in his system in a drug test on 7 September 2018[70] was that he had attended a party and had picked up someone else's drink that must have been laced with the drug. He said he didn't feel any effect at the time. This explanation was different to the one proffered to Prime recruitment where he suggested his drink must have been spiked[71] (not someone else's). Both explanations are highly unlikely – if the Worker is not, as he claims, a regular user of that drug it is very unlikely that even if he had ingested the drug accidently he would not have felt any effect. I do not accept that the Worker is being truthful about his use of this drug on that occasion. He also gave alternative explanation in his oral evidence that a friend had given him drugs to calm him down, it wasn't clear what drug to which he was referring in this evidence. His report to Dr Spear that he had taken methamphetamine once[72] but did not suggest that was an accidental use.[73]

148. It is not clear whether the Worker is a regular user of illicit drugs (even though Dr Mander noted he was an occasional user of cannabis[74]), however I do not accept he has only used illicit drugs on one occasion by mistake and find he was being untruthful about this issue.

149. While the Worker's use of recreational drugs is a real possibility it is not something any of the doctors suggest has caused his continuing mental health presentation. Dr Hundertmark in particular confirmed that he "didn't think the illicit drug was significant in trying to understand this case"[75]. This is only relevant to the Worker's credibility and the reliability of the histories he recounted to the doctors.

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[68] See page 276 of trial book.

[69] Corbett v NTA [2015] NTSC 45 per Barr J at 20.

[70] See page 724 of Trial Book Prime Recruitment records noting request Thejo Aust did not want Worker back because of failed drug test and previous failure to make flight.

[71] See page 726 of the Trial Book Prime recruitment employee records.

[72] See page 128 of the Trial book Dr Spear's report of 26th March 2020.

[73] See page 125 of Trial Book Dr Spear's report of 26th March 2020 page 3.

[74] See page 105 of Trial Book Dr Mander's report of the 14th February 2019.

[75] See page 163 of Transcript of 2nd September.

150. The Worker also admitted to lying when questioned about his representations to Prime in 2018 regarding the possibility of full time work with another organisation. He admitted he lied about that opportunity because he wanted to show them that he was valued by others.[76]

151. Taking into account all of the above I am of the view that the Worker is a person who is prepared to lie to gain advantage for himself and as such is a person who may very well have either exaggerated his symptoms or fabricated his symptoms to illicit support from his doctors and therapists; and when he was not happy about their responses he became distrustful and disengaged with them.[77]

152. The Worker presented in his oral evidence uncooperative and sometimes manipulative trying to distract counsel for the first and second employers with comments to Mr McConnell SC as "you have a pretty laugh" and to Mr Roper SC "go and have your ciggie".

153. Additionally the Worker showed no discomfort in relation to his back pain when giving evidence. Even though I advised him at the beginning of his evidence he could sit and stand as required he did not need to do so. The only time he stood was to retrieve a tissue from a box on the bar table and he made no requests for a break so that he could stretch his back. His claim to be in constant pain regarding his back is not supported in his presentation to this court. He gave evidence for a lengthy period of time of over three days without any indication of discomfort.

154. The Worker also claimed that one of his symptoms of his mental health condition was not to be able to interact and socialise with others whereas there is evidence that he specifically requested his psychologists to meet with him in a café for coffee instead of attending their consulting rooms for appointments. Further he did not appear to be disturbed by attending court. His absence from the last days of the hearing was not explained as a decision made because the Worker found it too distressing, rather that it was a cost saving exercise[78]. I accept however in the earlier part of the proceedings the court was advised the Worker preferred not to be present during the evidence of certain doctors but there was no suggestion that he found it distressing just that he preferred not to be present.

155. Given all of the above, I find the Worker to be a person willing to try and manipulate circumstances in his favour and his evidence must be considered in that light.

156. Counsel for the Worker submits any inconsistencies in the Worker's actions and evidence should be considered:

> *"In the context of his particular personal circumstances including his ethnic and cultural origins and past experiences."*

157. I am not sure what part of the Worker's cultural and ethnic background would make him more likely to tell untruths, and there is nothing in the evidence which would suggest the Worker's untruths and exaggerations arise from his past experiences.

158. I accept the passage of time will affect memory but it has been demonstrated that significant inconsistencies in the Worker's evidence cannot be explained by the passage of time.

159. Particularly of concern is the failure to report his suicidal ideation before or after his alleged attempt at suicide on 19 November 2019 to his psychologist Ms Elliott. All of the psychologists and psychiatrists who gave oral evidence emphasised if the attempt did occur then that was an

[76] See pages 743 and 744 of the Trial book Prime employee records.
[77] E.g. He disengaged with Ms Bale when she reported his drug use to the GP and with Mr Heytebury.
[78] See page 568 pf transcript.

indication that the incident could have triggered the Worker's pre-existing PTSD. None opine the incident to be sufficient to cause the onset of PTSD.

160. One of the diagnostic criteria for PTSD contained in the DSM 5 for Mental Disorders is "Exposure to actual or threatened death, serious injury or sexual violence".

161. The comments made by the Worker's co-worker could not be categorised as "exposure to actual or threatened death, serious injury or sexual violence" and therefore cannot be basis for the onset of PTSD.
162. The real question is whether the Worker had an underlying asymptomatic PTSD which was aggravated (became symptomatic) because of the incident or was exacerbated by the incident.

163. The Worker's traumatic history is not disputed. The Worker's exposure to the killing of his father, his journey to Australia as a refugee and his detention for four years, the fact that he was subjected to a criminal assault are all incidents which would fit into the criteria for a diagnosis of PTSD. That is "exposure to actual or threated death, serious injury or sexual violence".

164. Contitech's counsel argued the Worker had not been previously diagnosed as suffering PTSD by the various doctors he had consulted with in the past. I do not accept that argument it is clear that the Worker has been treated for PTSD symptoms in the past and it is more than probable given the trauma in his past he has suffered PTSD. Even Dr Hundertmark accepted the Worker had previously been diagnosed with PTSD.

165. Dr Hundertmark accepted that the Worker may have had PTSD in the past although he could not confirm the diagnosis because the Worker refused to discuss any of that traumatic past with the doctor. He did not accept that the incident on 19 November 2019 was enough to make a dormant PTSD active or make an active PTSD worse.

166. Dr Hundertmark did not accept the worker had made a suicide attempt on 19 November 2019 at all.

167. Dr Tavasoli on the other hand opined the worker as having PTSD arising from the incident and recommended he be placed on the disability support pension as the doctor did not see a recovery in the Worker's foreseeable future.[79]

168. In his diagnosis of the Worker and the recommended treatment, the doctor accepted the Worker's description of his continuing symptoms and his initial reaction to the incident on 19 November 2019, his suicide attempt.

169. The Worker's report of the suicide attempt is a significant factor which underpins his diagnosis of PTSD, and as set out before, there is some question over the truthfulness of this report particularly because Dr Elliott has no note or recollection of the Worker reporting this to her.

170. The Worker's counsel sought to convince the Court that the failure of Ms Elliott to make any note of the Worker mentioning suicide when he called her on 19 November 2019 could possibly explained by the fact it was a telephone call not a face to face consult, and Ms Elliott did not have the advantage of seeing the Worker's body language. This is a fanciful submission – that was not suggested by Ms Elliott and does not explain why there was no note of the attempted suicide as the Worker's evidence was that he actually told her of the attempt.

[79] Trial Book page 89 Dr Tavasoli's letter to Centrelink.

171. Worker's counsel also sought to downplay the lack of notation by Ms Elliott by comparing her note taking with that of Dr Hasan[80] who saw the Worker the next day and recorded the Worker saying he had called Ms Elliott immediately after having the suicidal thoughts. This criticism of the Ms Elliott's note taking does not take away from her evidence, had the Worker told her of suicidal thoughts, she would have made a note of it. She did not, which leads to the conclusion the Worker did not tell her he was having suicidal thoughts, which is not consistent with someone so distressed as the worker claimed he was after the incident.

172. In her oral evidence, Ms Elliott recalled the Worker at some stage telling her of an attempt to hang himself with a sheet from the fan, but could not remember when he told her. Even if her memory of this report (which is not recorded in any of her later notes) is accurate it does not accord with what the Worker told other practitioners.

173. In one part of his evidence the Worker said his attempt went so far as to finding a "rope" but decided it wasn't going to work, so he desisted. This is inconsistent with what he apparently told Ms Elliott later. These are not details which would be expected to change with the passage of time.

174. Dr Hundertmark did not accept there was a suicide attempt and he is of the opinion the Worker is exaggerating how the comments on 19 November 2019 had actually affected him.

175. Another example of the Worker exaggerating matters to make his past trauma seem worse than it was is when he recanted to Dr Ng that his mother had been killed. Although he had previously told others that his mother had died when he was very young this is the first time he suggested she had been "killed".

176. Dr Spear reiterated the history of trauma suffered by the Worker. Dr Spear saw the worker in January 2020 and produced a report out of that interview and a further report after being provided with Dr Cook's report of 25 March 2020. In both reports he accepted the Worker's description of his symptoms and did not describe the Worker as uncooperative. He was of the view that the Worker's symptoms were consistent with a relapse of his PTSD brought on by the work incident on 19 November 2019. He too had accepted the Worker's recount of having attempted suicide in that diagnoses. He expected the Worker to recover within 6 months given he had before from episodes of PTSD.

177. Dr Spear's observations of the Worker are of note because it illustrates a stark difference between the Worker's attitude to doctors assessing him on behalf of the Employer's insurers, before and after the cancellation of his benefits. It is only after the cancellation of benefits that he started not to cooperate with the doctors concerned, that change in attitude supports a view that he only becomes distrustful of practitioners if he thinks they will not be in favour of his claim.[81] Again Dr Spear's opinion is based on his acceptance of the Worker's recount to him of his symptoms.

Conclusion

178. Even though there are doctors who support a finding that the Worker has suffered a back injury which still troubles him and psychiatrists who are of the view he continues to suffer symptoms of PTSD which causes him to be totally incapacitated for work, I find myself unable to accept

[80] Trial book page 267.

[81] The worker has refused to work with Ms Bale because she disclosed his use of recreational drugs, he stopped consulting with Mr Heytbury because he was too young and too handsome and should be a model as recorded in Dr Cooks notes Trial book 324 he became aggressive and abusive towards Dr Cook and his staff when his access to the doctor was restricted, he stopped consulting with Dr Abedegboye because there was some suggestion of in-patient care.

those opinions as they are based in the unreliable reporting of symptoms and events by the Worker.

179. Even the Worker's GP Dr Cook who is supportive of the Worker would not sign a certificate which certified him as permanently totally disabled and implied that the Worker is now so focussed on his compensation claim that his issues will not resolve until the compensation proceedings are resolved.

180. The evidence supports a finding that the Worker is resistant to a return to work with Contitech or RTA and any other workplace because he says he is afraid of further racism and that he may complete suicide if exposed to that again. Given I cannot be satisfied to the relevant standard that the Worker actually had suicidal thoughts after the incident of 19 November 2019, I do not accept the Worker's fear to be genuine.

181. The psychiatric evidence describes the whole range of diagnoses from adjustment disorder with major depressive symptoms, PTSD, complex PTSD to abnormal illness behaviour. All psychiatrists acknowledge that the worker's background of trauma would have left him with a vulnerability to PTSD. However over the years since he has been living Australia, the Worker has had episodes of mental illness which have resolved with treatment some of those instances arose from a lot more serious events, e.g., assault and lengthy detention.

182. The worker admitted that he was willing to lie to his advantage, he expressed a view that he cannot go back to work for the Employer because he was afraid of further bullying and having suicidal thoughts, and now says that applies to all workplaces.

183. I remind myself that I have to have cogent evidence to make the serious finding that the Worker's evidence cannot be relied upon. The cogent evidence I have before me is, among other things,- the Worker's reporting of the alleged suicide attempt was inconsistent, his history of manipulating the VOC claim in 2014-2015 was clearly made out, the inconsistencies in his reported symptoms and his actions (e.g., can't socialise yet asks psychologists to meet in cafes), his dishonesty about his use of recreational drugs his admission, that he believes it acceptable to lie to his advantage and his presentation in Court was inconsistent with his reported symptoms.

184. This is all evidence which cause me to find the Worker to be an unreliable historian and untruthful in his recount of significant events and the subsequent effects of those events on him. I also find that the Worker in making applications for compensation and payments he tailors his story to the requirements of the particular scheme.[82]

185. In those circumstances I cannot be satisfied on the balance of probabilities that the worker is being truthful in his report of his symptoms of mental health and back pain or that he continues to suffer PTSD as a result of the work incident on 19 November 2019. Or that he suffered a reoccurrence or aggravation of a pre-existing PTSD at all.

186. I accept the Worker suffered distress at the comment made but cannot be satisfied that his reaction to that comment resulted in him attempting suicide and such that it formed the basis for the presentation of PTSD.

[82] Refer to the worker's request to Dr Doucas to change his certificate to reflect the period of 2 years consistent with the requirements under the VOC scheme and his insistent requests to Dr Cook for a certificate to certify him as totally and permanently disabled for the purposes of his superannuation when the doctor has told him that he was not of that view.

187. **Orders:**

a. The Worker's application for orders contained in 26.1, & 26.2 of his Further Amended Statement of claim is dismissed;

b. The Worker's application for declarations in 26.3.1 and 26.3.2 is dismissed;

c. The Worker's application for arrears and continuing benefits pursuant to section 65 is dismissed;

d. The Worker's application for section 89 interest is dismissed;

e. The First Employer's counterclaim I declare no compensable psychological sequelae;

f. The Second Employer's counterclaim 35(b) is dismissed;

g. The Second Employer's Counterclaim in paragraphs 35(a) 35(c) is granted; and

h. Matter certified fit for senior counsel.

188. I will hear the parties on costs.
