

WORKERS COMPENSATION COMMISSION



CERTIFICATE OF DETERMINATION

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

MATTER NO: WCC008720/10
APPLICANT: Darren Pickavance
RESPONDENT: NSW Police Force
DATE OF DETERMINATION: 5 May 2011

The Commission determines:

1. That the applicant has leave by consent to amend the Application to Resolve a Dispute filed 22 October 2010 to rely on a deemed date of injury of 18 May 2003.
2. That the respondent to pay the applicant lump sum compensation under section 66 of the *Workers Compensation Act 1987* in respect of 22 per cent whole person impairment in the sum of \$32,500 less a 50 per cent reduction in compensation payable as found under Schedule 6 Part 18C clause 3 of *Workers Compensation Act 1987* entitling the applicant to the sum of \$16,250 under section 66.
3. That the respondent to pay the applicant in respect of pain and suffering under section 67 of the *Workers Compensation Act 1987* the sum of \$20,000 less a 50 per cent reduction in compensation payable as found under Schedule 6 Part 18C clause 3 of the *Workers Compensation Act 1987* entitling the applicant to the sum of \$10,000 under section 67.
4. That the respondent pay the applicant's costs as agreed or assessed.
5. That the matter is complex and the costs of both parties be increased by 15 per cent.

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

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF **JANE PEACOCK**, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

For REGISTRAR

Mark Norman
Senior Dispute Services Officer
By Delegation of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. By Application filed 22 October 2010, as amended, the applicant Mr Darren Pickavance (Mr Pickavance) seeks lump sum compensation a result of psychological injury alleged deemed to **have occurred** on 18 May 2003 in the course of or arising out of his employment as a Police Officer.
2. Mr Pickavance served as a Police Officer from 29 July 1988. As a result of his psychological injury Mr Pickavance has not worked as a Police Officer since 18 May 2003.
3. The respondent is the NSW Police Force (the Police). The Police's workers compensation insurer is Allianz Australia Insurance Ltd, an agent of the Treasury Managed Fund No 3 (Allianz).
4. The Police have denied liability for the claim.

ISSUES FOR DETERMINATION

5. At the arbitration Mr Pickavance was granted leave by consent to amend the Application to rely on a deemed date of injury of 18 May 2003.
6. It is not disputed that Mr Pickavance suffers from a psychological injury in the form of Post Traumatic Stress Disorder (PTSD) that arose out of or in the course of his employment as a Police Officer, to which Mr Pickavance's employment as a Police Officer was a substantial contributing factor.
7. The dispute concerns the deemed date of injury for Mr Pickavance's psychological injury. This matter was properly notified as disputed.
8. Mr Pickavance contends his PTSD is a disease of gradual process and section 15 of the *Workers Compensation Act 1987* (the 1987 Act) operates to deem the date of injury. Mr Pickavance contends the correct date of injury is 18 May 2003 when he became incapacitated for his employment as a Police Officer.
9. The Police do not dispute that Mr Pickavance's PTSD is a disease or that section 15 of the 1987 Act operates to deem the date of injury. The Police however contend that the true date of injury is 6 September 2001 when Mr Pickavance first went off work as a result of his PTSD.
10. The effect of a finding that the date of injury is 6 September 2001 would be that Mr Pickavance would have no entitlement to lump sum compensation for his psychological injury as such entitlements are only available under the 1987 Act as amended from 1 January 2002. Accordingly an award for the respondent is sought.
11. In the alternative, the Police contend that at best I would find two dates of injury being 6 September 2001 and 18 May 2003 and would remit the matter to the Registrar for referral to an Approved Medical Specialist (AMS) to assess the degree of permanent impairment, if any, as a result of the injury deemed to have occurred on 18 May 2003 only. The rationale of this approach by the Police is that in their view the AMS would be required to make a deduction under section 323 of the *Workplace Injury Management and Workers*

Compensation Act 1998 (the 1998 Act) for the degree of permanent impairment as a result of the injury deemed on 6 September 2001.

12. The parties agree however that in the event that I find one date of injury of 18 May 2003, there is no need for the matter to go to an AMS as there is no dispute that Mr Pickavance suffers a 22 per cent whole person impairment, entitling him to the sum of \$32,500, subject to the application of the transitional provisions in Schedule 6 Part 18C clause 3 of the 1987 Act (the transitional provisions).
13. The parties also agree that if I have found only one date of injury of 18 May 2003 then Mr Pickavance is entitled to compensation for pain and suffering under section 67 of the 1987 Act in the sum of \$20,000, subject to the application of the transitional provisions.
14. The parties agree that both the entitlements under section 66 (22 per cent whole person impairment in the sum of \$32,500) and under section 67 (\$20,000) would be subject to the application of the transitional provisions.
15. The parties do not agree how the transitional provisions should be construed or applied. Nor do they agree on the percentage or quantum of the reduction that should be applied under the transitional provisions.
16. The Police contend that the reduction should be applied to the percentage whole person impairment (agreed at 22 per cent) and argue for a 75 per cent reduction in the percentage impairment. This would bring Mr Pickavance's whole person impairment to 5.5 per cent which is under the 15 per cent whole person impairment threshold for lump sum compensation for psychiatric injury set by section 65A(3) of the 1987 Act such that Mr Pickavance would not be entitled to lump sum compensation for his PTSD. Accordingly an award for the respondent is sought.
17. Mr Pickavance contends that, in accordance with a literal interpretation of the transitional provisions, there should be a reduction in the compensation or dollar amount payable to him. Mr Pickavance contends that there should be a 50 per cent reduction in the compensation payable to him under sections 66 and 67 by reason of the application of the transitional provisions. Accordingly orders are sought for the payment of lump sum compensation under section 66 in respect of 22 per cent whole person impairment in the sum of \$32,500 less a 50 per cent reduction in compensation payable being the sum of \$16,250 and, for the payment of lump sum compensation in respect of pain and suffering under section 67 less a 50 per cent reduction in compensation payable being the sum of \$10,000.
18. Essentially therefore the issues in dispute can be summarised as two main issues as follows:
 - (a) The correct deemed date of injury under section 15 of the 1987 Act for Mr Pickavance's undisputed work injury of the disease of gradual process of PTSD, and
 - (b) The proper application of the transitional provisions.

PROCEDURE BEFORE THE COMMISSION

19. The parties attended a conciliation/arbitration on 1 February 2011 in Newcastle. The parties were both legally represented by counsel. Conciliation took place however the parties were unable to come to an overall resolution of the matter, though they were able to reach

agreement on certain issues as set out above. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary Evidence

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

For Mr Pickavance:

- (1) Application to Resolve a Dispute and attached documents, and
- (2) Supplementary statement of Mr Pickavance dated 24 January 2011, admitted by consent and marked "exhibit "A".

For the Police:

- (1) Reply and attached documents;
- (2) The documents produced under direction by Dr Joseph admitted by consent and marked exhibit "B" (noting that this is not a complete record of Dr Joseph's documents as Mr Pickavance, prior to the arbitration, made a claim for privilege in respect of certain documents which was accepted by the Police), and
- (3) Claim Form for Total and Permanent Disablement Benefits dated 16 May 2006 admitted by consent and marked exhibit "C".

Oral Evidence

21. Mr Pickavance did not seek leave to give any further oral evidence at the arbitration and the Police did not seek leave to cross-examine Mr Pickavance.

FINDINGS AND REASONS

22. I have set out above the parameters of the dispute between the parties in this matter.

23. Turning first then to the date of injury issue.

Date of Injury

24. There is no dispute about injury. That is, there is no dispute that Mr Pickavance suffers a disease of gradual onset being PTSD caused by his employment as a Police Officer. There is therefore no dispute that Mr Pickavance has suffered an injury within the meaning of section 4 of the 1987 Act.

25. There is no dispute that section 15 of the 1987 Act operates to deem a date of injury. That is, there is no dispute that Mr Pickavance has suffered an injury (PTSD) which is of such a nature as to be contracted by a gradual process.

26. Section 15 of the 1987 Act provides relevantly as follows:

15 Diseases of gradual process--employer liable, date of injury etc

(1) If an injury is a disease which is of such a nature as to be contracted by a gradual process:

(a) the injury shall, for the purposes of this Act, be deemed to have happened:

(i) at the time of the worker's death or incapacity, or

(ii) if death or incapacity has not resulted from the injury--at the time the worker makes a claim for compensation with respect to the injury, and

(b) compensation is payable by the employer who last employed the worker in employment to the nature of which the disease was due.

(4) In this section, a reference to an injury includes a reference to a permanent impairment for which compensation is payable under Division 4 of Part 3.

27. Mr Pickavance's case is that I would deem the date of injury as 18 May 2003 being the date on which Mr Pickavance became totally incapacitated for his work as a Police Officer. It is not disputed that Mr Pickavance has not been able to work as a Police Officer since that date and will never be able to return to that employment by reason of his injury of PTSD.
28. The Police case is that I would deem the date of injury as 6 September 2001, the date on which Mr Pickavance first went off work as a result of PTSD.
29. This is a claim for lump sum compensation only. There is no dispute about Mr Pickavance's entitlements to weekly compensation which are being paid.
30. Despite Mr Pickavance's claim being a claim for lump sum compensation and the line of authorities including *Stone v Stannard Brothers Launch Services Pty Ltd* [2004] NSWCA277 (*Stone*) which suggest that there could be two dates of injury deemed under section 15 depending on the nature of the claim (lump sum or weekly), such that in a claim for lump sum compensation it could be argued that the deemed date of injury is the date of claim (in this instance 8 October 2009), counsel for Mr Pickavance expressly declined to make that argument, electing to rely on the time of Mr Pickavance's incapacity in accordance with section 15(1)(a)(i). In his view, as incapacity had resulted from the injury, the terms of section 15(1)(a)(i) and (ii) deem the date of incapacity to be the date of injury.
31. Counsel for the Police agreed that there is no reason to rely on the date of claim because there is incapacity as a result of the injury but of course submits that the deemed date should be the first date of incapacity namely 6 September 2001. If this argument was rejected, counsel for the Police agreed that the date of injury would be 18 May 2003. Further to this, counsel for the Police went on to make an alternative argument that I would find that Mr Pickavance suffered two injuries being one deemed on 6 September 2001 and one on 18 May 2003.
32. Thus while it may have been open to Mr Pickavance to argue that the correct deemed date of injury for the claim for lump sum compensation was 8 October 2009 (the date on which Mr Pickavance's solicitors made that claim), neither party has suggested that the deemed date of injury should be other than by reference to the date of incapacity.

33. I note that Deputy President Roche dealt with a similar situation in *Department of Environment, Climate Change & Water v J* [2010] NSWCCPD 56 where he said:
- “The authorities are clear that it is possible to have different deemed dates of injury for lump sum compensation and for weekly compensation (*Alto Fords Pty Ltd v Antaw* [1999] NSWCA 234, (1999) 18 NSWCCR 246). Though it may have been open to argue that the correct deemed date of injury for the claim for lump sum compensation was 3 September 2009 (the date on which Ms J’s solicitors made that claim), neither party has suggested that there should be two deemed dates of injury in the present matter. Ms J’s entitlement to compensation is, subject to the transitional provisions discussed below, to be calculated on the basis of the deemed date of injury of 11 December 2007.”
34. Following the approach of Deputy President Roche in the above case, in view of the parties’ agreement that the date of injury should be deemed at the time of Mr Pickavance’s incapacity, I will approach the instant case in this way. I will however return to make further comment about the availability of the date of claim argument later in these reasons.
35. Citing the Court of Appeal authorities of *Alto Fords Pty Ltd v Antaw* [1999] NSWCA 234 (*Antaw*) and *P & O Berkley Challenge Pty Ltd in the interests of HIH Winterthur Workers Compensation (NSW) Pty Ltd v Alfonso & Ors* [2000] NSWCA 214 (*Alfonso*), counsel for Mr Pickavance submitted that the deemed date of injury is the date of 18 May 2003 when Mr Pickavance became incapacitated for his former employment as a Police Officer.
36. The primary submission by the Police at the arbitration was that I would find that Mr Pickavance suffers from PTSD deemed to have occurred on 6 September 2001 and furthermore that there is no further injury beyond that date. Counsel for the Police did not refer to any authorities in support of this argument but did refer to the many pieces of evidence which show that Mr Pickavance had been diagnosed with PTSD in 2001. It is on this basis that they allege Mr Pickavance has no entitlement to lump sum compensation for psychological injury because he was diagnosed with PTSD in 2001 and therefore prior to the amendments to the 1987 Act which took effect from 1 January 2002 and which conferred an entitlement to lump sum compensation for primary psychological injury for injuries received after that date.
37. There is no dispute that the date of 6 September 2001 is the first date that Mr Pickavance went off work as a result of a diagnosis of PTSD.
38. As to the chronology of return to work after this date, the parties agreed the following:
- (a) From 6 September 2001 to 11 November 2001 Mr Pickavance was certified totally unfit for work.
 - (b) On 12 November 2001 he returned to work on restricted duties.
 - (c) From 13 November 2001 to 29 January 2003 he was on restricted duties.
 - (d) On 30 January 2003 he was certified fit to return to full duties.
 - (e) From 3 February 2003 to 18 May 2003 he was on full duties.
 - (f) On 18 May 2003 he became totally incapacitated for his work as a police officer.
 - (g) Mr Pickavance has not worked since 18 May 2003 as a result of his injury of PTSD.

39. Mr Pickavance has given evidence in his statement dated 11 August 2010, attached to the Application, that he performed general duties at Belmont Police station in 2002 and 2003. There was no evidence from the Police to traverse this evidence and it was not the subject of challenge by cross-examination.
40. Counsel for the Police drew my attention to the fact that the Workcover Medical Certificates issued by the treating general practitioner (GP) Dr Joseph all certify un/fitness for work as a result of PTSD as a result of being “shot at by a criminal” and specify May 2001 as the date of injury.
41. It is common ground that the relevant incident of being “shot at by a criminal” is the one that occurred on 24 March 2001 which is the subject of the Employees Compensation Claim Form dated 11 December 2001 (page 62 of the Application) to which counsel for the Police also expressly referred me to. The claim form describes the incident as “male offender apparently armed, ran at police vehicle aiming gun at occupants.” This occurred in the middle of the night. It later transpired that the gun was a toy gun. On the claim form the injury is described as “post traumatic stress”.
42. Mr Pickavance does not dispute that all of the above certifications as to incapacity/partial capacity/total incapacity by his general practitioner Dr Joseph were as a result of a diagnosis of PTSD.
43. The parties agree that 6 September 2001 was the first date that Mr Pickavance went off work by reason of psychological injury in the form of PTSD. He did not lose wages as he was paid compensation as claimed.
44. Counsel for the Police submitted that as a result of that event/trauma on 24 March 2001 Mr Pickavance suffered injury in the form of PTSD but was careful to point out that it is not that event itself which is causative of PTSD, it is years of trauma which preceded it. Indeed I note that the event of 24 March 2001 is not described at all in the statement of evidence that Mr Pickavance has given in these proceedings. He does give very detailed evidence of being exposed to trauma over many years in the course of his employment as a Police Officer. These included being exposed to road fatalities and dealing with the families of deceased persons.
45. Nonetheless it is clear that the event of 24 March 2001 took place and it was traumatic as were the other events to which Mr Pickavance was exposed in the course of his long police career and about which he has given evidence.
46. In support of their primary contention that I should deem the date of injury as 6 September 2001 the Police also point to the fact that Dr Joseph (the GP) completed a Medical Attendants Statement on 16 May 2006 in respect of Mr Pickavance’s Claim for Total and Permanent Disablement Benefits (exhibit “c”) in which he noted a diagnosis of PTSD about which he was first consulted in May 2001.
47. The Police submit that it is not the event of 24 March 2001 alone that caused the PTSD but that it is the years of trauma that preceded it. They refer to Mr Pickavance’s statement detailing the years of trauma, death, horror and carnage to which he was exposed in the course of his work as a Police Officer. However they only refer to the exposure to trauma that preceded Mr Pickavance going off work on 6 September 2001.

48. In fact in his statement of evidence dated 11 August 2010 Mr Pickavance gives evidence of the trauma to which he was exposed following his return to general duties at Belmont Police Station and his return to unrestricted duties in 2003. As I have noted, there was no evidence from the Police to traverse this evidence and it was not the subject of challenge by cross-examination.

49. In his statement of evidence dated 11 August 2010 Mr Pickavance gives evidence as follows:

“In 2002 I was transferred to the other side of the lake (Belmont), where I was to finish my police career. I think I was at Belmont for about 2 years. One of the incidents that sticks out in my mind is a hanging death in Swansea which occurred at some time in 2002. I remember being called to a home in Swansea to investigate the whereabouts of a male person who did not attend court on that day. He was to answer for serious sexual assault matters. I think either his father or mother let us into the home. The male person was hanging from a doorway obviously deceased. The relative or friend that allowed us entry into the premises absolutely freaked out. I remember part forcibly removing them from the home. The male hanging in the doorway had kicked a stool from underneath them. A pool of faeces about 12 inches round was underneath the deceased. It is not so much the incident that disturbs me now as the smell of the faeces, and a couple of flies enjoying the feast. The smell remains with me today; yet I have smelt and seen considerably worse. This however just seems to stick in my mind.

I remember completing the P79a report of death to the coroner, in the side office of the morgue and looking over and seeing the faeces on the deceased’s jeans from where we had cut him down and dragged him through the faeces. I could smell the odour even though this wasn’t possible because of the ventilation.”

50. In his statement of evidence dated 11 August 2010 Mr Pickavance gives further evidence as follows:

“In 2003 I was involved in the arrest of Scott Hollingshed, a person who I had known for many years from my days at Waratah. He was a standover man and drug dealer. He liked firearms and had many prior convictions for the possession of and use of firearms to commit violent crimes. I had taken a statement from a witness that morning whom Hollingshed had placed a sawn off shotgun to their head and made threats. All cars in the area were on the lookout for him. I had informed the radio that I knew the offender and that he would shoot to avoid apprehension. Whilst driving through Cardiff South I saw Hollingshed in a phone box outside of the butchers. I knew he was armed. He hadn’t seen me, so I drove on, informed the radio and started to set up a perimeter, keeping the offender in view. It was then that I saw a police vehicle skid to a halt outside of the phone box jump from the car and run 10 metres to arrest Hollingshed. They were the longest 10 metres in history. I was too far away to assist. When I arrived I assisted in the handcuffing of the offender. I couldn’t believe the stupidity of the arresting officers. On hearing my radio call they had decided to storm the phone box to arrest the offender. I located the sawn off shotgun and ammunition about 40 metres away. My anxiety levels during this entire incident were extreme. I had chest pains, quickened heart rate and began sweating. This incident had a profound impact on me.”

51. Mr Pickavance goes on:

“Throughout 2002-2003 I performed general duties at Belmont Police Station. During this time I was exposed to violence both directly and indirectly, threats of violence,

arresting violent offenders, gruesome scenes including car accidents, suicides and morgue attendances. As a result I became increasingly agitated, felt isolated and found it hard to cope with my duties. During my previous years of service I had always been able to cope with these types of situations, however, I found myself becoming increasingly stressed, depressed, anxious, angry and teary with each new situation. Incidents that I would have normally dealt with and had no problems with became difficult. I began to drink more to cope with everyday occurrences and found that I began to dread going to work in case I was faced with having to confront another violent offender.

On my last day I attended an assault occasioning actual bodily harm. A woman had been beaten by a male. I witnessed the assault then arrested and charged him. My anger levels were out of control. I was shaking and felt like vomiting.

Another example of what began to occur to me in 2002-3 I was raising my voice to a person that came to the Belmont Police Station counter. I distinctly remember raising my voice and becoming angry at her.

At one stage I told a duty officer to 'get fucked'. This was on my last day and I couldn't cope. I was directed to go on sick report and see my doctor."

52. Dr Wade psychiatrist in his report dated 14 September 2010 addresses the question of the evolution of Mr Pickavance's PTSD. He opines as follows:

"It would appear from the history that by 31 December 2001 Mr Pickavance had a well developed injury of Post Traumatic Stress Disorder and there appeared to be evidence of increasing disability particularly in his non-police life. Where he continued to function in a state of duty very much in the police sense of duty before self for the police but other parts of his life suffered – home life, sporting and recreational life, away from work becoming increasingly obsessed by and overwhelmed by police based issues. Such that he battled to do his duty, to try and look after his fellow police officer and to do his duty to the public of New South Wales, such that the more obvious incapacity then developed more in the late 2001/2002/2003 period.

The likelihood is that if he had left work around the end of or before 31st December 2001 his injury and disablement would most likely have progressed to a high degree of incapacity. In his long police career he has accumulated so many horrific and traumatic incidents, particularly incidents involving gross bodily injuries and then the main damage would appear to be then dealing with the families of the deceased.

Though around and after 31st December 2001 Mr Pickavance reported that he was in control of himself in the professional sense, even though he would suffer flashbacks and nightmares of previous horrific events, he was in control of his thoughts, his emotions and his behaviours, it would appear that in terms of functional incapacity in terms of his breakdown of his capacity to be in control of his thoughts and feelings and behaviours this occurred very much towards the end of his police career. This is very much in keeping with my previous experience of chronic PTSD in the police setting. That is that the injury can be longstanding but the functional incapacity has virtually an exponential nature to it as far as the rapid decline at the end, very much in the sense of 'the bridge too far'. As brain science develops in relationship to the study of PTSD it may very much relate to critical levels of connections and disconnections when it

comes to control systems in the brain and how those control systems are affected by chronic PTSD. At what stage critical levels are reached when there is that breakdown of integration of connection, the breakdown of control, such that Mr Pickavance then becoming afraid of his own aggression, afraid of his inappropriateness which did not occur until the 2002/2003 period. Such that even though Mr Pickavance had a well-developed injury of PTSD before 31st December 2001 it would appear that his major functional incapacity is the breakdown of control within him, the breakdown of composure, the breakdown of his capacity for composure occurred after that date.”

53. The submission by the Police that the injury should be deemed to occur on 6 September 2001 ignores completely the evidence of the exposure to trauma in 2002 and 2003 and the medical evidence which supports that this contributed to his disease of PTSD.
54. Mr Pickavance has given clear evidence of the trauma to which he was exposed in this period and the effect that this had on him. The veracity of his evidence is not in question – he was not cross-examined and there is no other evidence to traverse his evidence in this regard.
55. Consistent with Mr Pickavance’s evidence, Dr Wade notes the exponential increase in Mr Pickavance’s experience of psychological symptoms in 2002 and 2003. Dr Wade notes that:

“...it would appear that in terms of functional incapacity in terms of his breakdown of his capacity to be in control of his thoughts and feelings and behaviours this occurred very much towards the end of his police career.”
56. In his opinion as a psychiatrist Dr Wade considers that:

“This is very much in keeping with my previous experience of chronic PTSD in the police setting. That is that the injury can be longstanding but the functional incapacity has virtually an exponential nature to it as far as the rapid decline at the end, very much in the sense of ‘the bridge too far’.”
57. I note that Dr Wade has the benefit of being Mr Pickavance’s treating psychiatrist and has the benefit of treating him over time. He records a comprehensive history taken from Mr Pickavance which accords with the evidence of Mr Pickavance in these proceedings. I also note that the expertise of Dr Wade as a psychiatrist is not in question.
58. The submission by the Police might have had some force if Mr Pickavance had never returned to his work as a Police Officer after 6 September 2001. But return to work he did. He was exposed to more trauma in the course of his work which he describes as having a profound impact on him. He became progressively unable to cope with his duties and the exposure to traumatic events. After his return to work at Belmont in 2002 and 2003, he experienced an “exponential” increase in his psychological symptoms until he went off work on 18 May 2003. He has not been able to return to his former work as a Police Officer and will not ever be able to do so by reason of his psychological injury.
59. As I have stated, this evidence of Mr Pickavance’s about what happened to him when he returned to work is consistent in Dr Wades’s opinion, whose expertise as a psychiatrist is not in question, with the experience of chronic PTSD in the police setting.
60. The submission by the Police that there should be finding that the date of injury is 6 September 2001 simply ignores all of this evidence.

61. It ignores too the authorities from the Court of Appeal which support the view that section 15 should not be applied in this way. I note that counsel for the Police did not refer to any authorities which would support the deeming of the date of injury as 6 September 2001 under section 15 of the 1987 Act.
62. The Court of Appeal has spelled out very clearly why section 15 exists as a deeming provision and how it is to be applied.
63. For example, In *Alfonzo*, the Court of Appeal per Priestly J said:

“Because some s4(b)(i) disease injuries are contracted by a gradual process which can cause difficulties in establishing the date of injury, s 15 specifies defined times at which such injuries are deemed to have happened....

Sections 15 and 16 reduce the need to analyse in detail at what stage in the gradual process of disease injuries the stage of an injury, or incapacity, for the purposes of the Act, has been reached. The price paid for this is the imposition of rules which cannot altogether eliminate some arbitrariness in their operation.”

64. The Court of Appeal went on to reject the argument that the deemed date was when Mrs Alfonzo, a cleaner, first went off work as a result of her experience of painful symptoms in her left arm (her first period of incapacity) and went on to deem the date as the later date when she became incapacitated for her former employment as a cleaner.
65. With respect to counsel for the Police the approach that the Court of Appeal explicitly rejected is exactly what he is trying to argue that I should do here. I reject that approach as contrary to the authority by which I am bound.
66. Accordingly when regard is had to the totality of the evidence and in accordance with section 15(1)(a)(i), the deemed date of injury for the purposes of this claim is at the time of Mr Pickavance’s incapacity for his former employment as a Police Officer being 18 May 2003.
67. Accordingly Mr Pickavance has an entitlement to lump sum compensation for psychological injury because his injury is deemed received after 1 January 2002. This entitlement is of course subject to the application of the transitional provisions.
68. If I am wrong in this finding that the date of injury is 18 May 2003, I would refer the parties to the availability of the argument that the date of claim was the correct deemed date for a claim for lump sum compensation only. As I have stated above neither party approached the matter in this way. Nonetheless it would have in my view been an available argument in line with the authorities of *Antaw*, and *Stone*. I refer the parties to the decision of Deputy President Roche in *White v Sylvania Lighting Australasia Pty Ltd* [2011] NSWCCPD7 (*White*) where he undertook a comprehensive review of the authorities and concluded as follows:

“In Mr White’s matter, there is no claim for weekly compensation, but only a claim for additional lump sum compensation. His claimed s 66 impairment/losses in January 2010 could not have caused his incapacity in 2000. As a result, applying the principles in *Antaw*, as explained in *Stone*, s 16 can “fix different dates for incapacity

and impairment injuries”, and the correct deemed date of injury for Mr White’s “impairment injury” is the date of claim.”

69. On this approach the deemed date of injury for Mr Pickavance’s claim for his impairment injury would be the date of claim of 8 October 2009. On this approach Mr Pickavance would have an entitlement to lump sum compensation for psychological injury because his injury is deemed received after 1 January 2002, subject to the application of the transitional provisions.
70. However, as I have said, in view of the approach by the parties, Mr Pickavance’s entitlement to lump sum compensation is, subject to the transitional provisions discussed below, to be calculated on the basis of the deemed date of injury of 18 May 2003.
71. In the event that I rejected the primary submission by the Police that the deemed date of injury should be 6 September 2001 (or the first period of incapacity), counsel for the Police mounted an alternative argument that “at best” the finding should be that there are two dates of injury, namely 6 September 2001 and 18 May 2003 with only the latter being referred to an AMS who would then they argue make a deduction under section 323 of the *Workers Compensation and Workplace Injury Management Act 1998* (the 1998 Act) for the impairment as a result of psychological injury deemed to occur on 6 September 2001.
72. That is, the alternative argument is that there should be a finding that Mr Pickavance has suffered two injuries. Firstly a disease injury of PTSD with a deemed date under section 15 of 6 September 2001 and secondly, that Mr Pickavance then suffered an aggravation of his disease of PTSD in the same employment with a deemed date under section 16 of 18 May 2003. There was no authority advanced to support this approach.
73. Counsel for Mr Pickavance contends that this alternative argument is wrong as a matter of law. As a matter of law, Mr Pickavance cannot have an injury in the nature of a disease caused by his employment (a section 4(b)(i) injury) to which section 15 applies to deem the date of injury and also have an injury in the form of an aggravation of that same disease by the same employment (a section 4(b)(ii) injury) to which section 16 applies to deem the date of injury. He makes the point that once section 15 is enlivened (that is, the injury is in the nature of a disease which is of such a nature to be contracted by a gradual process) then it is enlivened for all purposes in that employment. He makes the point that it would be different if Mr Pickavance contracted the disease of PTSD in and because of his employment as a Police Officer, left that employment and went to another employment where he experienced an aggravation of his disease of PTSD.
74. With respect to counsel for the Police I agree that his argument is wrong as a matter of law and that you cannot have in the circumstances of Mr Pickavance’s case a disease of gradual onset caused by his employment (with date of injury deemed under section 15 as the first period of incapacity) and then that same disease aggravated in the course of the same employment (with the injury deemed to occur under section 16 at date he became incapacitated for his employment as a Police Officer), with the effect that he suffered two injuries.
75. Accordingly, Mr Pickavance’s entitlements to lump sum compensation for his psychological injury of PTSD fall to be determined by reference to a deemed date of injury of 18 May 2003.

76. This finding enlivens the transitional provisions and I now turn then to the dispute in relation to their application.

Transitional Provisions

77. As noted above the parties agreed as follows:

- (a) That in the event that I find one date of injury of 18 May 2003, there is no need for the matter to go to an AMS as there is no dispute that Mr Pickavance suffers a 22 per cent whole person impairment, entitling him to the sum of \$32,500, subject to the application of the transitional provisions.
- (b) That if I found only one date of injury of 18 May 2003 then Mr Pickavance is entitled to compensation for pain and suffering under section 67 of the 1987 Act in the sum of \$20,000, subject to the application of the transitional provisions.
- (c) That both the entitlements under section 66 (22 per cent whole person impairment in the sum of \$32,500) and under section 67 (\$20,000) would be subject to the application of the transitional provisions.

78. The parties do not agree how the transitional provisions should be construed or applied. Nor do they agree on the percentage or quantum of the reduction that should be applied under the transitional provisions.

79. The Police contend that the reduction should be applied to the percentage whole person impairment (agreed at 22 per cent) and argue for a 75 per cent reduction in the percentage impairment. This would bring Mr Pickavance's whole person impairment to 5.5 per cent which is under the 15 per cent whole person impairment threshold for lump sum compensation for psychiatric injury set by section 65A(3) of the 1987 Act such that Mr Pickavance would not be entitled to lump sum compensation for his PTSD. Accordingly an award for the respondent is sought.

80. Mr Pickavance contends that, in accordance with a literal interpretation of the transitional provisions, there should be a reduction in the compensation or dollar amount payable to him. Mr Pickavance contends that there should be a 50 per cent reduction in the compensation payable to him under sections 66 and 67 by reason of the application of the transitional provisions. Accordingly orders are sought for the payment of lump sum compensation under section 66 in respect of 22 per cent whole person impairment in the sum of \$32,500 less a 50 per cent reduction in compensation payable being the sum of \$16,250 and, for the payment of lump sum compensation in respect of pain and suffering under section 67 less a 50 per cent reduction in compensation payable being the sum of \$10,000.

81. The transitional provisions in Part 18C of Schedule 6 of the 1987 Act relevantly provide as follows in sub-clauses (2) and (3) of clause 3:

“(2) There is to be a reduction in the compensation payable under division 4 of Part 3 (as amended by the lump sum compensation amendments) for any proportion of the permanent impairment concerned that is previously non-compensable impairment. This sub-clause does not limit the operation of section 323 of the 1998 Act or section 68B of the 1987 Act.

(3) A *previously non-compensable impairment* is loss or impairment that is due to something that occurred before the commencement of the amendments to Division 4 of Part 3 made by the lump sum compensation amendments, being loss or impairment that is of a kind for which no compensation was payable under that division before that commencement.”

82. The transitional provisions are clearly enlivened in the circumstances of Mr Pickavance’s case and the parties agree that to be so. In view of the correspondence between the parties prior to the filing of the Application, I regard this matter as having been properly notified as disputed.
83. Both counsel considered that determination of the application of the transitional provisions lies with me as the Arbitrator as opposed to an AMS.
84. Neither counsel submitted that any of the cases which have dealt with the application of the transitional provisions constitute a binding authority on the question of how the provisions are to be interpreted.
85. There has been a disparity of approach to the interpretation of the transitional provisions both within the District Court and within this Commission.
86. Counsel for the Police submitted that it was still open to argue that there should be a reduction in the percentage impairment. This is line with the approach taken in the District Court by Neilson J in *Maguire v SAS Trustee Corporation* (unreported 30/11/09) (*Maguire*) and Armitage J in *Blakemore v SAS Trustee Corporation* (unreported 11/12/09) (*Blakemore*). I note that this was the approach taken by Arbitrator Grotte in this Commission in *Spoelder v NSW Police Force* (WCC2166-2010 8 June 2010) (*Spoelder*).
87. Mr Pickavance contends the transitional provisions should be given their literal meaning. This accords with the approach taken in this Commission by Arbitrator McManamey in *Young v Commissioner of Police* (WCC10343/09 28 June 2010) (*Young*) and Arbitrator Tanner in *Ryan v NSW Police Force* (WCC7216/09 18 August 2010) (*Ryan*).
88. This is the approach taken by Gibb DCJ in *Coleman v SAS Trustee Corporation* (unreported 19/11/2010) (*Coleman*).
89. It is perhaps curious that counsel for Mr Pickavance did not submit that I, as an Arbitrator, would be bound to follow the reasoning of a District Court Judge Gibb in *Coleman* who has expressly considered the question of the construction of the transitional provisions. The judges in *Blakemore* and *Maguire* both proceeded on the assumption that the reduction was to be applied to the compensable impairment. They were not invited to consider otherwise. In contrast Gibb DCJ has expressly considered the construction of the transitional provisions as to whether it is a reduction in the percentage impairment or in the compensation payable. Gibb J decided that the proper construction was that it be a reduction in the compensation payable.
90. Gibb DCJ in *Coleman* pointed out that:

“The difficulty is that no precise test is formulated in the Act; and the plain face of the words of the transition provisions apply the discount to the ‘compensation payable’ rather than to the assessment of the degree of permanent impairment.”

91. Gibb J noted that “the transition provisions refer expressly to ‘a reduction in the compensation payable’”. That wording is quite different from the structure established by section 323 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) in respect of the “deduction for previous injury or pre-existing condition or abnormality” which he points out refer to a “deduction for any proportion of the impairment that is due to any previous injury”. In other words, providing for a reduction in the compensation payable under the transitional provisions is not the same as providing for a reduction in the degree of permanent impairment. If the legislature intended that be a reduction in the degree of permanent impairment, then they would have said so, as they did in section 323 of the 1998 Act.
92. Gibb DCJ considers this argument to be consistent with what was said by Basten JA in *SAS Trustee Corporation v Pearce* [2009] NSWCA 302 (*Pearce*) from which he cites the following:

“111. To the extent that the PTSD constituted, or was the consequence of, an injury received before the commencement of the amendments, the lump sum compensation amendments did not apply. However once the Commissioner determined that the injury happened in 2005 because the PTSD constituted a disease within the terms of s 15 or 16, it was an injury received after the commencement of the amendments on 1 January 2002. The transitional provisions are then engaged.

112. The reduction required by the transitional provisions turns on a causal connection between the impairment and the events which occurred before the commencement of the amendments. There may be various circumstances in which an injury is received after a particular date but is ‘due to something’ that occurred before that date. Circumstances which engage ss15 or 16, providing for deemed dates of injury, could also engage the transitional provisions and require a reduction under cl 3(2). They require the assessment of the ‘proportion’ of the impairment which is due to events occurring before 2002.”
93. Following this analysis, Gibb J determined that

“If the transition provisions are engaged as would appear to be so, the deduction is to be made by way of a reduction in the compensation payable.”
94. Counsel for Mr Pickavance did not submit that I was bound to follow Gibb DCJ in *Coleman* notwithstanding that he is a Judge of the District Court and he has expressly considered the proper construction of the transitional provisions. It might be properly considered that I would be so bound. Counsel for the Police submitted that it was still open to argument along the lines of *Maguire* and *Blakemore*.
95. Even if I am not strictly bound to follow the authority of Gibb J in *Coleman*, it would certainly be persuasive authority.
96. But even if that were not so and it was still open to argument as counsel for the Police suggests, in my view the approach taken by Gibb J in *Coleman* is the correct one.
97. It is my view, in short, that when approaching the construction of the transitional provisions in the context of beneficial legislation, the provisions should be given their literal meaning. They provide for a reduction in compensation *payable*. In other words, providing for a reduction in the compensation payable under the transitional provisions is not the same as providing for a deduction in the degree of permanent impairment as provided for in

section 323 of the 1998 Act. If the legislature intended that there be a reduction in the degree of permanent impairment, then they would have said so, as they did in section 323 of the 1998 Act.

98. Accordingly I will approach the matter on the basis that there is to be a reduction in the compensation payable to Mr Pickavance.
99. The parties agree on Mr Pickavance's lump sum entitlements under sections 66 and 67 subject to the application of the transitional provisions. That is, it is agreed that he suffers a 22 per cent whole person impairment as a result of his injury which equates to \$32,500 (for a date of injury as found of 18 May 2003) (section 66) and that he is entitled to the sum of \$20,000 in respect of pain and suffering (section 67).
100. The parties do not agree on the quantum of the reduction to be applied. Mr Pickavance submits that it should be a reduction of 50 per cent applied to both the section 66 and 67 entitlements. The Police submit that it should be 75 per cent reduction to both entitlements.
101. Mr Pickavance's statement dated 11 August 2010 attached to the Application which went without challenge details the effects of the trauma to which he was exposed in the course of his police career both before and after 1 January 2002. The medical evidence supports this. It follows that there must be some reduction.
102. Counsel for Mr Pickavance submits that the appropriate reduction is by 50 per cent. This is in accordance with the opinion of Dr Wade, Mr Pickavance's treating psychiatrist
103. Dr Wade's opinion on this issue is contained in his report dated 14 September 2010 as follows:

"It would appear from the history that by 31 December 2001 Mr Pickavance had a well developed injury of Post Traumatic Stress Disorder and there appeared to be evidence of increasing disability particularly in his non-police life. Where he continued to function in a state of duty very much in the police sense of duty before self for the police but other parts of his life suffered – home life, sporting and recreational life, away from work becoming increasingly obsessed by and overwhelmed by police based issues. Such that he battled to do his duty, to try and look after his fellow police officers and to do his duty to the public of New South Wales, such that the more obvious incapacity the developed more in the late 2001/2002/2003 period.

The likelihood is that if he had left work around the end of or before 31st December 2001 his injury and disablement would most likely have progressed to a high degree of incapacity. In his long police career he has accumulated so many horrific and traumatic incidents, particularly incidents involving gross bodily injuries and then the main damage would appear to be then dealing with the families of the deceased.

Though around and after 31st December 2001 Mr Pickavance reported that he was in control of himself in the professional sense, even though he would suffer flashbacks and nightmares of previous horrific events, he was in control of his thoughts, his emotions and his behaviours, it would appear that in terms of functional incapacity in terms of his breakdown of his capacity to be in control of his thoughts and feelings and behaviours this occurred very much towards the end of his police career. This is very much in keeping with my previous experience of chronic PTSD in the police setting. That is that the injury can be longstanding but the functional incapacity has virtually an

exponential nature to it as far as the rapid decline at the end, very much in the sense of 'the bridge too far'. As brain science develops in relationship to the study of PTSD it may very much relate to critical levels of connections and disconnections when it comes to control systems in the brain and how those control systems are affected by chronic PTSD. At what stage critical levels are reached when there is that breakdown of integration of connection, the breakdown of control, such that Mr Pickavance then becoming afraid of his own aggression, afraid of his inappropriateness which did not occur until the 2002/2003 period. Such that even though Mr Pickavance had a well-developed injury of PTSD before 31st December 2001 it would appear that his major functional incapacity is the breakdown of control within him, the breakdown of composure, the breakdown of his capacity for composure occurred after that date.

Unfortunately there is a lack of hard science here and evidence based medicine to put hard figures on but my opinion, erring on the conservative – that is on the high side – would be that his percentage of permanent impairment attributable to the period prior to and including 31st December 2001 would be about 50%. That is if had left the police before 31st December 2001 he would have had impairment but not to the highly deteriorated extent that he reached by the end of his police career. That is if he had left before the end of 2001 he may have been capable of employment, he may have been in a state where treatment of his PTSD would have been much more effective. That is getting in with treatment before critical levels of shutdown occurred and related incapacity. Such that 50% is somewhat arbitrary but I think it is a conservative, on the high side, estimate of the permanent impairment that could be attributed to his pre 31st December 2001 police career.”

104. Dr Wade’s opinion is the only expert opinion on this issue.
105. Counsel for Mr Pickavance points out correctly that I am not bound to follow this opinion, that it cannot be said to be determinative of the issue and it is one piece of evidence that is to be weighed in the balance with the other evidence. Although he does say that it would be persuasive because Dr Wade has the benefit of being the treating psychiatrist and has treated Mr Pickavance over time.
106. As Gibb J said in *Coleman* there is “no simple, mechanistic way to measure any such deduction”. He pointed out that in case before him “the only expert opinion on the point is Dr Kenny’s educated guess of a reduction of about one-third”.
107. Gibb J went onto say that

“It is questionable whether it is for the Court to conjure up an appropriate decision on a reduction in the compensation payable without the aid of an expert opinion. There may be a case for doing so, by reference to the approach applied to contributory negligence. That does not seem to be entirely appropriate in a world governed by Guidelines and formalised assessments on technical criteria. On the other hand, absent expert opinion, it would be inappropriate to ignore the statutory requirement for reduction. As Mason CJ and Dawson CJ said in *Commonwealth v Amann Aviation Pty Ltd* [(1992) 174 CLR 64]:

“31. The settled rule, both here and in England, is that mere difficulty in estimating damages does not relieve the Court from estimating them as best it can:...Indeed, in *Jones v Schiffmann* (1971) 124 CLR 303, Menzies J went so far as to say that the assessment of damages...does sometimes, of

necessity involve what is guess work rather than estimation”: at p308. Where precise evidence is not available, the Court must do the best it can: *Biggin and Co Ltd v Permanite Ltd* (1951) 1 KB 422, per Devlin J at p438. And uncertainty as to the profits to be derived from a business by reason of contingencies is not a reason for a court refusing to assess damages: see *McGregor on Damages*, 15th ed (1988) pars 357-359.”

108. Gibb J went onto say that “*There is only one assessment available: Dr Kenny’s educated guess that there should be a deduction of one-third. It is by no means an unreasonable estimate.*” and then briefly summarised the history of the matter in this context. Gibb J then went on to repeat that “*Dr Kenny’s educated guess is my only guide*” and found that “*If the plaintiff qualified for compensation, the appropriate reduction would be of one-third*”.
109. Similarly here Dr Wade’s “conservative estimate” of 50 per cent is my only aid by way of expert opinion.
110. I have had regard to Dr Wade’s estimate in the context of all the other evidence in these proceedings including the evidence from Mr Pickavance of the trauma to which he was exposed to over the course of his police career from 1988 to 2003 and the effect that the various events to which he has deposed had on him. I have also had regard to Mr Pickavance’s evidence of the profound impact of the trauma to which he was exposed in 2002 and 2003 until he was progressively unable to cope with his police duties, leading to him becoming permanently incapacitated for police work in 2003. I have regard to this evidence in combination with the expert opinion from Dr Wade of the exponential nature of Mr Pickavance’s impairment as a result of his PTSD that occurred in 2002 and 2003 which he identifies as follows: “...it would appear that in terms of functional incapacity in terms of his breakdown of his capacity to be in control of his thoughts and feelings and behaviours this occurred very much towards the end of his police career. This is very much in keeping with my previous experience of chronic PTSD in the police setting. That is that the injury can be longstanding but the functional incapacity has virtually an exponential nature to it as far as the rapid decline at the end, very much in the sense of ‘the bridge too far’.”
111. When regard is had therefore to the totality of the evidence that I have before me on this issue in this case, I consider that a 50 per cent reduction in the compensation payable is an appropriate assessment of the proportion of the impairment that occurred prior to 1 January 2002 in the circumstances of Mr Pickavance’s case.
112. Accordingly the entitlements of Mr Pickavance to lump sum compensation are as follows:
 - (a) In view of the agreement reached that in the event of a finding that the deemed date of injury is 18 May 2003 as so found, that the respondent will pay the applicant lump sum compensation under section 66 of the *Workers Compensation Act 1987* in respect of 22 per cent whole person impairment in the sum of \$32,500 less a 50 per cent reduction in compensation payable as found under Schedule 6 Part 18C clause 3 of *Workers Compensation Act 1987* entitling the applicant to the sum of \$16,250 under section 66.
 - (b) In view of the agreement reached that the respondent will pay the applicant in respect of pain and suffering under section 67 of the *Workers Compensation Act 1987* the sum of \$20,000 less a 50 per cent reduction in compensation payable as found under Schedule 6 Part 18C clause 3 of the *Workers Compensation Act 1987* entitling the applicant to the sum of \$10,000 under section 67.

113. I will make orders in these terms. I should note that we did not discuss at the arbitration whether I could make orders in these terms (it being simply assumed by the parties that I could do so) or whether, as there has never been an assessment of the section 66 entitlements by an AMS (the 22 per cent whole person impairment being the subject of agreement), the matter would need to be finalised by the parties entering into a complying agreement. If the parties now consider that it would need to be the subject of a complying agreement then they can simply enter into one providing for the payment of the lump sum entitlements in accordance with my findings.

Costs

114. Lastly, in response to the application by counsel for Mr Pickavance in relation to the question of costs, I consider that the matter is complex, by reason of the complex legal issues involved, and that the costs of both parties should be increased by 15 per cent as sought.