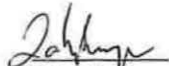


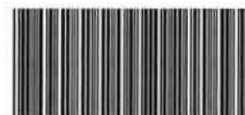
I, Zahra Panju, solicitor for the Appellant, hereby certify this and the following 9 pages are a true and correct copy of the Appellant's written submissions for publication on the Supreme Court of New South Wales website pursuant to paragraph 27 of Practice Note SC CA 1.

Dated: 31 October 2025


Zahra Panju



Filed: 8 September 2025 3:05 PM



D00027YM50

Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00150256

TITLE OF PROCEEDINGS

First Applicant	Troy Townsend
First Prospective Respondent	CPB CONTRACTORS PTY LIMITED ABN 98000893667

FILING DETAILS

Filed for	Troy Townsend, Applicant 1
Legal representative	armando john gardiman
Legal representative reference	
Telephone	02 8833 2500
Your reference	ZP278640

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (Townsend Troy v CPB Contractors written submissions Court of Appeal 6.09.2025.pdf)

[attach.]

Troy Townsend
Appellant

V

CPB Contractors Pty Limited
Respondent

Appellant's written Submissions

Background

1. The Appellant has an accepted injury to the right hip.
2. He claimed that as a result of that injury he was incapacitated for his pre-injury work from 3 November 2023.
3. The Appellant said in his statement that at the time of his injury he was working as a construction worker.¹This was extremely strenuous work.²
4. He suffered the injury on 21 January 2020 when he felt a tear in his right hip.³
5. About a week after the injury he became the occupational first aid officer. This was lighter work which the Appellant performed until the job at Campbelltown Hospital was complete. The Appellant then transferred to the Pitt St Metro Project as the health and safety representative. He performed that work until he left work on 6 October 2023. At no time did the Appellant resume his pre-injury duties.
6. In his statement the Appellant set out his continuing disabilities as a result of his hip injury.⁴ Those disabilities included pain in the hip, difficulty walking, difficulty walking on uneven surfaces, difficulty walking stairs, difficulty putting on shoes and socks, hip locking, difficulty bending, overwhelming pain when unlocking hip, instability, loss of confidence and sleep disturbance.
7. In his supplementary statement he says that as the health and safety officer he was required to walk every day. He says he continued to work despite the pain and disability. His hip would be in agony, especially when he would walk flights of stairs and walk on steel.⁵

¹ CB 1 par10

² CB 2 par 15

³ CB 2 par 12

⁴ CB 6 par 45

⁵ CB 9 par 8-11

8. Significantly he said that he deteriorated quickly within the two years between being certified fit to work and being certified unfit to work in 2023.⁶
9. Dr Herald examined the Appellant on 31 January 2024.
10. He found that there was a positive Trendelenburg sign and a positive Trendelenburg gait. There was irritability in the hip joint together with limited movements.⁷ He diagnosed advanced osteoarthritis of the right hip and an associated labral tear. Significantly he found that the condition will continue to deteriorate.⁸
11. Dr Herald thought the Appellant will require a hip replacement. This was in response to the question: "Do you consider our client requires any medical treatment to treat his injury". When the answer is considered with the question Dr Herald's opinion is that he requires a hip replacement now or at least in the very near future as a result of the continuing deterioration in the hip.
12. On 10 November Dr Mechreky certified the Appellant as having no current capacity from 10 October 2023. In the certificate of capacity he describes the injury as "exacerbation of right hip pain – MRI – tearing of labral complex(sic) again". To the question "How is the injury related to work" he said "Exacerbation of right hip pain from 6/10/2023"⁹
13. There was no other medical evidence that considered the condition of the Appellant's hip on and after 6 October 2023.
14. The Member initially gave a decision on 28 May 2024.¹⁰ The Member entered an award for the Respondent.¹¹ The Certificate of Determination was amended on 21 June 2024.¹²
15. On 21 June 2024 the Appellant lodged an Appeal Against Decision of the Member.
16. The Acting Deputy President delivered a determination of the Appeal on 31 March 2025.¹³
17. The Appellant appeals from that decision on the basis that there were errors in point of law.

Submissions

Ground 1

18. The entitlement to weekly compensation relevant to this matter is found in sections 33 to 37 of the Workers Compensation Act 1987.

⁶ CB 10 par 15

⁷ CB 102 M

⁸ CB 103 F

⁹ CB 21 Q & T

¹⁰ RB 36

¹¹ RB 36

¹² RB 43

¹³ RB 69

19. Those sections provide:

33 WEEKLY COMPENSATION DURING TOTAL OR PARTIAL INCAPACITY FOR WORK

(cf former s 9 (1))

If total or partial incapacity for work results from an injury, the compensation payable by the employer under this Act to the injured worker shall include a weekly payment during the incapacity.

36 WEEKLY PAYMENTS DURING FIRST ENTITLEMENT PERIOD (FIRST 13 WEEKS)

(1) The weekly payment of compensation to which an injured worker who has no current work capacity is entitled during the first entitlement period is to be at the rate of 95% of the worker's pre-injury average weekly earnings.

(2) The weekly payment of compensation to which an injured worker who has current work capacity is entitled during the first entitlement period is to be at the lesser of the following rates--

(a) 95% of the worker's pre-injury average weekly earnings, less the worker's current weekly earnings,

(b) the maximum weekly compensation amount, less the worker's current weekly earnings.

37 WEEKLY PAYMENTS DURING SECOND ENTITLEMENT PERIOD (WEEKS 14-130)

(1) The weekly payment of compensation to which an injured worker who has no current work capacity is entitled during the second entitlement period is to be at the rate of 80% of the worker's pre-injury average weekly earnings.

(2) The weekly payment of compensation to which an injured worker who has current work capacity and has returned to work for not less than 15 hours per week is entitled during the second entitlement period is to be at the lesser of the following rates--

(a) 95% of the worker's pre-injury average weekly earnings, less the worker's current weekly earnings,

(b) the maximum weekly compensation amount, less the worker's current weekly earnings.

(3) The weekly payment of compensation to which an injured worker who has current work capacity and has returned to work for less than 15 hours per week (or who has not returned to work) is entitled during the second entitlement period is to be at the lesser of the following rates--

(a) 80% of the worker's pre-injury average weekly earnings, less the worker's current weekly earnings,

(b) the maximum weekly compensation amount, less the worker's current weekly earnings.

20. Current work capacity and no current work capacity are defined in Schedule 3.

21. The definitions are:

9 MEANING OF "CURRENT WORK CAPACITY" AND "NO CURRENT WORK CAPACITY"

- (1) An injured worker has **"current work capacity"** if the worker has a present inability arising from the injury such that the worker is able to return to the worker's pre-injury employment, or is able to return to work in suitable employment, but the weekly amount that the worker has the capacity to earn in any such employment is less than the weekly amount that the worker had the capacity to earn in that employment immediately before the injury.
- (2) An injured worker has **"no current work capacity"** if the worker has a present inability arising from an injury such that the worker is not able to return to work, either in the worker's pre-injury employment or in suitable employment.

22. The claim before the Member and the Acting Deputy President was a claim for weekly compensation from 3 November 2023 to the date of hearing and ongoing.¹⁴
23. The determination of that claim required findings that the Appellant had either no current work capacity or current work capacity from 3 November 2023. Because the entitlement is weekly it requires that the question be considered for each week.
24. Thus the first question to be determined was whether there was an entitlement to compensation as at 3 November 2023 and then whether there was an entitlement at each week from 3 November 2023 to the date of determination.
25. The Member approached the matter by considering why the Appellant had ceased working for the Respondent in September 2023.
26. The dispositive paragraphs say:
35. The applicant did not cease work in September 2023 because his hip injury incapacitated him for work. He resigned as a result of a considered decision to avoid an adverse finding arising out of an investigation into his personal conduct. The applicant had been engaged on full-time ordinary duties until he resigned for reasons unconnected to any injury either to his hip or to a psychological injury.
36. The applicant subsequently sought to withdraw his resignation and return to work, but his resignation was accepted and the withdrawal refused. If the applicant had not considered he was fit for work at the time he made the application to withdraw his resignation it is reasonable to presume he would not have done so.
37. I am not persuaded that the applicant was unfit for work as a result of his injury when he resigned his employment.
38. I am not persuaded by the Certificates of Capacity provided by the applicant's general practitioner regarding incapacity for work in November 2023. There is insufficient evidence before the Commission to establish that the applicant was incapacitated for work from 23 November 2023 as a result of the deterioration of his hip injury.
27. Whilst the Member had referred to other evidence including the report of Dr Herald dated 31 January 2024 and the reports of Dr Glezos she did not refer to them as part of her reasoning. She only referred to them as part of recounting the evidence before her.

¹⁴ RB 29

28. The Appeal to the Presidential Member contained 4 Grounds of Appeal.
29. Those grounds were:
1. The Member erred by asking the wrong question to determine the Appellant's entitlement to weekly compensation.
 2. The Member erred by failing to consider all relevant evidence before her.
 3. The Member erred by considering the fact that the Appellant withdrew his resignation determined the question of whether he had an incapacity.
 4. The member failed to give reasons for rejecting the Certificates of capacity.
30. The first ground of Appeal relates primarily to the disposition of ground 1 of the appeal before the Acting Deputy President.
31. The matter raised before the Acting Deputy President was that the Member had failed to address the correct question which was whether there was an incapacity from 3 November 2023.
32. The Acting Deputy President considered this ground in paragraphs 45 to 51 of his reasons.
33. The Acting Deputy President considered that there had been no challenge to the finding that the Appellant had been engaged in full time ordinary duties until he resigned for reasons unconnected to any injury either to his hip or to a psychological injury.
34. This statement was not correct. The Appellant had challenged the finding that he was performing his pre-injury duties in September 2023.¹⁵
35. Otherwise the Acting Deputy President did not address the substance of the submission made.
36. He approached the ground by finding that he agreed that the Appellant ceased work for reasons not connected with his hip injury.
37. The Acting Deputy President did not address or consider the substance of the submission made. He did not consider the evidence concerning the Appellant's condition and restrictions as at 3 November or thereafter including the time when he was examined by Dr Herald in January 2024.
38. The Acting Deputy President did not consider any of the matters that constitute the terms of the relevant sections of the Workers Compensation Act.
39. He did not consider the physical demands of the Appellant's pre-injury duties as a construction worker. He did not consider the restrictions present in November 2023 and later caused by the right hip injury.

¹⁵ RB 58S and 59S

40. The Acting Deputy President repeated the error made by the Member. He considered that there could only be an entitlement to compensation if there was an economic loss caused by the injury when he left work in September 2023.
41. It is trite to observe that there was no compensable loss until the Appellant resigned in September 2023. By 3 November the Appellant had a loss as he had not worked since October. The question was whether there was an incapacity at that time.
42. It is not a complete answer to that question to find that there was no incapacity in September 2023. Legal logic does not work so that once there is a finding about the events in September 2023 there can be no entitlement unless it can be shown that there was a change in circumstances by November 2023.¹⁶
43. The proper task for the Member and the Acting Deputy President was to consider the totality of the evidence as it related to the Appellant's condition on 3 November 2023 and at later times up to the date of determination. The task was to determine whether there was compensable incapacity as a result of the accepted hip injury during that time and not at the earlier time in September 2023.
44. The unchallenged evidence of the Appellant was that he had ongoing pain in the right hip, difficulty walking, difficulty walking on uneven surfaces; difficulty walking stairs; difficulty putting on shoes; difficulty bending at certain angles and pain associated with locking of the hip.¹⁷
45. Dr Herald found positive Trendelenburg sign and positive Trendelenburg gait which supports the Appellant's complaints.¹⁸
46. On 10 November 2023 Dr Mechreky certified that there was exacerbation of right hip pain from 06/10/2023.¹⁹
47. The evidence was a compelling case that by 3 November 2023 there had been a deterioration in the Appellant's condition or at least his condition was such that he could no longer perform his pre-injury duties as a construction worker.
48. Neither the Member or the Acting Deputy President applied the proper test which was to consider whether there was an incapacity on 3 November 2023 and afterwards.
49. The Acting Deputy President repeated the error when considering Ground 2 of the Appeal before him.
50. That ground related to a failure by the Member to relevant evidence being the supplementary statement evidencing increasing restrictions at work, Dr Herald's evidence that the hip was continuing to deteriorate and Dr Mechreky's opinion that the incapacity was due to an exacerbation of right hip pain.

¹⁶ *Rail Services Australia v Dimovski and Anor* [2004] NSWCA 267 at 12 – 13; *O'Donel v Commissioner of Road Transport* [1938] HCA 15; (1938) 59 CLR 744

¹⁷ CB 6N – 7K see also CB9

¹⁸ CB 102M

¹⁹ CB 21T

51. The Acting Deputy President decided the ground by holding that the attempt to withdraw the resignation indicated that the appellant's physical condition at that time was the same (in his perception) as it was before the resignation and that he was not incapacitated for the work he was doing at the time of the resignation.²⁰
52. This conclusion repeats the error of deciding the matter based on a view of incapacity at September 2023 and not the relevant date which is 3 November 2023.
53. The error was repeated in the context of ground 3. The Acting Deputy President rejected this ground saying that "The Member did not determine the appellant's incapacity on the basis of the attempted withdrawal of the resignation. The Member inferred from the attempted withdrawal that the appellant's capacity for work so far as the appellant perceived it was the same as it was before he submitted his resignation."²¹
54. Finally the error was repeated in considering ground 4. The Acting Deputy President again considered that the question was whether there was any difference in the Appellant's condition before and after the resignation.²²
55. The correct question was whether there was incapacity on or after 3 November 2023.
56. When considered overall the Acting Deputy President failed to consider a ground that had been squarely raised. This amounts to an error of law.²³

Ground 2

57. The Appellant repeats the submissions in respect of Ground 1.
58. As a result of the incorrect approach taken by the Member and the Acting Deputy President he did not consider the evidence found in the statements of the Appellant or the full evidence of Dr Herald.
59. The Acting Deputy President does not refer to the evidence of the Appellant despite the fact that it had been squarely raised in support of the appeal along with the evidence of Dr Herald.²⁴ With regard the Dr Herald the Acting Deputy President only considered the report in the context of whether the Appellant had been able to perform his duties as a Health and Safety Representative which was lighter work than his pre-injury work as a construction worker. He did not refer to the evidence of the restrictions found by Dr Herald or the Appellant's evidence of his ongoing restrictions which was unchallenged.

Ground 3

²⁰ Reasons 66 RB 80I-L

²¹ Reasons 74 RB 81M-N

²² Reasons 88 RB 83 N-O

²³ *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421; [2019] HCA 3; *NABE v Minister for Immigration and Multicultural and Indigenous Affairs* (No 2) (2004) 144 FCR 1; [2004] FCAFC 263

²⁴ RB 56M-U, 57E-G, 58F-H, 58M-T

60. When considering ground 1 of the appeal the Acting Deputy President said The appellant does not challenge the finding of fact made by the Member at reasons [35], namely:

“The [appellant] did not cease work in September 2023 because his hip injury incapacitated him for work ... The [appellant] had been engaged [in] full-time ordinary duties until he resigned for reasons unconnected to any injury either to his hip or to a psychological injury.”

61. It is true that there was no direct challenge to the finding that the Appellant resigned for reasons other than his incapacity. It was not correct that there was no challenge to the finding that he was performing his full time ordinary duties.

62. There had been an express challenge to that finding.

63. The Appellant had squarely submitted that at the time he resigned he was engaged in alternate duties that were lighter than his pre-injury duties.²⁵ That submission also necessarily challenges any finding that there was no incapacity in the medical sense. In fact the submission had been made that there had been a failure to consider whether the Appellant had incapacity for his pre-injury work and his lighter duty work.

Ground 4

64. In the submissions on appeal the Appellant had put in support of ground 2 that the Member had failed to consider the evidence of the Appellant in the supplementary statement. It was put that the evidence explained why there was an incapacity on 3 November 2023 whether or not there was incapacity in September 2023.²⁶

65. The Acting Deputy President did not refer to the supplementary statement in his consideration.²⁷ He referred to the submission but did not then consider firstly whether there had been a failure by the Member to consider the evidence. He then only considered Dr Herald's evidence in a limited manner. He said that “Dr Herald's evidence of deterioration was general and not specifically directed to the period between 26 September 2023 and 3 November 2023. Dr Herald offered a general prognosis:

“What is your prognosis?

His condition will continue to deteriorate. He will most likely require a total hip replacement.”

66. The Acting Deputy President did not address the question of whether the evidence had been considered by the Member. He did not consider if that evidence formed part of the reasoning process. Furthermore he did not carry out the task on appeal which is to consider the evidence to determine if there has been an error of fact, law or discretion.²⁸

²⁵ RB 56K-L, 58S-T and 59E-F

²⁶ RB 58N and Q-U

²⁷ RB 79m-80M

²⁸ State of New South Wales v Culhane [2025] NSWCA 157

67. The submission before him was that a combination of the three pieces of evidence supported a conclusion that there was an incapacity by 3 November 2023.

68. For that task it was not determinative whether Dr Herald was specifically addressing the period from 26 September 2023 and 3 November 2023. The point being made was that the hip condition was one that deteriorates. That evidence had to be assessed with the evidence from the Appellant that it was deteriorating and from Dr Mechrecky that it had.

69. The Acting Deputy President simply did not address that submission.



B G McManamey
Counsel for the Appellant
PH: 9373 7447
Email: mcmanamey@siranthonymason.com.au