I, Jessica Liu, solicitor for the Respondent, hereby certify this and the following 11 pages are a true and correct copy of the Respondent'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

Jessica Liu

Filed: 3 October 2025 10:12 AM

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Written Submissions

COURT DETAILS

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

TITLE OF PROCEEDINGS

First Appellant	Troy Townsend
First Respondent	CPB CONTRACTORS PTY LIMITED ABN 98000893667

FILING DETAILS

Filed for	CPB CONTRACTORS PTY LIMITED,Respondent 1
Legal representative	NICHOLAS JAMES STUDDERT
Legal representative reference	
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Your reference	NWS JEL - 273764

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 - Respondent's Submissions - 02.10.2025.pdf)

[attach.]

TROY TOWNSEND
Appellant

v

CPB CONTRACTORS PTY LIMITED
Respondent

CA 2025/00150256

RESPONDENT'S SUBMISSIONS

Introduction and overview

1 The Appellant appeals from a decision of the Personal Injury Commission of NSW (**PIC**), being the determination of appeal by Acting Deputy President (**ADP**) Parker SC dated 31 March 2025. In that decision ADP Parker rejected an appeal by the Appellant from a decision by PIC Member Drake, dated 28 May 2024 (amended 21 June 2024).

2 The appeal from the Member's decision to ADP Parker was governed by s 352(5) *Workplace Injury Management and Workers Compensation Act 1998* (NSW) (**WIM Act**), which provides:

> *(5) An appeal under this section is limited to a determination of whether the decision appealed against was or was not affected by any error of fact, law or discretion, and to the correction of any such error. The appeal is not a review or new hearing.*

3 ADP Parker was a presidential member for the purposes of the WIM Act provisions. The appeal from ADP Parker's decision to this Court is governed by s 353 of the WIM Act, which relevantly provides:

> *(1) If a party to any proceedings under the Workers Compensation Acts before the Commission constituted by a presidential member is aggrieved by a decision of the presidential member in point of law, the party may appeal to the Court of Appeal.*

> *(2) The Court of Appeal may, on the hearing of any appeal under this section, remit the matter to the Commission constituted by a presidential member for determination by the Commission in accordance with any decision of the Court and may make such other order in relation to the appeal as the Court thinks fit.*
>
> *…*

Point of law

4 This appeal therefore is restricted to aggrievement by a decision in point of law, as that phrase has been interpreted: ***Fisher v Nonconformist*** *Pty Ltd* (2024) 114 NSWLR 1; [2024] NSWCA 32. The decision of the presidential member does not need to have been on a point of law, but the appeal must raise a challenge in point of law. Recognised challenges of the requisite character include constructive failure to exercise or properly exercise jurisdiction, failing to accord procedural fairness, failing to consider all the substantial, clearly articulated arguments made, and failing to address the correct legal question.

5 The grounds of appeal should be considered having regard to their true substance not merely their form. The Respondent does not accept that, properly characterised, any of the grounds in this appeal are in point of law, notwithstanding their framing, for reasons set out below by reference to individual grounds.

Material error

6 Establishing legal error in the decision should not necessarily lead to the decision being overturned. The powers in s 353(2) of the WIM Act to remit the matter or make other orders are expressly discretionary. Generally the error must be demonstrated to be material.[1] This involves consideration of whether there is a realistic possibility that the error could have made a difference to the result.

7 The Appellant, as applicant for compensation, needed to satisfy the Member that he was suffering incapacity within the meaning of the statutory provisions sufficiently to entitle him to compensation. The Member considered the evidence put before her and

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[1] *Fisher v Nonconformist* at [50]; *Yates Property Corp Pty Ltd (in liq) v Darling Harbour Authority* (1991) 24 NSWLR 156 at 177; *Melino v Roads and Maritime Services* [2018] NSWCA 251; (2018) 98 NSWLR 625 at [52].

was not satisfied of relevant incapacity for the period claimed. In essence, she considered the evidence in support of that claim was insufficient.

8 On the appeal from that decision, ADP Parker considered arguments critical of the way in which the Member had approached her task. However, not only was he not satisfied that she had made any error in approach, but he was also of the view that the evidence had not been sufficient to establish incapacity.

9 The Respondent submits that the following potted chronology of certain uncontroversial objective facts provides relevant context for assessing the decisions below:

(a) the Appellant commenced working with the Respondent on 3 July 2019;[2]

(b) he suffered an injury to his right hip at work, on 21 January 2020;[3]

(c) he did not have any time off work for that injury;

(d) about a week later, he changed duties when he became an occupational first aid officer;[4]

(e) on 6 April 2021 he was certified as fit for pre-injury duties;[5] (no documentary evidence of certification as to fitness to work prior to that time was in evidence);

(f) in April or May 2022, he was transferred from the Campbelltown Hospital site to the Pitt Street Metro Project site, where he was the health and safety representative, chairman of the safety committee, and union delegate;[6]

(g) he had no time off for the injury between January 2020 and September 2023, over three and a half years;

[2] Combined Book 1R-S.
[3] Combined Book 2H.
[4] Combined Book 2Q.
[5] Combined Book 12-14.
[6] Combined Book 2T-V; 9I.

(h) on 26 September 2023 he was issued with a show cause notice, presumably putting his employment in jeopardy, regarding an allegation of serious and wilful misconduct;[7]

(i) Upon receipt of that notice he resigned from his employment;

(j) He attended his general practitioner on 3 November 2023, (apparently for the first time since 30 July 2023),[8] and was certified as having no current work capacity.[9]

10 The evidence here was insufficient to establish incapacity, and no error in point of law by ADP Parker was material.

Incapacity

11 S 9 of the *Workers Compensation Act 1987* (NSW), (**1987 Act**), provides relevantly:

> *A worker who has received an injury…shall receive compensation…in accordance with this Act.*

12 The Appellant was claiming weekly compensation. The entitlements to weekly compensation are provided for in Part 2, Division 2 of the 1987 Act. Within Division 2, the primary compensation provision is s 33, which provides:

> *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.*

13 "Incapacity" is not defined in the 1987 Act. The 1987 Act must be construed as if it formed part of the WIM Act and, in the event of an inconsistency between the two Acts, the WIM Act prevails: s 2A of the 1987 Act. S 4(1) of the WIM Act contains only an inclusive definition of the term "incapacity", relating to disfigurement.

14 Historically, for worker's compensation purposes incapacity arises where a worker's capacity for doing work in the labour market in which the worker was working, or might

[7] Combined Book 5K.
[8] Combined Book 52.
[9] Combined Book 21.

reasonably be expected to work, was impaired by injury.[10] However, for the purposes of the compensation provisions in Part 2 Division 2, it is well established that "incapacity…is incapacity falling within the period during which a worker has become entitled to weekly payments of compensation for incapacity." [11] That is, there must be entitlement to compensation, by reference to the provisions which calculate loss of wages, for there to be incapacity.

15 Some of the authorities on this point relied on an earlier version of s 34 of the 1987 Act. S 34 was substituted to its present form, which now contains nothing relevant to the question, in 2012.[12] However the principle has been adhered to in later cases; "the existence of an incapacity must depend upon an entitlement to compensation, being an entitlement of the kind the subject of a claim, that is, one encompassing economic loss".[13] This requirement is maintained in the provisions which now prescribe the manner of calculating entitlements for weekly benefits by reference to distinct time periods,[14] and the definition of "current work capacity",[15] set out in the Appellant's submissions. The weekly amount that the worker has the capacity to earn must be less than the weekly amount that the worker had the capacity to earn in the employment immediately before the injury.

16 The applicant must establish that the incapacity encompasses economic loss, in other words he or she must establish not merely difficulty with some work duties, but actual economic incapacity. This focus on economic incapacity correctly informed the approach taken by the Member, and the ADP, to the position leading up to, and after, the resignation.

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[10] *Arnotts Snack Products Pty Ltd v Yacob* (1985) 155 CLR 171 at 177-178; see also *Holden v Toll Chadwick Transport Ltd* (1987) 8 NSWLR 222 at 227.
[11] *P & O Berkeley Challenge Pty Ltd v Alfonzo* (2000) 49 NSWLR 481; [2000] NSWCA 214 at [22]-[28] per Priestley JA, (Clarke AJA agreeing); *Stone v Stannard Brothers Launch Services Pty Ltd* (2004) 1 DDCR 701; [2004] NSWCA 277 at [37] per Hodgson JA, (Mason P agreeing).
[12] Substituted by 2012 No 53, Sch 1.1 [3].
[13] *Inghams Enterprises Pty Ltd v Thoroughgood* (2014) 13 DDCR 125; [2014] NSWCA 166 at [46] per Basten JA, (McColl and Meagher JJA agreeing); ***Haddad v Geo Group*** *Australia Pty Ltd* (2024) 114 NSWLR 407; [2024] NSWCA 135 at [124] per Griffiths AJA, (Kirk and Stern JJA agreeing).
[14] 1987 Act ss 36-38; in their current form since 2018: 2018 No 62, Sch 3.1[6]; periods defined in 1987 Act s 32A.
[15] 1987 Act, Schedule 3, cl 9.

Ground 1

17 In the appeal to the ADP, the Appellant submitted that the Member had erred in her approach to the issue of incapacity, in effect by focusing on the date at which the Appellant ceased work, in September 2023, rather than the date of the period of claim, which was from 3 November 2023 continuing.

18 As a first point, there was no error in the Member's approach. Her focus on incapacity at September of 2023 was because that was the point at which the Appellant went from working full time with no economic loss, to not working or earning at all. There was no evidence of any material change in capacity, or economic circumstances, from that time until the claimed period commenced only a matter of weeks later. Merely because the claim was formulated seeking benefits from November does not mean that evidence of lack of incapacity two months earlier can be ignored.[16] The approach was rational.

19 The appeal ground asserts that the ADP failed to properly consider the Appellant's submission on the point. This is not in substance any point of law; the Appellant does not contend that the submission was wholly ignored, sufficiently to constitute a failure to exercise jurisdiction, nor is such a submission reasonably open.

20 In any event, the contention of a failure to "properly consider" is without foundation. The ADP appropriately and accurately summarised the Appellant's submissions on the point in his reasons: Red 76E-P. He then set out his consideration of the submissions at Red 77J-78G. These reasons reveal adequate understanding and attention to the submissions made. As the ADP concluded, the Member's findings properly reflected the evidence as to incapacity for the purposes of s 33 of the 1987 Act, (the core provision for entitlement to weekly compensation). This justified the express reliance in the reasons[17] on the passages from the report of the Appellant's medico legal doctor, Dr Herald, which stated that the Appellant had been back to his normal duties until October 2023, but then left his work for other reasons.[18]

21 In his written submissions the Appellant contends, at [33], that the ADP erred in considering that there had been no challenge to the finding that the Appellant had been

[16] *Haddad v Geo Group* at [72].
[17] Red 77T.
[18] Combined Book 102J.

engaged in full time ordinary duties until he resigned for reasons unconnected to his injury. The Appellant contends, at [34], that this finding was in fact challenged, referring to Red 58S and 59S.

22 The Respondent submits that these references do not support the submission that the finding was challenged. Rather, the Appellant was contending that the Member should have recognised that the Appellant was not performing his pre-injury duties at the time of his resignation. The difficulty with these submissions is that "ordinary duties" do not necessarily correlate precisely with "pre-injury duties". It is not clear on the evidence as to why the Appellant's duties changed, either at a point approximately one week after the initial injury in 2020, or again in April or May of 2022. In any event, the evidence was that the Appellant worked thereafter on "ordinary duties", in the sense that they were not restricted in any way, either by reference to medical certification, or any other practical limitations dictated by the employer. Although the Appellant said Dr Mechreky "put me on light duties" immediately after the accident,[19] no certificate to that effect was tendered, and Dr Mechreky's clinical notes do not even record the injury, let alone any recommendation or certification of light duties.[20]

23 The Appellant separately said in his supplementary statement that on 6 April 2021 he was "certified fit to work as tolerated", but the 6 April 2021 certificate, from Dr Ghaly,[21] contained no such qualifications to capacity, and the relevant certificate containing the words "as tolerated", from Dr Glezos dated 4 May 2021, certified the Appellant nevertheless as "fit for pre-injury duties",[22] as the Appellant had acknowledged in his first statement.[23]

24 Any differences between the duties the Appellant was performing at the time of his injury, and his duties for the next 3 ½ years were not made relevant to the issue by any evidence. Before the accident, the Appellant engaged in walking stairs and on steel, and

[19] Combined Book 2J.
[20] Combined Book 67.
[21] Combined Book 12-14.
[22] Combined Book 16G.
[23] Combined Book 6G.

general labouring duties involving heavy labour.[24] On the Pitt Street Metro Project he walked stairs and on steel, and performed general heavy labouring duties.[25]

25 Not only was it reasonable to conclude that the relevant finding was not challenged, the original finding was correct on the evidence.

26 The Appellant complains that the ADP did not consider the matters that constitute the terms of the relevant sections of the 1987 Act. The first difficulty with that submission is that he was not asked to overturn the Member's decision by reference to any particular statutory provision. Secondly, there is no basis to conclude that the ADP misunderstood or misapplied any of the relevant sections.

27 The underlying difficulty with the Appellant's position on this point is that the evidence did not support incapacity in the time period claimed in any event because it comprised only:

(a) statements by the Appellant himself which were not conclusive as to incapacity for the purposes of the statute, and in any event were not supported by other evidence, (referred to below); and,

(b) medical certificates from a general practitioner, which did not constitute expert opinion evidence of incapacity,[26] because they did not include any reasoning upon which the Member or the ADP could rely with confidence, such as is generally required for expert evidence.

28 Against this there was the evidence that the Appellant had been working in "ordinary duties", full time without any economic loss, continually since the incident. In that context it was not only permissible but appropriate for the Member, and in turn the ADP, to consider that the fact that the Appellant had resigned in September 2023 for reasons unconnected with his original injury as particularly germane to the question of his true incapacity at that time and in the months following. There is no reason to think that any incapacity developed or increased between September 2023 and November 2023.

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[24] Combined Book 2F.
[25] Combined Book 9M-R.
[26] Combined Book 21 – 50.

29 It is so that the Appellant said in his first statement that he made the decision to resign "*on advice from the Union, to avoid any finding against me and due [sic] increasing pain and disability in the right hip and mental stress and difficulty sleeping …*".[27] However, according to the history given to Dr Herald in January of 2024, the Appellant had not associated his resignation with his hip condition at all. Furthermore, it was relevant, as the Member considered, that the Appellant immediately decided to withdraw his resignation. This was at the least not supportive of any physical disability having been a trigger for the resignation.

30 The Appellant had asserted that his work duties on stairs was "why I deteriorated so quickly within the two years..",[28] and Dr Herald said his "condition will continue to deteriorate", but there was nonetheless no medical evidence supporting or explaining the conclusion that the Appellant's capacity for work had actually deteriorated either leading up to September 2023, or after September 2023.

31 Ultimately, the contention that the ADP failed to properly consider the relevant submissions is not sustainable. In any event, his treatment of the submissions could not rise to an error in point of law. Regardless, the underlying findings about incapacity were correct on the evidence.

Ground 2

32 The Appellant further contends by ground 2 that the ADP failed to consider relevant evidence in the period of incapacity claimed.

33 Again, the ADP did not fail to consider evidence, and any failure to refer to evidence could not rise to a failure to exercise jurisdiction, or constitute any other error in point of law.

34 There is no basis to think that the ADP ignored any particular piece of important evidence in his consideration of the submissions put. The fact is that the evidence, both in statement form from the Appellant and medical evidence, was of particularly narrow compass. The reasons of the ADP reflect an entirely adequate review of that limited material. Evidence from the Appellant himself had to be read not simply as

[27] Combined Book 5M.
[28] Combined Book 10E.

"unchallenged", (in a forum where oral evidence and cross-examination are not the usual practice),[29] but against the background of no economic incapacity for three and a half years, then a resignation for unrelated reasons. Again, it was correct to describe that working period as involving "ordinary duties", as distinct from restricted duties, light duties or restricted hours.

35 In terms of the medical evidence, not only was there no expert medical report supporting or explaining the claimed incapacity, but Dr Herald's report did not express any opinion that the Appellant was incapacitated at all. This was unsurprising in light of what the Appellant had told him about his treatment history, his work history, and his resignation.

36 Notably there was other medical evidence before the Member and the ADP which also did not support incapacity. The Orthopaedic Surgeon Dr Glezos reported on 22 June 2021 that the Appellant was "not restricted functionally and manages well at work".[30] From that time on until the Appellant resigned there were numerous visits to the general practitioner's surgery for various complaints but, despite that, no reference to any complaint in relation to the hip at all, let alone any difficulty with work arising therefrom.[31] There are numerous entries in these notes in the period relating to chronic pain and pain medication, including MS Contin, but no reason to think that these relate to the hip, particularly as similar entries can be seen regularly pre-dating the index incident of 21 January 2020.[32] These matters were referred to in the Member's reasons,[33] but there was no attempt below by the Appellant to explain or reconcile them, and they have not been acknowledged by the Appellant in any submissions in this appeal. They justified the Member not being persuaded by subsequent certificates from the same doctor.

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[29] See Direction 12 of the PIC's Procedural Direction PIC10: *Questioning or cross-examination of witnesses (including parties) may be permitted if the presiding member decides that it is necessary or is otherwise significantly preferred, in the interests of justice or for any other reason.'*
[30] Combined Book 20M.
[31] Combined Book 52-61.
[32] Combined Book 67-75.
[33] Red 47V.

Ground 3

37 Ground 3 takes the specific point about the challenge, or lack of challenge, to the finding of full time ordinary duties already addressed above. The ground is without substance for the reasons set out above. There is no error in point of law in the ADP's approach. The point made by the Appellant about his "pre-injury duties" did not make the finding about "ordinary duties" incorrect, or unfounded. On any view, there is no articulated error in point of law.

Ground 4

38 In the appeal to the ADP the Appellant had submitted that the Member had failed to consider certain evidence. One such piece of evidence was the Appellant's supplementary statement. It is so that the ADP referred to two other pieces of evidence, medical evidence, in addressing this submission, but made no express reference to the Appellant's supplementary statement.

39 Just as the Member was not obliged to refer to every piece of evidence in her reasons, nor was the ADP, and it was not an error of law for him to not expressly address each piece of evidence referred to in those particular submissions put to him. There is no basis to infer that he failed to consider it.

40 In any event, there is no material evidence in the supplementary statement that the Appellant points to which took the matter further than his original statement. By and large, the supplementary statement repeats what was in the first statement: (compare Combined Book 2 and 3 with 9 and 10). Perhaps the only material new point is the assertion referred to earlier, "this is why I deteriorated so quickly..". The Appellant's submissions do not make this statement material. There is no substance to the ground of appeal.

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2 October 2025