Workers Compensation Commission of New South Wales - Presidential

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Landmark Recruitment Pty Limited v Taoube [2012] NSWWCCPD 64 (7 November 2012)

Last Updated: 15 November 2012

WORKERS COMPENSATION COMMISSION

DETERMINATION OF APPEAL AGAINST A DECISION OF THE COMMISSION CONSTITUTED BY AN ARBITRATOR

CITATION:	**Landmark Recruitment Pty Limited v Taoube [2012] NSWWCCPD 64**
APPELLANT:	**Landmark Recruitment** Pty Limited
RESPONDENT:	Hamid Taoube
INSURER:	Employers Mutual Indemnity (Workers Compensation) Limited
FILE NUMBER:	A1-8397/11
ARBITRATOR:	Ms J Scott
DATE OF ARBITRATOR'S DECISION:	5 July 2012
DATE OF APPEAL DECISION:	7 November 2012

SUBJECT MATTER OF DECISION:	Challenge to finding of incapacity; entitlement to weekly compensation; relevance of economic loss to question of incapacity; monies received by worker not for service or labour; challenge to findings as to credit of witness
PRESIDENTIAL MEMBER:	Deputy President Kevin O'Grady
HEARING:	On the papers
REPRESENTATION:	**Appellant:** Kemp & Co Lawyers **Respondent:** Slater & Gordon Lawyers
ORDERS MADE ON APPEAL:	1. The orders made in Certificate of Determination dated 5 July 2012 are confirmed. 2. The appellant is to pay Mr Taoube's costs of this appeal.

BACKGROUND

1. Mr Hamid Taoube, a native of Lebanon, arrived in this country in 1977 at the age of 14. He attended high school in this state until the following year at which time his schooling ceased during year nine. The evidence establishes that, when employed thereafter, he performed general labouring duties. There is conflict in the evidence concerning his employment history. However, the following summary is based on the available material. Between 1979 and 1981 he had two such labouring positions. Between 1983 and 1984 he was employed by the State Rail Authority of NSW. He was injured in the course of that work on a date not revealed on the evidence. He injured his lumbar spine. On an unknown, date Mr Taoube commenced work with Players Biscuits. He was injured in the course of that work on 9 June 1998. He injured his head and left leg. A claim for compensation benefits was made against the employer. It seems that, earlier, in 1997 he was granted a government pension for a period by reason of psychological disability.
2. On a date not revealed in the evidence, Mr Taoube commenced employment with Eco Farms. In the course of that work, on 3 May 2000, he again injured his lumbar spine. He remained unemployed thereafter until commencement of his employment as a storeman with **Landmark Recruitment** Pty Limited (the appellant) in May 2005. I note that before taking up that position he had been injured in a motor vehicle accident which occurred on 28 September 2000. In that accident he injured his cervical spine, left shoulder and lumbar spine.
3. Mr Taoube was injured in the course of work with the appellant on 27 September 2005. He injured his right shoulder and right knee when he was struck by a moving forklift. It seems that Mr Taoube was absent from work for two weeks following which he returned to work on suitable duties.
4. On 17 January 2006, Mr Taoube was again injured in the course of his work with the appellant as he attempted to move a large garbage container. That injury involved his left shoulder and cervical spine. Mr Taoube was absent from work for one month following which he returned to suitable part-time work. That work was performed until September 2006. He ceased that work by reason of his injuries. He then commenced to receive Centrelink benefits.
5. On 27 June 2008, Mr Taoube's employment with the appellant resumed. On that day he travelled to work by taxi. After alighting from the vehicle at the workplace Mr Taoube tripped and fell causing fractures to his left clavicle and the left fourth metacarpal. Since that injury he has reported painful symptoms in his left shoulder, neck, right shoulder, lumbar spine and right

knee. Weekly compensation payments were made until 11 April 2010 at which time the appellant declined further liability.

6. A dispute concerning Mr Taoube's entitlement to compensation benefits came before the Commission for determination in 2010. The claim, as ultimately litigated, only concerned Mr Taoube's entitlement or otherwise to lump sum compensation pursuant to ss 66 and 67 of the *Workers Compensation Act* 1987 (the 1987 Act). The appellant conceded that Mr Taoube had injured his left arm and left leg when injured in 2008. However, it was disputed that he had injured his cervical spine and lumbar spine in that incident.
7. That dispute was heard by Arbitrator Ireland on 22 June 2010. A Certificate of Determination was issued on 28 June 2010. The Arbitrator made factual findings including that Mr Taoube had received injury to his cervical and lumbar spines as a result of the 2008 injury. Orders were made concerning payment of medical and associated expenses, and the question of whole person impairment suffered as a result of each injury received was remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for assessment.
8. Mr Taoube was examined by an AMS, Dr Greg McGroder. A Medical Assessment Certificate was issued on 27 August 2010. The AMS certified that, following appropriate deductions, Mr Taoube had suffered two per cent whole person impairment (WPI) as a result of the 2005 injury; one per cent WPI as a result of the 2006 injury, and 13 per cent WPI as a result of the injury received on 27 June 2008.
9. On 5 October 2010, Mr Taoube's claim in respect of lump sums was settled by agreement with the appellant, and appropriate orders were made on that day by Arbitrator Garth Brown.
10. The present proceedings were commenced by Mr Taoube in September 2011, by the filing of an Application to Resolve a Dispute (the Application) which sought orders in respect of weekly payments. The claim as ultimately litigated concerned his entitlement to such payments from 12 April 2010 and thereafter.
11. The matter was listed for conciliation/arbitration before Arbitrator Jennifer Scott on three separate dates. On each of the first two dates the matter was adjourned to enable steps to be taken to require the production of documents by third parties and to permit the making of leave applications concerning the admission of late evidence. The matter proceeded to hearing on the third date being 22 May 2012, at which time the parties were represented by counsel.
12. A Certificate of Determination, accompanied by a Statement of Reasons (Reasons), was issued by the Arbitrator on 5 July 2012. That determination was as follows:

"The Commission determines:

1. The respondent pay the applicant weekly compensation at the maximum statutory rate for a worker without dependants, from 12 April 2010 to date and continuing under section 37 of the *Workers Compensation Act* 1987.
2. The respondent pay the applicant's section 60 of the *Workers Compensation Act* 1987 expenses on production of accounts or receipts.
3. The respondent pay the applicant's costs as agreed or assessed. I certify this case to have a level of complexity for both the applicant and the respondent and uplift costs by 30 per cent.

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

ISSUES IN DISPUTE

13. The grounds of appeal appear at 2.8 of the Application made with respect to this appeal. Those "grounds" are inexact in that the appellant has not, as is required by Practice Direction No 6, specifically identified the error or errors of which complaint is made. Having regard to submissions which were subsequently filed in support of the appeal, it appears that the issues raised on the appeal concern the following matters:

Whether the Arbitrator erred in:

(a) concluding that Mr Taoube had discharged the onus of proof upon him concerning the question of whether he had in fact suffered incapacity;
(b) failing to give reasons for her finding that moneys, being "undisclosed deposits", were "unlikely to represent income", and
(c) determining that Mr Taoube had, as a result of the injuries, been totally incapacitated.

14. It is further stated in the "grounds" of appeal that "the Arbitrator erred in fact, law and discretion with respect to the worker's credit".

ON THE PAPERS

15. Section 354(6) of the *Workplace Injury Management and Workers Compensation Act* 1998 (the 1998 Act) provides:

"(6) If the Commission is satisfied that sufficient information has been supplied to it in connection with proceedings, the Commission may exercise functions under this Act without holding any conference or formal hearing."

16. Both parties consent to the matter being heard on the papers. Notwithstanding that consent, the appellant has submitted that, by reason of the suggested complexity of this matter, an oral hearing would be "appropriate".
17. Having regard to Practice Directions Nos 1 and 6, the documents that are before me, and the submissions by the parties that the appeal can proceed to be determined on the basis of these documents, I am satisfied that I have sufficient information to proceed 'on the papers', without holding any conference or formal hearing, and that this is the appropriate course in the circumstances.

THE ARBITRAL PROCEEDINGS

18. The proceedings were recorded and a transcript (T) has been produced. A copy of the transcript has been provided to the parties. It was Mr Taoube's case that he was partially incapacitated as a result of the subject injuries, except that during a period of convalescence immediately following surgery, which he underwent at the hands of Dr Hugh Jones in February 2012, he was totally incapacitated. That procedure involved arthroscopic right shoulder, distal clavicle excision, superior labral repair and rotator cuff repair with subacromial decompression. Dr Maniam, whose evidence was relied upon by Mr Taoube, expressed the opinion in a report dated 1 August 2011, that Mr Taoube was totally unfit and had been so since the last of the three relevant injuries. The view was expressed that "in due course he may be capable of selected duties".
19. Counsel for Mr Taoube made it clear in argument before the Arbitrator that, whilst an ability to earn was acknowledged, "the real problem is finding that type of work on the open labour market" (at T58). It is to be noted that the wages schedule which appears at 5.2 of the Application alleged that Mr Taoube had received "nil" earnings at all relevant times.
20. The evidence of Dr Grahame Mahony, whose report dated 19 March 2009 was tendered on behalf of Mr Taoube, was that Mr Taoube was, as a result of all three injuries received whilst in the appellant's employ, permanently unfit for work. There was a large volume of evidence, including expert medical opinions and the views of Mr Sebastian Bass, a psychologist who had examined Mr Taoube on behalf of the appellant for the purpose of preparing a vocational assessment, which suggested that Mr Taoube was in fact partially incapacitated for work.
21. The evidence which assumed most significance during the proceedings before the Arbitrator concerned the financial records produced by Mr Taoube, and gaming statements produced by the Cabra-Vale Ex-Active Servicemen's Club (the Club) which relate to Mr Taoube's gambling activities.
22. Those records were analysed, at the request of the appellant, by Ms Tamara Lindsay, a director of Forensis Accounting, chartered accountant. A report prepared by Ms Lindsay dated 12 April 2012 was tendered before the Arbitrator. The detail of that report is addressed in the course of

discussion below. Significant aspects of that report, as argued on behalf of the appellant, were that, firstly, Ms Lindsay had identified a sum of $295,000 (approximately) deposited by Mr Taoube between April 2005 and December 2011, the sources of which were unable to be identified. The total amount of deposits during that period was calculated to be just less than $520,000. Secondly, the gambling records demonstrate, in the view of Ms Lindsay, that Mr Taoube had, between January 2009 and December 2011, gambled "in excess of $1.2 million and lost in the order of $137-140,000 at the club (whilst gambling on a registered basis)" (at [42] of Ms Lindsay's report). It is also reported that $30,000 (approximately) of the total paid to Mr Taoube by the Club does not appear in the banking records produced by him.

23. Mr Taoube adduced evidence which suggested that between the years 2005 and 2011 he had received money from various sources including payments made by his son, Hossan, and his daughter, Rabab. He states that such payments were made "to hold on their behalf". The amounts, being cash, would vary and were deposited in his Westpac account.
24. Mr Taoube also stated in evidence that "a number of deposits between $1000 and $10,000" relate to "gambling winnings".
25. Payments made by the insurance company GIO in respect of a number of motor vehicle property damage claims had, it was stated by Mr Taoube, been deposited into his account. A letter from that insurer is in evidence. It seems that a total of approximately $40,000 was paid to Mr Taoube in respect of those claims.
26. Mr Taoube stated in evidence that he had sold his interest in land in Lebanon to his siblings for an agreed sum of $80,000 and that payment had been made to him in instalments.
27. Mr Taoube further stated that he would "turn to my family and ask for money when I had none, in order to pay for the necessities and bills" (Statement 9 December 2011).
28. Mr Taoube also stated that he had "received approximately $35,000 from my whole person impairment assessment including pain and suffering" and that he had received approximately $35,000 from his "superannuation through a TPD claim".
29. In a statement dated 26 April 2012, Mr Taoube said that he was distressed after his injuries and was depressed. He would attend the club so that he would "have something to do". His family, he stated, gave him money "to play pokies so I get out of the house". He stated that he had hurt his family. He had taken their money and "gambled it away". He calculated his loss at between $600 and $700 "every week".
30. Mr Taoube stated that he had seen the financial report of Ms Lindsay and that he "did not understand it much".
31. A document is in evidence signed by Mr Taoube's wife and three children stating that each gave money to Mr Taoube from time to time.
32. A statement concerning payment of money to Mr Taoube by his brothers Hussein and Youssef, dated 19 December 2011 was tendered in evidence. That evidence was subsequently withdrawn by each of the brothers.
33. The appellant tendered a copy of Mr Taoube's record of convictions which had been produced by the New South Wales police.

SUBMISSIONS BEFORE THE ARBITRATOR

34. The appellant informed the Arbitrator that the injuries as alleged by Mr Taoube were "not themselves in dispute" (at T3).
35. The appellant's defence to the claim was expressed by counsel as follows:

"... [Mr Taoube] fails to discharge his onus, that he carries the onus, of proving that he actually sustains any economic loss for any of the periods that he claims and that is because of the financial records ... we say that [Mr Taoube] just fails entirely with his claim.

The second issue is ... that [Mr Taoube] on the medical evidence ... the vocational evidence ... cannot prove that any incapacity that he does have results in economic loss because he is fit to perform a wide range of suitable duties that would remunerate him either the same or more than ... his probable earnings but for injury are" (at T3-4).

36. The appellant relied on the financial analysis found in Ms Lindsay's report concerning banking and gambling records. It was put that Mr Taoube has failed to identify "where this money has come from" (at T6).
37. An argument appears to have been put that, having regard to the financial records in evidence, the Arbitrator would not be satisfied that any "economic loss" had been demonstrated.
38. Counsel made reference to the evidence of Mr Taoube's record of convictions and evidence that he had used aliases in place of his own name, as being material which should be taken into account when addressing the creditworthiness of Mr Taoube.
39. Counsel appearing for Mr Taoube argued that, having regard to all the circumstances, including the length of time since Mr Taoube had last breached the law, the evidence of prior convictions would not influence the Arbitrator when determining questions of credit.
40. In the course of submissions counsel amended the claim for weekly benefits. The claim, as amended, commenced on 12 April 2010. It seems that there was not any issue that Mr Taoube's probable earnings but for injury were $696.54 per week (at T44).
41. It was argued by Mr Taoube that the evidence concerning financial records relating to gambling activity was "not evidence that this is income derived from [Mr Taoube's] ability to earn" and, further, that there is "ample evidence from [Mr Taoube] that he received that money from his family; his family have confirmed that" (at T48). Counsel made reference to other evidence concerning the origins of money credited to Mr Taoube's accounts including the insurance claims and the sale of property.
42. Counsel proceeded to address concerning the nature of Mr Taoube's incapacity. The argument was put that, whilst Mr Taoube had some limited work capacity, "the difficulty for him is finding that work on the open labour market" (at T50).
43. A finding of total incapacity should, it was argued, be made in respect of the period following surgery from 23 June 2011 up to the date of review by the treating surgeon six weeks post operatively.
44. During an exchange with counsel, it was said by the Arbitrator that the financial records might suggest "money laundering", and that such was an illegal activity and as such would not be "categorised" as "income". That proposition appears to have been accepted by counsel (T65-66). The relevance of such speculation was not made clear during that exchange.
45. In reply counsel for the appellant appears to have repeated earlier argument and submitted concerning the unexplained deposits in Mr Taoube's account:

"[The deposits are] not otherwise explained. It far exceeds the $696 probable earnings but for injury. You cannot be satisfied, on the balance of probabilities, what his actual earnings are over the period of time that he's making his claim, ergo the claim fails because the onus has not been discharged, before you even go through a medical analysis...".

THE ARBITRATOR'S DECISION

46. The Arbitrator identified the issues in dispute, as agreed by the parties, as follows (at [7] of Reasons):

"(a) whether [Mr Taoube] is in receipt of income and no longer suffers an economic loss, and

(b) whether [Mr Taoube] is incapacitated for work or in the alternative whether any incapacity for work is a result of the injuries sustained with [the appellant]."

47. The evidence concerning the financial records and the report of Ms Lindsay was summarised by the Arbitrator as was the evidence of Mr Taoube concerning the suggested sources of the money deposited to his credit in relevant accounts. It appears from her observations (at [13] of Reasons) that the Arbitrator was not satisfied by that evidence as to the origins of the money. However, a finding appears to have been made that "there is no pattern that suggests money received from a regular source, such as income" (at [14] of Reasons).
48. The Arbitrator made the observation that "Mr Taoube received considerable money from

gambling" and the question was posed by her as to whether this money should "be considered income" (at [15] of Reasons).

49. The Arbitrator proceeded to consider the concept of "income" and Mr Taoube's gambling activity. A conclusion was reached by the Arbitrator that she did "not consider Mr Taoube's gambling winnings as income" (at [17] of Reasons).
50. The appellant's submission that Mr Taoube has "the onus of proving that he has sustained an economic loss" was accepted by the Arbitrator (at [19] of Reasons). Following a consideration of the evidence and a number of authorities which address the question concerning discharge of the onus of proof, the Arbitrator reached the conclusion that the monies "are unlikely to represent income" (at [21] of Reasons).
51. In reaching her conclusion the Arbitrator appears to have taken into account the appellant's submission concerning Mr Taoube's credit as a witness (at [18] of Reasons).
52. The Arbitrator proceeded to consider the question of incapacity. Much of the medical evidence relied upon by the parties was summarised. The Arbitrator accepted that Mr Taoube would have been totally incapacitated for a period following surgery he underwent in February 2011. The question was then raised by the Arbitrator as to whether Mr Taoube was "totally incapacitated for any period prior to and after his recovery [from surgery]" (at [28] of Reasons).
53. The Arbitrator proceeded to consider the relevant labour market available to Mr Taoube together with his general circumstances including the "significant" problems with his left shoulder. Having regard to the state of the evidence the Arbitrator concluded that Mr Taoube had been totally incapacitated since 12 April 2010. An award in his favour was entered pursuant to s 37 of the 1987 Act.

SUBMISSIONS, DISCUSSION AND FINDINGS

54. The appellant submits that the Arbitrator was correct in determining that Mr Taoube had the "onus of proving that he has sustained an economic loss". However, it is contended in argument that factual error was committed by the Arbitrator when concluding that "since 2010 Mr Taoube has not been in receipt of income". It is further argued that in reaching that conclusion the Arbitrator had failed to provide "reasons for her findings".
55. The manner in which the appellant's argument was advanced before the Arbitrator, and as argument is put on this appeal, appears to suggest that the state of the evidence concerning the substantial, unexplained sums credited to Mr Taoube's accounts, and of payments made by the Club, negate any allegation of incapacity and any entitlement to weekly compensation. The basis of this argument appears to be that failure to explain the sources of the money demonstrates a failure to establish a loss of earning power. However, in my opinion, the concept of "income" which had been considered by the Arbitrator is not one which arises for determination under the Acts when the question of incapacity is being considered. That Mr Taoube had, between 2005 and 2011, received a substantial sum of money is not in issue. The analysis of the banking records demonstrates that the source of approximately $295,000 is unknown. Further, the analysis of the gambling activity demonstrates that in the three years 2009 to 2011 Mr Taoube received payment from the club of a sum exceeding $75,000. There is no record of how much money Mr Taoube brought to the club for gambling purposes. What is known is that during that period his gambling losses totalled approximately $137,000.
56. Mr Taoube's entitlement to weekly compensation was dependent upon proof by him before the Arbitrator that he had suffered total or partial incapacity for work as a result of the injury (ss 9 and 33 of the 1987 Act).
57. Having regard to the authorities discussed below I consider that it was necessary that the Arbitrator determine the question of the existence or otherwise of incapacity for work, and its extent (either total or partial), before any consideration of the appellant's arguments concerning the relevance of the receipt by Mr Taoube of the money amounts addressed in Ms Lindsay's report. I am of the opinion that the Arbitrator has erred in dealing with the arguments raised concerning "income" before determining the question of incapacity. However, as I attempt to make clear below, the Arbitrator's ultimate conclusions are in my view correct and any error identified in her reasoning process does not vitiate her determination of the dispute.

58. It is proposed to deal firstly with the appellant's complaints concerning the Arbitrator's finding of total incapacity (ground three). It seems that the errors suggested are both of fact and of law. Leaving aside the question as to whether any argument was raised before the Arbitrator concerning Mr Taoube's failure to "comply" with requests by the insurer with respect to rehabilitation, such argument, as put on this appeal, can have no relevance to a determination of the existence and extent of any incapacity. The question before the Arbitrator was whether, as a result of injury, incapacity prevents Mr Taoube from doing any work or that he has a reduced physical capacity for actually doing work in the labour market in which he was working or might reasonably be expected to work (see discussion in *Arnotts Snack Products Pty Limited v Yacob* [1985] HCA 2; 155 CLR 171 at 177 per Mason, Wilson, Deane and Dawson JJ). Entitlement to compensation in respect of such incapacity for work requires proof of a loss of earning power. As stated by Jacobs J in *The Commonwealth v Muratore* [1978] HCA 47; 141 CLR 296, at 300-301, "It has always been recognised that 'incapacity for work', those words being taken to refer to physical incapacity, is only relevant where it produces an economic incapacity".
59. The appellant submits that the Arbitrator has erred in her apparent acceptance of the evidence of Dr Maniam, given that "[Mr Taoube] did not disclose the full history surrounding prior injuries as [found in the evidence]" (supplementary submissions [14]). I reject that submission and the latter suggestion made by the appellant concerning the relevance of the decision in *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; [2001] 52 NSWLR 705. The employer must take the worker as he finds him. There is no meaningful argument raised which suggests that the weight of Dr Maniam's opinion is in any relevant sense adversely affected by the history recorded and relied upon by that practitioner in his report. Further, I reject the suggestion made in submissions that the history as recorded is "inaccurate".
60. The finding which is the subject of this ground is found (at [31] of Reasons) as follows:

"The relevant labour market, for Mr Taoube, is that of a labourer and cleaner. Mr Taoube has a scant work history, was educated to year nine, and has sustained multiple injuries over many years with several employers. As summed up by Mr Bass, although in theory he is employable, in practical terms, Mr Taoube is unlikely to be competitive in this labour market. He has not undergone any real rehabilitation and the latest medical reports indicate that he is still having significant problems with his left shoulder. For these reasons, I find the applicant to be totally incapacitated since 12 April 2010."

61. As earlier noted, there was before the Arbitrator evidence capable of supporting a finding of either total incapacity (Dr Mahony and Dr Maniam) or one of partial incapacity (including the evidence of Mr Bass). In so far as factual error is suggested it is clear, in my opinion, that on the evidence before her it was open to the Arbitrator to conclude as she did concerning the existence of total incapacity.
62. The appellant appears to suggest error of law in that the Arbitrator has applied an incorrect test to determine the question of the existence and extent of incapacity. It is argued (at [45] of submissions filed in support of this appeal) that error is demonstrated by the Arbitrator's acceptance of the evidence of Mr Bass, being that, by reason of a complex of circumstances including incapacity, Mr Taoube is uncompetitive in the labour market, and by her proceeding to the conclusion that Mr Taoube is totally incapacitated. It is argued that "being uncompetitive does not equate to incapacity".
63. The appellant's submission must be rejected. It is clear from the Arbitrator's reasoning that her conclusion concerning total incapacity had been reached following a consideration of that stated by Mahoney P (with whom Handley and Powell JJA agreed) in *Lawarra Nominees Pty Ltd v Wilson* [1996] NSWSC 584; (1996) 25 NSWCCR 206 (at 213) (*Lawarra*) as follows:

"... in assessing whether a worker is wholly or partially incapacitated and to what extent, the Court will ordinarily not be concerned, for example, to determine in an artificial or theoretical situation what he could do if the work available to him would allow him to stand for a time, sit for a time, cease when the pain he suffers became unacceptable, and generally work as, in his condition, he would fairly wish to work. The Court does not, as it were, spell out according to the periods of time which could be

spent at work in such a way and what he could do during those periods, the extent of his capacity for work. The exercise is, in my opinion, a more practical exercise. It involves the assessment of a capacity 'for work' having regard to the realities of the labour market in which he is to be engaged."

64. The approach adopted by the Arbitrator to the question of incapacity was in accordance with the "practical exercise" which was considered by the Court of Appeal in *Lawarra*. Having regard to the state of the evidence, including that of Dr Maniam and Dr Mahony, albeit that no direct reference is made by the Arbitrator to Dr Mahony's opinion, and given the correct approach adopted by the Arbitrator to the questions of incapacity and its extent, I conclude that no error has been demonstrated and that this ground fails.
65. It is convenient to deal with grounds one and two together. It seems that the first ground concerns the "onus of proof" said to be upon Mr Taoube to prove "that he has not received income or earnings". It is to be inferred that complaint is made that the Arbitrator has erred in concluding that Mr Taoube had in fact received no relevant earnings and that no finding of economic incapacity should have been made.
66. The second ground is very closely related to the complaint raised in the first ground. The complaint is that the Arbitrator has erred in finding that "[Mr Taoube] was not in receipt of income". Emphasis is placed in submissions upon those authorities relevant to a consideration of the discharge of the burden of proof including reference to the decision of the High Court in *Malec v JC Hutton Pty Ltd* [1990] HCA 20; 169 CLR 638.
67. It must be remembered that the Arbitrator has found Mr Taoube to be totally incapacitated. The appellant's argument that there was an onus upon Mr Taoube to prove "that the very substantial sums of money appearing in his banking transactions were not derived from earnings or income" (submissions in support of appeal at [4]) must be examined in the light of the decision of the High Court of Australia in *Steggles Pty Ltd v Vandenberg* [1987] HCA 35; 163 CLR 321 (*Vandenberg*) in which decision the Court expressed its approval of that stated by McHugh JA in the decision of the Court of Appeal from which the appeal to the High Court had been brought (*Steggles Pty Ltd v Vandenberg* (1986) 6 NSWLR 233).
68. The decisions in the *Vandenberg* appeals concerned the entitlement of a totally incapacitated worker to compensation in respect of a day on which she was paid by the employer for a rostered day off as provided in the relevant industrial award. The statutory provisions considered were those found in the now repealed *Workers Compensation Act* 1926 (the former Act) which are in terms similar to those provisions of the 1987 Act relevant in the present matter.
69. As noted by McHugh JA in *Vandenberg,* the employer had argued that "before it can become liable to pay compensation in respect of a particular period there must be a 'consequent economic loss of wages'". The employer in that matter placed considerable reliance upon the decision of the Full Court in *Thompson v Armstrong and Royse Pty Ltd* (1950) 50 SR (NSW) 298 (*Thompson*) and the judgment of Latham CJ in that case on appeal to the High Court (reported [1950] HCA 46; (1950) 81 CLR 585). The judgments in the matter of *Thompson* were the subject of a detailed analysis by McHugh JA in *Vandenberg*.
70. The conclusion reached by McHugh JA as upheld by the High Court, was that "economic loss was not part of the concept of incapacity" (see discussion by McHugh JA between 240 and 243).
71. It follows that the evidence of receipt of "income" at relevant times by Mr Taoube, and in the absence of any argument founded upon s 46 of the 1987 Act (which is in similar terms to s 13 of the former Act discussed in *Vandenberg*), has no relevance to the question of incapacity and may not be relied upon to challenge the Arbitrator's determination of total incapacity. The first ground fails.
72. It is reasonably clear that the complaint made on this appeal is that the Arbitrator has erred in determining that Mr Taoube has an entitlement to weekly compensation notwithstanding his failure to explain the sources of the substantial sums credited to his accounts as summarised by Ms Lindsay. The appellant's submissions challenge the finding made by the Arbitrator (at [21] of Reasons) where it was stated:

"Taking into account all the evidence, the vagueness, the insurance payouts, the sale of land in Lebanon and the fact that Mr Taoube was a regular gambler (sums under $2,000 are paid in cash), I am satisfied that the undisclosed deposits are unlikely to represent income. Therefore I find that since 12 April 2010, Mr Taoube has not been in receipt of income."

73. The Arbitrator's finding of total incapacity established, prima facie, that Mr Taoube had as a result of that incapacity been prevented from doing any remunerative work. Given the evidence concerning his financial circumstances it was necessary that he prove that such "income" did not represent relevant earnings. That is, that the monies received by him were not monies received in return "for his service or labour or under a subsisting contract of employment" see discussion by Sheller JA (with whom Mahoney and Priestley JJA agreed) in *Fox Sound & Electronics Pty Ltd v Mellios* (1995) 11 NSWCCR 485 at 491 and 495 (*Mellios*).
74. In reaching her conclusion it is made clear by the Arbitrator that her view was that Mr Taoube, whilst presenting evidence as to the source of the various deposits, had not provided "supportive evidence" concerning such payments (at [13] of Reasons). It is thus reasonably clear that the Arbitrator was not satisfied that the sources of the funds had been explained.
75. The Arbitrator's approach to the evidence included, in my view correctly, an examination of the "banking history" with particular focus upon the period from 12 April 2010, the commencement date of the claim for weekly benefits. Her summary of deposits from that date to November 2011 appears at [14] of Reasons. The Arbitrator formed the view that "there is no pattern that suggests money received from a regular source, such as income".
76. It should be noted that the instructions given to Ms Lindsay concerning the forensic accounting report included a request that she provide an opinion as to various matters including "[Mr Taoube's] current gross weekly earnings from personal exertion" (at [19(i)] of Ms Lindsay's report). At [43] of the report, under heading "Opinion", Ms Lindsay states:

"[Mr Taoube] has not lodged an income tax return for the 2011 year.

I have no information which indicates that [Mr Taoube] is in receipt of income from personal exertion.

In the 3 years to December 2011, [Mr Taoube] gambled around $8000 per week".

77. I have earlier (at [55] above) observed that it is not disputed that Mr Taoube had between 2005 and 2011, received substantial money sums, some from the Club, some received as recorded in the report of Ms Lindsay and much of the total sum remaining unexplained. That fact has plainly caused the Arbitrator considerable disquiet which, it seems, led to her speculation noted at [44] above. An objective assessment of Mr Taoube's financial circumstances over that period may give rise to considerable disquiet and may lead to suspicion and speculation. Notwithstanding that circumstance I have concluded that the Arbitrator's determination that the sums received were "unlikely to represent income" and that since 12 April 2010 Mr Taoube "has not been in receipt of income" constitute a finding that at relevant times those receipts were not "earnings" as discussed in *Mellios*. Such a finding was open on the evidence including that of Ms Lindsay noted at [76] above. The Arbitrator's reasons were plainly and adequately stated and I conclude that no relevant error has been demonstrated by the appellant. Ground two fails.
78. The fourth ground of appeal suggests error on the part of the Arbitrator in failing to "fully and carefully assess the evidence in order to determine whether [Mr Taoube] was an honest and credible witness" (at [49] of submissions in support of the appeal). Having regard to that which is put at [60] of those submissions, it seems to be suggested that the failure to have regard to the credibility issue led the Arbitrator into error in concluding that Mr Taoube "was not in receipt of income".
79. The appellant's submissions must be rejected. It is clear that the matters raised with respect to credit were the subject of consideration by the Arbitrator where it was stated (at [18] of Reasons):

"The respondent has raised concerns as to Mr Taoube's credibility, by presenting evidence of his past criminal records and his failure to satisfactorily respond to the source of the undisclosed deposits. I accept that these convictions could bring into question Mr Taoube's credibility, however, I also note that the convictions were many years ago and in quite different circumstances to the matter before me. I note however, that despite the inconsistencies, the respondent did not cross-examine the applicant, or any other deponent. This left untested the claim regarding the proceeds of the sale of land. The respondent has made no submissions as to what type of work, except gambling, that Mr Taoube may be engaged in. The respondent simply raises the concern based on the bank records and Club records and claims that the applicant has failed to prove that the undisclosed deposits are not income."

80. In my view, nothing raised by the appellant in submissions concerning this ground suggests error on the part of the Arbitrator concerning Mr Taoube's credit as a witness. Whilst her reasons demonstrate that she was of the view that the evidence in Mr Taoube's case, as a whole, did not fully explain matters arising from evidence concerning his financial circumstances, it was noted by her that Mr Taoube had not been cross-examined in respect of certain matters. Indeed no oral evidence was given by Mr Taoube. No assessment of credibility founded upon demeanour was made. The Arbitrator's conclusions concerning the issue of "income" were based upon her assessment of the evidence as a whole. That assessment took into account the appellant's argument concerning credit and her apparent misgivings concerning Mr Taoube's attempted explanations. No error is made out. This ground must fail.
81. In the circumstances the appeal fails and the Arbitrator's determination must be confirmed. Appropriate orders are made below.

DECISION

82. The orders made in Certificate of Determination dated 5 July 2012 are confirmed.

COSTS

83. The appellant is to pay Mr Taoube's costs of this appeal.

Kevin O'Grady

Deputy President

7 November 2012

I, MARGOT UNDERCLIFFE, CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE REASONS FOR DECISION OF KEVIN O'GRADY, DEPUTY PRESIDENT OF THE WORKERS COMPENSATION COMMISSION.

ASSOCIATE

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