

**QUEENSLAND INDUSTRIAL RELATIONS COMMISSION**

CITATION: *Clackson v Simon Blackwood (Workers' Compensation Regulator)* [2014] QIRC 077

PARTIES: **Clackson, Peter**  
(Appellant)

v

**Simon Blackwood (Workers' Compensation Regulator)**  
(Respondent)

CASE NO: WC/2013/321

PROCEEDING: Appeal against a decision of Simon Blackwood  
(Workers' Compensation Regulator)

DELIVERED ON: 7 May 2014

HEARING DATES: 27 and 28 February 2014  
14 March 2014 (Regulator's Written Submission)  
20 March 2014 (Appellant's Written Submission)  
24 March 2014 (Regulator's Written Submission in Reply)

MEMBER: Vice President Linnane

ORDERS :

- 1. The appeal is allowed.**
- 2. The review decision of the Regulator dated 11 September 2013 is set aside.**
- 3. A new decision that the Appellant suffered a minor acquired brain injury as a result of the assault on 8 June 2009 be substituted in lieu of the Regulator's decision.**
- 4. Costs are reserved.**

CATCHWORDS: WORKERS' COMPENSATION - APPEAL AGAINST DECISION - Appellant had previously accepted injuries resulting from assault at workplace - Whether Appellant also suffered an acquired brain injury as a result of the assault - Whether Appellant lost consciousness during the assault or shortly thereafter - On balance of probabilities Appellant suffered a minor acquired brain injury - Appeal allowed.

CASES: *Workers' Compensation and Rehabilitation Act 2003*  
s 32

APPEARANCES:

Mr J. Kimmins, Counsel instructed by Carter Capner Law for the Appellant

Mr A. Johnson, Counsel directly instructed by the Respondent

- [1] On 8 June 2009 Peter Clackson, whilst performing night duties as a security officer with Key Security Patrol Pty Ltd, was seriously assaulted by an armed intruder using a knuckleduster. As a result of the assault Mr Clackson initially suffered a closed head injury and was hospitalised. The armed intruder was subsequently arrested and charged with serious assault, assault occasioning bodily harm, robbery, stealing and entering with intent. The assailant pleaded guilty to those charges.
- [2] Mr Clackson has an accepted WorkCover Queensland (WorkCover) claim for "fractured skull and facial bones" resulting from the assault and has received workers' compensation for that injury. Additionally, Mr Clackson was assessed by a Psychiatric Medical Assessment Tribunal on 25 January 2011 with a post-traumatic stress disorder with a degree of impairment of 12.5% Whole Person Impairment.

**Issue for Determination**

- [3] The issue for determination is whether Mr Clarkson sustained an acquired brain injury within the meaning of s. 32 of the *Workers' Compensation and Rehabilitation Act 2003* (Act) resulting from the assault on 8 June 2009. An acquired brain injury is a permanent brain injury resulting from a head injury. For Mr Clackson's claim to succeed, his impairment must be due to organic factors rather than psychiatric or psychological factors for which he has already been assessed by a Medical Assessment Tribunal. Central to a finding that Mr Clackson's impairment is due to organic factors is whether Mr Clackson lost consciousness during, or shortly after, the assault on 8 June 2009.
- [4] Mr Clackson's claim was rejected by WorkCover and, following an Application for Claim Review by Mr Clackson, this position was confirmed by Simon Blackwood (Workers' Compensation Regulator) (Regulator) in a decision dated 11 September 2013. This is an appeal by Mr Clackson against that decision of the Regulator. The Regulator conceded that Mr Clackson was a worker at the relevant time.
- [5] The proceeding is by way of a hearing *de novo* and Mr Clackson bears the onus of proof on the balance of probabilities: see *Rossmuller v Q-COMP (C/2009/36)* at para [2].<sup>1</sup>

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<sup>1</sup> *Eric Martin Rossmuller v Q-COMP (C/2009/36) - Decision - <http://www.qirc.qld.gov.au>.*

### **History of Issues faced by Mr Clackson other than the Assault**

- [6] Mr Clackson has, throughout his life, had many issues to deal with. Mr Clackson had coped well with these issues up until the 2009 assault. Dr O'Dowd found that "at the time of the assault Mr Clackson was working full-time and he does not appear to have been experiencing any notable problems in his day to day functioning and so I have given him a pre-existing PIRS rating of 0%".
- [7] The first of these issues was the diagnosis of his daughter, Kylie, with cystic fibrosis at an early age. Kylie was a daughter with his first wife. He divorced in 1985 but remained close to his ex-wife as they supported each other while Kylie endured numerous serious health complications, including a double lung transplant and two kidney transplants.
- [8] Mr Clackson married his current wife, Vanessa, in 1991. They also have a daughter, Casey, who was diagnosed with a less severe form of cystic fibrosis at age 12 years. Casey is currently 24 years of age.
- [9] Since the 2009 assault the issues faced by Mr Clackson have magnified. His wife was diagnosed with breast cancer in January 2010 and she underwent surgery, chemotherapy, radiotherapy and is currently in remission. His daughter Kylie's heart failed and she died in March 2010. By October 2010, Mr and Mrs Clackson were declared bankrupt because of their inability to work and their mounting medical expenses. In addition, Mr Clackson's father underwent triple bypass heart surgery in March 2011 and later that year was diagnosed with pancreatic cancer and died in March 2012.

### **Evidence**

- [10] The Appellant relied upon the evidence of the following witnesses:

- Mr Clackson;
- Vanessa Clackson, the Appellant's wife;
- Dr Scott Francis Campbell, Neurosurgeon; and
- Dr Brona Siobhan O'Dowd, a Clinical Neuropsychologist

whilst the Regulator relied upon the evidence of Dr Michael John Weidmann, Neurologist.

- [11] **Appellant's Evidence:** The general tenor of Mr Clackson's evidence of the assault is confirmed in the accounts of the assault apparently provided to the Townsville Bulletin on 10 June 2009, the Queensland Police Service within a week of the assault and the Victim Impact Statement provided on or about 17 September 2009. Mr Clackson can recall the interview with the Townsville Bulletin and speaking with someone from Queensland Police Service within a week of the assault. Whilst he recalls these interviews he has no independent recollection of what he said on those occasions. He has no recollection of giving the Victim Impact Statement.
- [12] The Witness Statement given to the Queensland Police Service is undated and unsigned and was never used in Court as the assailant pleaded guilty to the charges. This Statement gives the most detailed account of the incident on 8 June 2009 and

generally accords with the evidence given by Mr Clackson in this hearing. That Statement relevantly provides as follows:

"2. I remember Monday the 8<sup>th</sup> of June 2009.

...

5. At about 5.45 am on this morning I drove the Key Security Patrol vehicle into the rear carpark of the Key Security Office at Level 1, 30 Main Street, Proserpine. The usual routine when completing the night security patrol is to attend at the office and enter via the rear stairs, return the keys and equipment to the office and then head home.
6. The Key Security Office has a small key safe which is accessed by a combination on the wall next to the rear door. The key safe has the key to the rear door. The rear door is secured by a lock in the door handle and also a deadbolt. The deadbolt is not able to be locked without the key.
7. Once inside, the premises has an electronic alarm which requires a combination to be entered into a key pad to switch the alarm off. There is extensive video surveillance at the office covering both the internal and external of the building.
8. The rear door has a set of external stairs leading up to a second floor small landing. This landing has a male and female toilet side by side to the right as you are going up the stairs and has the rear door to the left.
9. I parked the Key Security vehicle in the rear carpark and I gathered up a green box containing equipment, a folder, a torch and a key box full of keys. I walked from the vehicle towards the bottom of the external rear stairs. I then started climbing the stairs with this equipment in my arms. Usually the security light comes on but it didn't come on this time.
10. The security light didn't concern me too much as there had been other times when the security light hasn't gone on for whatever reason. There is no other light on the landing and it was still pretty dark out.
11. I got to the landing and I placed all of the equipment on the landing just near the top step. I put the torch under my arm in preparation to get the key from the key safe. I stood up on the landing and faced the keysafe.
12. All of a sudden I felt a sharp heavy blow to the back of my head just at the base of my skull. My vision went white straight away and I collapsed down onto one knee. I immediately felt another 6 or 7 hard blows to the top and back of my head. I can't remember any particular noises or speech at that time. It felt like I was just being hit

for the sake of it. I tried to protect myself as best I could and hunched my head over.

13. At first, I thought that someone was bashing me to get revenge over being thrown out of one of the nightclubs or something like that. The blows to my head were extremely painful and I was scared that this was going to be it for me. I was scared that I was going to get hit so hard it would kill me.
14. I thought that I had to do something to stop this and I managed to stand up and turn around. I saw that there was one person there who was assaulting me. I managed to grab him by the front of his clothes. I could see that this person was wearing grey overalls and a black woollen balaklava and black leather work boots.
15. His overalls had bright orange strips on them like they wear down at the sugar mill for high visibility.
16. I could see that the person was a male and that they were a bit taller than me and a fair bit heavier.
17. I couldn't see any facial features or eye colour due to the balaklava and the dark. I did not recognise the male.
18. It was my intention when I turned around to either throw him to the ground or throw him down the stairs. I was off balance due to the previous head blows and I sort of fell as I tried to throw him. My shoulder hit the wall of the female toilet which is the one closest to the stairs and I fell down onto the ground inside the female toilet with the male person on top of me.
19. The male person leant up over me and pulled his right hand back in a fist. I could see that he had a type of home made knuckleduster on his fist. It looked as though it was made out of quarter inch metal plate. It was sort of rectangular in shape with a hole cut in the middle for the fingers to pass through.
20. The male punched me hard with the knuckleduster just under the right eye. I can vividly remember this punch as it was the first time I had seen the male punch me and the first time I had seen the knuckleduster on his fist. This was also one of the most painful punches and I could feel that a lot of damage had been done to my cheek just below my right eye.
21. The male person hit me another couple of times to the face and head but I managed to block them a bit more after the first punch.
22. I was able to get my legs up to my chest as I was lying with my back on the toilet floor and push him back a bit with my legs. He kept trying to punch me with the knuckleduster but I kept pushing him back with my legs."

In the following paragraphs of the Witness Statement, Mr Clackson said that after this, the assailant indicated that he wanted access to the guns in the office. Mr Clackson said that he would get the assailant the guns. Mr Clackson could not find his glasses and the assailant found his glasses. Thinking that he could not let the assailant have the guns, Mr Clackson got the key out of the key safe and then put the key in the lock to the deadbolt. He reckoned that the deadbolt was strong enough for him to snap the key off. He put the key in the lock and snapped it sideways. The head of the key came off and the body of the key remained in the lock. Following this Mr Clackson's Statement continues as follows:

"44. I didn't know what else to do so I threw myself down the stairs head first. I rolled a couple of times down the stairs and hurt my shoulder, back and legs hitting the stairs. At some point I managed to get on my feet and I ran down the stairs as quickly as I could. I didn't look back.

...".

[13] Mr Clackson then left the premises to find someone to assist him. He went to the Proserpine Police Station but it was closed. He was then noticed by a cleaner at the local pub. Mr Clackson then recalls the publican coming to his assistance and carrying him like a "baby" to the patron's bus and then conveying him to the Proserpine Hospital. Mr Clackson has little recollection of that ride to the Proserpine Hospital. He does not recall how he got from the bus into the Hospital. The next thing he recalls is being on a stretcher at the Hospital.

[14] Mr Clackson said that he had only recently seen the Witness Statement that he had given to the Queensland Police Service as it had not been provided to him at any earlier stage. With the benefit of a viewing of the CCTV footage, he has been able to identify the following errors in that Witness Statement:

- he had said he was working the night shift as security patrol when in fact he was called off the door at Magnums, the nightclub, and was told to leave there and go to patrols - he was not supposed to be on that shift;
- he apparently told them that he started work at 8.30pm when in fact he had started work at 4.00pm;
- he had said that he got to the landing, had placed all of the equipment on the landing just near the top step, had put his torch under his arm in preparation to get the key from the key safe and that he had stood on the landing and faced the key safe. Whilst Mr Clackson had thought this account was correct at the time, a review of the CCTV footage confirmed quite a different scenario; and
- he said that he collapsed down on to one knee whereas the CCTV footage shows that he could not have landed on one knee.

- [15] The Victim Impact Statement, apparently given by Mr Clackson in an interview on or about 17 September 2009, generally accords with the account given in his Witness Statement to the Queensland Police Service. This Victim Impact Statement is unsigned and Mr Clackson has no real recollection of providing that Statement.

### **CCTV Footage**

- [16] According to the CCTV footage, Mr Clackson is seen entering the camera view carrying a torch for a brief moment before he falls down beyond the camera view. This was noted at 5.45.44 on the footage. This does not accord with Mr Clackson's recollection of events in his Witness Statement and/or the Victim Impact Statement. It is apparent that as soon as he reached the landing he was struck from behind. The footage shows Mr Clackson disappearing suddenly from camera view at 5.50.31 i.e. at the time when he throws himself down the stairs. The assault thus took approximately five minutes.
- [17] Since giving the Witness Statement and the Victim Impact Statement, Mr Clackson has viewed the CCTV footage of the assault. He really does not know whether he lost consciousness during the assault. All he knows is that there is a gap in time in his recollection of the event where he does not know what happened.
- [18] Mr Clackson said that it was only when he visited Dr Campbell who asked him questions in an attempt to work out what exactly happened that he realised that there was a period of time missing. Mr Clackson said that Dr Campbell was the first person to ask him those types of questions. He said that Dr Campbell would ask "[w]hat happened between this time and that time?" and it was only then that he realised that he had no recollection of a period of time during the assault. He is missing a few minutes of time and he doesn't know what happened in those few minutes.
- [19] At all times Mr Clackson, in giving his account of the assault, said that he walked up to the back door and put everything down and went to open the door. Upon viewing the CCTV footage he says that clearly did not occur. In fact he went nowhere near the back door. He simply got up the last back step and still had all of his gear in his arms when he was first hit. His account of what occurred was always incorrect and it was only on viewing the CCTV footage that he became aware of the correct sequence of events. He simply recalled what he thought had happened to the Proserpine Hospital, the Townsville Bulletin and the Queensland Police Service. Mr Clackson said that he must have just conjured that up in his own imagination at the time.
- [20] There is no mention of Mr Clackson losing consciousness in the Witness Statement, the Victim Impact Statement or the interview with the Townsville Bulletin. Further, there is a note in the Proserpine Hospital Inpatient Progress Notes that Mr Clackson was "[n]ot knocked out". The note in the Hospital records is made at 6.20 am on 8 June 2009, the interview with the Townsville Bulletin occurred on 9 June 2009 and the interview with Police occurred within a few days of the assault. The report of the social worker at the Proserpine Hospital on 9 June 2009 indicated that Mr Clackson was then dealing with the repercussions of the assault and suggested he receive psychological assistance.

[21] Mr Clackson had been in fear of his life during the assault. I do not place great weight on the fact that Mr Clackson did not think to say to either the Townsville Bulletin or the Queensland Police Service that he had lost consciousness in the assault. Given his account of the assault, it is doubtful that Mr Clackson would have given any thought to the issue of whether he suffered a loss of consciousness or otherwise in the incident in the days following the assault.

[22] In terms of the issues currently facing Mr Clackson he said that since the assault his "whole life has changed". He said that he had gone from a man that could handle anything to a man that can tolerate nothing, from a man who could run a company to a man who has trouble running his own life. Life has never been the same since the assault both physically and mentally. He said that he suffered the following disabilities:

- terrible headaches;
- a numbness around his right eye down towards his teeth as a result of a nerve in the area being severed during the assault;
- anger issues. Mr Clackson explained that prior to the assault he had a job that he took pride in. That no matter how hostile a situation got he was able to resolve such situations. Since the assault an "anger started growing in me". He instanced a road rage incident at the Gold Coast where he chased a car with the intent of dragging the other driver out of his motor vehicle and beating him up. Mr Clackson said that he now has fights all the time with his wife and other members of his family which never happened prior to the assault. A restraint order had been placed against him as a result of his anger issues. Mr Clackson now takes medication to control these anger issues; and
- memory issues. Mr Clackson now has to keep a notebook in his pocket in order to recall things. He has been a musician for a number of years and now requires the use a karaoke system to assist him in the recollection of the lyrics. Once prompted with the karaoke system he then gets to recall the words more easily.

[23] As for whether Mr Clackson lost consciousness during the assault, his evidence is that he really does not know. All he knows is that there is a gap in time and he does not know what happened during that gap. The gap in his knowledge is following a hit to his head where the next thing he recalls is looking at the assailant's boots which were covered in blood. The gap in time is either at the commencement of the assault or very close to the commencement of the assault.

[24] **Mrs Vanessa Clackson:** Prior to the assault in 2009, Mrs Clackson said that her husband had always been able to deal with situations that arose (e.g. his two daughters' illnesses) and had been able to keep the family together. However, since the June 2009 incident she has noticed the following changes in him:

- he really is no longer head of the family as he is unable to deal with situations any longer. She has had to take on the responsibility for the

household paperwork (particularly the financial paperwork) e.g. any dealings with Centrelink;

- he has lost his ability to spell;
- his memory has deteriorated;
- he suffers from headaches;
- he gets frustrated easily. Previously he was able to handle any situation however now he has outbursts;
- he does not recall conversations and he loses concentration easily; and
- he used to do a lot of the driving, however, now she does 95% of the driving as she has to constantly remind him of speed limits when he is driving.

### **Medical Evidence**

[25] **Dr Scott Campbell, Consultant Neurosurgeon:** Dr Campbell examined Mr Clackson on 9 May 2013 for the purpose of providing a medico-legal report. His initial report was dated the same day i.e. approximately four years after the assault. The history provided in that report is as follows:

"Mr Peter Clarkson [sic] stated that he was assaulted at work on 08 June 2009. At the time he entered his boss's office at the end of the shift to drop off gear in his capacity as a security guard. Whilst performing this activity he was assaulted from behind by an assailant who was after guns. He was attacked from behind with a set of knuckle dusters. He was punched in the face and neck region and wrestled to the ground. An 18-minute confrontation ensued and during that time Mr Clarkson [sic] briefly lost consciousness. He was dazed and amnesic for some of the events. He managed to escape from his assailant and dived down a flight of stairs. He noted multiple aches and pains and facial lacerations and facial numbness.

Mr Clarkson [sic] attended upon the Proserpine Hospital on the day of the assault complaining of the above symptoms. A CT scan of the brain and face was performed and was reported as normal. The lacerations were cleaned, sutured and dressed. He was admitted for a two-day period of bed rest, observation and pain relief. He was diagnosed with a closed head injury and right infraorbital nerve and maxillary nerve injury.

Following discharge from hospital Mr Clarkson [sic] attended upon his local doctor for an opinion. He complained of poor short-term memory, headaches, dizziness and facial numbness. Treatment was with Panadol and counseling.

Mr Clarkson [sic] was referred to a plastic surgeon regarding numbness of his teeth. Treatment was conservative."

[26] The current status of the Mr Clackson's injuries were said by Dr Campbell to be:

1. Cognitive deficits.
2. Chronic headaches.
3. Facial numbness.

The cognitive deficits manifest as poor short-term memory, reduced concentration and altered personality. He is forgetful of names, conversations and yesterday's events. He misplaces personal items such as his keys and sunglasses. He has difficulty with word selection and reading. He is susceptible to easy frustration and anger outbursts.

The headaches occur most days of the week and when severe he lies down and rests and takes painkillers. The headaches are associated with dizziness.

The right facial numbness is located over the cheek and upper lip and upper gum region. The numbness is annoying."

- [27] Dr Campbell provided a Supplementary Report dated 10 October 2013 in which he responded to a couple of questions asked by Solicitors for Mr Clackson. The first question asked was "[w]hether your diagnosis of cognitive deficits and altered personality equate to a diagnosis of acquired brain injury?" Dr Campbell's response was as follows:

"Yes, Mr Clarkson [sic] was knocked out and sustained a head injury when he was assaulted at work on 08 June 2009. He was amnesic for the events. The subsequent CT scan of the brain showed no intracranial pathology. In the postoperative period, he noted poor short term memory and headaches. At examination on 09 May 2013, he could recall zero of five facts at five minutes. Taking these facts into consideration, I have concluded that Mr Clarkson [sic] has sustained a minor acquired brain injury as a result of the workplace assault on 08 June 2009."

- [28] The second question that Dr Campbell was asked to respond to was "[w]hen is it either appropriate or possible to diagnose an acute brain injury?" Dr Campbell responded as follows:

"An acquired brain injury is a diagnosis that can only be made with the passage of time. In the early stages of a head injury, the classification is mild, moderate or severe head injury and the outcome with time can be that of a complete recovery or a mild acquired injury through to a severe acquired injury. It would be unusual for a hospital casualty department to make the diagnosis of an acquired brain injury within the initial days or weeks of the injury."

- [29] In a further medical report dated 19 February 2014 Dr Campbell dealt again with the history provided by the Appellant and stated as follows:

"Mr Peter Clackson was assaulted at work on 08 June 2009 whilst performing his duties as a security guard. An assailant attacked him from behind and used knuckle dusters to punch him in the head and face. He was rendered unconscious and amnesic for the events. Mr Clackson reported that he

received a blow from a steel plated fist to the base of his skull to the left and then loss of consciousness. He was amnesic for the events that followed (including all associated pain) until he was on his knees looking at the assailant's feet.

This history in conjunction with the facial lacerations and infraorbital injury (including injury to the infraorbital and maxillary nerve) indicates that Mr Clackson was rendered unconscious and sustained a minor closed head injury. He has been left with ongoing cognitive deficits and altered personality and chronic headaches which are consistent with the head injury sustained."

- [30] In concluding that Mr Clackson suffered a minor acquired brain injury as a result of the 2009 assault, Dr Campbell relied upon Mr Clackson's account of events including that he had lost consciousness and was amnesic to some of the events of the assault. Dr Campbell was unaware of the availability of the CCTV footage or that Mr Clackson has viewed that footage prior to his examination of him on 9 May 2013.
- [31] According to Dr Campbell, loss of consciousness is a critical factor in an acquired brain injury. Under cross-examination, he said that before he makes a diagnosis of minor head injury, he likes there to be a loss of consciousness. If there is no loss of consciousness, then Dr Campbell generally is not too concerned about their brain injury. Dr Campbell stated that if Mr Clackson did not lose consciousness then he was of the view that he did not have a cognitive impairment as a result of the head injury suffered in the 2009 assault.
- [32] Dr Campbell was not concerned that the Proserpine Hospital Report revealed no loss of consciousness. He said that often the patient themselves will not know in the acute phase if they have been dazed or shocked. It is only upon reflection will they recall a loss of consciousness.
- [33] **Dr Brona Siobhan O'Dowd, Clinical Neuropsychologist:** Dr O'Dowd prepared a medical report dated 31 January 2013 having assessed Mr Clackson on 22 January 2013. The history of the incident on 8 June 2009 that Dr O'Dowd gave in her medical report is as follows:

"Mr Clackson is a 49-year-old man who was employed as a Security Guard with Key Security Group when he sustained trauma to his face, head, and body in an attempted firearm robbery at around 5.45 am on Monday 08 June 2009. Apparently he was opening the office door after finishing his shift when he was attacked from behind by a man wearing a balaclava and knuckle dusters. He was hit multiple times in his face and head, and feared he would be killed. He reported that he was dazed in the assault but he did not lose consciousness. He was able to provide a vivid recount of the events that took place and his thoughts/emotions during the assault, stating '... it was like being taken by a shark and violently shaken ... the smell and warm feeling of blood spraying and spurting ...'

Mr Clarkson managed to escape his attacker and get help at a local pub. The publican took him to the Proserpine Hospital at which time he said he was falling in and out of consciousness."

[34] As for his post-hospital symptoms, Dr O'Dowd reported:

"Mr Clackson reported that in the aftermath of the assault he developed a range of disturbing trauma symptoms (e.g. fear, hyper vigilance, nightmares, moodiness, helplessness etc) and feelings of anger towards his attacker...

Mr Clackson reported that over the first two years after the assault he really did not have time to focus on his own symptoms and treatment as there were other more pressing crises happening in his life."

[35] The ongoing symptoms that Dr O'Dowd recorded in her medical report are:

"Physical:

- General muscle deconditioning and weight loss (- 10 kgs)
- Regular stress headaches that start with shooting head pains
- Numbness in his teeth due to facial nerve damage
- Reduced balance and dizzy spells
- Occasional 'electric tingles' throughout his body
- Reduced vision and droop in his right eye when tired
- Intermittent swelling in the right side of his nose
- Frequent bouts of diarrhoea
- Minimal sleep due to his mind racing and disturbing dreams
- Lack of libido with some erectile problems
- Excessive fatigue

Cognitive:

- Difficulty maintaining his focus on tasks
  - He tends to 'zone out'
  - He is intolerant of interruptions
- General forgetfulness
  - Often forgets names and what people have told him
- Word finding difficulties

Emotional/Behavioural:

- Persisting fluctuating trauma symptoms
  - Unable to relax and is fearful in the dark
  - Disturbing nightmares and flashbacks to the attack
  - Is hyper vigilant, constantly needs to protect his back
- Is more irritable and is easily frustrated
- Has difficulty controlling his anger
  - Has intense feelings of anger towards his attacker
  - Over-reacts and is rude and verbally abusive to people
  - Has frequent incidents of road rage
  - Worries he might snap and hurt someone
- Experiences excessive sadness with thought of self harm
  - Feels overwhelmed by his emotions
- Is more reclusive and rarely socialises now days".

[36] Dr O'Dowd opined that:

"In my opinion Mr Clackson has sustained a very mild acquired brain injury in the subject incident on the 8 June 2009. Of more significance here, he has developed *Post Traumatic Stress Disorder* in association with the subject attempted robbery. I am also of the opinion that the emotional trauma/distress stemming from the subject robbery and other unrelated but coinciding life crises/stressors have led to an amplification of pre-existing emotional problems. Further, I feel that the combination of Mr Clackson's noted PTSD and Depression are primarily responsible for his current reported everyday functional difficulties."

[37] The factors that Dr O'Dowd considered in reaching this conclusion are outlined in paragraph 4.2 of her medical report. One such factor was that while Mr Clackson had said that he did not lose consciousness during the assault, he did report that he later fell in and out of consciousness while being taken to hospital.

[38] It was Dr O'Dowd's view that a loss of consciousness did not necessarily have to occur in order to sustain a brain injury. It is, however, one of the criteria that is used to measure the severity of brain injury. The longer a person has lost consciousness is an indicator for severity of brain injury. Just because a person stays conscious does not mean that they have not sustained a brain injury. Mr Clackson did advise Dr O'Dowd that he was dazed but that he did not lose consciousness during the assault.

[39] **Dr Michael John Weidmann, Neurosurgeon:** Dr Weidmann provided a medical report dated 8 May 2013 having examined Mr Clackson on the same day. Dr Weidmann's history as reported to him by Mr Clackson was as follows:

"Mr Clarkson told me that he was employed as a security officer in Proserpine. In the course of his work on 8<sup>th</sup> June 2009 he was unexpectedly assaulted by a person wearing a balaclava and a knuckle duster in the right hand. He said the first blow was from behind into the left occipital region. He said he then dropped to his knees and was struck several times over the top of his head. There was then a scuffle and he was struck several more times over his face, particularly the left forehead, left cheek and right cheek. The assailant wanted to gain access to a locked gun cabinet. Mr Clackson was then able to escape. He said he was very dazed and he wandered to the local hotel which was very close by. The publican put him into his bus and took him to the Proserpine Hospital.

Mr Clackson is able to remember the details of the event. There was no loss of consciousness although he was initially dazed and shaken. The records of the Proserpine Hospital state that there had been no loss of consciousness.

...

The facial lacerations healed over a period of time but he said his life then 'went pear shaped'. A daughter aged twenty-five years died two years ago from cystic fibrosis, having undergone lung and kidney transplants previously. His wife then had breast cancer requiring chemotherapy and radiotherapy. He

said this all involved emotional and financial difficulties and he was declared bankrupt at one stage.

Mr Clackson now feels his overall condition is now stable."

[40] According to Dr Weidmann, Mr Clackson described problems with anger and fatigue. He had never had a problem with anger prior to this incident, however, some months prior to the consultation Mr Clackson said that he assaulted someone. In November 2012 he was admitted to the Bundaberg Hospital for psychiatric care. Mr Clackson also complained of insomnia or difficulty sleeping and he has an intermittent buzzing sensation inside his head. He described bi-frontal headaches as "a balloon blowing up inside my head" particularly if he is tired. Mr Clackson further complained of persisting numbness and irritation over the right cheek below the right eye. This numbness extends down to the upper teeth. Whilst Mr Clackson did not volunteer memory problems, when asked about it he said that he sometimes would forget where he had been when driving.

[41] Dr Weidmann in outlining his opinion said that Mr Clackson was dazed but there was "no definite loss of consciousness". Mr Clackson developed significant psychiatric problems following the assault and there were other major stressor events in his life. Dr Weidmann opined that Mr Clackson had suffered significant psychiatric dysfunction as a result of the injury which has been assessed in the psychiatric and psychological reports.

[42] Ultimately Dr Weidmann opined:

"From a neurological point of view I doubt he has suffered a significant degree of organic or physical brain damage. Organic brain damage was not suggested initially but I note that the Neuro Psychological report of Dr. B O'Dowd dated 31<sup>st</sup> January, 2013 states on page 10 "In my opinion Mr. Clackson has sustained a very mild acquired brain injury. Further, I feel that the combination of Mr Clackson's noted PTSD and depression are primarily responsible for his current reported every day functional difficulties'. I agree that Mr. Clackson has significant functional difficulties but in my opinion, it is more likely that these are all of a psychiatric nature. While it may be possible there is a minor degree of organic brain injury, I believe it would be very difficult to demonstrate this objectively. In the absence of loss of consciousness, a significant degree of organic brain damage with someone with a closed head injury would be quite unusual".

and further:

"In summary, it is my opinion that Mr. Clackson has suffered a mild head injury but with no loss of consciousness and no organic brain damage or injury. He has however suffered facial scarring as well as a permanent subtotal injury to the right infra orbital nerve. His headaches are muscle contraction of stress headaches by description and do not indicate any neurological problem."

[43] Dr Weidmann did however state that he could not exclude absolutely Mr Clackson's short-term memory loss being due to a minor degree of organic brain injury.

Dr Weidmann, however, thought it unlikely in circumstances where Mr Clackson had not lost consciousness. Under cross-examination, Dr Weidmann said that loss of consciousness was not a critical issue in any determination of whether a person has an acquired brain injury but rather it is a relevant issue to consider. Dr Weidmann agreed that the determination of whether or not Mr Clackson suffered an acquired brain injury was finely balanced and that should the Commission make such a finding it would be "fine" by him. However, in his opinion, he would probably say that Mr Clackson had not suffered an acquired brain injury.

- [44] Dr Weidmann also indicated that, based upon what Mr Clackson told him about the assault, he would estimate that the assault occurred over one or two minutes. The CCTV footage indicates that the assault occurred over a five minute period. Yet one of the issues upon which Dr Weidmann relied to form his view that Mr Clackson did not suffer a loss of consciousness was the fact that Mr Clackson was "able to remember the details of the event". In his medical report Dr Weidmann followed that comment up with the view that there "was no lack of consciousness although he was initially dazed and shaken".

### **Conclusion**

- [45] It is apparent that, the issue of whether or not Mr Clackson lost consciousness during the assault, was not something that Mr Clackson considered until after viewing the CCTV footage. His genuine recollection of the assault, as conveyed to the Townsville Bulletin and the Queensland Police Service was not what actually occurred. The real error in Mr Clackson's genuine recollection arises at the commencement of the assault.
- [46] It appears that Mr Clackson had not been forced to actually recall in detail the events of the assault until he visited Dr Campbell who kept asking him "what followed next". Mr Clackson said that no other person had gone through the event with him in such detail. I found Mr Clackson to be very genuine in his attempts to recall the events of 8 June 2009. When asked whether or not he lost consciousness during the assault his response was that he did not really know. All he knew was that there was a gap in time during the assault where he does not know what happened.
- [47] It is to be noted that Mr Clackson advised Dr Campbell that the assault occurred over an 18 minute period of time. That reflected his evidence at the hearing. I find no evidence in the CCTV footage to support that account of the assault. Whilst the assailant was visible on the CCTV footage from 5:07:48, Mr Clackson was first shown entering the camera view at 5:45:44.
- [48] Mr Clackson had been consistent in his accounts of the early stages of the assault following the 8 June 2009 incident. When he first saw the CCTV footage approximately 12 months ago, the footage caused Mr Clackson to re-think what had actually occurred during the assault. Since that time he has become aware of events that occurred for which he has no recollection. Some loss of consciousness, albeit short in duration, would seem to be a logical conclusion.
- [49] On 22 January 2013 Mr Clackson advised Dr O'Dowd that he "was falling in and out of consciousness" when being taken to the Proserpine Hospital and that he was

"dazed in the assault but he did not lose consciousness". Mr Clackson also told Dr Weidmann on 8 May 2013 that "he was very dazed" although Dr Weidmann said that there was no loss of consciousness, and on 9 May 2013 Mr Clackson told Dr Campbell that he "briefly lost consciousness" and was "dazed" during the assault.

- [50] The fact that the Proserpine Hospital recorded that Mr Clackson was not "knocked out" would reveal what he told the Hospital staff at the time. As Dr Campbell stated, he was not concerned at this Hospital Report as, in an acute phase, patients themselves do not know whether they have been dazed or shocked and it is only on reflection that they will recall a loss of consciousness.
- [51] The onus is on Mr Clackson to prove, on the balance of probabilities, that he suffered an acquired brain injury. If he did suffer such an acquired brain injury it was, as the medical evidence reveals, a minor acquired brain injury. I am satisfied that, on the balance of probabilities, Mr Clackson did suffer a minor acquired brain injury as a result of the assault on 8 June 2009. I am satisfied, on the balance of probabilities, that Mr Clackson lost consciousness during the course of that assault. I am further satisfied that Mr Clackson was in and out of consciousness whilst being transported to the Proserpine Hospital shortly after the assault.
- [52] I accept that it was only after viewing the CCTV footage and seeing Dr Campbell that Mr Clackson has become aware that there is a period of time during the assault for which he has no recollection whatsoever. I find that the likely result of this loss of recollection that Mr Clackson suffered a loss of consciousness during the assault.
- [53] I have no difficulty with Mr Clackson utilising the CCTV footage to assist his recollection of the assault. It is in Mr Clackson's recollection of the initial stages of the assault that the CCTV footage is of assistance. That initial stage of the footage shows that Mr Clackson's earlier accounts of that period of the assault to be wrong.
- [54] I find that Mr Clackson did suffer a minor acquired brain injury which arose out of, or in the course of, the assault on 8 June 2009. Mr Clackson's acquired brain injury is thus a compensable injury: see s 32 of the Act. In those circumstances I set aside the decision of the Regulator dated 11 September 2013 and I substitute a decision that Mr Clackson's acquired brain injury is a personal injury that arose out of, or in the course of, his employment with Key Security Patrol Pty Ltd i.e. it is an injury within the meaning of that term in s 32 of the Act.
- [55] Order accordingly.