

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 3779/19
Applicant: Minah Popal
Respondent: Myer Holdings Pty Ltd
Date of Determination: 12 November 2019
Citation: [2019] NSWCC 363

The Commission determines:

1. The respondent is to pay the applicant weekly compensation under s 37 of the *Workers Compensation Act 1987* as follows:
 - (a) \$471.50 per week from 11 January 2015 to 20 January 2015, and
 - (b) thereafter, award for the respondent on the claim for weekly compensation.
2. The respondent is to pay the applicant's s 60 expenses.
3. I remit the matter to the Registrar for referral to an Approved Medical Specialist to assess the applicant's permanent impairment as a result of a psychological injury suffered on 7 July 2014.

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

Catherine McDonald
Arbitrator

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

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Minah Popal was employed by Myer Holdings Pty Limited (Myer) in the cosmetics department of its Parramatta store. She worked on a part time basis for 24 hours per week as a makeup artist for Christian Dior.
2. On 7 July 2014 she witnessed a stabbing immediately outside the store. She suffered a psychological injury as a result of those events and was paid weekly compensation until 10 January 2015, when her claim was denied.
3. Ms Popal claims weekly compensation from January 2015 until the end of the second entitlement period as defined in s 32A of the *Workers Compensation Act 1987* (the 1987 Act). She claims s 60 expenses and seeks referral to an Approved Medical Specialist (AMS) for assessment of permanent impairment.

ISSUES FOR DETERMINATION

4. The parties agree that the following issues remain in dispute:
 - (a) Ms Popal's entitlement to weekly compensation and s 60 expenses after 11 January 2015, and
 - (b) whether she has recovered so that she should not be referred to an AMS.

PROCEDURE BEFORE THE COMMISSION

5. The claim was listed for conciliation conference and arbitration hearing on 23 October 2019 when Mr Hanrahan of counsel appeared for Ms Popal and Mr Saul of counsel appeared for Myer.
6. The parties agreed that Ms Popal's average weekly earnings were \$589.37 and that she was paid compensation for 27 weeks, encompassing the whole of the first entitlement period. It is agreed that 80% of that figure is \$471.50. Ms Popal worked on weekends and was paid shift allowances. After the first 52 weeks her pre-injury average weekly earnings reduced to \$471.15 in accordance with s 44C(1)(b) of the 1987 Act, and 80% of that amount is \$376.92.
7. The parties agreed that the second entitlement period ended on 6 January 2017.
8. Mr Saul elected to rely on the reports of Dr S Roberts. The report of Dr J A Roberts dated 27 November 2014 was excluded under clause 44 of the *Workers Compensation Regulation 2016*.
9. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

10. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute and attached documents (ARD);

- (b) Reply (excluding the report of Dr J A Roberts dated 27 November 2014);
- (c) Ms Popal's Applications to Admit Late Documents dated 14 August 2019, 9 September 2010 and 16 October 2019, and
- (d) Myer's Application to Admit Late Documents dated 17 October 2019.

11. There was no oral evidence.

Ms Popal's evidence

- 12. Ms Popal signed a statement on 8 November 2017. She commenced employment for Myer in about 2007 while still at school. She became a makeup artist in about 2010. She worked full time after finishing school until 2014 when she began to work on a part time basis because she had commenced to study primary education at university.
- 13. At the time that statement was prepared, Ms Popal was married with two children who were born in October 2015 and April 2017. She has since had a third child in 2019.
- 14. On 7 July 2014, Ms Popal witnessed a stabbing outside Myer and suffered a psychological injury. She was treated by ambulance officers but declined to be taken to hospital. On the following day, at the suggestion of Myer, she submitted a workers compensation claim and her claim was accepted.
- 15. In late 2014, Ms Popal made three unsuccessful attempts to return to work. She said that she was assessed as fit for work on 10 January 2015 at her own request. She continued attempts to return to work until mid 2015 when she was again assessed as unfit. She said that she no longer felt that she was being supported by her treating doctor, Dr Wang, "which is when I felt my condition began to further deteriorate."
- 16. Ms Popal said that she had problems with her menstrual cycle (with associated headaches) and had been diagnosed with depression before the injury. She had seen a psychologist and been prescribed Avanza but she said she did not take it until after the injury.
- 17. After the injury, Ms Popal saw her general practitioner, Dr Dukkak on 9 July 2014. She was then referred to Dr Wang by Myer and has seen him since. She saw Ms Sheila Holley, psychologist and Dr Gordana Jovanova, psychiatrist.
- 18. The last certificate of capacity was obtained in July 2016. Ms Popal said that her current general practitioner, Dr Hussaini, was reluctant to provide certificates of capacity because she had not been involved in the claim from the beginning. Dr Hussaini prescribes medication for migraine and Avanza.
- 19. Ms Popal said that she became fearful of leaving the house after the shooting outside Parramatta Police Station in October 2015. On 19 November 2015 a man tried to enter her home and exposed himself to her from outside. This aggravated her fear even at home. In early 2016 she drove past Parramatta Police Station and saw men chasing a man with a gun and shots were fired.
- 20. Ms Popal said that she has suffered from trigeminal neuralgia since the end of 2015 and that she believes that the condition is related to her psychological condition. She said that she suffers chronic right sided pain and that she was referred to an ophthalmologist in 2016, who confirmed that her symptoms are not related to her eye. Ms Popal said that her condition was diagnosed by Dr Duad and that she was prescribed medication. She said that the condition flares up when she experiences an onset of anxiety and stress.

21. Ms Popal said that she set up a business called MP Maquillage in about April 2014. She said:

"I am a Makeup Artist and I provide quality makeup service for bridal, formal and photo shoot events. I use Facebook to advertise my services and I upload pictures and videos of myself and others with my makeup on. I have only performed makeup services on three (3) people, and these were all from last year.

My psychologist recommended I do something like this and to continue doing it. I am extremely happy doing my makeup and other people's makeup. This is something that I have always been good at.

I also upload videos of me applying the makeup. I take these videos in the comfort of my own home, as I do not like to leave my home often.

I do not earn any money from these videos or from my business. I wanted to make my makeup artistry venture a business, but I cannot allow strangers to come into my home, and I do not like leaving my home for any reason."

22. Ms Popal prepared a further statement on 9 September 2019, after a telephone conference on 27 August 2019. She said that her employment was terminated on 21 February 2015 but did not amplify the circumstances of termination. She said that she continued to try to operate her business MP Maquillage to allow herself to appear well in the eyes of outsiders. She had no income and "closed the account" (referring to social media) because she did not feel she was accomplishing anything.
23. A few months later, she opened an Instagram account as "GlambyMinah". She said that she posted photographs of herself wearing makeup and looking normal and happy but she removed the makeup straight away because she "felt miserable that everyone thinks I am mental and have psychological issues."
24. Ms Popal is in receipt of Family Tax Benefits Part A and B from Centrelink. She said that she found managing finances was difficult so that she used her husband's bank account.
25. Ms Popal said she saw Ms Holley for treatment until she was no longer able to afford it.
26. The notes from Blacktown General Practice show that Ms Popal saw Dr Dukkak and Dr Wang and had consulted that practice since at least June 2012. She consulted a psychologist, Soraya Motala at that practice in March and May 2014.
27. The notes confirm that she saw Dr Dukkak on 9 July 2014 and was referred again to Ms Motala. On 26 July 2014 Ms A Ranganathan, psychologist, entered her notes for 19 July 2014 and recorded, in addition to a history of the incident:
- "Client reported she used to experience anxiety at night since she was a child. She reported she would feel suffocated if the door and windows were closed and would then experience panic attacks. She reported this had improved about 1 month prior to witnessing the stabbing, and she had stopped her medication 1 month ago."
28. In August 2014, Dr Wang diagnosed post-traumatic stress disorder (PTSD). The notes show that she continued to see Ms Motala until November 2014, when she was assessed by Blacktown Mental Health Service.
29. Ms Popal continued to see Dr Wang until August 2015. His certificates are attached to the Reply and described below. On 11 May 2015 he noted that Ms Popal was eight weeks pregnant.

30. Dr Jovanova reported to Dr Wang on 1 December 2014. Dr Jovanova obtained the history that Ms Popal was well until the incident in July 2014 and set out the symptoms of which she complained. Ms Popal denied previous psychiatric symptoms. Dr Jovanova recorded that two weeks previously she considered taking her own life and was planning to drink nail polish remover.
31. Dr Jovanova diagnosed PTSD and recommended treatment with a psychiatrist and psychologist. Dr Jovanova recommended adjustments to medication and a graded return to work.
32. There are no other reports from Dr Jovanova. The notes in the ARD suggest that Ms Popal may have seen Ms Holley from 9 December 2014. The notes are not labelled but attributed to Ms Holley in the Index. The date is consistent with Ms Popal's evidence.
33. Ms Holley reported to Dr Wang on 20 July 2015 and said that "given the severity of her symptoms, in my opinion she should not return to work until there has been a significant improvement."
34. Ms Holley provided a detailed report to Ms Popal's solicitors on 29 March 2016 in which she said that she saw Ms Popal for the first time on 11 June 2015 and described the treatment provided between June and October 2015 being psycho-education regarding PTSD and cognitive behavioural strategies for managing anxiety and depression. In October 2015, when there was a shooting incident outside Parramatta Police Station, Ms Popal's symptoms worsened. By the time of the report, Ms Popal was able to travel by car to take her baby to appointments and to attend her own and had started to take her baby for short walks outside her home. Ms Holley said that Ms Popal met the criteria for the diagnosis of PTSD and remained unable to return to full time work. Ms Holley considered that if Ms Popal continued to actively engage in treatment, she would be able to return to her studies, which she estimated would be in about 12 months. Ms Holley said:

"Ms Popal reported that she has felt unsupported by her employer and that the company's attitude toward her has felt hostile and punitive. It is unlikely, therefore that she will return to her pre-injury employment. However, Ms Popal is hopeful that she will be able to return to her studies, which have been deferred since the traumatic incident, and achieve her current goal of becoming a primary school teacher."
35. There is one report from Dr R Daud, neurologist, in the ARD dated 5 September 2017, addressed to Dr Hussaini. She diagnosed trigeminal neuralgia and prescribed Lyrica. The report is brief and there is no reference in it to Ms Popal's psychological condition.
36. The notes of Pacific Medical Centre are attached to Ms Popal's Application to Admit Late Documents dated 16 October 2019. Apart from one attendance, those notes span the period from 14 January 2015 to 23 July 2019. Despite reasonably frequent attendances at the practice, the first reference to the injury was on 1 February 2016. On 15 June 2016, Dr Bashal noted that payment for psychologist sessions had ceased and that she needed a "M/C under medicare for counselling sessions." There are no other references to the injury.

Dr Allnutt

37. Ms Popal's solicitors qualified Dr Stephen Allnutt, psychiatrist, who has prepared five reports.
38. Dr Allnutt's first report is dated 27 February 2016. He recorded that Ms Popal was not taking medication and was consulting Dr Jovanova and Ms Holley. Dr Allnutt said that Ms Popal manifested a constellation of symptoms consistent with chronic PTSD. He said there was no evidence of a pre-existing diagnosable psychiatric condition. He considered her totally unfit for her pre-injury employment and recommended ongoing treatment and medication. Dr Allnutt assessed 15% permanent impairment.

39. Dr Allnutt reconsidered his permanent impairment assessment in a report dated 18 July 2016 on the basis of comment from Ms Popal and increased his assessment to 24%.
40. Dr Allnutt's second report was prepared on 27 March 2017 in response to a request that he consider Ms Popal's statement. He noted Ms Popal's evidence that she had suffered depression but was not prescribed medication. Dr Allnutt assumed that she was not manifesting symptoms of depression at the time of the injury. He said that he understood that a diagnosis of PTSD had been made before further traumatic events in October 2015, 19 November 2015 and early 2016. He considered that those events aggravated her symptoms. He confirmed the opinions in his earlier report.
41. Dr Allnutt's third report is dated 15 December 2017 and said he understood there was evidence that Ms Popal had seen a psychologist (Ms Motala) on one occasion in relation to bullying. He also noted that Ms Popal had problems with her menstrual cycle before the injury, was prescribed Avanza and consulted with Ms Motala under a mental health care plan. He was "instructed that she has a diagnosis of trigeminal neuralgia which flares up when she becomes depressed." Dr Allnutt said that the prior depression may have increased her vulnerability to reacting with PTSD after the injury but the information did not cause him to alter his diagnosis. He said that he was not an expert in respect of trigeminal neuralgia but was aware that "stress and anxiety has been identified as a potential factor that can trigger the onset of trigeminal neuralgia and can also aggravate the condition."
42. Dr Allnutt saw Ms Popal again on 4 December 2018 and provided a further report dated 19 February 2019. Dr Allnutt recorded that Ms Popal was taking Panadeine Forte, Maxalt and Lyrica but was not taking psychiatric medication. She was not seeing a mental health professional because she could not afford it. Since the last consultation, Ms Popal had given birth to her second child and had two miscarriages in 2018. She had not taken psychiatric medication since she found out she was pregnant with her second child. She took Lyrica for trigeminal neuralgia.
43. Dr Allnutt recorded that Ms Popal had seen Ms Holley every two weeks for about two years. Ms Popal told him that Ms Holley told her to do things that made her happy. She began a Facebook page to show friends and family that she was fine. Over time, she would do makeup for friends and post it on line but she deleted the Facebook account after six months to a year. She opened her Facebook page again on several occasions but lost motivation. She deleted the last one three to four months before.
44. Dr Allnutt recorded his mental state examination:
- "She presented as cooperative and well groomed. Her speech was clear and coherent, and she maintained good eye contact. She did not manifest behaviours consistent with side effect to psychiatric medication or neurological illness. She spoke in a clear and coherent manner. She was tearful during the interview. Her affect was flat. She endorsed a number of depressive and anxiety symptoms. There was no suicidal ideation, plan or intent, there was no mania or hypomania, and there was no psychosis. She complained of concentration problems. Her capacity for insight and judgment was adequate."
45. Dr Allnutt recorded a detailed history of Ms Popal's symptoms and reviewed medical reports, including those of Dr S Roberts dealing with investigation material. Dr Allnutt said that he also reviewed that material and that it did not cause him to alter his opinion. He said:
- "The Facebook information has limited to no clinical information about her mental state and, like other surveillance material provides limited information about a person's motivations, thoughts, emotions and mental state and thus caution must be exercised in the level of weight and inference made about a person's subjectivity given such

material, in the absence of clinical interview in that regard and the nature of a persons' mental state.

It does not appear that Dr Roberts had the opportunity to re-interview your client in order to seek clarification, particularly with regard to her underlying emotions, behaviour and motives relevant to her Facebook account. The account she provided to me is consistent with PTSD; her description is that her Facebook posts as reported in by Quantum were because she was socially withdrawn, and an attempt to assist her recovery from social withdrawal due to PTSD and these behaviours were as a consequence of her PTSD, and thus arguably symptomatic of her PTSD. I do not believe that the content provided in that the Facebook posts provides adequate basis to reject a diagnosis of PTSD; on the contrary, her account about her Facebook behaviour, supports the diagnosis.”

46. Ms Popal relies on notes from Ms Holley at the Hills Clinic and Penrith Therapy Centre between 11 June 2015 and September 2016. Mr Hanrahan did not take me to those notes. There is another set of notes in different handwriting from the Hills Clinic but I was not taken to them and it is not possible to determine whose notes they are.
47. Notes from Pacific Medical Centre commence in January 2015 and are attached to Ms Popal's Application to Admit Late Documents dated 16 October 2019. Again, I was not taken to the notes. The notes deal with general medical matters and Ms Popal's pregnancy. There is no reference to the injury until February 2016 and no reference to treatment in respect of it.

Myer's evidence

48. Myer attached all of the medical certificates of capacity provided to it to the Reply.
49. Dr Dukkak certified Ms Popal as having no current work capacity until 31 July 2014 and prepared a report to Myer on 31 July 2014. Dr Dukkak diagnosed PTSD but noted that Ms Popal had a history of anxiety and panic attacks since she was a child and considered that the incident had aggravated her pre-existing condition.
50. Dr Wang provided a non-WorkCover certificate for the period 1 to 6 August 2014 and certificates from 7 August to 4 September stating that she had no current work capacity. He certified Ms Popal fit for one to two hours on two to three days per week from 5 September to 26 September and for two hours on two days per week from 26 September to 7 November (with the exception of 31 October when she had no work capacity). From 11 to 24 November, Dr Wang considered that Ms Popal was fit for two hours on two to four days per week. He certified her fit for three hours on three days per week from 10 to 23 December then totally unfit on 17 to 19 December. He increased her capacity to four hours on three days from 23 December and usual hours and days from 20 January 2015.
51. Dr Wang provided both non-WorkCover and WorkCover certificates from 31 January to 1 February stating that Ms Popal was unfit. (His notes show that this was for a gastric illness). He certified her fit for pre-injury duties from 27 March 2015 until at least 11 May 2015. Dr Wang certified Ms Popal as having no current work capacity from 23 June 2015 and having capacity for flexible hours and days from 20 July 2015 to 31 October 2015. That certificate is dated 25 August 2015 is the last certificate of capacity in the file.
52. Dr U Banshal of Pacific Medical Centre prepared a general medical certificate dated 15 June 2016 which said that Ms Popal was suffering from "work stress" and that she was unfit from, 15 to 30 June 2015. The certificate noted "This medical medicare certificate is being given because the files are not transferred and so work cover certificate cannot be given."

53. A copy of Dr Wang's notes up to the date of his last consultation in August 2015 is attached to Myer's Application to Admit Late Documents dated 17 October 2019.
54. Mr T Blank of Quantumcorp prepared an Online Investigation Report dated 29 September 2016. The first post identified was on 28 July 2015 to a Facebook public group called Muslim Market suggesting that Instagram users follow MP Maquillage and offering makeup and hair services. A Facebook post in her married name of Minah Omary on 25 July 2015 noted that she had opened an Instagram page and was in the process of opening a YouTube channel. The report highlights social media posts throughout 2016 including her first "motherhood post" in August 2016. On 8 August, she posted that she was not taking makeup bookings until the end of the year because she was working on a major project but that all confirmed bookings would go ahead. There appear to be a number of different people depicted in the photographs.
55. A surveillance report dated 22 November 2016 showed Ms Popal travelling as a passenger in a motor vehicle on one occasion. The accompanying film was not provided and the report has little probative value.
56. A further online investigation report prepared by Mr Blank of Quantumcorp is dated 28 February 2017. The report noted that Ms Popal's own Facebook page had only two posts since the last report. Since the previous report, the MP Maquillage Facebook and Instagram pages had been deleted but Ms Popal maintained business Facebook, Instagram, YouTube and Google+ profiles in the name GlambyMinah on which she advertised herself as an experienced makeup artist. A post dated 6 December 2016 said that the previous account MP Maquillage "unfortunately that was deleted. I did everything to retrieve it but it wasn't possible. I have to start all over again..." The most recent posts in the report were dated February 2017.

Dr Roberts

57. Dr Samson Roberts, psychiatrist saw Ms Popal on 10 November 2016 and prepared a report dated 21 November 2016. He obtained a history of the incident and Ms Popal's attempts to return to work. He was told that she had never before experienced symptoms of a psychiatric nature. Ms Popal told Dr Roberts that she had physical symptoms affecting the right side of her body. He considered that these may have been side effects of migraine medication because her daily dose was well above the recommended range.
58. Dr Roberts recorded his mental state examination and review of the documents provided being the reports of Dr J A Roberts, Dr Jovanova and Dr Allnutt. He said:

"The history presented by Ms Popal reflects the development of Posttraumatic Stress Disorder consequent upon the circumstances to which she was exposed at work. By her account she remains significantly debilitated by her psychiatric condition. Undermining her progress thus far and adversely impacting on her prognosis overall has been a delay in the implementation of an evidence based approach to treatment. Namely, whilst Ms Popal has been in receipt of ongoing psychological therapy with some apparent benefit, she has remained on antidepressant medication, namely Zoloft either 50 or 100mg daily, these being the two available tablet strengths. It is unusual that a more assertive approach with respect to pharmacological treatment was not undertaken from the outset. To delay the prescription of a safe antidepressant medication during pregnancy in a severely debilitated patient, is contrary to usual practice and to persist with a particular dose of medication for a prolonged period of time in the absence of clear benefit, is also contrary to usual practice. It is generally expected that an improvement in symptomatology would arise within four to eight weeks of the introduction of a medication or a dose adjustment, following which a further dose increase or a change in medication would typically be considered."

59. Dr Roberts said it was not apparent that Ms Popal's condition had improved meaningfully since the initial diagnosis. He considered that the event in July 2014 was the cause of her condition and that no pre-existing condition had contributed to it. Ms Popal did not report travelling overseas in the last three years though noted that his letter of instructions told him that she was overseas around the period her employment was terminated. He said that Ms Popal was unfit to participate in employment. He said that she needed specialist treatment and that her condition was likely to improve. Her condition therefore had not reached maximum medical improvement.
60. Dr Roberts prepared a second report dated 20 January 2017, having reviewed the report of Quantumcorp dated 29 September 2016. He said that the notes of the general practitioner showed that Ms Popal had been identified as suffering mixed anxiety and depression before the incident. Dr Dukkak had prepared a Mental Health Care Plan in March 2014 and Ms Popal had consulted Ms Motala. Her depression improved. After the incident on 7 July 2014, the psychologist's note for 26 July 2014 provided a detailed account of Ms Popal's childhood anxiety.
61. Dr Roberts said that there were significant detail in the documents that were at odds with the information provided by Ms Popal to psychiatrists she had seen for clinical and medico-legal purposes. He said:
- “The impression given that she had only briefly returned to work finding it a highly distressing experience, contrary to the information contained within the file which would suggest that she was deemed psychiatrically fit to resume usual duties over approximately six months. Ms Popal has consistently reported a range of symptoms reflective of Posttraumatic Stress Disorder. It is noted that her exposure to the incident of 7 July 2014 has been accepted as fact and, based on the available information, the event was of a nature consistent with an incident with the potential to produce Posttraumatic Stress Disorder. However, the extent of the inconsistencies presented and the inconsistencies identified above, calls into question the veracity of Ms Popal's account in its entirety. It is not psychiatrically reasonable to accept some aspects of her account as accurate when presented with information indicating that other aspects of her account are overtly inaccurate. Furthermore, it is noted that there were inconsistencies on her presentation at interview at the time of her attendance on 21 November 2016 when she presented as well-groomed without evidence of self-neglect whilst describing a depressed and anxious mood. Even if one were to assume that in the past Ms Popal was indeed suffering Posttraumatic Stress Disorder, the level of functioning documented in the report of Quantumcorp indicates that she has recovered to such an extent that the condition is no longer producing impairment and any residual symptomatology is therefore of an insufficient nature and severity as to meet the threshold for a psychiatric diagnosis.”
62. Dr Roberts said that there was little information about the nature and severity of Ms Popal's pre-existing condition but he considered it likely that the condition would have influenced her subsequent psychiatric presentation.
63. Dr Roberts said it was apparent that Ms Popal is
- “fully recovered from any psychiatric condition that may have arisen, either as a result of work or of a manifestation of a pre-existing tendency to depressive illness. On this basis, it is appropriate to consider that she has reached maximal medical improvement.”
64. Dr Roberts prepared a further report dated 9 October 2019 after reviewing additional documents, including the second report of Quantumcorp dated 28 February 2017 and the notes of Pacific Medical Centre. He said:

“The additional information demonstrates her extensive social media presence and includes photographs of Ms Popal indoors and outdoors. It demonstrates photographs of other people on whom she had applied makeup, evidently with meticulous care. It also includes written material and advertisements. Photographs of Ms Popal in the presence of a man in what would appear to be a social venue are included. Overall, the preparation of material posted on social media reflects intact functioning in several areas. There are posts that would require focus and attention to detail. Intense prolonged concentration would be required to apply makeup to the standard demonstrated in the photographs. The effort that Ms Popal has gone to in maintaining the social media presence reflects intact motivation.

Both the social media posts and the Statement of Evidence of Ms Popal make reference to her two children, the second one born on 18 April 2017, and the impression of an intact marital relationship.”

65. Dr Roberts noted that Ms Popal documented suffering postnatal depression after the birth of her second child in 2017. He said that this diagnosis, if accepted, is relevant because it is a “separate diagnosis with the potential to cause significant compromise of functioning.”

66. Dr Roberts considered the material in Ms Popal’s statements and said:

“The effort that Ms Popal would evidently go to, to apply makeup at the standard demonstrated in the photographs on social media, would no doubt have demanded prolonged periods of intense concentration and meticulous attention to detail, namely a level of motivation and attention incompatible with a debilitating psychiatric condition, which belies her statement that she would immediately thereafter remove the makeup only engaging in these activities to ‘look normal and happy’ to the outside world. Namely, this represents an approach and a level of effort inconsistent with a debilitating psychiatric condition.”

67. With respect to Dr Allnutt’s reports, Dr Roberts said:

“Dr Allnutt had available to him extensive documentation including the material from Quantumcorp. He did not consider the information of Quantumcorp to sufficiently inform a psychiatric impression of Ms Popal’s circumstances, nor did he consider the additional information to be of a nature as to alter the opinions previously expressed. He declined to engage with the material, expressing the opinion that it did not present information of clinical psychiatric relevance and noting a caution must be exercised in weighing the relevance of such material.”

68. Having reviewed material from Ms Popal’s general practitioners, Dr Roberts said:

“The additional documents reinforce the impression of a divergence between the information provided by Ms Popal to medicolegal assessors and that contained within clinical notes and objective material. Namely, contemporaneous general practice records include information that she has overtly contradicted in presenting her account in interactions relevant to the Workers Compensation process. She has also presented an account of impairment of functioning that is unsupported by objective evaluation of her online presence. The level of functioning demonstrated by the social media material would demand the commitment of time, concentration, energy and motivation in a manner that would not be expected in the context of a psychiatric illness of the nature and severity proposed by Ms Popal. The additional information has not caused me to revise the opinions expressed in my reports of 21 November 2016 and 20 January 2017. The extent of the contradictions has been reinforced by the additional material and renders Ms Popal’s account psychiatrically unreliable.”

69. When asked about Ms Popal's current diagnosis, Dr Roberts said:

"Confidence with respect to any diagnostic formulation is undermined by the inconsistencies and contradictions. Having regard for the apparent level of functioning demonstrated by Ms Popal as can be interpreted from objective material, the prospect that she is suffering any diagnosis is called into question."

70. Dr Roberts was asked about other possible causes for Ms Popal's presentation and said:

"There are a number of life events with which Ms Popal has been challenged. These include a complicated Workers Compensation Claim process, pregnancies and parenting, her marriage which, based on information presented to a psychologist, would appear to have been challenged at one point, two miscarriages, stalking type behaviour directed towards Ms Popal including indecent exposure and a theft of her husband's property. In addition, Ms Popal has a documented history of Postnatal Depression. If indeed she is suffering a diagnosable psychiatric condition, her pre-existing propensity to depressive illness must be taken into consideration, diminishing any contribution of the subject events in the production of her current psychiatric condition."

Dispute notices

71. Myer is self-insured. It prepared a series of dispute notices under s 74 of the *Workplace Injury Management and Workers Compensation Act 1998*. The first is dated 14 July 2015. The insurer noted that Ms Popal had been certified fit to return to work on 20 January 2015 then certified unfit due to personal illness on non-WorkCover certificates. She then did not return to see Dr Wang until 27 March 2015 when she was again certified fit. The insurer noted that Myer had terminated Ms Popal's employment on the basis of abandonment and noted that she had married on 14 February 2015 and spent her honeymoon in Thailand.
72. Myer set out a history of medical certificates during 2015 and noted that Ms Popal had been certified fit. It considered that there was no justification for the change in capacity. It noted that Dr Wang had told Myer's Ms Williams that he would certify Ms Popal fit if Myer reinstated her which was evidence that she did not suffer any incapacity.
73. Myer issued a further notice on 24 May 2016 care of Ms Holley. It denied liability for treatment because prior approval had not been sought and because it had not received certificates of capacity or a treatment plan.
74. The decision dated 14 July 2015 was reviewed on 31 October 2016. A notice was issued care of Ms Popal's solicitors. Myer considered Dr Allnutt's first two reports and noted the opinion of Dr J A Roberts dated 27 November 2014 (whose report is not relied on in these proceedings.) Myer said that it preferred the opinion expressed in Dr Wang's certificates to that of Dr Allnutt. It indicated that it would review its position on receipt of a report from Dr S Roberts.
75. The final dispute notice is dated 9 December 2016. Myer disputed that Ms Popal had reached maximum medical improvement to permit a claim for permanent impairment compensation or, in the alternative, that she did not suffer 15% permanent impairment. Myer also relied on the online investigation report from Quantumcorp disclosing Ms Popal's use of social media to advertise a business as a makeup artist and the registration of an Australian Business Number in August 2014.

SUBMISSIONS

76. The submissions of counsel were concise. They were recorded and I will summarise them.
77. Mr Hanrahan said that Ms Popal had witnessed a stabbing murder and undergone immediate psychological treatment. She had made unsuccessful attempts to return to work in the immediate surroundings of the incident. Those attempts were made during the period for which she was paid compensation.
78. Mr Hanrahan noted that Ms Popal had married on 14 February 2015 and travelled to Thailand for her honeymoon.
79. After her return, Dr Wang certified her fit but Mr Hanrahan said I should be careful in drawing conclusions with respect to the material in those certificates.
80. Mr Hanrahan submitted that the evidence showed that Ms Popal either had no current work capacity or only a modest ability to earn in the real world. He said that I should not form a conclusion as to her capacity by reference to what was posted on social media because Ms Popal was following Ms Holley's advice to "fake it till you make it." He frankly conceded that this advice was not referred to in Ms Holley's report or notes.
81. Dr Allnut's evidence is that Ms Popal's condition has not improved sufficiently for her to return to work. In the absence of treatment, the incapacity continues.
82. Mr Saul said that Mr Hanrahan had put Ms Popal's case fairly but there was no evidence from a treating practitioner after July 2015. After that date, the Quantumcorp report showed that she was operating a makeup business and there was no other evidence about her psychological state beside that of Dr Allnut, whose first report was prepared some time later. I should therefore be cautious about accepting her evidence.
83. Mr Saul said that Dr Roberts' report was powerful because his original diagnosis was that Ms Popal had, and was still suffering from, PTSD. Having seen further material, Dr Roberts recanted that opinion and his most recent report was a detailed account which brought all the evidence together.
84. On the basis of that evidence, Mr Saul submitted that Ms Popal had significant earning capacity, irrespective of whether she was earning income. '
85. Mr Saul said that the repeal of s 65(3) of the 1987 Act no longer mandated referral of a medical dispute about permanent impairment to an AMS. In those circumstances it was open to me to find that Ms Popal had recovered from the effects of her injury and there was nothing to refer to an AMS. He relied on the decision of DP O'Grady in *Peric v Lee and Ran (t/as Pure & Delicious Healthy)*¹ (*Peric*). He said that the repeal of s 65(3) overturned the effect of decisions such as *Bindah v Carter Holt Harvey Woodproducts Australia Pty Ltd*² (*Bindah*) such that *Peric* was once again good law.
86. With respect to weekly compensation, Mr Saul noted that Ms Popal's pre-injury average weekly earnings were low. She has three young children and he submitted that I can take account of what that involves. Dr Wang certified Ms Popal fit for pre-injury duties in 2015. Mr Saul said I would find that there are a wide range of duties for which Ms Popal was fit, noting that she is young and educated. He submitted that the definition of suitable employment in s 32A of the 1987 Act required me to disregard whether that work was actually available. He submitted that I would find that Ms Popal had capacity to earn what she did in pre-injury employment and that I would not award weekly compensation.

¹ [2009] NSWCCPD 47; (2009) 7 DDCR 215.

² [2014] NSWCA 264.

87. Mr Saul submitted that s 59A of the 1987 Act would preclude any order with respect to s 60 expenses.
88. In reply, Mr Hanrahan said that he did not disagree that I needed to be cautious in assessing the evidence. The social media material was an advertisement and two dimensional and not reflective of the real world.
89. Mr Hanrahan said that the removal of the obligation to refer disputes about permanent impairment to an AMS did not extend the Commission's jurisdiction in the way suggested by Mr Saul; if there was a dispute between experts, Ms Popal should be referred to an AMS. He said there was no evidence that Ms Popal had recovered.
90. Both counsel agreed that there was no discretion in the weekly payments provisions to take account of Ms Popal's pregnancies and child care obligations.

FINDINGS AND REASONS

91. Ms Popal's evidence is unsatisfactory with respect to a number of important issues. She denied previous psychological conditions to a number of medical practitioners. In her first statement she admitted that she suffered from symptoms of depression as a result of problems with her menstrual cycle and consulted with Ms Motala on one occasion. Apart from the fact that she saw Ms Motala on two occasions, her evidence is borne out by the medical records. However, she failed to disclose the previous history of significant anxiety recorded by Ms Ranganathan and she did not dispute Ms Ranganathan's account.
92. Ms Popal said in her statement that she wanted to return to work in January 2015 and was assessed as fit for that reason. Neither of her statements provides evidence about the circumstances of the end of her employment with Myer – she merely said in the second statement that it was terminated on 21 February 2015 without any explanation.
93. Other documents in the file suggest that her employment was terminated on the basis of abandonment because she went overseas without telling Myer. Admittedly, there are no statements from staff of Myer about that event but the matter is dealt with in the s 74 notice dated 14 July 2015. Mr Hanrahan conceded in submissions that Ms Popal married on 14 February 2015 and went to Thailand for her honeymoon. Ms Popal did not mention her marriage in her statement.
94. Those significant omissions mean that I have difficulty accepting her evidence when it is not supported by contemporaneous documents.
95. Ms Popal said that she made efforts to return to work until about July 2015. That suggests that the termination may have been rescinded. Dr Wang's note for 23 June 2015 says that he spoke to Ms Williams of Myer about the possibility of work.
96. There is no report from Dr Wang but he provided a series of medical certificates. There is no reason not to accept that the certificates reflect his opinion on the dates on which he prepared them. Dr Wang certified Ms Popal fit for pre-injury duties from 20 January 2015 and again on 27 March 2015.
97. While the certificates suggest that Ms Popal's capacity for work waxed and waned during that period, there are very significant gaps in her evidence about her life at that time. I am satisfied that, on the basis of all of the evidence, she has been fit for suitable employment since 20 January 2015.

98. The last evidence from a treating medical practitioner with full history of the injury and Ms Popal's condition is that of Dr Wang. He provided a number of certificates with his opinion ranging from that Ms Popal was fit for full duties to the final certificate that she was fit for some employment for flexible hours and flexible days from 20 July 2015. He referred her to Ms Holley at about the same time but the need for treatment is not inconsistent with fitness for some form of employment.
99. Despite the later report from Ms Holley, there is – as Mr Hanrahan conceded - no evidence about the advice Ms Popal said she had been given by Ms Holley about doing makeup because it was something that made her happy.
100. While Ms Holley did consider in her report dated 29 March 2016 that Ms Popal was unfit, her report is couched in terms of Ms Popal's perception of the events. It is not clear that she had a history of the circumstances of the events surrounding the termination of Ms Popal's employment.
101. Ms Popal said that she saw Dr Jovanova for an extended period but there is only one report dated 1 December 2014. There are no notes in the file which are clearly attributable to her. If she did continue to see Ms Popal, the lack of any other reports from her is a significant gap in the evidence.
102. Mr Hanrahan did not argue that there was any relationship between trigeminal neuralgia which Ms Popal has been diagnosed as suffering, not is it pleaded. There is one report from Dr Daud which does not address the issue. I therefore disregard the diagnosis of trigeminal neuralgia in considering Ms Popal's capacity for work.
103. Dr Allnutt and Dr Roberts disagree with each other about Ms Popal's capacity for work based on the impact of the social media posts. Dr Allnutt's response is brief and he accepted Ms Popal's account that the posts were an attempt to assist her recovery and supported the diagnosis of PTSD. He did not engage with the content of the posts.
104. Dr Roberts, on the other hand, reviewed the form and content of the posts and considered the concentration required to maintain a profile on several social media profiles and to undertake the activities depicted. Dr Roberts had agreed with the diagnosis of PTSD at his consultation but said that the ability to form a diagnosis was undermined by inconsistencies and contradictions.
105. Importantly, Dr Roberts also considered the notes of Pacific Medical Centre which contradicted Ms Popal's account. Ms Popal saw doctors at that practice for general medical issues while consulting Dr Wang. She mentioned her injury on only two occasions.
106. I prefer the evidence of Dr Roberts, who has engaged with the evidence, to that of Dr Allnutt who has relied primarily on Ms Popal's statement. Her social media activity shows that she had a significant capacity for work.
107. As a part time worker, Ms Popal's wages were not high. Counsel did not address on the amount which it would be appropriate to award, other than Mr Saul's submission that her capacity was substantial. I am satisfied that she was fit for employment from January 2015 and that she would have been able to earn an amount equivalent to her pre-injury earnings in suitable employment.
108. Myer is therefore ordered to pay Ms Popal the following weekly compensation:
 - (a) \$471.50 per week from 11 January 2015 to 20 January 2015, and
 - (b) thereafter, award for the respondent on the claim for weekly compensation.

Section 60 expenses

109. Myer paid Ms Popal's treatment expenses until 24 April 2016. In its dispute notice dated 24 May 2016, it declined to pay further expenses because prior approval had not been sought for treatment and no further certificates of capacity had been provided.
110. Dr Wang considered that Ms Popal required treatment at the time of his last consultation in August 2015. She continued to see Ms Holley until mid 2016. There is no evidence of any treatment related to the injury after that date, though Ms Holley considered that ongoing treatment was required to assist a return to university in about 12 months' time.
111. Taking the limited evidence into account and noting that the need for some treatment is not inconsistent with a capacity for work, I order Myer to pay Ms Popal's s 60 expenses. I note that, in the absence of a finding that her permanent impairment is greater than 10%, the entitlement ceased in January 2017 under s 59A of the 1987 Act.

Permanent impairment claim

112. Ms Popal claims permanent impairment compensation. Dr Allnutt assessed 15% permanent impairment in February 2016 and increased the assessment to 24% in his report dated 18 July 2016 after comments from Ms Popal. He has not provided any further assessments.
113. Mr Saul submitted that I would find, on the basis of Dr Roberts' reports, that Ms Popal has recovered from her injury. Dr Roberts did not re-examine Ms Popal for the purpose of preparing his 2019 report. I do not consider that there is evidence to form the conclusion that she has recovered. I have found that she has an ability to earn but that is not the same thing. At the time of his first report, Dr Roberts did not consider that Ms Popal had reached maximum medical improvement. In his later reports, he cast doubt on Ms Popal's diagnosis and considered that other events played a role in perpetuating any condition. He did not see Ms Popal again. His analysis of the social media material supports the contention that she is fit for work but does not prove that she had recovered.
114. Mr Saul provided only the reference to *Peric* and did not take me to the decision.
115. In *Peric*, the Arbitrator found that the worker suffered a minor physical injury to her neck and rejected the claim that she suffered an electric shock. The Arbitrator did not accept that a psychological condition was connected to employment because the alleged psychological injury relied on her suffering severe trauma. He therefore determined that she had recovered from the injury and did not suffer permanent impairment. On appeal, O'Grady DP said:³

"I am of the opinion that a question as whether an injury proven in proceedings before the Commission has caused ongoing disability or whether such injury has had a pathological effect limited to a particular period of time is a legal question (namely one of causation), which remains within the exclusive jurisdiction of the Commission (an arbitrator) to decide. Such questions arise for determination in various circumstances on a regular basis before the Commission (for example whether aggravation of a disease is permanent or otherwise; whether incapacity results from one or more identified injuries; whether apportionment among employers pursuant to section 22 of the 1987 Act is appropriate in case of multiple proven injuries). The fact that a claim may involve a question of the degree of permanent impairment as a result of an injury in terms of section 319 does not, in my view, deprive an arbitrator of jurisdiction to determine questions as to the duration of pathological consequences of an injury."

³ At [77].

116. Roche DP considered the correctness of *Peric* in *Jaffarie v Quality Castings Pty Ltd*⁴ (*Jaffarie*) and said:

“The Deputy President added (at [80]) that the Arbitrator’s findings could be distinguished from the ‘consent’ finding purportedly made by the Arbitrator in *Haroun*, which was that the injuries ‘continue[d] to contribute to any impairment’. He said that the Arbitrator’s finding in the matter before him ‘resolved not only the dispute as to the true nature of the injuries suffered by the Applicant but also determined the dispute concerning the pathological consequences of such injury’. Such finding, being one within the exclusive jurisdiction of the Commission, resolved the dispute. Thus, the worker had no entitlement to lump sum compensation even though an AMS had not provided an assessment. The Commission has subsequently followed this approach (*Moore* at [97]; *Evans* at [57]).”

117. Roche DP said that *Peric* could not stand in light of Court of Appeal decisions such as *Bindah, Zanardo & Rodriguez Sales & Services Pty Ltd v Tolevski*⁵ and summarised the principles from those decisions:

“Notwithstanding the different approach by Emmett JA and Meagher JA, it is my view that the following principles apply to proceedings in the Commission:

- (a) questions of causation are not foreign to medical disputes within the meaning of that term when used in the 1998 Act. Assessing the degree of permanent impairment ‘as a result of an injury’, and whether any proportion of permanent impairment is ‘due’ to any previous injury or pre-existing condition or abnormality, both call for a determination of a causal connection (*Bindah* at [110]);
- (b) it is for the Commission to determine whether a worker has received an injury within the meaning of s 4 of the 1987 Act and whether there are any disentitling provisions, such that compensation is not payable for that injury (*Bindah* at [111] and s 105 of the 1998 Act);
- (c) the Commission’s jurisdiction is restricted by s 65(3) of the 1987 Act, which precludes the Commission (an Arbitrator or a Presidential member) from awarding permanent impairment compensation if there is a dispute about the degree of permanent impairment, unless the degree of impairment has been assessed by an AMS (*Bindah* at [111]);
- (d) the determination of the degree of permanent impairment that results from an injury is a matter wholly within the jurisdiction of the AMS or, on appeal, the Appeal Panel and is not a matter for determination by an Arbitrator (*Bindah* at [112]);
- (e) a finding made by a person without jurisdiction cannot bind a person or persons who have jurisdiction (*Haroun* at [16] and [19]–[21]), and
- (f) it is desirable to avoid drawing a rigid distinction between jurisdiction to decide issues of liability and jurisdiction to decide medical issues (*Bindah* at [110]; *Tolevski* at [35]).

⁴ [2014] NSWCCPD 79.

⁵ [2013] NSWCA 449.

This means that, to the extent that it held that all matters of causation are exclusively within the jurisdiction of the Commission, *Peric* cannot stand with *Bindah*, *Tolevksi* and *Austin*. It follows that [counsel's] submissions cannot be accepted. That is because, in a claim for lump sum compensation, the physical consequences of the injury (in relation to the assessment of whole person impairment as a result of the injury) are not within the exclusive jurisdiction of the Commission. They are within the exclusive jurisdiction of the AMS. That is so even if the matter also involves a disputed claim for weekly compensation and disputes about causation, which the Commission has determined."

118. While the Deputy President's decision in *Jaffarie* was overturned in the Court of Appeal, it was not on this point.
119. Section 65(3) of the 1987 Act has been repealed but Mr Hanrahan was correct to submit that there remained a medical dispute about the extent of any permanent impairment as a result of the injury suffered by Ms Popal. I have found that Ms Popal was fit to return to suitable employment in early 2015 and that she would be capable of earning at least what she had earned before the injury. I have also found that she required some treatment after that time. I do not consider that am able to reach the conclusion on the basis of the medical evidence that she has recovered from the effects of the injury.
120. It is therefore appropriate that her claim for permanent impairment compensation be referred to an AMS.

