WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**4851/20**
Applicant:	**Tracey Galbraith**
Respondent:	**Gerard Lighting Pty Ltd**
Date of Determination:	**1 February 2021**
Citation No:	**[2021] NSWWCC 33**

1. The Respondent pay the Applicant weekly compensation under section 37 of the *Workers Compensation Act* 1987 (the 1987 Act) at the rate of $737.07 per week from 29 July 2020 to date and continuing in accordance with the provisions of the1987 Act.

2. The Respondent pay the Applicant's section 60 expenses on production of accounts and/or receipts.

Jane Peacock
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 JANE PEACOCK, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. By Application to Resolve a Dispute (the Application) Ms Tracey Galbraith (the applicant) seeks weekly compensation and compensation for medical expenses as a result of psychological injury.

2. The respondent is Gerard Lighting Pty Ltd. The respondent was insured at the relevant time for the purposes of workers compensation by Employers Mutual NSW Limited (the insurer).

3. The respondent denied liability for the claim.

ISSUES FOR DETERMINATION

4. There is no dispute that the applicant suffered a psychological injury within the meaning of the *Workers Compensation Act 1987* (the 1987 Act).

5. The dispute relates to section 11A of the 1987 Act, that is whether the applicant's psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to performance appraisal and/or discipline of the applicant.

6. There is no dispute that the employer's actions in relation to discipline and/or performance appraisal were the whole or predominant cause of the applicant's psychological injury.

7. The real issue is whether the employer's actions were reasonable.

8. The applicant amended her application by consent to seek a general order in respect of section 60 expenses. In the event the applicant is successful on the question of liability, the respondent consents to a general order being made in respect of section 60 expenses in favour of the applicant.

9. In the event the applicant is successful on liability, the applicant's capacity for work and any award of weekly compensation to be made, is the subject of despite.

10. The pre-injury average weekly earnings (PIAWE) is agreed at $1,953.84 per week.

11. It is not disputed that the applicant cannot return to work with the respondent.

12. The applicant says she has no current work capacity and seeks an award under section 37 from 29 July 2020 to date and continuing at the rate of $1,563.07 per week being 80% of the agreed PIAWE of $1,953.84 per week.

13. The respondent disputes that the applicant has no current work capacity. The respondent says the applicant has capacity to perform her pre-injury job with another employer for 20 hours per week.

PROCEDURE BEFORE THE COMMISSION

14. The parties attended a conciliation arbitration which took place by telephone. Both parties were represented by counsel with Mr Stockley appearing for and with the applicant instructed by Ms Pace solicitor and Mr Robison of counsel appearing for the respondent instructed by Ms Kikinis solicitor, appearing for the respondent. Ms Sagvand appeared from the insurer. 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

Documentary evidence

15. The following documents were in evidence before the Commission being admitted by consent, and taken into account in making this determination:

    For the applicant:

    (a) Application and attached documents.
    (b) Late documents filed 22 Septmber 2020, 23 October 2020 and late documents tendered 7 December 2020.

    For the respondent:

    (a) The Reply and attached documents.
    (b) Late documents filed 9 October 2020.

Oral evidence

16. The applicant did not seek leave to adduce further oral evidence.

17. Counsel for the respondent did not seek leave to cross-examine the applicant.

FINDINGS AND REASONS

18. There is no dispute that the applicant suffered a psychological injury.

19. The dispute concerns section 11A of the 1987 Act.

20. Section 11A provides as follows:

> **"11A No compensation for psychological injury caused by reasonable actions of employer**
>
> (1) No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers."

21. The respondent relies on the heads of discipline and/or performance appraisal.

22. The respondent bears the onus of proof.

23. There is no dispute the employer's action in relation to performance appraisal and/or discipline were the whole or predominant cause of the applicant's psychological injury.

24. The real issue is whether the employer's action in relation to discipline and/or performance appraisal were reasonable.

25. The respondent's counsel submitted that the respondent has only acted as an employer seeking to performance manager an underperforming employee with an eye to the profitability of its business as it is entitled to do.

26. Of course, an employer is entitled to performance manage an underperforming employee. The question in this case is whether the actions of the employer in relation to performance appraisal and/or discipline were reasonable.

27. If the defence under section 11A is made out this will preclude the applicant from recovery of compensation.

28. I must make a determination in this case on the evidence and in accordance with the law.

29. Turning now to an examination of the evidence in this case.

30. The applicant gave evidence in her first statement that she had been working for the respondent as a business development manager (referred in various statements in evidence as a BDM) since about 2016 when she was head-hunted for the role. She had no experience in the lighting industry and she communicated this to her employer. She was hired. She gave evidence that the respondent rationalised its business and she was offered a newly created role in the health space reporting to Mr Phil Payne. She told him she had no previous exposure to that segment of the market. She was given the role.

31. The applicant gave evidence that when she was offered the new role she was not provided with a new contract or revised job description. She was told to focus on the architects who worked in the health space.

32. The applicant gave evidence that "a job description for a BDM role in GLG was included in the statement of Kevin An", the human resources manager. She says this was not her job description and she has never been provided with this document.

33. The applicant gave evidence that she felt she had a positive employment relationship with her employer and her manager Mr Payne. She says she received encouraging feedback from him.

34. The applicant gave evidence about a performance review scheduled for her (and the whole team) in August 2019 that was cancelled. She gave evidence as follows:

> "On or around 15 August 2019, I had a performance review scheduled with the executive General Manager. Phil Payne emailed a list of potential questions to the whole team along with the way he would like us to respond, I discussed my preparation for the performance review with Phil in relation to the points he listed and work I had carried out so far. He was very positive and agreed I was on the right track.
>
> As I was driving to my performance review, I received a telephone call from Phil saying words to the effect 'I've got some good news, your performance review has been cancelled you are all good.' I recall I felt somewhat disappointed as I was well prepared for the review, Phil laughed and said words to the effect 'oh well, why don't you take an early mark and have a good weekend'."

35. The applicant gave evidence that on or around 24 September 2019 she had a meeting with Mr Payne to discuss some of her projects as follows:

> "during this meeting he advised me that I needed to start achieving a sales target of $2,000,000. Phil said to me words to the effect, 'I am getting pressure from above'. I expressed my concern about obtaining such a figure within the current limitation I was provided. In an effort to progress, I suggested that I be allowed to broaden beyond the architectural market that I was focusing on. Phil agreed and said to me words to the effect, 'Yes as I have said before, I think you could own this space'."

36. The applicant went on to give evidence that only one month later, on 28 October 2019, she received an invitation to a performance investigation meeting. The applicant gave evidence:

> "On or around 28 October 2019, I was at a loss when I received an email with a letter attached titled: 'Invite to performance investigation meeting.' At the time I was sitting in front of my computer, I could not believe what I was seeing. I started to shake.
>
> Up until 28 October 2019, I had only ever been given praise by my managers and colleagues, including my current manager, Phil Payne."

37. The letter dated 28 October 2019 invites the applicant to attend a performance investigation meeting on 30 October 2020 and says:

> "At this meeting, you will have the opportunity to respond to the following allegations in accordance with the Company Disciplinary policy:
>
> 1) Overall sales performance not meeting expectation.
> 2) Activity in marketplace, lack of client engagement
> 3) opportunities and quotations not present
> 4) Sales Xcellence Lead measurements not being met."

38. She was informed of her right to bring a support person.

39. The applicant says she was shocked by the contents of this letter. She started to shake.

40. There is no explanation in the evidence from Mr Payne or Mr An as to why such a heavy-handed approach was taken in the context of the applicant's employment history with the respondent.

41. The tone and text of the letter is harsh and seemingly out of step with all prior communication between the applicant and Mr Payne, her manager. The language of the letter in referring to "allegations in accordance with the company's disciplinary policy" is more suggestive of misconduct then sales target concerns. When the letter is read in the context of the history of Mr Payne's dealing with the applicant it is incongruous and could not be considered reasonable.

42. The applicant attended a meeting on 4 November 2019 with Mr Payne and Mr Kevin An from human resources. She was placed on a PIP dated 4 November 2019.

43. The applicant says the next meeting took place on 3 February 2020 and she was placed on another PIP dated 3 February 2020. She says:

> "During this meeting, all of the measures of my PIP were increased. My required face to face call rate was increased from 10 to 12 per week. The quotation amount was increased from $150,000 to $300,000 per month. In addition to this, an additional requirement of $100,000.00 in orders was added to my PIP. The CRM training had been removed and the timeframe of the PIP was brought forward to 20 April 2020.

44. The applicant gave evidence that she questioned the "unreasonable increases" as follows: "when I questioned the unreasonable increases, Kevin An said to me words to the effect, 'Look the company requires it, that just how it is and because other people are off sick." Kevin continued to explain to me how one of the BDMs were away because of a back injury."

45. Mr An denied he said this.

46. The applicant gave evidence as follows:

> "In the statement of Kevin An, Kevin misrepresents the order of the PIPs, stating that they decreased the measures to try to assist me. Rather the measures were increased. Please refer to the difference in the PIPs dated 4 November 2019 and 3 February 2020."

47. The human resources business partner, Mr An, gave evidence in two statements.

48. The applicant says that the respondent altered the PIP dated 4 November 2019 during its currency to increase the expectations upon her and that this was unreasonable. Mr An says that in fact the expectations placed upon the applicant were decreased. He says:

> "On 4 November 2029 Tracey attended the scheduled meeting and signed a performance improvement plan. The plan clearly defined her responsibilities, specific areas of concern and defined strategies to address those concerns. This included resources available to assist her and timeframes.
>
> Tracey was provided with a copy of the PIP and was welcomed to provide any comment and appropriate requested to amend it. She advised she would review and advise, the changes to the PIP were the amount of client engagement required and quotations to be had, client engagement was reduced form 12 calls per week to 10, quotations was reduced from $300,000 to $150,000. The original requirement were confirmed by another general manager within GLG that her employees have similar markets."

49. Mr An goes on to give evidence as follows:

> "On 3rd February 2020, a further performance improvement plan was entered into by Tracey due to an improvement however she was still not meeting performance objectives."

50. Mr An is saying in his first statement that the respondent required the applicant to enter the further PIP because she had improved.

51. Mr An gave further evidence in second statement in which he says as follows:

> "I can confirm that during the meeting on 3rd February 2020, we reduced her call requirement from 15 to 7/8 calls a month, her sales were reduced from $300,000 to $150,000 and we the review date. I dispute Tracey assertion that it was increased."

52. Mr An goes on to say:

> "Tracey had actually gone backwards and her productivity had decreased. Throughout the period Tracey was offered marketing campaigns to assist with her sales and yet she declined to accept the offer."

53. This appears contrary to his evidence in his previous statement that there had been improvement in performance and that is why the PIP was changed and the goals and measures contained therein increased. In his second statement Mr An is saying that the applicant had "gone backwards".

54. Mr An goes onto give evidence that

> "I dispute that at the time the show cause was issued Tracey had $1 million worth of sales in the pipeline. There was no record of any such sales or quotes in the system at that time.

55. Mr An goes onto give evidence as follows:

> "The performance management of Tracey was more than reasonable. The requirement of the PIP did change in measurement but not in task. The measurements were reduced and not increased as alleged by Tracey.".

56. Mr An's evidence as contained in his two statements is internally inconsistent.

57. Moreover, it is not supported by an analysis of the respective PIPs themselves.

58. I note the PIP dated 4 November 2019 sets the following goals and their respective measurements:

    (a) Minimum 2 face to face calls a day measured by 10 calls a week minimum.

    (b) Generate minimum $150,000 of new quotations per month measured by minimum of $150,000 of new opportunities quoted monthly.

    (c) Achieve 2 hours of 1 to 1 training on CRM measured by 2 x 1 hours sessions completed.

59. The review meetings are listed for 27 January 2020, 31 March 2020, and 15 June 2020. That is, the period of performance review covers some eight months from November to the following June.

60. Within the currency of the PIP dated 4 November 2019, the applicant is required to enter a new PIP dated 3 February 2020.

61. I note the PIP dated 3 February 2020 sets the following goals and their respective measurements:

    (a) Minimum 2 face to face calls but to average 12 a week measured by 12 calls a week minimum.

    (b) Generate a minimum of $300,000 of new quotations per month measured by a minimum of $300,000 of new opportunities quoted monthly.

62. This represents a clear increase in goals and measures compared to the PIP dated 4 November 2019.

63. In addition, the following goals and their respective measurements were added:

    - at least 2 Concord Europe presentations a week measured by CRM uploaded to reflect 8 presentations a month, updated weekly no punctuation

    - generate a minimum of $100K order intake per month measured by order intake reports.

64. This time the review period is shortened, and the following review meetings are listed for 2 March 2020, 23 March 2020 and 20 April 2020.

65. That is, the first PIP dated 4 November 2019 had the final review meeting for June 2020 (that is a review period of some 8 months). Whereas the review period covered by the second PIP dated 3 February 2020 is considerably shortened – the final meeting is listed for 20 April 2020, that a review period of some two and half months.

66. As the above analysis of the two PIPs shows there was a clear increase in the goals. For example, in respect of new quotations the goal in fact doubled from $150,000 to $300,000.

67. Mr An says the measurements were reduced. This is simply not the case when regard is had to the content of the two PIPs. As I have set out above, the measurements are shown to increase as well. For example in respect of new quotations the measurement is specifically stated to be a "minimum of $300,000 of new opportunities quoted monthly".

68. Mr Payne gave evidence in his statement about the change in the PIP as follows:

> "On 3rd February 2020, a further performance improvement plan was entered into by Tracey. Some improvement was being shown; however, she was still not meeting performance objectives in terms of quotations, order intake and invoice sales, a modified PIP was restarted from 3 February 2020 to April 2020. A further review be scheduled for march.
>
> The PIP has been modified from the original, the emphasis was placed upon the need to generate quotations and then orders for project work, retail and health or associated works. It was reduced to tow face to face calls a day with an average of 12 per week, $300,000 of new quotations month, 2 concord architectural presentations a month and an average of $100,00 of order intakes per month. The invoices sales target was out to one side as the primary focus was to generate quotations and then follow through to orders stage."

69. Mr Payne has given evidence that the applicant had shown some improvement but she was still not meeting performance objectives for example in relation to quotations. This gives me no insight into why the respondent then required her to enter a new PIP on 3 February 2020 with a much more constrained review period and which increased the expectations placed upon her, for example in relation to monthly quotations which in fact doubled from $150,000 to $300,00.

70. Mr Payne says the original PIP was suspended because the applicant was having personal difficulties. The applicant says she was never told it was suspended. If the PIP was indeed suspended, I am not assisted by Mr Payne's evidence as to why was a new one entered into that increased expectation over a more constrained period then the original one. The evidence of Mr An in this regard is internally inconsistent. The evidence of Mr Payne provides me with no insight as to why the PIP dated 3 February 2020 differs so much from the PIP dated 4 November 2019 such that performance goals and measurements were increased and performance was to be measured over a much more constrained review period.

71. The applicant was given notice to show cause by letter dated 30 March 2020. She consulted her GP who certified her unfit for work as a result of injury described as "harassment and bullying by employer despite good performance. Constant moving of goal posts".

72. I note this case has not been run by counsel for the applicant as a case of harassment and bullying (despite the pleadings). It was run by the applicant's counsel as a case that I would not be satisfied that the respondent's actions in relation to performance appraisal and/or discipline were reasonable. I have dealt with the case on the basis of how it was run before me. This was the real dispute before me, that is whether the actions of the respondent in relation to performance appraisal and/or discipline were reasonable.

73. When regard is had to all of the evidence I can find no internally consistent explanation from the respondent which would lead me to the view that the respondent's actions in placing the applicant on a PIP dated 4 November 2019 in the terms set out above and then before the review period specified in that plan has expired, requiring the applicant to enter another PIP dated 3 February 2020 which increases performance targets, such as doubling monthly quotations from $150,000 to $300,000 and correspondingly increasing the measurements of performance and significantly shortening the period over which performance would be reviewed. This takes place subsequent to the applicant being summoned to attend a performance investigation meeting by letter dated 28 October 2019 that is harsh in language and tone. It uses the language of "allegations that she has breached the company's disciplinary policy". It uses this language in the context of the meeting being about sales performance. It is also language and tone that is significantly at odds with the manner in which the respondent had dealt with the applicant prior to that time, for example, cancelling the performance review of August 2019 and not requiring it to be rescheduled; and having just one meeting in September 2019 which talked about increasing sales and within that meeting allowing the applicant to increase her target markets beyond the architectural market which she had previously been limited to by the respondent. Then only one month later in October 2019 the respondent issues the applicant with a summons to attend a meeting where she will be required to meet allegations that she has breached the company's disciplinary policy. When all of the evidence is weighed in the balance, I am not satisfied that the respondent's actions were reasonable in relation to performance appraisal and/or discipline. Accordingly, the section 11 A defence fails and the applicant is not precluded from the recovery of compensation for her undisputed psychological injury.

74. Turning next to the question of capacity. The applicant says she has no current work capacity. The respondent says she can do her pre-injury role, albeit not for the respondent, and can work 20 hours per week.

75. I must make a determination on the balance of probabilities on the evidence in this case in accordance with the law.

76. The relevant legislation is found in Division 2 of the 1987 Act, specifically sections 32A, 33, 36 and 37 as follows:

> **"Division 2–Weekly compensation by way of income support**
>
> **Subdivision 1–Interpretation**
>
> **32A Definitions**
>
> (1) In this Division and in Schedule 3—
> **'fair work instrument'** means—
>
> (a) a fair work instrument (other than an FWA order) within the meaning of the *Fair Work Act 2009* of the Commonwealth, or
>
> (b) a transitional instrument within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* of the Commonwealth.

‘first entitlement period’, in relation to a claim for compensation in the form of weekly payments made by a worker, means an aggregate period not exceeding 13 weeks (whether or not consecutive) in respect of which a weekly payment has been paid or is payable to the worker.

‘maximum weekly compensation amount’ means the maximum weekly compensation amount under section 34.

‘second entitlement period’, in relation to a claim for compensation in the form of weekly payments made by a worker, means an aggregate period of 117 weeks (whether or not consecutive) after the expiry of the first entitlement period in respect of which a weekly payment has been paid or is payable to the worker.
‘suitable employment’, in relation to a worker, means employment in work for which the worker is currently suited—

(a) having regard to—

(i) the nature of the worker’s incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and

(ii) the worker’s age, education, skills and work experience, and
(iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and

(iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and

(v) such other matters as the Workers Compensation Guidelines may specify, and

(b) regardless of—

(i) whether the work or the employment is available, and

(ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and

(iii) the nature of the worker’s pre-injury employment, and

(iv) the worker’s place of residence.

‘work capacity assessment’ means a work capacity assessment under section 44A.

‘work capacity decision’ —see section 43.
‘worker with high needs’ means a worker whose injury has resulted in permanent impairment and—

(a) the degree of permanent impairment has been assessed for the purposes of Division 4 to be more than 20%, or

(b) an assessment of the degree of permanent impairment is pending and has not been made because an approved medical specialist has declined to make the assessment on the basis that maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable, or

[Note: Paragraph (b) no longer applies once the degree of permanent impairment has been assessed.]

(c) the insurer is satisfied that the degree of permanent impairment is likely to be more than 20%,

and includes a worker with highest needs.

'worker with highest needs' means a worker whose injury has resulted in permanent impairment and—

(a) the degree of permanent impairment has been assessed for the purposes of Division 4 to be more than 30%, or

(b) an assessment of the degree of permanent impairment is pending and has not been made because an approved medical specialist has declined to make the assessment on the basis that maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable, or
[Note: Paragraph (b) no longer applies once the degree of permanent impairment has been assessed.]

(c) the insurer is satisfied that the degree of permanent impairment is likely to be more than 30%.

(2) Words and expressions in this Division that are defined in Schedule 3 have the meanings provided by that Schedule. The regulations may amend Schedule 3.
[Note: Definitions include '**current work capacity'**, '**current weekly earnings'** and '**pre-injury average weekly earnings'**.]

Subdivision 2–Entitlement to weekly compensation

33 Weekly compensation during total or partial incapacity for work

(cf former s 9 (1))

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

[Note: Chapter 3 of the 1998 Act (Workplace injury management) provides that, if a worker fails unreasonably to comply with a requirement of that Chapter after being requested to do so by an insurer, the worker has no entitlement to weekly payments of compensation for the period that the failure continues.]

36 Weekly payments during first entitlement period (first 13 weeks)

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

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

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

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

37 Weekly payments during second entitlement period (weeks 14–130)

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

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

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

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

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

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

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

77. In *Wollongong Nursing Home Pty Ltd V Dewar* [2014] NSWWCCPD 55 (*Dewar*), Deputy President Roche dealt with meaning of the phrases "no current work capacity", "current work capacity" and "suitable employment" in section 32A of the 1987 Act. More specifically the appeal concerned the challenge to the Arbitrator's finding in that case that the worker, whose treating general practitioner had certified her fit for suitable duties, had "no current work capacity" because, before employment can be viewed as "suitable employment", as defined in section 32A, there must be a capacity "which is at least potentially able to be realised for financial reward on the labour market". In that case, the worker was given light duties by her employer. Whilst that is not the case here, the Deputy President usefully outlines the approach that is to be taken when assessing a worker's capacity for employment in light of the 2012 amendments as follows:

> "In light of the 2012 amendments, care must be exercised in relying on *Lawarra Nominees* and *Woods*. Under those authorities, the task of assessing whether a worker was wholly or partially incapacitated was a 'practical exercise' that 'nvolve[d] the assessment of a capacity 'for work' having regard to the realities of *the labour market in which [the worker] is to be engaged"* (Mahoney P at [30] in *Lawarra Nominees*).
>
> This approach was consistent with the High Court's decision in *Arnotts Snack Products Pty Ltd v Yacob* [1985] HCA 2; 155 CLR 171, where Mason, Wilson, Deane and Dawson JJ said (at 178) that 'the concept of partial incapacity for work is that of reduced physical capacity, by reason of physical disability, for actually doing work *in the labour market in which the employee was working or might reasonably be expected to work'* (emphasis added).

It is the emphasised words in the two preceding paragraphs that have effectively been eliminated by the directions in s 32A that employment for which the worker is currently suited is determined 'regardless of' whether the work or employment is 'available' and regardless of whether it is 'of a type or nature that is generally available in the employment market'. However, other aspects of *Lawarra Nominees* and *Woods* remain relevant in determining whether a worker is 'suited' for suitable employment.

There is nothing in the context of the definition of suitable employment to suggest that 'available' should be given anything other than its relevant dictionary meaning. The third meaning attributed to 'available' in the *Shorter Oxford English Dictionary* (Oxford University Press, 6th ed, 2007) is '[a]ble to be used or turned to account; at one's disposal; within one's reach, obtainable'. Thus, just because the suitable employment the worker is able to perform is not 'available' in the labour market in which the employee was working or might reasonably be expected to work does not justify a finding that the worker has no current work capacity.

However, while the new definition of suitable employment has eliminated the geographical labour market from consideration, it has not eliminated the fact that 'suitable employment' must be determined by reference to what the worker is physically (and psychologically) capable of doing, having regard to the worker's 'inability arising from an injury'. Suitable employment means '*employment in work* for which the worker is currently suited' (emphasis added).

The word 'employment' is not defined in the legislation. Its common meaning is 'the state of being employed'. However, 'worker' is defined. It means, subject to specified exclusions, 'a person who has entered into or works under a contract of service or a training contract with an employer' (s 4 of the 1998 Act). In context, the phrase 'employment in work', in the definition of suitable employment, 'in relation to a worker', must refer to real work in the labour market. That is, it must refer to a real job in employment for which the worker is suited.

Therefore, the determination of whether a worker is 'able to return to work in suitable employment' is not a totally theoretical or academic exercise and Mason P's reference to the 'eye of the needle' test may still be relevant in many cases. To use his Honour's example, a labourer who is rendered a quadriplegic may well be able to perform tasks using only his voice. However, whether, under the new provisions, he or she would be found to have no current work capacity will depend on a realistic assessment of the matters listed at (a) and (b) of the definition of suitable employment. Depending on the evidence, it is difficult to see that work tasks that are totally artificial, because they have been made up in order to comply with an employer's obligations to provide suitable work under s 49 of the 1998 Act, and do not exist in any labour market in Australia, will be suitable employment.

If the Arbitrator meant to say that Mrs Dewar's light duties with the Nursing Home were artificial in the sense referred to in the preceding paragraph, and therefore not suitable employment within the terms of s 32A, he did not properly explain how that was so. That is because the evidence about the light duties performed by Mrs Dewar was inconsistent and the Arbitrator did not resolve that inconsistency. In any event, even if it were accepted that the light duties were not 'suitable employment' that did not relieve the Arbitrator of his obligation to apply the remaining provision of s 32A to determine if Mrs Dewar was able to return to work in suitable employment.

The determination of what is suitable employment is a practical exercise that is conducted 'having regard to':

(a) the nature of the incapacity and the details provided in medical information;

(b) the worker's age, education, skills and work experience;

(c) any return to work plan; and

(d) any occupational rehabilitation services that have been provided to the worker.

However, without regard to:

(a) whether the work or employment is available, that is, obtainable;

(b) whether the work or the employment is of a type or nature that is generally available in the employment market;

(c) the nature of the worker's pre-injury employment; and

(d) the worker's place of employment.

Thus, the task requires the identification of whether there are any 'real jobs' (*Giankos v SPC Ardmona Operations Ltd* [2011] VSCA 121 at [102]) which, having regard to the matters in sub-s (a) of the definition, the worker is able to do, regardless of whether those jobs are 'available' (to the worker) or are 'of a type or nature that is generally available in the employment market'. The Arbitrator did not properly undertake that task and did not resolve the conflict in the evidence about the nature of the light duties Mrs Dewar performed (see [4] and [5] above).

In determining if a worker is 'not able to return to work' in suitable employment there will often be issues about the suitability of the work in question. Such issues will be determined on a case-by-case basis, depending on the available evidence dealing with the issues in sub-s (a) of the definition. In the present case, the only evidence that addressed the issue, including the evidence from Mrs Dewar, was that she was fit for suitable employment, but with the restrictions noted by Dr Sherrell. Though the evidence of the kinds of jobs Mrs Dewar could now perform, given her present inability arising from her injury, was in a most unsatisfactory state, that did not relieve the Arbitrator from performing his statutory task.

The Arbitrator's reliance on s 35 does not assist. That section identifies the factors to be used to determine the rate of weekly compensation payable. Before one considers that section, one must determine whether the worker has a current work capacity. The words 'the worker is able to earn in suitable employment' in s 35 do not govern the meaning of 'current work capacity' or 'suitable employment'. Those terms are defined in s 32A.

If there is a current work capacity, that is relevant to calculating 'E' (the amount to be taken into account as the worker's earnings after the injury, where the worker is not employed), which is then used in the equations in ss 36(2) and 37(2) and (3). If there is no current work capacity, one looks to s 36(1) or s 37(1), depending on whether the claim is in the first or second entitlement period.

Thus, the words 'the amount the worker is able to earn in suitable employment' in s 35 are not relevant to the preliminary question of whether a worker has a current work capacity. They are, however, relevant to determining the amount to be taken into account as the worker's earnings after the injury where he or she is not employed. In assessing that amount, the reference to 'the amount the worker is able to earn in suitable employment' is a reference to the amount the worker is able to earn in suitable employment, as that term is defined in s 32A.

> I accept, as Mr Wilson has submitted, that Mrs Dewar has an incapacity, and that ss 36 and 37 provide the methodology for calculating the amount of weekly compensation payable. However, that does not mean that the phrases 'current work capacity' and 'no current work capacity' have no purpose other than to determine which of the subsections in ss 36 and 37 applies. Before getting to ss 36 and 37, there must be a determination of whether the worker has a 'current work capacity' or 'no current work capacity'. That is determined by reference to the definitions in s 32A."

78. The question to be answered is whether Ms Galbraith has a "current work capacity" or no "current work capacity". This is to be determined by reference to the definitions in section 32A.

79. Each case will of course turn on its own facts. Turning then to an examination of the evidence in this case.

80. The applicant says she should be assessed as having no current work capacity and seeks an award of weekly compensation at the rate of from 29 July 2020 to date and continuing.

81. There is no dispute that the applicant cannot return to work with the respondent. This accords with the opinion of Dr Samuel, consultant psychiatrist, the independent medical expert (IME) qualified on behalf of the respondent.

82. The applicant relies on the certification from the applicant's treating GP Dr Block that she has no current work capacity. These certificates amount to unexplained medical opinion.

83. The applicant relies on a report dated 4 November 2020 from Dr Block.

84. The applicant also relies on a report from her treating psychologist Ms Green who has treated the applicant for her injury since referral from Dr Block in April 2020.

85. Dr Block provided a report dated 4 November 2020 as follows:

> "Tracey Galbraith, aged 52 years has been a patient of mine for over 25 years. I feel this long terms therapeutic relationship put me in good position to assess Tracey both physically and mentally in order to advise her fitness for week.
>
> As I have documented in Tracey workers compensation certificate, I did NOT feel she was in a position to work at all, in my considered and informed medical opinion.
> I believe this still holds, despite the recommendation of the independent medical assessor who only saw her the once.
>
> Tracey has not been able to work, as all my legally binding documents state and in fact I have seen her on other occasions for other physical issues which have directly resulted from the workers compensation claim and support her inability to work.
> I appreciate your consideration in this matter.

86. This report of Dr Block is of no real assistance to me. It provides no objective basis for her opinion and is one in which she appears to act as an advocate for the applicant.

87. The applicant also relies on the report of Ms Green, clinical psychologist who has been treating the applicant since 6 April 2020 on referral from Dr Block in relation to the subject injury.

88. Ms Green details a history consistent with the other evidence before me. She details the treatment provided and treatment plan. She notes her cognitive behavioural therapy (CBT) approach.

89. Ms Green notes:

> "Her recent scores in DASS questionnaire (depression, anxiety and stress scales) continue to fall in the extremely severe range for depression and anxiety and severe on the stress scale, I do think k this is exacerbated by the uncertainly of her situation with the workers compensation claim and her worry about her financial and employment future."

90. Ms Green goes onto state:

> "I believe continued sessions taking a CBT approach and aimed at helping her reframe and change her thinking would be helpful now that her activity and function has slightly improved. I understand she is reviewing the need for antidepressant medication with her general practitioner. I would recommend a further six sessions as Ms Galbraith also engages in a RTW process of retraining and gradual return to work related activity on a partial basis."

91. Ms Green outlined "prognosis and RTW' as follows:

> "I believe Ms Galbraith cannot return to her preinjury employer in the pre disability role, She feels very betrayed by her employer and this loss of trust would make the success of a RTW unlikely. She will experience anxiety were she to return to this role in my opinion.
>
> In a recent session we discussed other work possibilities and Ms Galbraith is of the belief that she could attempt a return to work in a similar role in a few months time. She is keen to undertake retraining to both refresh her skills and build her confidence, her concentration capacity and ability to make decisions, I think this is appropriate. I would recommend that her RTW be graded and we have discussed commencing back to work for one to two days a week with a different employer".

92. The applicant's counsel says that this report supports a finding of no current work capacity. I do not agree. The applicant's self-reported limitations in saying she thinks she can go back in a "few month's time" cannot found the basis of a decision on current work capacity. When the report is read as a whole, it supports a finding that the applicant has a work capacity of one to two days per week with a different employer.

93. Ms Green does not say that the applicant could not do the same type of work that she was performing pre-injury..

94. An IME was qualified on behalf of the respondent, namely Dr Samuel, consultant psychiatrist. The applicant filed his report dated 26 June 2020 with her application. There is no other opinion from a psychiatrist upon which the applicant relies either as a treater or as an IME qualified on her behalf.

95. Dr Samuels' considers that the applicant can not return to her pre-injury job with the respondent but could do her pre-injury role with a different employer for 20 hours per week.

96. Dr Samuel takes a history, reviews the other material, and conducts a mental state examination. He supports the applicant on injury and hence there was no dispute about this issue, He says it was caused by performance management process. Again there was no dispute about this, the dispute being in relation to whether the employer's actions were reasonable and I have found that they were not.

97. He takes a history of the effect on activities of daily living and a history of physiological symptoms affecting sleep, appetite, mood, diurnal mood variation and concentration.

98. His findings on mental state examination are noted as:

> "Ms Galbraith presented as a pleasant and co-operative woman of stated years. She looked unhappy from the outset of the interview. She co-operated with the assessment. There was no sense that she was exaggerating or embellishing her difficulties. She presented her narrative through a framework of injustice.
>
> Her effect was reactive. She was observed to be tearful during the examination. Her tearfulness was consistent with her narrative.
>
> Her cognitive function was clinically normal.
>
> There was no evidence of psychosis.

99. Dr Samuel diagnosis is that of adjustment disorder with mixed disturbance of mood.

100. He opines:

> "As far as I can tell the relationship with her pre-injury employer has been irrevocably damaged. She will not return to her preinjury employer. It is likely that she will return to a different employer doing her pre-injury duties ."

101. Dr Samuel considers that the applicant has a positive prognosis as follows:

> "In my opinion, she has a positive prognosis. I expect her to make a full recovery from her adjustment disorder and expect that she will return to her preinjury employment with an alternative employer and resume her usual activities of daily living."

102. He considers that "she could immediately commence a graduated return to work plan with a different employer".

103. He is asked for his clinical assessment of the applicant's capacity to work, including hours and capabilities and he answers as follows:

> "Her adjustment disorder is mild to moderate in extent and would not preclude her from working up to 20 hours we week with a different employer performing her usual duties."

104. When I weigh all of the evidence in the balance, I prefer the opinion of the only IME who is able to provide expert psychiatric opinion. I prefer the opinion of Dr Samuel and find that the applicant has a work capacity of 20 hours per week doing her pre-injury duties for a different employer.

105. There is no basis on the evidence to find, as was submitted by the applicant, that her capacity would not be for her pre-injury duties but would be in a lesser role such as in retail.

106. There is no basis on the evidence to assess her as only having the capacity to work at a much lower hourly rate then she earned with the respondent. The applicant contended that if a residual capacity was assessed it should be at $18 to $20 per hour such as for a retail worker. This is not supported by the evidence.

107. The PAIWE was agreed at $1,953.84 for a full-time employee this equates to $51.49 per hour, calculated on the basis of a 38-hour week. The applicant says I would not assess this rate because it includes allowances for phone and a car which working part time in this role would not generate.

108. Allowing for merit in this argument, then using the base salary of $81,600 equates to $41.30 per hour for a full-time employee working 38 hours per week.

109. The applicant is assessed as having the capacity to work 20 hours per week at $41.30 per hour doing her pre-injury duties which equates to $826 per week.

110. When this is deducted from $1,563.07 in accordance with the provisions of section 37 (2), this leaves compensation payable of $737.07 per week. I will accordingly so order along with the agreed general order under section 60.