

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 3045/19  
**Applicant:** Debra Duran  
**Respondent:** RSL LifeCare Ltd  
**Date of Determination:** 8 October 2019  
**Citation:** [2019] NSWCC 325

The Commission determines:

1. The respondent's application pursuant to s 329(1)(b) of the *Workplace Injury Management and Workers Compensation Act 1998* for referral of matter for reconsideration of the Medical Assessment Certificate dated 26 August 2019 by the Approved Medical Specialist is granted.
2. I refer the matter pursuant to s 329(1)(b) of the *Workplace Injury Management and Workers Compensation Act 1998* to the Approved Medical Specialist, Dr Baker, for further medical assessment or reconsideration.
3. The Approved Medical Specialist is to undertake a further examination of the applicant after 31 October 2019.
4. The applicant is granted leave to file and serve a further statement and medical evidence by 31 October 2019.
5. The documents to be reviewed by the Approved Medical Specialist are:
  - (a) Application to Resolve a Dispute and attached documents, excluding the reports of Dr Brown dated 5 January 2016 and 23 January 2016;
  - (b) Reply and attached documents;
  - (c) Application to Admit Late Documents received 2 July 2019;
  - (d) Medical Assessment Certificate of Dr Baker dated 26 August 2019;
  - (e) Surveillance reports and DVD of AB Investigations added 30 August 2019 and 2 September 2019;
  - (f) A copy of this Certification of Determination, and
  - (g) Application to Admit Late Documents, attaching a further statement from the applicant and medical evidence, to be filed and served by 31 October 2019.
6. The matter is to be listed for a telephone conference before me after the Medical Assessment Certificate is issued to the parties.
7. No order as to costs.

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

**Glenn Capel**  
**Senior 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 GLENN CAPEL, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

*A Reynolds*

Antony Reynolds  
Senior Dispute Services Officer  
**As delegate of the Registrar**



## STATEMENT OF REASONS

### BACKGROUND

1. Debra Duran (the applicant) is 54 years old and was employed by RSL LifeCare Ltd (the respondent) as an assistant in nursing.
2. There is no dispute that the applicant sustained a psychological injury arising out of or in the course of her employment with the respondent on 6 November 2016 when her car was vandalised when she was at work.
3. Liability was accepted by Employers Mutual Ltd (the insurer). According to a list of payments, weekly compensation and medical expenses were paid until 18 June 2018.
4. On 1 May 2018, the insurer issued a notice pursuant to s 54 of the *Workers Compensation Act 1987* (the 1987 Act), alleging that the applicant had recovered from effects of her work injury and that her current psychological condition was due to a pre-existing/constitutional psychological injury.
5. The insurer alleged that if the applicant was incapacitated as a result of her work injury, she had the capacity to perform suitable work at an alternative workplace earning the same or greater wages. It also disputed that it was liable to pay medical expenses and lump sum compensation. The insurer cited ss 9A, 33, 37, 59, 60 and 66 of the 1987 Act. The insurer advised that payments would cease on 19 June 2018.
6. On 13 February 2019, the applicant's solicitor served a notice of claim on the respondent and the insurer in respect of weekly compensation, medical expenses and lump sum compensation, based on an assessment of Dr Selwyn Smith dated 15 January 2019.
7. On 3 June 2019, the insurer issued a notice pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), disputing that the applicant was entitled to lump sum compensation.
8. By an Application to Resolve a Dispute (the Application) registered in the Workers Compensation Commission (the Commission) on 21 June 2019, the applicant claims weekly compensation, medical expenses and lump sum compensation due to a psychological injury sustained on 6 November 2016.

### PROCEDURE BEFORE THE COMMISSION

9. At the telephone conference on 22 July 2019, the applicant's claim for weekly compensation and medical expenses was adjourned to a telephone conference on a date to be fixed before an arbitrator who conducts matters in Wollongong.
10. The applicant's claim for lump sum compensation was remitted to the Registrar to appoint and Approved Medical Specialist (AMS) for assessment of the whole person impairment due to a psychological injury sustained on 6 November 2016.
11. The AMS, Dr Baker, issued a Medical Assessment Certificate (MAC) on 26 August 2019. He assessed 17% whole person impairment.
12. On 4 September 2019, the respondent's solicitor, Mr Lee, wrote to the Registrar and requested that the matter be referred back to the AMS pursuant to s 329 of the 1998 Act, because surveillance evidence had been obtained of the applicant's activities before and after the medical examination on 6 August 2019 which was allegedly inconsistent with the applicant's clinical presentation to the AMS.

13. On 11 September 2019, the applicant's solicitor wrote to the Registrar and opposed the respondent's application. Upon receipt of this correspondence, a telephone conference was listed before me at 2.00 pm on 12 September 2019.
14. The surveillance reports and DVD were not attached to the respondent's letter, but a hard copy was received by the Commission shortly before the telephone conference. After hearing some brief submissions, I directed that submissions be filed by the parties.
15. Written submissions were filed by the respondent on 23 September 2019 and by the applicant on 30 September 2019. Submissions in reply were received on 8 October 2019.

## **ISSUES FOR DETERMINATION**

16. The following issue remains in dispute:

- (a) Whether the dispute in respect of the applicant's claim should be referred back to the AMS for reconsideration - s 329 of the 1998 Act.

## **EVIDENCE**

### **Documentary evidence**

17. The following documents were in evidence before the Commission and taken into account in making this determination:
  - (a) The Application and attached documents, excluding the reports of Dr Brown dated 5 January 2016 and 23 January 2016;
  - (b) Reply and attached documents;
  - (c) Application to Admit Late Documents received 2 July 2019;
  - (d) MAC of Dr Baker dated 26 August 2019, and
  - (e) Surveillance reports and DVD of AB Investigations added 30 August 2019 and 2 September 2019.

## **REVIEW OF EVIDENCE**

### **Medical Assessment Certificate**

18. Dr Baker provided his MAC on 26 August 2019. He noted the following history regarding the applicant's response to the incident on 6 November 2016:

"She felt shamed and humiliated. She became anxious and fearful. She was unable to stop ruminating about the incident. Her sleep became poor. She reported her mood deteriorated and she was unable to recover from her work-related injury. She said she felt humiliated and bullied by her employer. She failed attempts to return to work. As her mood deteriorated, her energy and concentration deteriorated. She began drinking more alcohol until she was drinking one bottle of wine per night. She isolated herself in her room. Her interest in socialising with her husband and extended family ceased."<sup>1</sup>

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<sup>1</sup> MAC, p 3.

19. Dr Baker recorded the applicant's symptoms and the PIRS categories as follows:

### **"Present Symptoms**

Mrs Duran reported the following psychiatric symptoms at the time of this assessment:

- A persistently depressed mood with anxious distress
- Intrusive irritating ruminating such as, 'They scratched my car with the work "FUCK" on it.'
- Increased tearfulness
- Loss of appetite
- Increased fatigue
- Anhedonia with a loss of ability to enjoy her interests
- Loss of libido with no interest in intimacy with her husband
- Angry verbal arguments with her husband and family
- Persistent thoughts of hopelessness, worthlessness and low self esteem
- Intrusive and distressing depressive thoughts of her not being able to complete tasks that she could previously complete without difficulty
- Recurrent outbursts of anger
- Low energy
- Suicidal thoughts without intent to act
- Commencing drinking alcohol between 11am to noon each day
- Increased consumption of alcohol at hazardous levels
- Craving alcohol if she was delayed in her commencement of consumption
- Mild tremors each morning on rising
- Increased anxiety and difficulty driving....

### **Social activities/ADL**

Mrs Duran reported that she enjoyed socialising with her husband and extended family. She enjoyed celebrating birthdays, anniversaries, Easter and Christmas. She said she enjoyed playing netball and had played in a Saturday afternoon competition. She enjoyed attending Church and maintaining her garden with vegetables. She also had two dogs that she enjoyed grooming, playing with and walking on a daily basis.

### **Self-care and personal hygiene**

Mrs Duran stated that prior to the onset of this work-related injury she had been independent in her self-care and personal hygiene. She was the home maker and AIN. She was able to purchase groceries and prepare the family meals. She stated that she provided all of the domestic duties for her home. She had been able to live independently prior to the onset of this work-related injury.

Mrs Duran reported that she had lost more than 5% of her body weight whilst depressed. She stated that she had deteriorated to such an extent that she required her husband to care for her and prepare meals as well as prompt her to maintain a minimum level of nutrition. She was less interested in food and had a poor diet. She required her husband's care daily to maintain her living in the family home. Mrs Duran relied on her husband to wash her laundry, clean her house and maintain her garden. She required her husband to prompt her to maintain her self-care and personal hygiene. He would monitor her medical treatment and advise her of her appointment schedule.

## **Social & Recreational Activities**

Mrs Duran reported that prior to the onset of this work-related injury she had an interest in gardening. She enjoyed growing vegetables. She also enjoyed visiting her parents. She stated that she would celebrate and buy gifts for her family for birthdays, Christmas and Easter. She enjoyed attending to her dogs and socialising in public with her husband at cafes and restaurants. She was a volunteer for her local domestic violence charity fundraiser. The money she helped to raise would assist with accommodation for women and children at risk.

Mrs Duran reported she had lost interest in her husband and family. She no longer had the necessary motivation to assist with the care and walking of her pets. She had lost her friendship group. She no longer socialised in public with her husband. She no longer grew vegetables in her garden for pleasure. She had lost interest in sharing television programs with her husband. She no longer participated in extended family Christmas, birthday or special events. She had not been able to socialise whilst on the cruise and kept isolated from the community on board.

## **Travel**

Mrs Duran reported that she had been a confident driver in metropolitan Sydney. She said she had enjoyed her driving prior to the onset of this work-related injury. She reported that she had travelled using public transport in the past without impairment.

Mrs Duran stated that she was anxious when travelling and would never travel without the assistance of a family member she trusted to travel to unfamiliar locations. She was able to drive locally. She did not use public transport.

## **Social functioning**

Mrs Duran reported that she had enjoyed her marriage with her husband. She said she had enjoyed a kind, sharing and intimate relationship with him. She reported that she also enjoyed socialising with her adult children and husband prior to the work-related injury. She stated that she also enjoyed caring for her elderly parents.

Mrs Duran reported that there was some difficulty in her relationship with her husband since the onset of this work-related injury. She had lost her capacity to be intimate and she reported tension in their marriage. She reported increased tension in her relationship with her children. She stated that she also lost interest in caring for her aged parents. She did not report any periods of separation or episodes of domestic violence. She had lost friends from her social group and no longer socialised publicly.

## **Concentration, persistence & pace**

Mrs Duran stated that prior to the onset of this work-related injury she was able to read and concentrate easily on her complex daily tasks. She was able to organise her daily work routine without impairment. Mrs Duran reported that she was also able to read, study and follow the news. She enjoyed watching her favourite programs as well as watching movies with her family.

Mrs Duran reported that she was slow in her capacity to complete tasks. She said she had lost her motivation to persist and her pace of task completion had decreased markedly. She said she was not interested in reading. She had lost interest in the news. She had lost interest in watching her favourite gardening shows as she lacked the capacity to organise and complete complex tasks such as caring for her garden and following a television series or watching movies.

## Employability

Mrs Duran reported that prior to the onset of this work-related injury she was working permanent part time hours. She was working in an emotionally demanding role caring for patients with severe dementia in a closed ward without impairment.

Mrs Duran reported that she had just “given up”. She lacked persistence and pace in completing any task. She would be erratic in her capacity to re-train in any role. She would struggle to work more than 1-2 days in any mainstream employment role. She was assessed as being severely impaired.”<sup>2</sup>

20. The AMS reported his findings on examination as follows:

### “FINDINGS ON MENTAL STATE EXAMINATION

Mrs Duran presented as a thin, agitated and irritable woman. She was dishevelled and her hair and nails were unkempt. She spoke in an agitated manner. She reported that she had lost hope and motivation to try and care for herself. She described craving for alcohol. She reported having a mild tremor that was not visible at the time of this assessment. She was orientated in time place and person. She stated that she had not drunk alcohol on the morning of this assessment. Her concentration was poor, and she required assistance to remain on topic. She did not have a fluctuating level of consciousness as may be seen in an acute state of confusion. She did not report any delusional ideas or psychotic symptoms. She was insightful into her condition. She reported suicidal thoughts without any plans. She appeared sullen, depressed anxious and distressed as she spoke about her work-related injury.”<sup>3</sup>

21. Dr Baker diagnosed a Persistent Depressive Disorder with anxious distress and an Alcohol Use Disorder. She had a pre-existing use of alcohol and was able to keep this under control and she had been treated for OCD and an eating disorder that was in remission. He assessed 17% whole person impairment after a one-tenth deduction for the pre-existing condition.
22. Dr Baker’s provided his PIRS assessment as follows:<sup>4</sup>

PIRS Category	Class	Reason for Decision
Self-Care and personal hygiene	3	Mrs Duran reported that she had lost more than 5% of her body weight whilst depressed. She stated that she had deteriorated to such an extent that she required her husband to care for her and prepare meals as well as prompt her to maintain a minimum level of nutrition. She was less interested in food and had a poor diet. She required her husband’s care daily to maintain her living in the family home. Mrs Duran relied on her husband to wash her laundry, clean her house and maintain her garden. She required her husband to prompt her to maintain her self-care and personal hygiene. He would monitor her medical treatment and advise her of her appointment schedule.

<sup>2</sup> MAC, pp 3 – 6.

<sup>3</sup> MAC, p 6.

<sup>4</sup> MAC, pp 13 -14.

<b>Social and recreational activities</b>	3	Mrs Duran reported she had lost interest in her husband and family. She no longer had the necessary motivation to assist with the care and walking of her pets. She had lost her friendship group. She no longer socialised in public with her husband. She no longer grew vegetables in her garden for pleasure. She had lost interest in sharing television programs with her husband. She no longer participated in extended family Christmas, birthday or special events. She had not been able to socialise whilst on the cruise and kept isolated from the community on board.
<b>Travel</b>	2	Mrs Duran stated that she was anxious when travelling and would never travel without the assistance of a family member she trusted to travel to unfamiliar locations. She was able to drive locally. She did not use public transport.
<b>Social functioning</b>	2	Mrs Duran reported that there was some difficulty in her relationship with her husband and she had lost her capacity to be intimate. She reported tension in their marriage. She reported increased tension in her relationship with her children. She stated that she also lost interest in caring for her aged parents. She did not report any periods of separation or episodes of domestic violence. She had lost friends from her social group and did not socialise publicly.
<b>Concentration, persistence and pace</b>	3	Mrs Duran reported that she was slow in her capacity to complete tasks. She said she had lost her motivation to persist and her pace of task completion had decreased markedly. She said he was not interested in reading. She had lost interest in the news. She had lost interest in watching her favourite gardening shows as she lacked the capacity to organise and complete complex tasks such as caring for her garden, following a television series or watching movies.
<b>Employability</b>	4	Mrs Duran reported that she had just "given up". She lacked persistence and pace in completing any task. She would be erratic in her capacity to re-train in any role. She would struggle to work more than 1-2 days in any mainstream employment role. She was assessed as being severely impaired.

## Surveillance Reports

23. AB Investigations provided reports dated 30 August 2019 and 2 September 2019. This initial report related to observations of the applicant undertaken on 31 July 2019 and on 2, 5, 8, 10, 23, 24 and 25 August 2019. The second report concerned observations undertaken on 31 August 2019. The following is a summary of the activities recorded by the investigator.
24. The first surveillance was undertaken on three days prior to the examination by the AMS. The applicant was not seen on 31 July 2019. She was observed on 5 August 2019 cleaning her car, driving to the local shops, laughing, interacting with a person in the Dog Deluxe Spa and walking her dog. On 5 August 2019, she was observed walking her dog with a female. She was observed laughing and joking.



25. On 8 August 2019, the applicant was not observed. On 10 August 2019, the applicant drove to Picton at 8.11 am and then to Chipping Norton, where she picked up a female. She then drove to the Canterbury Leagues Club at Belmore. The applicant was observed to play the poker machines from about 9.40 am to 12.30 pm by herself whilst other patrons walked around her. She then went to the café in the company of two other women for lunch. She spoke with the waitress and the two women. She seemed undisturbed by the crowd.
26. The investigator indicated that the applicant returned to the games area and played the poker machines from 1.30 pm to 3.21 pm, when she left the club with the other woman. The investigator lost contact with the applicant at this stage.
27. At 9.12 am on 23 August 2019, the applicant drove to Hill Top where she remained until 12.45 pm. She then drove to Mittagong Shopping Village. She negotiated crowds as she shopped with her daughter for 1.5 hours. She attended a coffee shop, Coles, BWS and KFC. She drove back to Hill Top at 2.25 pm and arrived home at 3.22 pm.
28. On 24 August 2019, the investigators observed the applicant as she repeated the activities undertaken on 8 August 2019. She was at the Canterbury Leagues Club for approximately five hours. She joked and laughed with the other two women and staff members. The applicant was not observed on 25 August 2019 and 31 August 2019.

## Legislation

29. The respondent brings this application pursuant to ss 329 and 350 of the 1998 Act. They provide:

### **“329 Referral of matter for further medical assessment or reconsideration**

- (1) A matter referred for assessment under this Part may be referred again on one or more further occasions for assessment in accordance with this Part, but only by:
  - (a) the Registrar as an alternative to an appeal against the assessment as provided by section 327, or
  - (b) a court or the Commission.
- (1A) A matter referred for assessment under this Part may be referred again on one or more further occasions by the Registrar to the approved medical specialist for reconsideration.
- (2) A certificate as to a matter referred again for further assessment or reconsideration prevails over any previous certificate as to the matter to the extent of any inconsistency.”

### **“350 Decisions of Commission**

- (1) Except as otherwise provided by this Act, a decision of the Commission under the Workers Compensation Acts is final and binding on the parties and is not subject to appeal or review.
- (2) A decision of or proceeding before the Commission is not:
  - (a) to be vitiated because of any informality or want of form, or
  - (b) liable to be challenged, appealed against, reviewed, quashed or called into question by any court.

- (3) The Commission may reconsider any matter that has been dealt with by the Commission and rescind, alter or amend any decision previously made or given by the Commission.”

30. Section 331 of the 1998 Act is also of relevance. It provides:

**“331 Guidelines**

Medical assessments, appeals and further assessments under this Part are subject to relevant provisions of the Workers Compensation Guidelines relating to the procedures for the referral of matters for assessment or appeal, the procedure on appeals and the procedure for assessments.”

31. The submission of surveillance DVDs is dealt with in cl 2.26 of Pt 2 of the *SIRA Workers Compensation Medical Dispute Assessment Guidelines* (the Guidelines). It provides:

“2.26 The Commission file may contain video surveillance material obtained as part of investigators’ reports. Video surveillance shall not be disclosed to the AMS unless ordered by the Commission in exceptional circumstances.”

**RESPONDENT’S SUBMISSIONS**

32. Mr Lee submits that the respondent seeks a further referral to Dr Baker pursuant to ss 329 and 350 of the 1998 Act so that the AMS can reconsider his MAC in the context of investigation reports dated 30 August 2019 and 2 September 2019 and DVD surveillance. He submits that the applicant’s presentation to the AMS was demonstrably inaccurate and this affected his assessment of the applicant’s whole person impairment.
33. Mr Lee submits that the applicant’s presentation during the structured AMS examination was sufficiently inconsistent with her presentation during the surveillance in the unguarded moments to warrant reconsideration to determine whether the AMS is of the view that the fresh evidence is sufficiently probative to cause him to alter his PIRS classifications and his whole person impairment assessment.
34. Mr Lee submits that the investigator was commissioned and conducted surveillance before the examination by the AMS on 6 August 2019. Verbal advice was received from the investigator prior to the examination by the AMS that the applicant had engaged in activities that were potentially inconsistent with her presentation to her clinicians and the qualified specialists. It was thought inappropriate to provide the surveillance and DVD to the applicant as this constituted a single period of observation and to avoid an unwarranted worsening of her psychological condition as a consequence of learning that she was under surveillance.
35. Mr Lee submits that evidence of a continuity of inconsistency was necessary, rather than a one-off display. The one-off surveillance could have been submitted to the AMS prior to his examination, but a decision was made not to submit the evidence because of the applicant’s welfare and the probity of the evidence.
36. Mr Lee submits that the surveillance was conducted immediately before and after the examination by the AMS. He submits that the applicant’s presentation to the AMS was grossly inaccurate when viewed in the context of the fresh surveillance evidence. The evidence was brought to the attention of the applicant and her solicitors before the expiry of the appeal period prescribed in s 327 of the 1998 Act.

37. Mr Lee submits that the surveillance reports and DVD is fresh evidence relevant to the assessment by the AMS, and has the potential to address a manifest injustice<sup>5</sup>. He submits that it is fair and reasonable, having regard to the inconsistencies in the applicant's presentation to justify a referral of the surveillance evidence and the DVD to the AMS for perusal and, if appropriate, reconsideration of the assessment of whole person impairment. The fresh evidence is material to the assessment by the AMS<sup>6</sup>. The applicant can provide a further statement addressing the surveillance.
38. Mr Lee submits that the authorities confirm that the s 329 of the 1998 is in broad unlimited terms and the decisions must have regard to the justice and merits of the case<sup>7</sup>, but the power must be used in accordance with the legislation on a case to case basis<sup>8</sup>, in circumstances where "the dictates of justice require a further referral for assessment"<sup>9</sup>. This applies in the present case.
39. Mr Lee submits that s 354(3) of the 1998 Act provides that the Commission is to act according to "equity, good conscience and the substantial merits of the case" and has a duty to observe the rules of natural justice to allow a party to be heard and present his or her case<sup>10</sup>, and "it is unfair to deny a person's interests are likely to be affected by the decision an opportunity to deal with the information"<sup>11</sup>.
40. Mr Lee submits that the AMS recorded the applicant's present symptoms included persistently depressed mood with anxious distress, loss of appetite, increased fatigue loss of ability to enjoy her interests, intrusive and depressive thoughts of not being able to complete tasks, recurrent outbursts of anger, drinking alcohol between 11.00 am to noon each day at increased hazardous levels with craving of alcohol if the consumption is delayed. This history is inconsistent with the surveillance of her driving her vehicle extensively.
41. Mr Lee submits that the surveillance evidence is inconsistent with the symptoms reported to the AMS. For example, on 2 August 2019, she was observed driving alone at 2.48 pm to the local shops. She told her treating doctor that she did not travel to the local shops for fear of seeing employees of the respondent. The observations show that this history is incorrect.
42. Mr Lee submits that the applicant told the AMS that she no longer had the necessary motivation to the care and walking of her pets. On 2 August 2019, she was observed collecting her pet from the "Dog Spa Deluxe", and on 5 August 2019, she was observed walking her dog with an unknown female. This was inconsistent with the history given to the AMS regarding the care of her pets and to some extent her social interactions.
43. Mr Lee submits that the applicant told the AMS that she had lost interest in caring for her elderly parents and that she no longer socialised. However, on 10 August 2019 and 24 August 2019, the applicant drove her vehicle, picked up her mother and drove to the Canterbury Leagues Club some 40 km from her home. At the club, she socialised with another woman and she played the poker machines in a crowded club. This occurred after the examination by the AMS. This was inconsistent with the history and presentation to the AMS.

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<sup>5</sup> *Nan v Country Road Freight Services Pty Ltd* [2006] NSWSC 160, [58] (ADP Snell).

<sup>6</sup> *Petrovic v BCSRV No14 Pty Ltd* [2007] NSWSC 1156.

<sup>7</sup> *Target Australia Pty Ltd v Mansour* [2006] NSWSC 286 (*Mansour*).

<sup>8</sup> *Milosavljevic v Medina Property Services Pty Ltd* [2008] NSWSC 56 (*Milosavljevic*).

<sup>9</sup> *Read v Liverpool City Council* [2007] NSWSC 320 (*Read*).

<sup>10</sup> *Ingham's Enterprises Pty Ltd v Zarb* [2003] NSWSC 15 (*Zarb*).

<sup>11</sup> *Kioa v West* [1985] HCA 81 (*Kioa*).

44. Mr Lee submits that although the applicant told the AMS that she had lost interest in her family, she was observed attending the house of a young woman, presumably her daughter. She interacted with the woman at the premises and at a large shopping centre in Mittagong. On 23 August 2019, she was observed driving to a residence in Hilltop, and she then drove with her daughter to a shopping centre in Mittagong, where she spent 1.5 hours. She shopped at the supermarket and paid for the items at the self-service checkout. This was inconsistent with the history given to the AMS.
45. Mr Lee submits that the AMS recorded that the applicant presented in an agitated and irritable state. She was dishevelled and her nails unkempt. This is inconsistent with the surveillance evidence.
46. Mr Lee submits that the applicant told the AMS that she required her husband's care and prompting to maintain self-care and hygiene. This is inconsistent with the surveillance of her at the Canterbury Leagues Club and when she went shopping. She was also able to travel significant distances in the company of others which shows a capacity to travel and socially interact.
47. Mr Lee submits that the applicant told the AMS that she was slow in her capacity to complete tasks and she had lost motivation to persist with tasks and her pace had decreased. However, she was observed playing poker machines for a number of hours over two days, something that requires concentration and decision making. This is inconsistent with her presentation to the AMS with regards to pace and concentration.
48. Mr Lee submits that there is continuity of inconsistency shown in the surveillance that warrants a further referral and a potential reconsideration of the assessment by the AMS. He submits that it would be unfair to the respondent if it was denied this opportunity. The material is credible, relevant and significant to the decision being made<sup>12</sup>.
49. Mr Lee submits that it is this inconsistency and potential inaccuracy of the history provided to the AMS, and her qualified specialist, that challenges her credibility and should be a matter for reconsideration by the AMS pursuant to 329(1A) of the 1998 Act.
50. Mr Lee submits that cl 2.26 of the Guidelines provides that video surveillance shall not be disclosed to an AMS unless ordered by the Commission in exceptional circumstances. He submits that there are exceptional circumstances in this matter. There is a clear continuous inconsistency in the applicant's presentation in unguarded moments when compared to her presentation and the history given to the AMS, and this shows that her history and presentation at the examination by the AMS was inaccurate and likely to adversely influence his assessment of whole person impairment.

## **APPLICANT'S SUBMISSIONS**

51. Ms Davis submits that an appeal or reconsideration based on fresh evidence cannot be allowed without constraint<sup>13</sup>. Section 328(3) of the 1998 Act prevents the admission of fresh evidence which could not reasonably have been obtained before the AMS examination and this has been confirmed by the Supreme Court and the Commission<sup>14</sup>.

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<sup>12</sup> *Kioa*, [628] – [629].

<sup>13</sup> *NSW Police Force v Registrar of the Workers Compensation Commission of New South Wales* (2013) NSWSC 172; *Pitsonis v Registrar of the Workers Compensation Commission of New South Wales* (2008) NSWCA 88, (*Pitsonis*).

<sup>14</sup> *State of NSW v Ali* [2018] NSWSC 1783, (*Ali*); *Foster v Broadpectrum Australia Pty Ltd* [2002] NSWCC 202; *Ross v Zurich Workers Compensation Insurance* [2002] NSWPD 7; *Workers Compensation Nominal Insurer v Rustom* [2013] NSWCCMA 53.

52. Ms Davis submits that admission of the surveillance reports ought to be analogous to the tests for admission of fresh evidence pursuant to ss 327(3)(b) and 328(3) of the 1998 Act. The failure by the respondent to lodge an appeal against the MAC was presumably because of the difficulty that it faced in satisfying the requirements in the legislation.
53. Ms Davis submits that the applicant submitted a claim in November 2016 and a notice of claim for lump sum compensation was served on the respondent on 13 February 2019 and proceedings were filed in the Commission in June 2019. There was no reason why the evidence could not have been obtained prior to the commencement of these proceedings or with due diligence during the proceedings prior to the AMS examination. No explanation has been provided why this evidence was not obtained earlier and included in the Reply.
54. Ms Davis submits that an inference can be drawn that it was obtained for the sole purpose of undermining, obstructing or cavilling with the MAC, as in *Pitsonis*. The investigator was retained on 25 July 2019, the same date that the parties were advised of the AMS examination. Further surveillance was sought after the issue of the MAC. This was done with full knowledge that the evidence had been obtained outside of the timeframes permitted by the legislation in a deliberate effort to undermine the AMS and the Commission processes, and to the prejudice of the applicant.
55. Ms Davis submits that to allow the surveillance to be sent to the AMS for the purposes of a reconsideration would prejudice the applicant because she has been denied the opportunity to respond or explain the proper context of the activities.
56. Ms Davis submits that if the respondent's application is successful, the applicant should be afforded the opportunity to respond to the material by way of a statement and medical evidence and have the right of a re-examination by the AMS.
57. Ms Davis submits that nothing in the surveillance touched in any way the findings of the AMS and it serves no legitimate forensic purpose. If the respondent submits that the surveillance may materially affects the assessment by the AMS, it "does not mean that it was not available and could not reasonably have been obtained before the impugned assessment was made" and "does not thereby convert the reports themselves into additional relevant information"<sup>15</sup>.
58. Ms Davis submits that one of the factors to be weighed in deciding to exercise discretion in favour of the moving party is the public interest that litigation should not proceed indefinitely. There was no notice given regarding the intention to seek to admit further material.
59. Ms Davis submits that s 331 of the 1998 Act confirms that assessments, appeals and further assessments are subject to the Workers Compensation Guidelines and there is no provision to allow for the inclusion of late surveillance material in circumstances where the AMS has already carried out his examination.
60. Ms Davis submits that the respondent's submission that the decision to refrain from filing the surveillance evidence prior to the AMS examination because it was in the interests of the applicant should be rejected because there was no supporting evidence for this assertion. The evidence would be excluded if the same principles applied as those applicable in respect of the admission of fresh evidence pursuant ss 327(3)(b) and 328(3) of the 1998 Act.
61. Ms Davis submits that the submission that the respondent will suffer manifest injustice is unsupported by evidence. The practice adopted by the respondent is designed to or will have the effect of permitting a party to "hide its hand", depending on the outcome of the MAC. This should not be supported in principle. The respondent's application is misconceived and the Commission should not exercise its discretion in favour of the respondent.

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<sup>15</sup> *Ali*, [37] – [38].

## RESPONDENT'S SUBMISSIONS IN REPLY

62. Mr Lee submits that the respondent did not lodge an appeal against the MAC because there were no grounds to do so. The respondent does not cavil with the assessment of the AMS premised on the examination and history given to him by the applicant, but that history was inaccurate, if not significantly embellished.
63. Mr Lee submits that the surveillance evidence is relevant to the tasks which were being performed by the AMS and the dictates of justice require a further examination, having regard to the apparent inconsistencies in presentation and on formal clinical examination when compared to unguarded moments. The video evidence and the report was not available at the time of the AMS examination and the respondent did not hide the evidence until after the examination by the AMS. There was merely a verbal report about the activities during a one-off period or surveillance and the applicant's welfare was considered.
64. Mr Lee submits that there is no authority relied upon by the applicant to support the submission that a consideration pursuant to s 329 and the admission of fresh evidence is the equivalent to the requirements for an appeal under ss 327(3)(b) and 328(3) of the 1998 Act. He is also unaware of any authority which requires the respondent to show "exceptional circumstances" for a reconsideration under s 329 of the 1998 Act.
65. Mr Lee acknowledges that the AMS may not disturb his previous assessment, however the dictates of justice are best served by the respondent being afforded the opportunity to rely on adverse evidence that is credible, relevant and significant to the decision, consistent with the principles discussed in *Kioa*. The evidence of injustice is shown by the apparent inconsistent surveillance taken before and after the AMS examination.

## REASONS

66. The applicant relies on a number of authorities, but these can be distinguished from the present matter as they concerned appeals from the decisions of a MAPs where fresh evidence was considered and ss 327 and 328 of the 1998 Act were of relevance.
67. In *Ali*, the employer relied upon surveillance evidence in its Reply. It lodged an appeal against the MAC pursuant to s 327 of the 1998 Act and sought to rely on further surveillance that was obtained after the MAC was issued. The delegate of the Registrar was not satisfied that at least one of the grounds in s 327 of the 1998 Act was made out, so the appeal did not proceed.
68. In dismissing the employer's summons for review of the decision of the delegate of the Registrar, Harrison J indicated that the later surveillance was neither additional nor relevant in terms of s 327(3)(b) of the 1998 Act. The surveillance was later in time, but was essentially identical to the surveillance reports which were attached to the Reply and considered by the AMS, bringing into question its probative value.
69. Section 331 of the 1998 Act confirms that referrals of assessments and the procedures are subject to the Workers Compensation Guidelines. The relevant guidelines are the *Workers compensation medical dispute assessment guidelines* (the Guidelines).
70. Part 2 of the Guidelines confirm that the Commission or the Registrar may refer a medical dispute for assessment by an AMS.
71. Part 5 of the Guidelines sets out the procedures in relation to an appeal against a MAC. Parts 5.12 and 5.13 provide that the Registrar may refer the matter for determination of the appeal by a MAP, or for a further assessment as an alternative to an appeal, and may refer the matter to the AMS for reconsideration on one or more occasions. The fact that there is no guideline that concerns the admission of fresh evidence does not mean that fresh evidence cannot be referred to an AMS for the purposes of a reconsideration.

72. In this matter, the respondent seeks a further referral to Dr Baker pursuant to ss 329 and 350 of the 1998 Act, so that the AMS can reconsider his MAC in light of the fresh surveillance. It does not seek an appeal so ss 327 and 328 of the 1998 Act are of no relevance.
73. Having regard to the circumstances in which the fresh evidence was obtained and the timing, there is merit in Ms Davis' submission that the employer may well had difficulty establishing the grounds of appeal based on s 327(3)(b) of the 1998 Act. Mr Lee also acknowledged that there were no grounds for appeal.
74. Section 329 of the 1998 Act provides a vehicle for the referral to an AMS for assessment on one or more occasions either by the Registrar, as an alternative to an appeal against a MAC, but only if the matter could have otherwise proceeded to an appeal under s 327 of the 1998 Act, or by the Commission. Although Mr Lee has referred to s 329 (1)(a) of the 1998 Act, I am not dealing with this matter as a delegate of the Registrar, but as an Arbitrator of the Commission. In those circumstances, the relevant power is governed by s 327(1)(b) of the 1998 Act.
75. According to s 368(1) of the 1998 Act, the Commission comprises the President, the Deputy Presidents, the Registrar and the Arbitrators. Therefore, s 329(1)(b) of the 1998 provides me as an Arbitrator of the Commission with the power to refer the matter back to the AMS. It does not need to be as an alternative to an appeal.
76. Although Mr Lee relies on s 350 of the 1998 Act, an AMS is not a member of the Commission and in the absence of an application for reconsideration of a Certificate of Determination (COD) or consent orders, s 350 of the 1998 Act is of no relevance.
77. However, that is not to say that the principles to be considered in applications for reconsideration pursuant to s 350 of the 1998 Act are of no significance in relation to applications made pursuant s 329 of the 1998 Act.
78. In *Samuel v Sebel Furniture Limited*<sup>16</sup>, Acting Deputy President Roche, as he then was, cited with approval the Court of Appeal decision in *Schipp v Herfords Pty Ltd*<sup>17</sup>, where the court considered the equivalent reconsideration provisions in the *Workers Compensation Act 1926*. He stated:
- “The factors relevant to the exercise of the discretion in section 36 of the 1926 Act were considered by the Court of Appeal in *Schipp v Herfords Pty Ltd* [1975] 1 NSWLR 413 (*'Schipp'*). The court noted the following factors were relevant in deciding whether the discretion should be exercised in favour of the moving party:
1. delay;
  2. whether the worker had a right of appeal from the first decision but failed to exercise that right;
  3. waiver or estoppel issues, and
  4. rescinding an earlier award will allow a worker to bring fresh proceedings.”<sup>18</sup>
79. The Acting Deputy President also had regard to the comments of Bishop CCJ in *Maksoudian v J Robins & Sons Pty Ltd*<sup>19</sup>, which dealt with the equivalent provision in the former s 17 of the 1987 Act. He stated:

<sup>16</sup> [2006] NSWCCPD 141 (*Samuel*).

<sup>17</sup> [1975] 1 NSWLR 413 (*Schipp*).

<sup>18</sup> *Samuel*, [45].

<sup>19</sup> [1993] NSWCC 36; (1993) 9 NSWCCR\_642 (*Maksoudian*).

"In *Maksoudian v J Robins & Sons Pty Ltd* [1993] NSWCC 36; (1993) 9 NSWCCR 642 (*'Maksoudian'*) Judge Bishop considered a reconsideration application under section 17(4) of the Court Act. His Honour stated at 645:

'The legal basis for a reconsideration for an award of the Court as laid down in section 36 of the previous legislation and section 17 of the present is well settled. There is no doubt that the discretion of this Court to reconsider is wide and far reaching. The task of the Court is to balance the policy requirement of finality of litigation with the obligation to rectify any clear-cut injustice. The cases do not comprehensively indicate how the Court is to approach this task, but it does seem that two broad requirements are laid down. The first of these is that the material leading to an application for reconsideration must be what can broadly be described as "fresh evidence", namely material that with reasonable diligence could not have been put before the Court at the time of the original proceedings and the application for reconsideration has to move with appropriate speed and diligence to bring that matter to the Court's attention. The second point is that the fresh evidence must be of such a nature that if it had been before the Court when the original proceedings were heard it would more likely than not have affected the outcome of the proceedings: *Hardaker v. Wright & Bruce Pty Ltd* (1962) 62 SR (NSW) 244 and *Hilliger v. Hilliger* (1952) 52 SR (NSW) 105.'

In *Maksoudian* the worker failed in his application for a reconsideration because there was an unexplained delay of over three years in bringing the application before the court and, more importantly, the new evidence would not if it had been put before the court at the original hearing have been likely to materially affect the outcome."<sup>20</sup>

80. The Acting Deputy President continued:

"Having regard to the above authorities and the provisions and objectives of the 1998 Act I believe that the following principles are applicable to reconsideration applications under section 350(3) of the 1998 Act:

1. the section gives the Commission a wide discretion to reconsider its previous decisions (*'Hardaker'*);
2. whilst the word 'decision' is not defined in section 350, it is defined for the purposes of section 352 to include 'an award, order, determination, ruling and direction'. In my view 'decision' in section 350(3) includes, but is not necessarily limited to, any award, order or determination of the Commission;
3. whilst the discretion is a wide one it must be exercised fairly with due regard to relevant considerations including the reason for and extent of any delay in bringing the application for reconsideration (*'Schipp'*);
4. one of the factors to be weighed in deciding whether to exercise the discretion in favour of the moving party is the public interest that litigation should not proceed indefinitely (*'Hilliger'*);
5. reconsideration may be allowed if new evidence that could not with reasonable diligence have been obtained at the first Arbitration is later obtained and that new evidence, if it had been put before an Arbitrator in the first hearing, would have been likely to lead to a different result (*'Maksoudian'*);

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<sup>20</sup> Samuel, [48] to [49].



6. given the broad power of 'review' in section 352 (which was not universally available in the Compensation Court of NSW) the reconsideration provision in section 350(3) will not usually be the preferred provision to be used to correct errors of fact, law or discretion made by Arbitrators;
7. depending on the facts of the particular case the principles enunciated by the High Court in *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45; (1981) 147 CLR 589 ('*Anshun*') may prevent a party from pursuing a claim or defence in later reconsideration proceedings if it unreasonably refrained from pursuing that claim or defence in the original proceedings ('*Anshun*');
8. a mistake or oversight by a legal adviser will not give rise to a ground for reconsideration ('*Hurst*'), and
9. the Commission has a duty to do justice between the parties according to the substantial merits of the case ('*Hilliger*' and section 354(3) of the 1998 Act)."<sup>21</sup>

81. In *Atomic Steel Constructions Pty Ltd v Tedeschi*<sup>22</sup>, Deputy President Roche reviewed a number of authorities and highlighted the fact that the interests of justice were paramount. He stated:

"Nevertheless, as Street CJ further observed, it is clear that the legislature intended to leave with certain tribunals the power of reviewing any decision to see 'that justice is done between the parties.'"<sup>23</sup>

82. The Deputy President continued:

"It follows that the question in the present matter is whether it is in the interests of justice that the consent orders be set aside. Essentially, this question comes down to whether there is some practical unfairness or injustice in allowing the orders to stand."<sup>24</sup>

83. In my view, two decisions cited by Mr Lee, namely *Mansour* and *Milosavljevic*, are of relevance to this dispute and warrant consideration in more detail.

84. In *Mansour*, a lump sum claim was referred to an AMS by an Arbitrator. Copies of surveillance video were to be lodged by the respondent's solicitor. There was a dispute regarding what transpired at the telephone conference prior to the referral.

85. The MAC issued by the AMS did not identify the surveillance report or video as documents before him, although he referred to the surveillance report in his MAC. Both parties lodged appeals against the MAC. The worker argued that the surveillance report should not have been sent to the AMS and there was a dispute as to whether the person in the surveillance report was in fact the worker.

86. The surveillance video was lodged by the employer with its appeal and it was submitted that a re-examination should be undertaken and the two AMSs on the Medical Appeal Panel (MAP) could view the video and draw their own conclusions as to what impact, if any, the material would have on the assessment of whole person impairment. The worker denied that the surveillance video had at any stage been admitted into evidence.

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<sup>21</sup> *Samuel*, [58].

<sup>22</sup> [2013] NSWCCPD 33 (*Tedeschi*).

<sup>23</sup> *Tedeschi* [83].

<sup>24</sup> *Tedeschi* [100].

87. The MAP did not believe that an examination was necessary. It considered the fresh evidence and revoked the MAC. A further telephone conference was convened and following an arbitration hearing, the Arbitrator excluded the surveillance report from the evidence and remitted the matter to the Registrar for referral to a fresh MAP pursuant to s 329(1)(b) of the 1998 Act.
88. On appeal, Deputy President Roche considered the principles of procedural fairness discussed in *Aluminium Louvres & Ceilings Pty Limited v Xue Qin Zheng*<sup>25</sup>, *Zarb* and *Kioa* regarding the obligation imposed on the Commission to observe the rules of natural justice and fairness to ensure that a person has the opportunity to deal with information that affects that person's interests, and the provisions of s 354 of the 1998 Act in respect of proceedings in the Commission.
89. The Deputy President indicated that a MAP had an obligation to comply with the broader rules of procedural fairness, and any decision by the Commission that is based on a certificate of a MAP that has been based on a clear breach of the rules of procedural fairness would be founded on a fundamental error. This should be avoided.
90. The Deputy President considered the terms of s 329 of the 1998 Act and concluded that it was not open to the Arbitrator to refer the claim back to a further MAP. Any referral would be to an AMS, not necessarily the same AMS, and he confirmed that an Arbitrator had the power to determine any dispute about the identity of a person in surveillance evidence before any referral was made, and which documents were to be referred to an AMS in the absence of agreement between the parties.
91. In the circumstances, the Deputy President revoked the Arbitrator's referral and remitted them matter to the Arbitrator to determine what material should be referred to a fresh AMS pursuant to s 329(1)(b) of the 198 Act.
92. In *Milosavljevic*, Deputy President Roche was called upon to determine whether an Arbitrator was in error when she declined to refer the worker's claim back to an AMS pursuant to s 329(1)(b) of the 1998 Act when the worker sought to rely of fresh evidence in the form of an affidavit, which was not available until after the examination by the AMS and had been rejected by a MAP. The Deputy President determined that it was not in the interests of justice to admit the fresh evidence.
93. The Deputy President considered the principles concerning the admission of fresh evidence and stated:

“The question of the introduction of fresh evidence on appeal was considered by the Court of Appeal in *Haider v JP Morgan Holdings Aust Ltd t/as JP Morgan Operations Australia Ltd* [2007] NSWCA 158, (2007) 4 DDCR 634 (*Haider*) where Basten JA referred to *Akins v National Australia Bank* (1994) 34 NSWLR 155 (*Akins*) and other authorities. In *Akins*, Clarke JA (Sheller JA and Powell JA agreeing) stated at 160 that three conditions need to be met before ‘fresh evidence’ can be admitted:

‘These are: (1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; (2) The evidence must be such that there must be a high degree of probability that there would be a different verdict; (3) The evidence must be credible.’

However, in *Nowlan v Marson Transport Pty Ltd* [2001] NSWCA 346; (2001) 53 NSWLR 116 Heydon JA stated at [15]:

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<sup>25</sup> [2006] NSWCA 34 (*Zheng*).

'Even if the three tests stated in the *Akins* case are applicable and are not satisfied, a question remains: is it just to admit the further evidence in this case?'

In considering an application to rely on fresh evidence or further evidence on appeal, the Commission must balance two competing requirements: the public interest that litigation should not continue indefinitely must be balanced against the need to ensure that justice is done in all the circumstances of the case. In balancing these matters the Commission must also keep in mind its statutory duty to act 'according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms' (section 354(3) of the 1998 Act).<sup>26</sup>

94. The Deputy President commented that s 329 of the 1998 Act provided no guidance as to how or when it is to be used, but he confirmed that it must be read in the context of that legislation and not in an unrestrained or unlimited way regardless of the commission's previous orders or determinations and its scope must be determined on a case-by-case-basis<sup>27</sup>.
95. The Deputy President stated that there was nothing to prevent the worker bringing an application pursuant to s 329 of the 1998 Act before the COD was issued by the Commission, but she failed to do so. He was not satisfied that the worker had established any of the grounds of procedural fairness made out in *Mansour*, so there was no valid basis to justify the application of s 329 of the 1998 Act by the Arbitrator.
96. The underlying principles in the authorities in respect to ss 329(1)(b) and 350 of the 1998 Act concern procedural fairness and natural justice. In *Samuel and Mansour*, Deputy President Roche confirmed that the Commission had a wide discretion and s 329(1)(b) of the 1998 Act was in broad and unlimited terms, but the discretion must be exercised fairly, having regard to the justice and merits of the case.
97. It is true that some of the surveillance was undertaken on three days prior to the examination by the AMS and I have summarised these activities above. Further, there is no explanation why surveillance was not undertaken earlier and the reports attached to the Reply.
98. The investigators were retained by the respondent's solicitor four days after the telephone conference. Obviously, a forensic decision was made to retain investigators at that late stage. The email and letter of instructions to the investigators are not in evidence, but it is apparent from page 2 of the report dated 30 August 2019 that the investigators were instructed to conduct 25 hours of surveillance of the applicant's activities. It appears that there was no direction given as to when the surveillance was to be undertaken and completed.
99. A search of the Commission's system shows that the parties were advised of the examination with the AMS on 6 August 2019 via email on 31 July 2019. It seems that the investigators were not informed of the AMS's appointment or instructed to complete the surveillance prior to 6 August 2019. In the circumstances, I do not accept Ms Davis' submissions the surveillance was sought after the issue of the MAC and that I can infer that it was requested to undermine, obstruct or cavil with the MAC. Such an inference could have been drawn if the investigators were retained after the MAC was issued to the parties.
100. The applicant told the AMS that she had two dogs but she has lost motivation to assist with their care and go walking. Of course, that does not mean that she did not walk her dogs or that she did not use professionals to groom them. There would undoubtedly be interaction with others when she undertook these activities.

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<sup>26</sup> *Milosavljevic*, [31] – [33].

<sup>27</sup> *Milosavljevic*, [58].

101. In my view, there seems nothing controversial in the brief period of surveillance undertaken on the three days prior to the AMS's examination, and I consider that if only this surveillance was put before the AMS, it would unlikely cause him to reconsider his assessment and lead to a different result. The respondent made a forensic decision to refrain from lodging this evidence in the interests of the applicant and I accept that this was a valid consideration.
102. The remaining surveillance was undertaken on five days before the MAC was issued. The applicant told the AMS that she relied on her husband to assisted with self-care, meal preparation and home duties. There were issues with her ability to socialise. She was able to drive locally but was anxious when travelling and never travelled to unfamiliar locations without the assistance of a family member.
103. The applicant told the AMS that she had lost interest in caring for her aged parents, she had lost friends and no longer socialised publicly. There were also difficulties in the relationships with her children. Her ability to complete tasks had been affected and she lacked persistence and pace. She also told the AMS that she did not gamble.
104. In my view, the activities undertaken by the applicant on 10 August 2019, 23 August 2019 and 24 August 2019 on face value seem inconsistent with what the applicant told the AMS.
105. Whilst the respondent might argue that the fact that the applicant drove a long way from her home to Belmore was inconsistent with the history provided to the AMS, it seems that she was driving to a familiar place and her mother accompanied her, so perhaps this is not of concern.
106. However, the history that she had lost friends, she did not socialise publicly and lacked persistence and pace seems at odds with the activities disclosed at the Canterbury Leagues Club. Further her shopping activities in Mittagong with her daughter seems somewhat inconsistent with a person who has indicated that she relies significantly on her husband.
107. There has been minimal delay in bringing the application and the surveillance evidence was provided to the applicant and the Commission within one week or so of the MAC. Any referral back to the AMS will not be against the public interest as the litigation will not conclude with a fresh MAC, given that there is a claim for weekly compensation and medical expenses still to be dealt with by me.
108. Section 354(3) of the 1998 Act provides that the Commission is to act according to "equity, good conscience and the substantial merits of the case". It is clear from the authorities that I have a wide discretion but I must be fair to all parties. Most importantly, justice must be done between the parties.
109. The respondent will be prejudiced if the AMS does not reconsider his MAC in light of the surveillance report. Whilst it is true that the applicant will also be prejudiced and there is a risk that she will be assessed with a lesser degree of whole person impairment and may even be assessed at less than the 15% threshold in s 65A(3) of the 1987 Act, the surveillance report has described contemporaneous activities which seem inconsistent with her presentation and the history provided to the AMS.
110. The surveillance report is probative and the AMS should be allowed to review the report and give the applicant the opportunity to provide an explanation of her actions. Further, the applicant should be permitted to adduce evidence in the form of a further statement and, if considered appropriate, medical evidence to address the activities identified in the surveillance. This will lessen the effect of any prejudice suffered by the applicant.

111. The respondent submits that the DVD should also be admitted into evidence and referred to the AMS because there is a clear continuous inconsistency in the applicant's presentation in unguarded moments when compared to her presentation and the history given to the AMS.
112. Whilst I do not necessarily agree with this submission, given the potential inconsistencies identified in the surveillance report, I consider that, in fairness to all parties, the AMS should have access to the DVD, so he can draw his own conclusions rather than rely on an investigator's perception and description of what the applicant was doing.
113. On the basis of the evidence currently before me, in the interests of justice and having regard to the greater prejudice that the respondent will suffer, I consider that the matter should be referred back to the AMS for a further examination and assessment pursuant to s 329(1)(b) of the 1998 Act.
114. The applicant will be granted leave to file a further statement and medical evidence by 31 October 2019.

## **ORDERS**

115. The respondent's application pursuant to s 329(1)(b) of the 1998 Act for referral of matter for reconsideration of the MAC dated 26 August 2019 by the AMS is granted.
116. I refer the matter pursuant to s 329(1)(b) of the 1998 Act to the AMS, Dr Baker, for further medical assessment or reconsideration.
117. The AMS is to conduct a further examination of the applicant after 31 October 2019.
118. The applicant is granted leave to file and serve a further statement and medical evidence by 31 October 2019.
119. The documents to be reviewed by the AMS are:
  - (a) The Application and attached documents, excluding the reports of Dr Brown dated 5 January 2016 and 23 January 2016;
  - (b) Reply and attached documents;
  - (c) Application to Admit Late Documents received 2 July 2019;
  - (d) MAC of Dr Baker dated 26 August 2019;
  - (e) Surveillance reports and DVD of AB Investigations added 30 August 2019 and 2 September 2019;
  - (f) A copy of this COD, and
  - (g) Application to Admit Late Documents, attaching a further statement from the applicant and medical evidence, to be filed and served by 31 October 2019.
120. The matter is to be listed for a telephone conference before me after the MAC is issued to the parties.
121. There will be no order as to costs.

