WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **5454/19**
Applicant: **Jennie Zugajev**
Respondent: **Secretary, Department of Education**
Date of Direction: **6 January 2020**
Citation: **[2020] NSWWCC 7**

The Commission determines:

Finding

1. In accordance with the Merit Review Decision dated 17 July 2019, the applicant had no current work capacity from at least 29 January 2018.

Orders

2. The respondent pays the applicant weekly compensation pursuant to s 38 of the *Workers Compensation 1987 Act* on the basis of no current work capacity as follows:

    (a) $1,100.80 per week from 29 January 2018 to 31 March 2018;

    (b) $1,116.54 per week from 1 April 2018 to 30 September 2018;

    (c) $1,123.46 per week from 1 October 2018 to 31 March 2019;

    (d) $1,140.31 per week from 1 April 2019 to 30 September 2019, and

    (e) $1,147.27 per week from 1 October 2019 to date and continuing, as adjusted, pursuant to s 82A of the *Workers Compensation 1987 Act*.

JOHN HARRIS
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 JOHN HARRIS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Ms Jenni Zugajev (the applicant) sustained an accepted psychological injury deemed to have occurred on 1 June 2015 (the injury) whilst employed by the Secretary of the Department of Education (the respondent).

2. The injury arose from interaction between the applicant and staff at Penrith High School since the end of 2014.[1] The claim was initially accepted until liability was denied on 12 July 2016.[2]

3. The applicant then commenced proceedings against the respondent in matter number 3947/17 in respect of the injury (the prior proceedings).[3] At a telephone conference in the prior proceedings the Commission issued the following consent orders and notation (Consent Orders).[4]

    1. Amend the name of the Respondent wherever appearing to "Secretary, Department of Education and Communities".

    2. Amend the Application to Resolve a Dispute at Parts 4, 5.1 and 5.2 by deleting the date "19 August 2016" wherever appearing and inserting instead the date "18 July 2016".

    3. Respondent to make weekly payments to the Applicant as follows:

        (a) At the rate of $ 1,700.50 per week from 18 July 2016 to 17 November 2016;
        (b) At the rate of $ 500.00 per week from 18 November 2016 to 12 September 2017.

    4. Award for the Respondent in respect of any claim for weekly payments as at and from 12 September 2017.

    The following is not a determination of the Commission however I note that the parties have agreed the following:

    (a) The Applicant acknowledges and accepts that as at and from 12 September 2017 she is fit for her pre-injury duties at Penrith High School.

4. Subsequent proceedings in matter number 6155/18 were discontinued.[5]

The WORK CAPACITY DECISION and the MERIT REVIEW DECISION

5. By notice dated 13 July 2016 the insurer issued a work capacity decision in respect of the injury (WCD). The WCD provided that the applicant had current work capacity with the ability to earn as much as her pre-injury average weekly earnings (PIAWE) in suitable employment.

6. No steps were taken in respect of contesting the WCD although action was commenced in the Commission in the prior proceedings. That unusual course meant that at the time of issuing the Consent Orders there was an inconsistent WCD.

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[1] Application to Resolve a Dispute (Application) p 25
[2] Application, p 34
[3] It was agreed at the hearing that the Consent Orders related to the injury deemed to have occurred on 1 June 2015 (Transcript (T), p 7)
[4] Reply, p 11
[5] Reply, p 12

7. The applicant eventually sought an internal review of the WCD by email dated 2 April 2019. On 18 April 2019 the Insurer affirmed the WCD.

8. The applicant then filed an application for merit review which was received by the State Insurance Regulatory Authority (the Authority) on 2 May 2019.

9. The Authority then issued a document headed "Findings and Recommendations on Merit Review by the Authority" dated 17 July 2019 (the Merit Review Decision)[6]. The Merit Review decision refers to a date of injury of 1 June 2015, comprises 48 paragraphs and provides a comprehensive analysis of the submissions of the parties and the evidence.

10. The Merit Review Officer concluded:[7]

> "46. I find that the present inability arising from Ms Zugajev's injury is such that she has no current capacity for any employment.
>
> **Findings** - **current work capacity**
>
> 47. Section 32A of the 1987 Act defines 'current work capacity' and 'no current work capacity' as:
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> ***Current work capacity,*** *in relation to a worker, means a present inability arising from an injury such that the worker is not able to return* to *his or her pre-injury employment but is able to return to work* in *suitable employment.*
>
> ***No current work capacity,*** *in relation to a worker, means a present inability arising from an injury such that the worker is not able* to *return to work, either in the worker's pre-injury employment or in suitable employment.*
>
> 48. As I have found that Ms Zugajev has no capacity to undertake any form of employment, I am satisfied that she has an inability arising from an injury such that she is not able to return to work, either in her pre-injury employment or suitable employment. I therefore find that Ms Zugajev has 'no current work capacity' pursuant to section 32A of the 1987 Act."

THE PRESENT APPLICATION

11. This is an application pursuant to s 38 of the *Workers Compensation Act 1987* (the 1987 Act) for weekly compensation pleaded from 29 January 2018 to date and continuing. The applicant only relied upon the accepted psychological injury caused by the injury.

12. Directions were issued at a telephone conference on 18 November 2019 (Directions). The Directions were in the following terms:

> 1. The application is based on an accepted injury on 1 June 2015 and an aggravation in September 2017.
>
> 2. The s 11A defence relates to an injury caused by transfer in 2016 (Reply, pg 2-3).
>
> 3. I note that the applicant is relying on the merit review decision dated 17 July 2019 which found that the applicant has no work capacity as a result of injury on 1 June 2015.

[6] Application, p 82
[7] Application, p 63

4. The respondent asserts that the merit review decision is "null and void". The parties are to address on what power I have to make such a declaration/finding.

5. The matter is listed for arbitration hearing at 2 pm on 4 December 2019.

13. The matter was listed for hearing on 4 December 2019 when Mr Ian Collins, Solicitor, appeared for the applicant and Mr Ross Hanrahan, Barrister, instructed by Mr Anthony Morrisey appeared for the respondent.[8]

14. The documentation admitted into evidence, without objection was:[9]

    (a) Application to Resolve a Dispute and attachments (Application), and

    (b) Reply and attachments which was attached to an Application to admit late documents (Reply).

15. There was no application by either party to adduce oral evidence.[10]

16. At the arbitration hearing the applicant discontinued, without objection, the "second injury" and relied solely on the injury.[11]

17. The respondent confirmed that it had previously admitted psychological injury caused by the injury and asserted that the effects of the injury had ceased. There was also an issue with respect to the calculation of the PIAWE as defined in the 1987 Act for the period after 52 weeks.[12]

18. The applicant then accepted the respondent's calculation of PIAWE after the 52-week period at $1,376 subject to indexation pursuant to s 82A of the 1987 Act.

19. A further direction was issued requiring written submissions on the indexed amount and a further matter raised late in the respondent's submissions. That direction was in the following terms (Direction No 2):

    1. The Applicant is to file and serve written submissions by close of business 11 December 2019 limited to:

        (a) Indexation of the agreed PIAWE of $1376 pursuant to s 82A of the 1987 Act; and

        (b) The power of the Commission to make an award consistent with the Work Capacity Decision during the s 38 period (on and from 1 December 2017).

    2. The respondent is to file and serve written submissions in reply only by close of business 18 December 2019.

    3. The parties are advised that written submissions outside the scope of this direction will not be considered.

[8] *Zugajev v Secretary, Department of Education*, 4 December 2019 (T)
[9] T, p 6
[10] T, p 6
[11] T, p 2
[12] T, pp 2 and 5

ORAL SUBMISSIONS

Applicant's submissions

20. The applicant solely relied on the Merit Review Decision and submitted that I was bound to apply that decision.[13] The date of the WCD, the request for internal review and the application for Merit Review were made at a time when the Authority had exclusive jurisdiction to review work capacity decisions.

21. Reference was made to my decision of *Grima v Bursons Automotive Pty Ltd*[14] where it was submitted that the work capacity review process occurred during the transitional phrase and jurisdiction to determine the matter remained with the Authority.

22. The applicant also referred to s 44(3)(g) and (h) of the 1987 Act, as preserved, which provided that the insurer was bound by the determination by the Authority.[15]

23. The applicant otherwise referred to a series of workcover certificates commencing at page 109 of the Application which certified no current work capacity from January 2018.[16]

Respondent's submissions

24. The respondent referred to the Consent Orders and submitted that the only matter that had changed since that time was the WCD.[17]

25. The respondent accepted that the jurisdiction to review the WCD remained with the Authority and I was "bound by the decision".[18]

26. It was submitted that the Merit Review Decision found that incapacity arose from two injuries, they being the injury and aggravating events in September 2017.[19] The Merit Review Officer adopted the opinion of Dr Morris in concluding that the incapacity arose from the injury and aggravating events in September 2017.

27. It was submitted:[20]

> "Well, we're saying that [the Merit Review Decision] finds no work capacity based on two sets of events. The applicant here is only relying on one of those sets of events. We'd say, therefore, that on a common sense basis only half of the incapacity is payable since the applicant does not rely upon the later events in these proceedings."

28. The respondent confirmed that I was "bound by the decision" but that the Merit Review Decision took into account subsequent events which were not relied upon in this case.[21] To find the incapacity was only based on the first injury "would be inconsistent with the [Merit Review Decision]".[22]

29. The respondent submitted that a Merit Review Decision was "binding and the only review is by way of judicial review". The applicant accepted that position. However, the respondent submitted:

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[13] T, pp 7-8
[14] [2019] NSWWCC 184
[15] T, pp 9-10
[16] T, p 37
[17] T, p 12
[18] T, p 13
[19] T, pp 13-16
[20] T, p 21
[21] T, pp 21-22
[22] T, p 28

> "But our submission is that you have to grapple with the substantive findings of the merit review in terms of what she's relied upon to reach the conclusion that she has and if there is a reason why you are unable to make an appropriate allowance in the circumstances of this claim ..."

30. The respondent further submitted that the Merit Review Decision would only operate from 13 September 2017 to 30 November 2017, that is after the date of the Consent Orders until the end of the s 37 period.[23] It was submitted that I could not make an award in the s 38 period due to the effect of decisions such as *Lee v Bunnings*[24] (*Lee*). The "better view" in other cases was that I "make no order at all" as there was "no jurisdiction in the s 38 period.[25]

31. The respondent submitted that even if the Merit Review Decision was a valid work capacity decision then the Commission had no jurisdiction[26] as the applicant was only claiming compensation during the s 38 period.[27]

WRITTEN SUBMISSIONS

Applicant's written submissions

32. The applicant submitted that the Commission retained power in the s 38 period provided the decision was consistent with a work capacity decision. Reference was made to *Hee v State Transit Authority of NSW*[28] (*Hee*), *Rawson v Coastal Management Group Pty Ltd*[29] (*Rawson*) and *Paterson v Paterson Panel Work Pty Ltd*[30].

33. The WCD had been reviewed in accordance with the legislation so the Commission had "jurisdiction to deal with the matter but only in a manner consistent with the Work Capacity Decision as reviewed under s 44BB."[31]

34. Subject to the previous s 44BB(5) concerning the exclusion for the stay period, the legalisation does not exclude the Commission from making a decision. The authorities require that a work capacity decision as reviewed is binding on the parties under s 44BB(3)(h) and in line with the principles discussed in *Hee* and *Rawson*.

35. The applicant otherwise attached a schedule indexing the agreed PAIWE for the period from 29 January 2018 in accordance with the factor B/C as provided by s 82A of the 1987 Act.

Respondent's written submissions

36. The respondent noted that the applicant's entitlements were pursuant to s 38 of the 1987 Act, after the cessation of the second entitlement period which occurred on 30 November 2017. It also noted that the applicant sought a review of the WCD on 2 April 2019, that is almost two years after the cessation of the second entitlement period.[32]

37. The respondent also noted that the Merit Review Decision was issued on 1 July 2019 which recommended that the Insurer determine that the applicant has "no current work capacity".[33]

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[23] T, p 33
[24] [2013] NSWWCCPD 54
[25] T, p 35
[26] T, p 36
[27] T, p 39
[28] [2018] NSWWCCPD 6
[29] [2015] NSWWCCPD 27
[30] [2018] NSWWCCPD 27
[31] Applicant's written submissions, paragraph 6
[32] Respondent's written submissions, paragraphs 2-9
[33] Respondent's written submissions, paragraph 9

38. The respondent submitted:[34]

> "**11.** It is submitted that the Applicant is firstly estopped by the Award in favour of the Respondent agreed to by the parties on 13 September 2017 concerning which no change of circumstances has been demonstrated. The only thing that has changed is the work capacity decision which has now been belatedly reviewed.
>
> **12.** The delay in making the merit review has had a significant prejudicial effect on the Respondent and ought not be allowed to be used by the worker to overcome the disentitling provisions of s38.
>
> **13.** Secondly it is submitted that since the Merit review finding of incapacity ('no current work capacity') is based on an injury/s which includes a condition 'aggravated by events from September, 2017' then any finding made by the Arbitrator, in order to avoid inconsistency with the review decision must remove the incapacitating consequences of the "aggravation" from any final Award made by the Commission.
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> **14.** The Respondent submits that the jurisdiction for the Arbitrator to make such a finding extends only until the end of the second entitlement period and that thereafter, the implementation of s38 entitlements and those decisions which are a pre-requisite to entitlement under that section, remain wholly within the province of the Insurer."

REASONS

39. The *Workers Compensation Legislation Amendment Act 2012* (2012 Amendment Act) introduced a scheme of changes which impacted on the exclusive jurisdiction of the Commission to determine matters under the 1987 Act and the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).

40. Section 43 of the 1987 Act, introduced by the 2012 Amendment Act, defined a work capacity decision to include a number of decisions by an insurer. Section 43(3) provided that the Commission:

> "[Does] not have jurisdiction to determine any dispute about a work capacity decision of an insurer and is not to make a decision in respect of a dispute before the Commission that is inconsistent with a work capacity decision of an insurer."

41. Section 105 of the 1998 Act provides that the Commission has exclusive jurisdiction "subject to this Act". A note under s 105(1) of the 1998 Act, also introduced by the 2012 Amendment Act, confirmed that the Commission "does not have jurisdiction to determine any dispute about a work capacity decision".

42. The 2012 Amendment Act introduced the concept of a "work capacity decision" (s 43 of the 1987 Act) and provided a procedure for the review of work capacity decisions. Section 44BA of the 1987 Act defined an "internal review" to mean "a review by an insurer under Section 44BB".

43. Section 44BB provided the mechanism of review including an initial review by an insurer under s 44BB(1)(a). There was no time limit in the 1987 Act requiring a worker to make an internal review to the insurer.

[34] Respondent's written submissions, paragraph 10

44. Following the internal review by an insurer, a worker could then apply for a merit review by the Authority and/or a procedural review by an "Independent Review Officer." Such applications must be made within 30 days of the worker receiving notice of the insurer's decision on an internal review.

45. There is a stay of a work capacity decision for various reasons such as whilst the decision is subject to review (s 44BC). Section 44BB(5) provides that the Commission cannot make a decision whilst a work capacity decision is stayed.

46. Section 44BB(3) of the 1987 Act relevantly applies:

> "The following provisions apply to the review of a work capacity decision when the reviewer is the Authority or the Independent Review Officer:
> …
>
> (g) recommendations made by the Authority are binding on the insurer and must be given effect to by the insurer".

47. Further amendments were enacted by the *Workers Compensation Legislation Amendment Act 2018* (the 2018 Amendment Act) which removed the jurisdiction of bodies outside of the Commission as the ultimate decision maker for work capacity decisions. Included within those amendments were the repeal of various sections such as ss 43(3), 44BA and 44BB of the 1987 Act and the note to s 105 of the 1998 Act. These amendments commenced on 1 January 2019.

48. The 2018 Amendment Act provided for transitional arrangements and preserved a category of work capacity decisions known as existing work capacity decisions. The transitional arrangements were contained in Sch 6, Pt 19L, cl 6 of the 1987 Act and relevantly provided:

> (1) Subdivision 3A of Division 2 of Part 3 of the 1987 Act continues to apply to an existing work capacity decision (as if the work capacity decision amendments had not been enacted):
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> (a) during the transitional review period, and
>
> (b) if, immediately before the expiry of the transitional review period, the decision is subject to a review under that Subdivision--until the review is finally determined.
>
> (2) A dispute about an existing work capacity decision that is determined before the expiry of the period during which Subdivision 3A of Division 2 of Part 3 of the 1987 Act applies to the decision is not subject to referral for determination by the Commission after the expiry of that period.
>
> (3) The work capacity decision amendments do not apply in relation to an existing work capacity decision during the period in which Subdivision 3A of Division 2 of Part 3 of the 1987 Act applies to the decision.
>
> (4) The **"transitional review period"** is:
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> (a) the period of 6 months commencing on the day on which Schedule 1.1 [3] to the 2018 amending Act commences, or
>
> (b) any other period prescribed by the regulations.

49. "Existing work capacity decision" is defined in cl 1 to mean "a work capacity decision of an insurer made before the commencement of Schedule 1 to the 2018 amending Act".

50. The parties accepted that the WCD was issued and the Merit Review Decision was determined when the Authority had exclusive jurisdiction. Whilst the 2018 Amendment Act repealed various sections pertaining to the making and review of work capacity decisions, the relevant legislation was saved in respect of an existing work decision where an internal review process had commenced prior to or during the transitional period.

51. I accept the parties' common submission that the WCD was an "existing work capacity decision" within the meaning of the transitional provisions of the 2018 Amendment Act. The WCD was made prior to the changes and an internal review was requested during the transitional period, that is from 1 January 2019 to 30 June 2019. Accordingly, the Authority retained exclusive jurisdiction over the WCD when it made the Merit Review Decision.

52. Work capacity decisions are binding on the parties subject to the review procedure in s 44BB and by way of judicial review to the Supreme Court (s 43(1)).

53. The respondent's submission that the Merit Review Decision was "null and void"[35] should not have been made. The appropriate and only step available to the respondent was to seek judicial review in the Supreme Court. There is no statutory basis in the Commission to rule upon this submission. The respondent did not seek a judicial review and basically ignored the Merit Review Decision. It otherwise provided no statutory basis upon which the Commission could made such a declaration.

54. The relevance of this finding is that the Commission does not have jurisdiction to determine any dispute about the WCD and does not have jurisdiction to determine the arguments the respondent raised about the defective nature of the Merit Review Decision (s 43(3)).

55. However, as the matter was argued on other bases, I express my views as why the respondent's submissions are wrong.

56. The respondent asserts that there was an estoppel by reasons of the Consent Orders.

57. There are two reasons why this submission is incorrect.

58. First, whilst there is an estoppel as at the date of the Consent Orders, there is no estoppel in a changing situation. In *Abou-Haidar v Consolidated Wire Pty Limited*[36] (*Abou-Haidar*) Deputy President Roche stated:[37]

> "The last point to note (though it was not argued by Consolidated, but may be relevant to future claims) is that there is no estoppel in a changing situation (*The Doctrine of Res Judicata* by Spencer Bower, Turner and Handley, 3rd edn, 1996, at page 102; *O'Donel v Commissioner for Road Transport & Tramways* [1938] HCA 15; 59 CLR 744; *Dimovski*; *Hamersley Iron Pty Ltd v The National Competition Council* [2008] FCA 598 at [114] to [116]; *Prisk v Department of Ageing, Disability and Home Care (No 2)* [2009] NSWWCCPD 13 at [55]). A claim for additional lump sum compensation is such a situation."

59. The comments of Deputy President Roche in *Abou-Haidar* were cited and approved by Harrison AsJ in *Railcorp NSW v Registrar of the WCC of NSW.*[38]

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[35] See Direction at paragraph 12 herein
[36] [2010] NSWWCCPD 128
[37] At [66]
[38] [2013] NSWSC 231 at [82] – [83]

60. The suggestion that the Consent Orders were final is inconsistent with the decision of the High Court in *O'Donel v Commissioner for Road Transport & Tramways*[39] and the decision of the Court of Appeal in *Rail Services Australia v Dimovski*.[40]

61. The suggestion that the applicant's current work capacity continued indefinitely as and from the Consent Orders must be examined in light of the evidence after that date.

62. The respondent, somewhat inconsistently, submitted that the applicant's condition deteriorated when it was aggravated by events in September 2017. That submission was made in circumstances where it submitted that the Merit Review Decision incorrectly used the effects of an event subsequent to the injury as contributing to the extent of the incapacity.

63. The evidence of the changing situation was adequately summarised in the Merit Review Decision. The evidence in support of this conclusion included the opinion of Dr Morris which established a deterioration in the applicant's psychological condition.

64. Secondly, any suggestion that there is an estoppel must give way to any statutory provision to the contrary.

65. A private law right such as estoppel cannot override a statutory entitlement. This principle was discussed by Meagher JA in *Trustees for the Roman Catholic Church for the Diocese of Bathurst v Hine* when his Honour stated:[41]

> "The private law right constituted by the estoppel cannot prevent the operation of a statutory provision in such imperative terms: *Chamberlain* at 510; and *Griffiths v Davies* [1943] 1 KB 618 at 621. See also *Spratt v Perilya Broken Hill Ltd; Spratt v Rowe* [2016] NSWCA 192 at [46] (per Leeming JA, McColl and Gleeson JJA agreeing) which recognises the operation of similar medical assessment provisions in Pt 3.4 of the *Motor Accidents Compensation Act 1999* (NSW) as abrogating a common law issue estoppel 'to the extent that it would otherwise preclude a medical assessor from performing the tasks imposed on him or her' by that Act."

66. The applicant has a statutory entitlement based on the (former but saved) provisions of the 1987 Act when the merit reviewer determined the matter in her favour. The Merit Review Decision was, pursuant to s 44BB(3)(g), binding on the insurer. This is clearly a statutory provision expressed in "imperative terms".

67. An estoppel based on the Consent Orders could not restrict the applicant from obtaining her entitlements to weekly compensation pursuant to that statutory provision.

68. The respondent also asserted that it was "unfair" and it was "prejudiced" by the fact that the review process was undertaken almost two years after the issuing of the Consent Orders and three years after the WCD was made.

69. The submission ignores that the 1987 Act allowed for the WCD to be challenged by the applicant when and in the manner she did. Questions of unfairness or prejudice do not arise. Both parties made submissions during the merit review process and the dispute was heard and determined by the Authority.

70. The respondent's complaints that the review process before the Authority was "unfair" and they were "prejudiced" are simply not legally based arguments.

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[39] [1938] HCA 15; 59 CLR 744
[40] [2004] NSWCA 267.
[41] [2016] NSWCA 213 at [51], Leeming and Simpson JJA agreeing at [65]-[66].

71. The respondent also raised an argument that the Merit Review Decision relied on the injury and also a further aggravating event not raised in these proceedings and not part of the WCD. The submission was that the WCD was accordingly not binding upon me

72. These submissions are incorrect for a number of reasons.

73. First, the Merit Review Decision stated that it was a review of the WCD. It is common ground that the WCD was only based on the injury. That fact is self-evident as the WCD was issued at a time prior to the aggravating events in September 2017.

74. Secondly, it the Merit Review Decision was wrong then it should have been challenged in the Supreme Court. The respondent did not do so. The Merit Review Decision cannot be challenged in the Commission.

75. Thirdly, the respondent's submissions of the effects of the aggravating event in September 2017 are misconceived and ignore binding High Court authority. This submission was raised in oral submissions and repeated in its written submissions even though I do not have the jurisdiction to question the Merit Review Decision.

76. I accept that the WCD only related to the injury.

77. I accept that the applicant's psychological condition was aggravated in September 2017. That separate injury was not part of the original WCD and not part of the proceedings before the Commission.

78. The relevant test is whether incapacity results from injury (s 33 of the 1987 Act). It is basic principle that the injury does not have to be the sole cause of incapacity.

79. In the unanimous decision in *Calman v Commissioner of Police*[42] (*Calman*), the High Court stated:[43]

> "39. Whether incapacity results from injury is a question of fact. Upon the findings in this case, however, the answer to that question could admit of only one answer. As a matter of law, the Tribunal was bound to find that the incapacity of the appellant resulted from injury within the meaning of s 33 of the Workers Compensation Act. Although the incapacity would not have arisen but for the appellant being told that he was to be transferred, there would have been no incapacity but for the existence of his underlying anxiety disorder. The incident, which was the immediate cause of his incapacity, merely exacerbated the underlying anxiety disorder which continued to exist, notwithstanding that immediately before the incident it manifested no symptoms. In those circumstances, the injury was a contributing cause to the incapacity. As Jordan CJ pointed out in *Salisbury v Australian Iron and Steel Ltd* [20]:
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> > 'It is not necessary that the employment injury should be the sole cause of disability. It is sufficient if it is a contributing cause[21]. It may be the catalyst which precipitates disability in a medium of disease. But when the stage is reached at which the employment injury ceases to produce effects and could therefore no longer be a contributing cause to any incapacity which may then exist, the right to compensation ceases.'

[42] [1999] HCA 60; (1999) ALR 91
[43] at [39]-[40]

> 40. In the present case, the underlying anxiety disorder continued and was capable of producing serious effects if exacerbated or aggravated, as the Tribunal's findings showed. That being so, the Tribunal was bound to find as a matter of law[22] that the appellant's incapacity resulted from injury within the meaning of s 33 of the Workers Compensation Act."

80. *Calman* was referred to in *McCarthy v Department of Corrective Services*[44] when Roche DP made observations concerning the appropriate test on causation for establishing an entitlement to weekly compensation. In particular, the Deputy President stated:[45]

> "It is trite law that a loss can result from more than one cause (*ACQ Pty Ltd v Cook* [2009] HCA 28 at [25] and [27]; [2009] HCA 28; (2009) 83 ALJR 986). The authority of *Calman* is also instructive on this issue. The Court held (at [38], excluding footnotes):
>
> Once the appellant established that his underlying anxiety disorder was an injury within the meaning of the Workers Compensation Act, he was entitled 'to compensation ... under [that] Act' upon proof that his total or partial incapacity for work resulted from that injury. The question then for the Tribunal was whether the appellant's incapacity was causally connected to the underlying anxiety disorder. It has long been settled that incapacity may result from an injury for the purposes of workers' compensation legislation even though the incapacity is also the product of other - even later - causes. Indeed, death or incapacity may result from a work injury even though the death or incapacity also results from a later, non-employment cause. Thus, in *Conkey & Sons Ltd v Miller*, Barwick CJ, with whose judgment Gibbs, Stephen, Jacobs and Murphy JJ agreed, held that it was open to the Workers' Compensation Commission to find from the medical evidence in that case 'that the death by reason of myocardial infarction when it did ultimately occur, 'resulted' from the work-caused injury of the first infarction, even if it could not be said that the final infarction was itself caused by work-caused injury."

81. Whilst the Merit Review Decision was only based on a WCD and the injury, the Merit Reviewer correctly applied the principles discussed in *Calman*.

82. The Merit Reviewer asked whether the present inability to return to work "arises from the accepted injury".[46] The discussion within the Merit Review Decision then included an acceptance of Dr Morris' opinion, an opinion which was given "particular weight", in a conclusion that the incapacity arose from the relevant injury and aggravated by the incident in September 2017.[47]

83. The medical evidence established that the effects of the injury were ongoing as at the date of the Consent Orders. The psychological condition was aggravated by an incident in September 2017 when the respondent refused to transfer the applicant in accordance with her request. The only available and proper conclusion from these findings is that the applicant's lack of capacity after that time resulted from the injury, even if it also resulted from another cause.

84. *Calman* was referred to the respondent during the arbitration's hearing when they were advised that its submissions appeared contrary to High Court authority. The respondent's submissions in response did not address the principle raised in *Calman*.[48]

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[44] [2010] NSWWCCPD 27
[45] at [148]-[149]
[46] Merit Review Decision, paragraph 41
[47] Merit Review Decision, paragraph 44
[48] See T pp 17-18

85. The respondent's submissions, referred to at paragraphs 27 and 38[49] herein, are wrong. The respondent's submission that the effects of an incident aggravating a work incident are either "removed" or the applicant otherwise receives "half" of her entitlement to weekly compensation are inconsistent with *Calman*.

86. The respondent finally submitted that the Commission could not make a decision during the third entitlement period. The respondent made reference to the decision of *Lee*. This submission was raised late in the arbitration hearing. I directed written submissions seeking relevant authority in support of this submission. The respondent was provided with authorities by the applicant and did not make any further submissions as requested in Direction No 2.

87. The respondent's submissions are contrary to the Court of Appeal decision in *Sabanayagam v St George Bank Ltd*[50] when Sackville AJA stated (Beazley P agreeing):

> "127. The Worker's Application to the Commission in the present case was made pursuant to s 288 of the WIM Act. The controversy the Worker sought to have determined by the Commission in May 2015 was her claim to be entitled to weekly compensation payments after the second entitlement period expired. She was entitled to compensation after the expiry of that period if she satisfied the requirements of s 38(2) or s 38(3) of the WIM Act. The Insurer asserted that the Worker was not entitled to a continuation of weekly compensation payments, while the Worker claimed that the Insurer should have assessed her as satisfying the statutory requirements for a continuation of the payments. The controversy between the parties arose under the WC Act and, subject to the operation of s 43(1) and (3) of the WC Act, was within the jurisdiction of the Commission to determine.
>
> 128. It follows that if s 43(1) and (3) are put to one side, the Commission would have jurisdiction to settle the controversy between the Worker and the Insurer (representing the Bank). For example, the Commission would have jurisdiction to evaluate the medical evidence relied on by the Insurer in order to determine whether the Worker was capable of returning to her pre-injury employment. Similarly, the Commission would have jurisdiction to determine whether the Insurer had misconstrued the legislation, thereby causing it to make an erroneous decision."

88. The issue in *Sabanayagam* concerned the worker's entitlements in the s 38 period. The decision of Sackville AJA is clear that his Honour was aware that the worker's claim for weekly compensation fell within the third entitlement period.[51] The matter was referred back by the Court of Appeal to the Commission to determine the worker's entitlements. As Sackville AJA stated in the above quotation:

> "The controversy between the parties arose under the WC Act and, subject to the operation of s 43(1) and (3) of the WC Act, was within the jurisdiction of the Commission to determine."

89. In my view it is unnecessary to refer to any other decision beyond binding Court of Appeal authority. However, given my ultimate view that the respondent's submissions are wrong, I add some further observations.

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[49] See written submission paragraph 13 quoted at paragraph 38 herein
[50] [2016] NSWCA 145
[51] See particularly at [29]

90. In *Lee* Keating P found that an entitlement to compensation under s 38 of the 1987 Act must be assessed by the insurer and not by the Commission[52]. The President further held that the insurer had not undertaken a work capacity assessment following the expiration of the second entitlement period and stated:[53]

> "It is common ground that the insurer has not undertaken a work capacity assessment of Mrs Lee's residual capacity for work following the expiration of the second entitlement period. In those circumstances, the Arbitrator erred by concluding that Mrs Lee had no ongoing entitlement to weekly compensation in the absence of such an assessment. Those rights have not yet been determined. In the circumstances, the Arbitrator should have declined to make any order in respect of the period from 1 January 2013. It follows that this award entered in favour of the respondent must be revoked."

91. The President stated that s 38 was clear that an entitlement to compensation had to be "assessed by the insurer, not by the Commission"[54]. In my view the President was referring to the issue of the quantum being "assessed" and did not decide the question of power to make orders "not inconsistent with a work capacity decision" within the meaning of s 43(3) of the 1987 Act.

92. In *Rawson*, Deputy President Roche held that in respect of the relevant period in dispute, that is, for the period between 17 September 2012 and 23 September 2014, the insurer had made a work capacity decision to the effect that the worker was "not entitled to be paid in that period". The Deputy President stated:[55]

> "That is because a decision by the Commission that Mr Rawson is entitled to weekly compensation between 17 September 2012 and 23 September 2014 would be inconsistent with the insurer's work capacity decision that he is not entitled to be paid in that period. Section 105 of the 1998 Act does not overcome the clear restriction on the Commission's jurisdiction in s 43(3)."

93. In *Inghams Enterprises Pty Ltd v Sok*[56] the appellant disputed the Commission's power to make an award in accordance with s 37 of the 1987 Act and submitted that the "Commission had no jurisdiction to make determinations as to weekly compensation from 1 January 2013 … based on the withdrawal of jurisdiction by s 43(3)".[57]

94. In rejecting this argument, Basten JA (with whom Barrett JA and Sackville AJA agreed[58]) accepted the submissions of the WorkCover Authority[59], which were as follows:

    (a) "any dispute about a work capacity decision" in s 43(3) does not mean "any dispute about a matter of a kind which may be the subject of a work capacity decision";[60]

    (b) The second limb of subs 43(3) operates only where a work capacity decision has been made;[61]

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[52] *Lee* at [57]
[53] *Lee* at [59]
[54] *Lee* at [57]
[55] *Rawson* at [68]
[56] [2014] NSWCA 217
[57] At [52]
[58] At [62]-[63]
[59] At [58]
[60] At [54]
[61] At [55]

(c) Both limbs of subs 43(3) assume that a work capacity decision has been made;[62]

(d) "S 44(5) purports to remove the power of the Commission to make a decision in proceedings concerning a dispute about weekly payments while a work capacity decision (which must have been made) is the subject of a review".[63]

95. The Commission has the power, pursuant to (the former but saved) s 43(3), to make orders "not inconsistent with a work capacity decision of an insurer" during the "third entitlement period" because:

(a) S 38 provides a worker with an entitlement to compensation in the "third entitlement period";

(b) the entitlement during the s 38 period depends upon an insurer making an assessment;

(c) the normal meaning of the words in s 43(3): "is not to make a decision … that is inconsistent with a work capacity decision" means that the Commission can make a decision consistent with the work capacity decision;

(d) s 38 does not expressly remove the power of the Commission to make an award during that period. This is contrasted with the clear removal of power or jurisdiction in s 44(5) of the 1987 Act, and

(e) The binding observations of the Court of Appeal in *Sabanayagam.*

96. In my view, the decisions in both *Lee* and *Rawson* depended on the finding that the insurer had either not made a relevant assessment (*Lee*) or the applicant was asking the Commission to make an order inconsistent with the insurer's decision (*Rawson*). In those situations, the Commission has no power to make an order during the s 38 period.

97. I reject the respondent's submissions as they are inconsistent with binding Court of Appeal authority. The Commission has jurisdiction to make an order in the s 38 period subject to the privative clauses in s 43(1) and (3).

98. The reasons otherwise accord with canons of statutory construction. As the plurality stated in *Military Rehabilitation Commission* v *May*[64], the "question of construction is determined by reference to the text, context and purpose of the Act"; citing *Project Blue Sky Inc v Australian Broadcasting Authority*[65] and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[66].

99. The respondent is statutorily bound by the Merit Review Decision. In the circumstances I award weekly compensation during the s 38 period consistent with that determination.

Quantification of entitlement

100. The applicant filed a schedule indexing the agreed PIAWE pursuant to s 82A of the 1987 Act.

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[62] At [55]
[63] At [56]
[64] [2016] HCA 19 at [10]
[65] [1998] HCA 28 [69]-[71]
[66] [2009] HCA 41 (*Alcan*)

101. The respondent's written submissions appeared to accept that the indexation provided by s 82A of the 1987 Act applied to Division 2[67], presumably a reference to Division 2 of Part 3 of the 1987 Act. No contrary figures were otherwise provided by the respondent.

102. Accordingly, I adopt the applicant's schedule as accurately setting out her indexed PIAWE and the entitlement to weekly compensation.

CONCLUSIONS

103. I record that the respondent's position in this matter was inappropriate in that it blatantly disregarded the binding Merit Review Decision.

104. The orders are set out in the Certificate of Determination.

[67] Respondent's written submissions, paragraph 15