

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 1235/20
Applicant: Vineta Dahiya
Respondent: Secretary, Department of Education
Date of Determination: 16 June 2020
Citation: [2020] NSWCC 199

The Commission determines:

1. An interim award in favour of the applicant pursuant to section 108 of the *Workplace Injury Management and Workers Compensation Act 1998* that the respondent is to pay the applicant weekly payments of compensation as follows:
 - (a) \$1,723.20 from 24 August 2016 to 23 November 2016 pursuant to section 36 of the *Workers Compensation Act 1987*, and
 - (b) \$1,451.20 from 24 November 2016 to 31 January 2017 pursuant to section 37 of the *Workers Compensation Act 1987*.
2. Respondent is to be given credit for any payments made to the applicant during the period 24 August 2016 to 31 January 2017.
3. Leave is granted to the parties to file Consent Orders in the Commission in respect of the applicant's entitlement to weekly payments of compensation from 1 February 2017 to the end of the second entitlement period pursuant to section 37 of the *Workers Compensation Act 1987* with credit to be given to the respondent for payments already made, or, alternatively, if the parties agree as to the terms of the award, apply to the Registrar to list the matter for telephone conference with Arbitrator Edwards for the purpose of issuing a final award.
4. Leave granted to the parties to apply to the Registrar, in the absence of agreement as to the applicant's entitlement to weekly payments from 1 February 2017 to the end of the second entitlement period pursuant to section 37 of the *Workers Compensation Act 1987*, to list the matter for telephone conference with Arbitrator Edwards for the purpose of determining the dispute.
5. No order as to the claim for medical and related treatment expenses pursuant to section 60 of the *Workers Compensation Act 1987*.

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

Grahame Edwards
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 GRAHAME EDWARDS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Ms Vineta Dahiya (the applicant) commenced proceedings in the Commission by the filing of an Application to Resolve a Dispute (the Application) dated 4 March 2020.
2. Ms Dahiya claims she suffers with a psychological injury arising out of or in the course of employment as a teacher with the Secretary, Department of Education (the respondent) as a result of alleged bullying by the principal from 1 June 2016 to 1 August 2017.
3. Ms Dahiya particularised her claim for weekly payments of compensation in the application from 24 August 2016 for the first entitlement period (13 weeks) pursuant to s 36 of the *Workers Compensation Act 1987* (the 1987 Act), and thereafter for the second entitlement period (14 to 130 weeks) pursuant to s 37 of the 1987 Act.
4. Ms Dahiya also claims medical and related treatment expenses pursuant to s 60 of the 1987 Act.
5. Ms Dahiya also claims lump sum compensation in respect of her psychological injury pursuant to s 66 of the 1987 Act.
6. The respondent filed its Reply to Application to Resolve Dispute (the Reply) dated 26 March 2020.
7. The respondent disputed liability for weekly payments of compensation and medical expenses upon the issuing of a notice pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) dated 6 November 2018¹ on the basis of the defence provided by s 11A of the 1998 Act.
8. The respondent also advised in the s 74 notice that in accordance with s 54 of the 1987 Act weekly payments of compensation would cease on 26 December 2018.
9. The respondent issued a notice dated 4 June 2019² pursuant to s 78 of the 1998 Act disputing Ms Dahiya's claim for lump sum compensation pursuant to s 66 of the 1987 Act in respect of permanent impairment of her psychological injury on the basis of the earlier dispute notice.
10. The Commission listed the matter for conciliation conference/arbitration via telephone conference before me on 28 April 2020 after the holding of an initial telephone conference with another arbitrator.
11. The arbitration hearing was sound recorded.
12. Mr Stockley of counsel instructed by Ms Wightley, solicitor, represented Ms Dahiya who was in attendance at the telephone conference.
13. Mr Perry of counsel instructed by Ms Fiona King, solicitor, represented the respondent in the interests of the insurance scheme agent.
14. The respondent withdrew its declinature of liability during the conciliation stage electing not to rely upon the defence provided by s 11A of the 1987 Act, accepting that Ms Dahiya suffers with a psychological injury arising out of or in the course of employment within the meaning of s 4 of the 1987 Act, and that the employment concerned was a substantial contributing factor to the injury within the meaning of s 9A of the 1987 Act.

¹ Application – pp 328-335

² supra – pp 321-325

15. The parties agreed to the matter being remitted to the Registrar for referral to an Approved Medical Specialist to assess permanent impairment of psychological injury as a result of injury on 10 June 2016; the first date of incapacity for work.
16. I issued a Certificate of Determination – Consent Orders remitting the matter to the Registrar for referral to an Approved Medical Specialist.
17. Ms Dahiya sought leave at the arbitration hearing to amend the application to claim weekly payments of compensation from 27 December 2018 (the date of declinature of liability to make weekly payments of compensation pursuant to s 54 of the 1987 Act on the basis of the s 11A defence) to 6 February 2020.
18. While the respondent concedes Ms Dahiya suffered a psychological injury arising out of or in the course of employment and that she had no had no capacity for work from 27 December 2018 to 20 February 2019, it did not concede Ms Dahiya is entitled to compensation payments beyond that date (20 February 2019) or that she had no capacity for work at all other relevant times.
19. The respondent objected to the application to amend the claim for weekly payments.
20. After hearing submissions, I directed the parties to provide written submissions on the disputed periods of Ms Dahiya’s entitlement to weekly payments of compensation in accordance with a timetable.
21. The parties have provided their written submissions.

ISSUES FOR DETERMINATION

22. The parties agree that the following issue remains in dispute:
 - (a) Periods of entitlement to weekly payments of compensation pursuant to ss 36 and 37 of the 1987 Act.

Matters previously notified as disputed

23. Liability for psychological injury was disputed as at 6 November 2018.
24. Weekly payments of compensation ceased on 26 December 2018.

Matters not previously notified

25. Application by the applicant to amend the application to claim weekly payments of compensation from 27 December 2018 to 6 February 2020 pursuant to ss 36 and 37 of the 1987 Act.

PROCEDURE BEFORE THE COMMISSION

26. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary evidence

27. The following documents were in evidence before the Commission and taken into account in making this determination:

Applicant

- (a) Application and attached documents, and
- (b) written submissions dated 30 April 2020.

Respondent

- (a) Reply and attached documents;
- (b) Applicant to Admit Late documents dated 3 April 2020, and
- (c) written submissions dated 26 May 2020

FINDINGS AND REASONS

Issue 1 – Is the applicant entitled to weekly payments of compensation to 6 February 2020?

28. Ms Dahiya seeks to amend the application to claim weekly payments of compensation from 27 December 2018 to 6 February 2020 (expiration of the second entitlement period with the first entitlement period commencing on 10 August 2017).
29. Ms Dahiya, in support of her application, relies upon the respondent's "List of Payments"³ showing weekly payments were made from 10 August 2017 to 27 December 2018 (period of 71 weeks and 6 days), submitting that it is apparent payments were made at the rate prescribed by s 36 for the first period of entitlement (13 weeks) and thereafter at the rate prescribed by s 37 of the 1987 Act during the second entitlement period.
30. Ms Dahiya submits she is entitled to weekly payments for the remainder of the second entitlement period from 27 December 2018 to 6 February 2020 (58 weeks and 1 day) at the rate of \$1,496 (pre-injury average weekly earnings (PIAWE) – \$1,813.92 x 80%) pursuant to s 37 on the basis of no capacity for work.
31. Ms Dahiya acknowledges the Commission does not have jurisdiction to award weekly payments of compensation beyond the expiration of the second entitlement period.
32. Ms Dahiya submits the Commission should not accept the respondent's submission made at the telephone conference that she is bound to claim weekly payments from June 2016 (date of injury particularised in the application as 1 June 2016) when she was first incapacitated for work as a result of her injury.
33. Ms Dahiya submits the respondent's leave history and medical certificates issued by the nominated treating doctor, Dr Gupta,⁴ certifies she was unfit and absent from work for broken periods between June 2016 and August 2017; and at other times during that period she had the certified capacity to work three days per week.

³ Reply – pp 452-456

⁴ Application – p 7 at [48] and Annexure "H" – pp 32-43

34. Ms Dahiya submits that for the convenience of the parties she would “prefer at this stage to sacrifice entitlement to compensation” between June 2016 and August 2017 because absences from work during that period were utilised by drawing upon a variety of entitlements such as sick leave with and without pay and holidays or vacation with or without pay; and with the operation of s 50 of the 1987 Act sick leave would be reinstated with “no tangible benefit to her” because it is unlikely she will return to work with the respondent.
35. Ms Dahiya submits this would be a more convenient way of calculating her entitlement to weekly payments of compensation on the basis of no capacity for work from 27 December 2017 to 6 February 2020, providing her with a “monetary advantage rather than reinstatement of sick leave”.
36. Ms Dahiya submits that weekly payments would have continued until 6 February 2020 if the respondent had not denied liability on the basis of the defence provided by s 11A of the 1987 Act.
37. The respondent submits that it is readily discernible from the documentary evidence before the Commission that the date of injury is 24 August 2016 as certified by Dr Gupta (nominated treating doctor) in the approved WorkCover medical certificate (approved medical certificate) dated 11 August 2017.⁵
38. The respondent submits that the s 74 notice issued on 6 November 2018 “specifies that a dispute is raised with respect to an injury sustained on 24 August 2016”.⁶
39. The respondent, in support of its submission that Ms Dahiya was first incapacitated for work as a result of her psychological injury on 24 August 2016, referred to an entry in the clinical records of Dr Gupta for that date recording symptoms of disturbed sleep, low appetite and intermittent headaches as a result of bullying by her principal.⁷
40. The respondent makes no assertion or submission that the applicant had any capacity for work as a result of her psychological injury until she was certified fit to return to work three days per week from 21 April 2017 by Dr Gupta.
41. The respondent submits Ms Dahiya made no claim during the period 22 April 2017 to 9 August 2017 “suggesting that she sustained injury during that period”.
42. The respondent submits that an award for weekly payments from 9 August 2017 as sought by Ms Dahiya would only be available to her if she suffered injury on that date.
43. The respondent submits Ms Dahiya cannot assert that the dispute before the Commission concerns an injury which occurred on 9 August 2017.
44. The respondent, in support of its submission that no injury occurred on 9 August 2017, referred to the terms of referral by consent to an Approved Medical Specialist for assessment of permanent impairment of Ms Dahiya’s psychological injury.
45. The respondent submits that the amendment sought by Ms Dahiya is, in effect, alleging injury on 9 August 2017, and that the application should be refused.
46. The respondent accepts that Ms Dahiya suffered a psychological injury “up to and including 24 August 2016” and that she had no capacity for work beyond that date until 21 April 2017.

⁵ Application – p 281

⁶ supra – p 328 and p 321

⁷ Supra – p 113

47. The respondent submits the entitlement to weekly payments pursuant to ss 36 and 37 should be calculated from 24 August 2016 to 20 February 2019.

Discussion

48. This dispute concerns an application by the applicant to amend the application to claim weekly payments of compensation pursuant to s 37 of the 1987 Act from 27 December 2018, during the second entitlement period, to 20 February 2020 (the end of the second entitlement period) on the basis that payments commenced on 10 August 2017.
49. Ms Dahiya relies upon the list of payments⁸ provided by the insurance scheme agent showing payments were made from 10 August 2017 for the first entitlement period pursuant to s 36 and thereafter for the second entitlement period pursuant to s 37 until liability was denied by the issuing of the s 74 notice.
50. Ms Dahiya submits that the payments would have continued to the end of the second entitlement period on 20 February 2020 if there had not been a declinature of liability.
51. The respondent accepts Ms Dahiya suffers with a psychological injury arising out of or in the course of employment when it abandoned the defence provided by s 11A of the 1987 Act at the conciliation conference/arbitration hearing held on 28 April 2020.
52. The respondent opposes the application to amend the application to claim weekly payments of compensation from 27 December 2017, submitting that the date of injury is 24 August 2016 when she first became incapacitated for work as recorded in the approved medical certificate issued by Dr Gupta dated 11 August 2017⁹; and that payments should commence on 24 August 2016 (commencement of the first entitlement period) notwithstanding payments were made from 10 August 2017 and continued until liability was disputed by the issuing of the s 74 notice with payments ceasing on 26 December 2018.
53. Dr Gupta's approved medical certificate dated 11 August 2017 records the diagnosis of the work related injury/disease as follows: "work related severe stress with anxiety and depression".
54. Dr Gupta recorded the following history in response to the question on the certificate as to how the injury/disease is related to work:
- "She gave H/O [history] facing multiple problems at work such as being bullied, constantly being harassed and treated very badly by her D. [deputy] principle since 24/08/16. This has a very significant impact on her family."
55. The approved medical certificate clearly records the date of injury as 24 August 2016.
56. The respondent makes no assertion that Ms Dahiya was not incapacitated for work until 21 April 2017 when she was certified by Dr Gupta as fit to return to work three days per week.
57. The respondent also relies upon the terms of the referral to the Approved Medical Specialist whereby Ms Dahiya agreed that the assessment of permanent impairment of her psychological injury was as a result of injury on 10 June 2016¹⁰, the first date of incapacity, in support of its submission that the commencement date for entitlement to weekly payments is 24 August 2016.

⁸ Reply – pp 453-455

⁹ Application – p 289

¹⁰ Certificate of Determination – Consent Orders issued by the Commission

58. While the clinical records of Dr Gupta were attached to the application, the only approved medical certificate is the one dated 11 August 2017. I was unable to locate any other approved medical certificates.
59. The agreed date of injury of 10 June 2010 being the first date of incapacity, referred to in order number two in the Certificate of Determination – Consent Orders, is referred to in the clinical records of the “Chatswood Medical & Dental Centre” (the clinical records)¹¹ as follows:

“Stress and anxiety, with sleeping difficulty
Requesting script and medical certificate

OBx Off Work Certificate
Rx: 25 Normison (Tablets) 10 mg”

60. The clinical records for the consultation on 24 August 2016¹² record the following:

“On Oroxine and Avapro
working as a teach science teacher
says being bullying by her principle she is finding defects with her was assessed
by her vice principle
Vineta teaching for 9 years she is the only Indian there
says unable to relax sleep wt same disturbed sleep appetite low headaches on
and off c/o feeling weak periods OK Bowels OK c/0 constipation no urinary
...

She certainly has s/s stress and anxiety”

61. The clinical records record relevant consultations after 24 August 2016 as follows:

“31-Oct-2016 bullying at work place has been reported to human services
requests cert/script await outcome.

...

5-Nov-2016 Medical Certificate
Alot of problems at school c/o no sleep no appetite
Lost wt [weight]
Her superior bullying her
Has not slept properly
O/E looks anaemic
...
Discussed adv [advised] rest had a long discussion adv should
see a psychologist
Taking Antenex had a long talk

30-Nov-2016 Feels same upset loss of appetite loss of wt disturbed sleep
...

Still not fit for work

3-Dec-2016 Still same S/S stress with anxiety

...

17-Feb-2017 On long service leave wants check up
still under stress very stressed

...

Adv [advised] to see a psychologist

¹¹ Application – p 114

¹² supra – p 113

3-Mar-2017 ...
 Adv [advised] diet
 Adv injection very stress work related stressed severe anxiety
 takes Antenex Nocte

21-April-2017 was on stress leave would like to work 3/7 requests cert

24-May-2017 Working three days a week managing well
 Improving wants to continue same days

5-Jul-2017 Still very depressed stressed had very hectic time at work on
 improvement programme feels very stressed c/o pain left side
 chest no radiation
 ...
 Very stressed anxious c/o lethargic no energy sleep disturbed
 ...

9-Aug-2017 Says things are worse now on a teacher improvement programme
 picking on her about very minor things still being bullied supervisors
 are appoint by the principle
 Very stressed unable to concentrate is working three days a week
 c/o unable to relax insomnia low self-esteem no interest at all
 unable to teach to her satisfaction which worries her
 O/K looks anxious
 ...
 Never had any such problems in her life before
 Discussed long meditation adv rest takes Antenex 5 mg nocte

10-Aug-2017 Wants to go on WorkCover we tried to contact principal contact
 could not be made persistent headache unable to relax low self-
 esteem no interests with family matters nil social life no sex life
 insomnia worse O/E looks very anxious hyperventilating bit
 confused
 ...
 WorkCover certificate given not very sure about the dates
 Should see a psychologist

11-Aug-2017 NSW WorkCover – initial
 Wants to change the dates because she did go to work in between
 since 24/08/16 She worked three days a week during second term
 this year which commenced from 26/04/2017. Also working during
 this term which commenced from 17 three days a week to 07/08/17
 she worked

16-Aug-2017 Depressed stressed anxious
 Being bullied at work Has low esteem no interest sleep disturbed
 unable to communicate loss of appetite no interest in sex gets
 cranky at small things discussed adv to see Dr Salter
 ...”

62. The consultations to which I have referred are in accordance with the amendment of “injury details” in the application by Ms Dahiya without objection at the arbitration hearing as: “10/06/2016 to 9/08/2017”.¹³

¹³ Certificate of Determination – Consent Orders – Order No. 1

63. I am unable to accept the respondent's submission that the date of injury is confined to 24 August 2016.
64. Mr Dahiya relies upon events or incidents in the workplace between 10 June 2016 and 9 August 2017, the last day she worked, as causative of her psychological injury¹⁴. Ms Dahiya's reliance on events in the workplace, which she perceived to be hostile, is consistent with histories taken by independent medical experts qualified by her and the respondent, and also the nominated treating doctors and treating psychiatrist. No objection was taken by the respondent to Ms Dahiya's application to amend the particulars of "injury details" in the application.
65. On 10 June 2016, Ms Dahiya consulted Dr Li of the Chatswood Medical & Dental Centre (same medical practice as Dr Gupta), who issued a medical certificate certifying Ms Dahiya to be suffering with anxiety, and "will be unfit up to and including: 10/6/16"¹⁵.
66. On 24 August 2016, Dr Gupta issued a medical certificate certifying Ms Dahiya as having no capacity for work until 26 August 2016.¹⁶
67. Medical certificates were issued on 28 August 2016, 31 October 2016, 5 November 2016, 30 November 2016, 3 December 2016, 3 March 2017, and 16 March 2017¹⁷ certifying Ms Dahiya as having no capacity for work.
68. Dr Gupta issued a medical certificate dated 21 April 2017¹⁸ certifying Ms Dahiya fit to return to work three days per week.
69. Medical certificates certifying some capacity for work prior to 21 April 2017 may have been issued, which are not in evidence, because Ms Dahiya states in her statement that she returned to work in the first term of 2017 on a full-time basis and by early March 2017 was working three days per week¹⁹.
70. Dr Gupta issued a further medical certificate dated 12 July 2017²⁰ certifying Ms Dahiya fit for work three days per week from 17 July 2017 to 18 August 2018.
71. The inference which could be drawn by the medical certificate dated 12 July 2017 is that Ms Dahiya might have been unable to work at all on various dates between 21 April 2017 and when she stopped work on 9 August 2017, although I make no such finding.
72. On 18 August 2017, Dr Gupta referred Ms Dahiya to Dr Salter, consultant psychiatrist, for treatment of her psychiatric condition. The letter of referral²¹ sets out the following history:

"Thank you for seeing Ms Vineta Dahiya ...

I spoke to you about this school teacher with severe stress anxiety and depression suffers insomnia no interests headaches uncontrolled BP [blood pressure] no sex life etc cause being bullied at school by D. Principal

Consultation notes on day of referral [emphasis in original]

16 Aug 2017

¹⁴ applicant's statement dated 25 November 2019 – Application – pp 1-18

¹⁵ Application – p 32

¹⁶ supra – p 33

¹⁷ supra – pp 40

¹⁸ supra – p 41 & p 187

¹⁹ supra at 14 – pp 5-6 at [35]-[36]

²⁰ supra – p 171

²¹ supra – p 169

History

Depressed stressed anxious

Being bullied at work has low self-esteem no interest sleep disturbed

Unable to communicate loss of appetite no interest in sex gets cranky at small matters

Discussed adv [advised] see Dr Salter

...”

73. Dr Salter wrote to the insurance scheme agent on 14 November 2017²² advising that she saw Ms Dahiya on referral of Dr Gupta in August, setting out the history of events or incidents in the course of employment with the respondent as the causation of her psychiatric condition.

74. Dr Salter said that the history provided was:

“... very plausible account of bullying and harassment by this principal”, and “throughout this period [referring to the period 10 June 2016 to 9 August 2017], Mrs Dahiya endured many repeated psychological injuries of this nature [referring to bullying], and felt increasingly humiliated, isolated, and helpless, and eventually actually became less functional as her state of mind became more and more confused and depressed.

As described above the initial incident, was only one of a series of psychological injuries, which had a cumulative effect and led to increasing feelings of helplessness, depression and despair. **Finally, she became depressed by was systematically being done to her, she was no longer capable of teaching at all** (emphasis not in original).”

75. Dr Salter diagnosed Ms Dahiya to be suffering with Major Depression.

76. Dr Smith, consultant psychiatrist, assessed Ms Dahiya at the request of the respondent on 19 December 2017²³.

77. Dr Smith took a similar history as that taken by Dr Salter. Dr Smith diagnosed Ms Dahiya to be suffering with “Major Depressive Disorder, with Anxious Distress, moderate severity”.

78. In respect of causation of the diagnosed psychiatric condition, Dr Smith opined:

“Ms Dahiya described the development of anxiety and depressive symptoms from mid-2016 after being informed that there had been complaints regarding her performance as a teacher. She reported distress when she had been placed on informal support plan and her teaching had been criticised. **She described predominant anxiety during early 2017 and had a substantial amount of time off work due to those symptoms. On return to work she was placed on a formal performance improvement plan and her anxiety and depressive symptoms worsened and she described symptoms consistent with an episode of Major Depressive Disorder.**” (emphasis not in original)

79. I accept the opinions of Drs Salter and Smith as to diagnosis and causation of Ms Dahiya's psychiatric condition resulting in her psychological injury as a result of cumulative events or incidents in the course of employment with Ms Dahiya having no capacity for work from 10 August 2017.

²² Application – p 85

²³ report of Dr Smith dated 20 December 2017 – Application to Admit Late Documents filed by the respondent – pp 1-10

80. I am unable to accept the respondent's submission that the s 74 notice issued on 6 November 2018 "specifies that a dispute is raised with respect to an injury sustained on 24 August 2016".
81. The reference to the date of injury occurring on 24 August 2016 is set out in the subsequent s 74 notice issued on 4 June 2019 declining liability in respect of the claim for lump sum compensation pursuant to s 66 of the 1987 Act.
82. In respect of claims for lump sum compensation, there can be various dates of injury (see *Collingridge v IAMA Agribusiness Pty Ltd*²⁴ for discussion by Deputy President Roche as to deeming dates of injury in respect of lump sum compensation claims).
83. Ms Dahiya, in my view, supported by the opinions of Drs Salter and Smith, which I accept, can rely upon events or incidents in the course of employment after 24 August 2016 as causative of her psychological injury resulting in no capacity for work from 10 August 2017.
84. I find the psychological injury was caused by cumulative events or incidents in the course of employment with the respondent between 10 June 2016 and 10 August 2017.
85. I agree with the respondent's submission that Ms Dahiya did not suffer a new injury on 9 August 2017 but became incapacitated for work as a result of the cumulative effect of the various events and incidents in the course of employment during the period 10 June 2016 to 9 August 2017.
86. The evidence establishes the first date of incapacity as a result of injury was 10 June 2016, the date Ms Dahiya relies upon as the date of injury set out in the terms of referral to the Approved Medical Specialist for permanent impairment assessment.
87. I find that the first date of incapacity as a result of the psychological injury was 10 June 2016, and that Ms Dahiya had no capacity for work from 24 August 2016 to 23 November 2016 (the first entitlement period), entitling her to weekly payments pursuant to s 36 of the 1987 Act.
88. I find that Ms Dahiya had no capacity for work from 24 November 2016 to 31 January 2017, entitling her to weekly payments of compensation pursuant to s 37 of the 1987 Act.
89. I am unable to determine Ms Dahiya's entitlement to weekly payments and periods of no and some capacity for work from 1 February 2017 because of the state of the evidence.
90. I am unable to accept Ms Dahiya's submission that it would be a more convenient way to calculate her entitlement to weekly payments providing her with a monetary advantage when the evidence establishes incapacity, whether total or partial, since 24 August 2016 to date.
91. Ms Dahiya's application to amend the application to claim weekly payments of compensation from 27 December 2018 to 6 February 2020 is refused.
92. Ms Dahiya agrees the Commission does not have jurisdiction to award weekly payments of compensation beyond the end of the second entitlement period.
93. Weighing up the state of the evidence as presented by Ms Dahiya, I find she had no capacity for work as follows:
 - (a) 10 June 2016;
 - (b) 24 August 2016 to 31 January 2017, and
 - (c) 10 August 2017 to date.

²⁴ [2011] NSWCCPD 31

94. I am satisfied that Ms Dahiya either had no capacity for work or some capacity for work at all relevant times from 1 February 2017, but I am unable to determine the respective periods and calculate the rate of weekly payments of compensation because of the unsatisfactory state of the evidence.
95. I accept the respondent's submission that the first entitlement period commenced on 24 August 2016 and that the second entitlement period commenced on 24 November 2016, although the end of the second entitlement period may need to be adjusted because there is evidence of Ms Dahiya working full time for about a month during first term of 2017.²⁵ Also, the calculation of the rate of weekly payments may need to be adjusted before 21 April 2017 because Ms Dahiya said she worked three days per week from early March 2017.²⁶
96. The parties agree the pre-injury average weekly earnings is \$1,813.91.
97. I propose to make an interim award pursuant to s 108 of the 1998 Act that the respondent pay Ms Dahiya weekly payments of compensation for the first entitlement pursuant to s 36, and for the second entitlement period up to 31 January 2017 pursuant to s 37 of the 1987 Act with credit to be given to the respondent for payments already made.
98. I grant leave to the parties to file Consent Orders in respect of the rate of weekly payments of compensation pursuant to s 37 of the 1987 Act from 1 February 2017 to the end of the second entitlement period; and, in the absence of agreement, apply to the Registrar to list the matter for telephone conference with me.



²⁵ Applicant's statement – Application – p 5 at [35]

²⁶ supra – at [36]