

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 4537/20  
**Applicant:** Lina Nguyen  
**Respondent:** State of New South Wales (NSW Police Force)  
**Date of Determination:** 3 February 2021  
**Citation No:** [2021] NSWCC 35

The Commission determines:

1. The applicant's employment between 4 February 2020 and 5 July 2020 was the main contributing factor to an aggravation or exacerbation of a psychological condition pursuant to s 4(b)(ii) of the *Workers Compensation Act 1987* (the 1987 Act).
2. The applicant was, in the period between 29 February 2020 and 5 July 2020, partially incapacitated for work as a result of the compensable injury.

The Commission orders:

1. During the first entitlement period from 29 February 2020, award for the applicant for weekly compensation in accordance with s 36(2)(b) of the 1987 Act.
2. During the second entitlement period up until 5 July 2020, award for the applicant for weekly compensation in accordance with s 37(2)(b) of the 1987 Act.
3. Liberty to the parties to apply within 14 days in the event of a dispute with respect to the calculation of the entitlement to weekly compensation in accordance with ss 36(2)(b) and 37(2)(b) of the 1987 Act.
4. The respondent to pay the applicant's reasonably necessary medical and related treatment expenses, incurred during the period 29 February 2020 to 5 July 2020, upon production of accounts, receipts and/or valid Medicare notice of charge, pursuant to s 60 of the 1987 Act.

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

Rachel Homan  
**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 RACHEL HOMAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic  
Lucy Golic  
Acting Senior Dispute Services Officer  
**As delegate of the Registrar**



## STATEMENT OF REASONS

### BACKGROUND

1. Ms Lina Nguyen (the applicant) was employed by the State of New South Wales (NSW Police Force) (the respondent) as a Principal Executive Officer, based at Police Headquarters in Parramatta.
2. The applicant alleges that she sustained a psychological injury when, on 20 December 2019, she was sexually assaulted by a sworn police officer at a work social event to farewell a senior police officer. The applicant reported the assault to her employer and shortly thereafter was transferred to the CBD office from Parramatta and also removed from her pre-injury role.
3. An Incident Notification Form was completed on 30 December 2019 and, on 14 January 2020, the respondent's insurer issued a notice disputing the claim pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).
4. A further Incident Notification Form was completed on 20 January 2020 and a further notice disputing the claim was issued pursuant to s 78 of the 1998 Act on 28 January 2020.
5. Following an internal review, a third notice maintaining the decision to decline liability for the alleged injury was issued pursuant to ss 78 and 287A of the 1998 Act on 23 June 2020.
6. The present proceedings were commenced by an Application to Resolve a Dispute (ARD) lodged in the Commission on 14 August 2020. The applicant seeks weekly compensation from 1 February 2020 to 5 July 2020 and compensation pursuant to s 60 of the *Workers Compensation Act 1987* (the 1987 Act) for incurred medical and related treatment expenses.

### PROCEDURE BEFORE THE COMMISSION

7. The parties attended a conciliation conference and arbitration hearing conducted by telephone on 5 November 2020. On that occasion, an application was made by the applicant to amend the date of injury to a deemed date of 30 January 2020 and to describe an injury falling within s 4(b)(ii) of the 1987 Act. The application was opposed and, after hearing submissions, the application was refused pursuant to r 4.2(2) of the *Workers Compensation Commission Rules 2011* for reasons delivered orally and recorded.
8. The applicant elected to proceed with the unamended ARD, however, the arbitration hearing was not able to be completed within the allocated time and was adjourned to 2 December 2020. On that occasion, directions were made for the filing of additional evidence in relation to the claim for weekly benefits.
9. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

## **ISSUES FOR DETERMINATION**

10. The parties agree that the following issues remain in dispute:
- (a) whether the applicant sustained an injury pursuant to s 4 of the 1987 Act as alleged;
  - (b) whether employment with the respondent was a substantial contributing factor to the injury pursuant to s 9A of the 1987 Act;
  - (c) the extent and quantification of any incapacity resulting from the injury, and
  - (d) the entitlement to s 60 expenses.

## **EVIDENCE**

### **Documentary evidence**

11. The following documents were in evidence before the Commission and taken into account in making this determination:
- (a) ARD and attached documents;
  - (b) Reply and attached documents;
  - (c) documents attached to an Application to Admit Late Documents filed by the applicant on 8 December 2020, and
  - (d) documents attached to an Application to Admit Late Documents filed by the respondent on 16 December 2020.
12. Neither party applied to adduce oral evidence or cross-examine any witness.

### **Applicant's evidence**

13. The applicant's evidence is set out in a written statement made by her on 2 July 2020.
14. The applicant disclosed a previous psychological history. The applicant was diagnosed with depression in approximately January 2018, which she was managing with Lexapro 10 mg daily. The applicant said that since the sexual assault her medication had increased to 15 mg per day.
15. The applicant stated that as an employee of the respondent, she had a duty under s 211F of the *Police Act 1990* to report the assault on 20 December 2019.
16. The applicant said the sexual assault was a traumatic event and she felt humiliated and ashamed. The applicant had been approved annual leave until 14 January 2020. That was subsequently transferred to sick leave. The applicant remained on sick leave until 3 February 2020.
17. During January 2020, the applicant made enquiries with her boss and internal witness support officer with regard to action taken against the perpetrator. Neither of them could provide an update and the applicant found the uncertainty over the perpetrator's employment status caused her great concern. By 31 January 2020, the applicant knew that no action had been taken to suspend or remove the perpetrator from the workplace. The applicant was, however, keen to return to work to reclaim a sense of control, normalcy and routine in her life and career.

18. On 31 January 2020, the applicant received a phone call from her boss during which it was agreed that the applicant would return to her usual workplace in Parramatta on a different floor to the perpetrator. The applicant would not be working in her normal role as this was on the same floor as the perpetrator. There were 14 floors and over 1000 employees working in the workplace. The applicant would commence working one day per week. The applicant was happy with this arrangement but was tearful and emotional during the call. The applicant's boss called back later in the day and said that he had heard distress in her voice during the earlier telephone call and held serious concerns about her capacity to return to her usual workplace.
19. Despite the applicant expressing her willingness to return to Paramatta, the applicant's boss said he wanted the applicant to work from Woolloomooloo instead. The applicant's boss offered to pay for all tolls and parking. Ultimately, the applicant agreed to work from Woolloomooloo, mainly out of loyalty to her boss. The applicant felt she had no real choice in the matter. The applicant's boss had said that the perpetrator and witnesses would be in the original workplace and this could present a medical risk of injury or aggravation of her condition.
20. The applicant returned to work on 4 February 2020 in an undefined project role at Woolloomooloo. There was no timeframe on this arrangement and no date given as to when the applicant could return to her substantive role. The applicant said:

"The transfer and demotion has made me feel like I am the problem, and a risk and a burden for my boss to manage. I feel like I have been moved to preserve the perpetrator's working conditions and rights. I felt that the level of support provided to me by my employer, the NSW Police Force, is conditional upon whether my complaint can be made out to a very high criminal standard. In that regard, I have not felt that by taking steps to report the sexual assault, that I have been totally believed and that there remains doubt regarding my credibility."
21. The applicant said she felt that losing her role was a huge loss. The applicant had created her whole life around working in Parramatta where her parents lived. The applicant had been able to access the work gym and her orthodontist was located in Parramatta. Most of the applicant's professional support networks were in Parramatta.
22. The work the applicant was allocated involved reviewing template documents and redrafting documents. These tasks were not within the applicant's normal duties. It became apparent to the applicant that others in the Woolloomooloo office were injured in one way or another. There were employees on return to work plans or police that were not operational. The applicant said it felt like a "dumping ground".
23. On 26 February 2020, the applicant raised with her boss her concern that the workplace in Woolloomooloo was counter-productive to her recovery. The applicant described an employee who had trouble controlling his emotions and was swearing excessively after speaking with clients on the telephone. The applicant's boss said he would address the swearing but did not address the applicant's concerns about returning to her usual workplace.
24. During February 2020 the applicant heard a colleague next to her on the phone speaking to the perpetrator. This reminded the applicant that the perpetrator was still doing his normal job but no action had been taken against him. In contrast, the applicant's job had been taken from her and she felt like she had caused problems for her boss to manage.

25. On 11 March 2020, the applicant's boss said he would consider supporting the applicant's return to her usual workplace subject to an independent medical assessment. On 14 March 2020 the applicant's doctor recommended a trial return to one day a week at Parramatta from 23 March 2020. The applicant had been working two days and increased to three days per week on 23 March 2020. By this time, COVID-19 restrictions were being implemented and the applicant was directed to work from home.
26. On 29 May 2020, the applicant's boss informed her that she could return to her Parramatta workplace from 9 June 2020. However, on 4 June 2020, the applicant was told that there would be no work available for her at the Parramatta office until 1 July 2020. The DPP's legal advice which would confirm whether charges were to be laid was expected by 30 June 2020.
27. The applicant felt that her position was being worked around the perpetrator. The respondent was willing to shuffle the applicant around but not willing to remove the perpetrator. The applicant felt like she was in limbo.
28. On 11 June 2020, the applicant had a telephone conversation with her boss about her request for a review of the insurer's decision to refuse her workers compensation claim. The applicant's boss expressed disagreement with the claim and the applicant felt like this was a withdrawal of support at a time when she needed support. This aggravated the applicant's psychological injury and she went on sick leave between 15 June 2020 and 30 June 2020.
29. From 6 July 2020, the applicant had been selected to fill a temporary role as manager at the Woolloomooloo office for four weeks. Following that, the applicant would return to work at her Parramatta workplace on a different floor and in a different role.
30. On 14 July 2020, the applicant attended appointments with the police medical officer and police psychologist who prepared reports supporting the applicant's return to work at the Parramatta workplace.
31. On 27 July 2020, the applicant was informed by her boss that the perpetrator had been removed from the Parramatta workplace. The applicant returned to the Parramatta workplace on 4 August 2020 in a different role.

### **Incident notification forms**

32. There are in evidence two incident notification forms.
33. The first form was completed by the employer on 30 December 2019. According to the description of the incident, the applicant had attended the Commercial Hotel at approximately 5pm on Friday, 20 December 2019. A number of the respondent's employees were present drinking prior to the Christmas break. The applicant celebrated with members of the robbery squad and left the hotel at approximately 8:45pm. The following morning at 10:30am, the applicant contacted the respondent made a number of allegations which were now the subject of an investigation by the professional standards command. The applicant was said to be unfit for work and required "psychological therapy/psychologist referral".
34. The second incident notification form was completed by the applicant on 20 January 2020 after the first s 78 notice was issued.
35. In the description of the incident, the applicant described her obligation to report knowledge of employee misconduct. The applicant stated that on 20 December 2019 she was the victim of a sexual assault by a police officer whom she knew through work. On 21 December 2019, the applicant reported the sexual assault to senior police officers who informed the applicant's boss. Later that day, two detectives from the professional standards command came to the applicant's home to interview the applicant. Two items of clothing were taken for

forensic analysis. The applicant provided statements to police at Gosford Police Station on 22 and 23 December 2019. The investigation was ongoing and the applicant continued to assist detectives.

36. The applicant stated that she suffered a psychological injury including trauma by the sexual assault, reporting the sexual assault, the ongoing investigation and possible criminal proceedings. As far as the applicant was aware the perpetrator remained in the workplace. Investigators were in the process of interviewing witnesses the majority of whom were employees of the respondent who worked on the same floor as the applicant.
37. The applicant had undergone intrusive intimate forensic procedures and was doing everything she possibly could to assist the investigation as well as taking proactive steps towards her recovery and return to work. The applicant was working with her general practitioner and psychologist on a return to work plan.

### **Evidence from treating practitioners**

38. The clinical records of the MC Family Medical Practice are in evidence and include an entry on 30 December 2019 recorded by general practitioner, Dr Samantha Lander as follows:

“Presents to open a workcover case.

Sexual assault: 20/12/2019. At Commercial Hotel in Parramatta - very close to workplace: NSW Police Headquarters attending drinks for a farewell. About 9pm Sexually assaulted by police officer known to Lina at work. Digital penetration without consent. Security guard then asked her to leave without any explanation. Left with perpetrator. Had been drinking. Remembers being confused about why asked to leave. Then was raped in a local park by the perpetrator. Immediately after went back to her car and slept there for a few hours before driving home.

Next morning attended Gosford Hospital for appropriate sexual assault examination. Referred to sexual assault counselling service. Reported to police - investigation commencing.

Initially felt she would go back to working full time. Now feeling very uncertain about this. Very anxious at the prospect of returning to work - seeing colleagues who witnessed the event etc. Currently feels numb. Has previously suffered depression. Not previously or currently suicidal, but has previously had thoughts that she wouldn't mind if she wasn't here. Not current.

Would like to see a psychologist. Due back to work on 15/1/2020

Also currently going through separation with her husband of 17 years - over the last 2 months

Does have a past history of depression, and has seen a psychologist previously - would like to see someone with experience with sexual assault

Noted after consultation has a past history of ?bipolar disorder 2 and has previously seen a psychiatrist in 2018”

39. A WorkCover certificate issued by Dr Lander on the same date diagnosed a psychological trauma from the work-related incident occurring at a work-related function. The applicant was certified as having no current work capacity.

40. Dr Lander reviewed the applicant on 6 January 2020 and noted:

“Depressive symptoms

Was having 15-17 hours time in bed per day

Now 10-12 hours per day (between normal night sleep, sleeping in and napping in afternoon). Has insight she is doing this to escape/withdraw

appetite OK

Negative body image distortions, self-loathing, self-judgement about what she is eating. Has not had this before. Has insight it is to regain control over her body where it has been lost with the assault.

No suicidal ideation, can see it would be possible though.”

41. A WorkCover certificate was issued in similar terms to the previous certificate.

42. On 20 January 2020, Dr Lander recorded that the applicant had seen psychologist, Ivette Moutzouris twice. The applicant had been devastated for a day when told her workers compensation claim had been denied. The applicant had an appointment to see psychiatrist, Dinah Bennett and was seeing a counsellor from the sexual assault service weekly.

43. Dr Lander issued a WorkCover certificate on 20 January 2020 which described injury related to work in the following terms:

“Has been a victim of sexual assault by a police officer known to her from work. Has reported the offence, resulting in an internal police investigation. Trauma from assaults (20/12/2019) and the ongoing investigation (from 21/12/2019) and possible criminal proceedings. Prior to incident, working on the same floor as the perpetrator. Injury exacerbated while perpetrator remains in the workplace and there is a current internal investigation.”

44. On 1 February 2020, Dr Lander noted the applicant had multiple stressors in the last week including her claim being denied, meeting with police and planning a return to work. Dr Lander recorded:

“Starting back at work on Tuesday; Will return to work 1 day week 1, 2 days week 2, then review. Will be working from the city rather than headquarters. Initially wanted to work from headquarters as previously to show she could, but felt relief on agreeing to work elsewhere. Has worked through and reached some acceptance around all of the above.”

45. On 11 February 2020, psychologist, Ms Ivette Moutzouris, reported to Dr Lander that the applicant had attended an initial appointment on 8 January 2020:

“During this consultation Lina discussed an incident that occurred with a work colleague late last year and how she has been coping since that time. Lina has been experiencing symptoms of anxiety/stress and low mood but has been slowly improving by proactively trying to focus on her goals and keeping a normal routine. Lina's goal for counselling has been to work through these issues so that she can return to work. She is also getting support from other professionals including her GP and Sexual Assault Counsellor and also family members.”

46. On 15 February 2020, Dr Lander noted that the applicant's dose of Lexapro 10 mg was changed from 1 Daily to 1.5 Daily.

47. Between February and June 2020, Dr Lander issued a number of ordinary medical certificates making recommendations for the applicant's return to work commencing one day per week from 4 February 2020 building to two days per week and from 23 March 2020 three days per week including a trial of one day per week at the applicant's usual workplace in Parramatta.

48. On 29 February 2020, Dr Lander noted an increase in motivation and energy with the increasing dose of medication. With regard to work, it was recorded:

“Moving towards 3 days at work. Feels in general ready to take on more work but at present feels this will be counterproductive in the current work environment. Current work environment non-ideal”

49. On 14 March 2020 Dr Lander recorded:

“Tuesday met with investigators. Much anxiety in lead up to this. Prepared for all eventualities. Informed that the officer involved will not be charged. Rollercoaster of emotions. Has since looked into options and does have ways forward to challenge this outcome.

Mental health:

Tuesday very confronting. Did not sleep Tuesday night. Sleep has slowly improved since then. Is back to where was sleep wise. Mood today 7/10. Can function again. After meeting tuesday: attempting to apply all strategies to manage this. Drawing a lot of strength from family. Started singing lessons a few weeks ago which is finding helpful, going to gym. Feeling improved as feels has a way forward. Phone counselling with EAP on Thursday No thoughts of self-harm.

Work:

Missed Wednesday at work. Confident can return to work next week. Working on a plan to get back to police headquarters. Is planning 2 days at current workplace, and 1 day per week at police headquarters. To start Monday week 23/3/2020. Boss has discussed a medium to longer term career move for Lina which would be good for her career, but also move her to a different workplace, and Lina feeling very positive about this.”

50. On 23 March 2020, Dr Lander recorded that the applicant had been asked to work from home which she was happy about.

51. On 6 April 2020, Dr Lander recorded:

“Spoke with Dr Bennett. Helpful as a check in and a check-up. Advised her on upcoming medical assessments. Being clear on the issues on how things have affected Lina. Also advised longer avoidance can raise stress levels. Also reinforced how badly has been treated through this. Has added to sadness. Doesn't feel fully mentally and psychologically supported in workplace. Not ready to increase beyond 3 days. They were about to close this matter. Only through Lina's self-advocacy and chasing further legal advice has it remained open.”

52. On 9 May 2020, Dr Lander recorded that the applicant was experiencing ups and downs but overall going well.

53. On 4 July 2020, Dr Lander issued a WorkCover certificate which described an injury as related to work as follows:

“The perpetrator is also an employee who works on the same floor as Lina. The employer's treatment of Lina after the sexual assault, particularly transferring her out of the workplace rather than the perpetrator, and the lack or consequence for the perpetrator, has detrimentally affected Lina's recovery.”

54. The applicant was to continue with psychological therapy and support with Dr Bennett, her psychologist and Dr Lander. The applicant was, however, certified as fit for pre-injury work from 6 July 2020.



## Dr Dinah Bennett

55. The applicant's treating psychiatrist, Dr Dinah Bennett prepared a report for the applicant's solicitors on 13 August 2020. Dr Bennett said she had reviewed the applicant on 7 February 2020 following a referral by her general practitioner, Dr Samantha Lander. The applicant had previously been seen in early 2018 for an assessment of mood symptoms which had responded well to treatment and there had been no further psychiatric review.
56. Dr Bennett stated that the applicant was experiencing symptoms of an acute stress disorder when reviewed in February 2020. The applicant expressed depressive symptoms following the sexual assault. The applicant had been in a very distressed state in the first 48 hours after the assault and was seen by the local sexual assault service. Dr Bennett stated:

"In the first month after the assault, she felt very emotionally numb. She felt low in mood with decreased enjoyment. She felt extremely distressed if she had to speak to the police or deal with any other issues that had come up regarding the assault. She had not been able to exercise as much as she usually does and had gained 1-2 kilograms in weight which had triggered feelings of negative body image and feeling that she is not in control of her body. Her appetite was decreased and she had sleep disturbance, waking at 1-2 am then tending to ruminate with negative thoughts.

At this stage she had some symptoms of PTSD, she was hypervigilant, and if triggered by a reminder of the assault was experiencing flashbacks. She had been seeing a psychologist to help her return to work and was also seeing a sexual assault counsellor."

57. Dr Bennett noted that the applicant had started the return to work process and was moved to Woolloomooloo instead of her usual workplace and Parramatta:

"Ms Nguyen was upset by this, she felt that Woolloomooloo was a 'dumping ground' for staff with issues. She was upset about being excluded from her own workplace while the perpetrator was able to continue in his usual role in his usual workplace. Although she felt her boss had been very supportive personally and had discussed the reason for her working in Woolloomooloo, she felt that she was being punished for reporting the crime and that her needs were being considered secondary to both the perpetrator's and the organisation's. She had agreed to work at Woolloomooloo on the understanding that it would be reviewed monthly. She was distressed by the lengthy process to return to her own workplace. She was not working in her usual role and was worried that this was a demotion. She worried that this would have a long-term detrimental effect on her career progression. However, in the last month at Woolloomooloo she was given a manager's role which she enjoyed. She felt she would have been able to return quicker if she had been able to return to her own workplace.

Ms Nguyen has continued to feel distressed that she has not been able to return to her workplace and this has exacerbated her psychiatric symptoms."

58. Dr Bennett diagnosed major depressive disorder with anxious distress (DSM 5) and acute stress reaction.
59. Dr Bennett was asked whether the respondent's conduct after the assault including the transfer and demotion was the main control meeting factor to the aggravation, acceleration, exacerbation or deterioration of the applicant's condition. Dr Bennett responded:

“The conduct of the employer has had a major impact on Ms Nguyen's recovery. This is now causing more distress and having a greater impact than the original traumatic incident. The assault was a traumatic event and Ms Nguyen was taking steps to facilitate her recovery. The conduct of the employer has been the main contributing factor to the exacerbation and delay in her recovery. She would have recovered faster if she had not been removed from her own workplace and if she could return to a safe environment by the perpetrator being removed from her workplace. The delay and continued independent assessments (despite the assessment recommending she return to her own workplace) has caused increased distress and exacerbated her psychological injury. She has felt that she is being punished for reporting the assault and is at risk of losing her career. She has felt unsupported by her employer (although her immediate boss has been supportive).”

60. Dr Bennett expressed the view that the applicant was fit to return to her employment although there would be a risk of incapacity if the applicant were required to work in the same location as the perpetrator.

### **Dr Ash Takyar**

61. The applicant relies on a medicolegal report prepared by psychiatrist, Dr Ash Takyar, dated 15 May 2020.

62. The letter of instruction to Dr Takyar dated 12 May 2020 from the applicant's legal representative provided the following background:

“Based on our client's instructions, we understand that the employer's treatment of our client after the assault, including the reporting of the assault and the investigation process, has aggravated our client's pre-existing psychological injury.”

63. Dr Takyar took a history of the applicant attending the Commercial Hotel on 20 December 2019 for the main purpose of farewelling a senior police officer. The applicant arrived at about 5pm whereas her police colleagues had arrived at lunchtime and had been drinking for a few hours. It was a hot evening and people were buying white wine for the applicant which she did not usually drink. The applicant had not eaten much and by 8:30pm was quite intoxicated.

64. The applicant was sitting on a bar stool when she was physically assaulted by a professional acquaintance. The applicant had a previous interaction with the same person in late October 2019 when there had been a fleeting kiss when the perpetrator walked the applicant back to her room following a function. The applicant did not consider the late October 2019 interaction traumatic. Dr Takyar reported:

“This was described as contrasting with the events of December 2019, which she described as intrusive, unexplained, non-consensual and she described feeling 'humiliation and shame'. She also reported that she recalled him asking how the sensation felt, and whether it felt good and she stated that she answered in a very literal manner because she felt disarmed by the alcohol and she described feeling shocked. She stated that she felt uncomfortable. She recalled that soon after she was approached by security to leave and she felt further humiliated.”

65. The applicant and the perpetrator left and walked to a park where a further sexual assault took place.

66. The next morning the applicant processed events and her boss was informed:

“She said that her boss had been highly supportive but the response of the police force had been unhelpful. She felt that the police force’s response had centred on protecting the male officer, that she stated her boss himself had been highly supportive. She recalled that after she informed the police, the police Professional Standards Command came to her house and support was given. She reported that there was a change in her mental state ‘immediately’.

Ms Nguyen added that she felt that the organisation was ‘not willing to discipline or remove him or change anything, so they removed me from the work location to minimise the risk of seeing each other’. She felt that she had been punished and ‘unsupported – felt certainly they had prioritised his needs over my own safety... where they put me was a dumping ground. I was excluded’. She stated that she felt that she would have returned to work quicker, had she returned to her usual location and had he been moved. She stated that she had no access to her usual professional supports at her substantive office while she was based at Woolloomooloo. She also stated that she felt upset that he had continued to work. She stated that while there was ‘certainly an injury due to the sexual assault’, she spoke of the lack of support of the police force, though she noted that her own boss had been supportive.”

67. Dr Takyar noted that the applicant had been diagnosed with depression or a psychiatric condition in around late 2017 when the applicant suffered a hypomanic reaction at the time an oral contraceptive pill had been withdrawn. The applicant saw a psychiatrist, Dr Dinah Bennett two to three times. The applicant was not having any psychotherapy at the time of the injury and had been stable and well on 10 mg of escitalopram. Prior to the assault, the applicant’s mood had been within the normal range, she was attending the gym, seeing friends and working full-time.

68. Dr Takyar diagnosed the applicant with a major depressive disorder with anxious distress under DSM-5 in the context of the following:

“Ms Nguyen described a change in her mental state in the context of both sexual assault occurring in December 2019 and a lack of organisational support from her employer after the male who had allegedly assaulted her was not subjected to any intervention or removed from the workplace, but she rather found herself removed from the workplace. She said that she was put in a position where she had no structure or meaningful work, no access to her usual supports in her substantive office and she described deterioration in her mental state for a period of six to eight weeks in an intense manner, but with continuing psychiatric symptoms at the current time.”

69. Dr Takyar was expressly asked “whether the employer’s conduct after the assault including the transfer and demotion was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the applicant’s condition”. Dr Takyar responded:

“The employer’s conduct after the assault including being transferred, subsequently feeling isolated and potential demotion appears to be a significant contributing factor along with the intrusive sexual assault, though it is difficult to determine whether it is the main contributing factor. Certainly, she reported a change in her mental state in relation to the sexual assault. It was clear that she also described feeling a sense of humiliation, lack of support, isolation and exclusion as a result of the transfer and she reported that the work she was moved into in her new position was less structured and meaningful. She reported that she felt that she would have been able to return to work quicker had she been able to return to her normal environment in a safe manner

without any risk of exposure to the male perpetrator. It is my view that the conduct of the employer after the assault (not including her boss, whom she stated was supportive) is an equal main contributing factor to the new psychological condition. If her condition is considered to have commenced in the context of the sexual assault, then the main contributing factor to the aggravation of that psychiatric condition would be considered to be the employer's conduct and lack of support."

70. Dr Takyar gave the opinion that the applicant had capacity to continue her current work but would not be able to return to work in a position to put her within proximity of the male perpetrator.

### **Correspondence from the applicant's legal representatives**

71. A letter from the applicant's legal representative to the insurer dated 10 June 2020 which sought review of the s 78 notices described the applicant's circumstances as follows:

"The worker was sexually assaulted by a colleague on 20 December 2019. As an employee of the NSW Police, the worker was obligated to report the sexual assault and had to participate in a lengthy investigation process.

No action was taken against the accused by the employer while the matter was investigated. He continued to work in his usual role at his usual workplace. However, our client was transferred to the CBD office from Parramatta and removed from her pre-injury role. She was essentially demoted after reporting the assault.

The treatment of the worker by the employer after reporting the assault including the transfer and demotion has aggravated our client's pre-existing psychological injury."

### **Applicant's submissions**

72. The applicant referred to the report of Dr Bennett dated 13 August 2020 and submitted that it revealed that the applicant suffered depressive symptoms following the sexual assault but those depressive symptoms were exacerbated and made worse in the period of incapacity from 1 February 2020 as a result of the lack of support by her employer. This was said to constitute an injury meeting the definition in s 4(b)(ii) of the 1987 Act.
73. The applicant did not resile from the fact that she experienced symptoms following the assault. The nub of her case, however, was that as part of the return to work process the applicant was moved to Woolloomooloo and she felt this was a dumping ground. The applicant was excluded from her own workplace while the perpetrator was able to continue in his usual role. The applicant felt she was being punished for reporting the crime and her needs were considered secondary to those of the perpetrator and the organisation. The applicant submitted that her incapacity between February and July 2020 was the result of an exacerbation of the original condition caused by the assault.
74. The applicant noted that Dr Bennett had given the opinion that the conduct of the employer was the main contributing factor to the exacerbation and delay in her recovery. The applicant would have recovered faster had she not been removed from her own workplace and been allowed to return to a safe environment by the perpetrator being removed from the workplace.
75. The applicant referred to the authority in *Murray v Shillingsworth*<sup>1</sup> and submitted that employment need only be the main contributing factor to the aggravation of her condition.

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<sup>1</sup> [2006] NSWCA 367.

76. The applicant referred to the report of Dr Takyar and her solicitor's letter of instruction to Dr Takyar. Dr Takyar was asked for an opinion as to whether the employer's conduct after the assault including the transfer and demotion, was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the applicant's condition (not the primary psychological injury or condition as a whole).
77. Dr Takyar provided a response which indicated that if the condition commenced in the context of the assault then the employer's conduct and lack of support was the main contributing factor to the aggravation of that psychiatric condition.
78. The applicant referred to her written statement and noted that the assault involved the applicant's work colleague. The applicant felt compelled to report the assault to her employer in accordance with her obligations under the *Police Act*. The assault was traumatic and humiliating but the applicant had wanted to return to work. No timeframe was put on the applicant's transfer to Woolloomooloo.
79. Referring to the clinical notes from her general practitioner, the applicant conceded that she had accepted the transfer to Woolloomooloo but that did not mean she was happy about it. Although the applicant initially felt some relief, once she commenced at Woolloomooloo, the applicant realised what was happening.
80. The applicant noted that the incident notification form completed on 20 January 2020 confirmed that it had been her intention to return to work quite early on. The applicant had an impressive curriculum vitae but was transferred to a unit where employees who were not operational were placed. The applicant felt this was a dumping ground and perceived the transfer as a demotion.
81. The applicant submitted that her recovery was hampered and delayed and the impact of her psychological condition increased due to a lack of support from the respondent. The applicant submitted that an injury pursuant to s 4(b)(ii) occurred as a result of the respondent's failure to assist her to return to the substantive position which she held prior to the assault. The delays and uncertainty and the transfer to a position which the applicant perceived to be a dumping ground exacerbated the injury that had already been sustained.
82. The applicant referred to the letter of claim dated 10 June 2020 as stating the nature of the applicant's injury. Dr Takyar had a clear and detailed history, was appropriately qualified and addressed the correct questions in his report. The applicant submitted that the Commission would have no difficulty accepting Dr Takyar's opinion, which was consistent with the evidence given by Dr Bennett.
83. The applicant noted that no defence pursuant to s 11A(1) of the 1987 Act had been raised.
84. The applicant noted that she had been certified as fit to engage in pre-injury duties on 6 July 2020. The applicant submitted that the certificates reflected her own evidence as set out in her written statement.

### **Respondent's submissions**

85. The respondent submitted that the applicant's incapacity arose out of the assault which took place on 20 December 2019 which was not a work-related matter. Although the applicant said she did not rely on that incident, the respondent did. Everything that happened afterwards flowed from the assault.

86. The respondent submitted that the applicant was not at work on 20 December 2019. The applicant had commenced leave and her last working day was 18 December 2019. There was no encouragement from the applicant's employer to go to the work function at which the assault occurred. The respondent submitted that a full history of what had occurred was set out in the evidence from Dr Takyar. The respondent submitted that the assault did not occur in the course of, nor did it arise out of, employment.
87. The respondent submitted that the employer had no obligation to do anything to assist the applicant. The circumstances of the assault were a criminal matter and there was a stark contrast between the applicant's circumstances and the employer's obligations in relation to an employee injured whilst on duty.
88. The respondent submitted that the applicant had not been due to return to work from leave until 14 January 2020. Around that time the applicant commenced discussions with her boss regarding a return to work. It was the applicant's boss who did not think the applicant was coping and would not cope with a return to her usual workplace in Parramatta knowing that her assailant was working on the same floor at the same time. This was the same day on which the applicant's claim was initially declined.
89. The respondent submitted that the applicant was paid sick leave until 3 February 2020 and submitted that sick leave should be recredited in the event of an award in favour of the applicant. The respondent noted that there was no evidence that the applicant was paid a lesser rate when transferred to Woolloomooloo.
90. The respondent submitted that there was no obligation on the employer to place the applicant's rights above the rights of its other employees. The assailant was not charged and there was no obligation to remove him from the workplace. The applicant's boss had however, tried to protect the applicant from coming into contact with him.
91. The respondent noted that the applicant's evidence was that she did not have any problem with her boss's conduct. It was, however, her boss's actions that caused the applicant to be transferred to Woolloomooloo. The evidence suggested that the applicant's boss kept her up to speed and tried to act in her interests. He offered to pay the applicant's tolls and parking. The applicant was kept away from the Parramatta headquarters to avoid the risk of injury or aggravation by coming into contact with the assailant.
92. The respondent submitted that there was not a fair climate for the acceptance of Dr Takyar's opinion. The respondent submitted that Dr Takyar did not appear to appreciate that the initial injury was not compensable. The actions of the employer were temporary and were the only action which the employer could responsibly take.
93. The respondent submitted that the applicant had suffered an acute injury because of the sexual assault. The applicant was trying to mount claim in which the Commission was being asked to forget the sexual assault. The applicant's evidence appeared to be that the conduct of her employer but not the conduct of her boss was the main contributing factor to an injury. It was not clear what conduct the applicant relied upon.
94. The respondent submitted that Dr Takyar had a great deal of difficulty ascertaining what the main contributing factor to the applicant's condition was. The respondent submitted that it was not possible to have two equal main contributing factors. There must be one main contributing factor to satisfy s 4(b)(ii). There was no evidence as to what "the" main contributing factor to the applicant's condition was.
95. The respondent submitted that Dr Bennett's opinion was also not provided in a fair climate in so far as she did not appear to appreciate that the initial event was not a work injury. There was no explanation as to how the initial injury was exacerbated or aggravated.

96. The evidence suggested an increase in symptoms relating to the investigation into whether criminal charges would be laid. The respondent submitted that there was a distinction between the actions of the respondent in the conduct of the criminal investigation and the respondent's actions as the applicant's employer.
97. The respondent noted that the early WorkCover certificates in evidence related the injury to work by reference to trauma from the assaults on 20 December 2019 and the ongoing investigation and possible criminal proceedings from 21 December 2019.

### **Applicant's submissions in reply**

98. The applicant submitted that there was an injury in the nature of an aggravation of a disease consistently with the comments of the High Court in *Federal Broom Co Pty Ltd v Semlitch*<sup>2</sup>. That is, employment had contributed to a worsening of the symptoms, or to the outward manifestations of the applicant's illness even though there was no worsening in the underlying disorder in a medical sense.
99. The applicant submitted that consistently with *State Transport Authority v Chemler*<sup>3</sup>, it was her perception that she was demoted. No defence under s 11A(1) was available to the respondent. There was also no countervailing medical evidence as to the main contributing factor to the applicant's injury.
100. The applicant noted that in the WorkCover certificate dated 4 July 2020 the applicant's injury was said to be related to work due to the employer's treatment of the applicant after the sexual assault, particularly transferring her out of the workplace and the lack of consequence for the perpetrator, which had detrimentally affected the applicant's recovery.

## **FINDINGS AND REASONS**

### **Injury**

101. Section 9 of the 1987 Act provides that a worker who has received an 'injury' shall receive compensation from the worker's employer in accordance with the Act. The term 'injury' is defined in s 4 as it applies to this case as:

#### **"4 Definition of 'injury'**

In this Act:

#### **injury:**

- (a) means personal injury arising out of or in the course of employment,
- (b) includes a disease injury, which means:
  - (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and
  - (ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease, and

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<sup>2</sup> [1964] HCA 34; (1964) 110 CLR 626.

<sup>3</sup> (2007) 5 DDCR 286.

- (c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the *Workers' Compensation (Dust Diseases) Act 1942*, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined."

102. "Psychological injury" is further defined in s 11A(3) of the 1987 Act:

- "(3) A psychological injury is an injury (as defined in s 4) that is a psychological or psychiatric disorder. The term extends to include the physiological effect of such a disorder on the nervous system."

103. In *Attorney General's Department v K<sup>4</sup> (K) Roche DP* summarised the principles to be applied in determining causation in cases of psychological injury at [52]:

"The following conclusions can be drawn from the above authorities:

- (a) employers take their employees as they find them. There is an 'egg-shell psyche' principle which is the equivalent of the 'egg-shell skull' principle (Spigelman CJ in *Chemler* at [40]);
- (b) a perception of real events, which are not external events, can satisfy the test of injury arising out of or in the course of employment (Spigelman CJ in *Chemler* at [54]);
- (c) if events which actually occurred in the workplace were perceived as creating an offensive or hostile working environment, and a psychological injury followed, it is open to the Commission to conclude that causation is established (Basten JA in *Chemler* at [69]);
- (d) so long as the events within the workplace were real, rather than imaginary, it does not matter that they affected the worker's psyche because of a flawed perception of events because of a disordered mind (President Hall in *Sheridan*);
- (e) there is no requirement at law that the worker's perception of the events must have been one that passed some qualitative test based on an 'objective measure of reasonableness' (Von Doussa J in *Wiegand* at [31]), and
- (f) it is not necessary that the worker's reaction to the events must have been 'rational, reasonable and proportionate' before compensation can be recovered."

104. Further at [54]:

"The critical question is whether the event or events complained of occurred in the workplace. If they did occur in the workplace and the worker perceived them as creating an 'offensive or hostile working environment', and a psychological injury has resulted, it is open to find that causation is established. A worker's reaction to the events will always be subjective and will depend upon his or her personality and circumstances."

105. It is the applicant who bears the onus of establishing on the balance of probabilities that an injury falling within the definition in s 4 has occurred. One of the difficulties for the applicant in discharging her onus is the lack of clarity around the nature of the injury alleged and the causative events on which the applicant relies.

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<sup>4</sup> [2010] NSWCCPD 76.



106. The initial incident notification form identified the alleged sexual assaults occurring on 20 December 2019 as the only causative events of a psychological injury. The applicant's claim for compensation was denied on 14 January 2020 on the grounds that the injury did not arise out of or occur in the course of employment. The insurer also did not agree that employment was a substantial contributing factor to the injury as required by s 9A of the 1987 Act.
107. The second incident notification form identified a number of other circumstances as causative of the applicant's injury in addition to the alleged sexual assaults including, the ongoing investigation and possible criminal proceedings, the perpetrator remaining in the workplace, investigators interviewing witnesses who worked on the same floor as the applicant, and undergoing intrusive forensic procedures.
108. On 28 January 2020, the decision to dispute liability was maintained on the basis that the reporting of the assault and subsequent investigation related entirely to the incident on 20 December 2019, which was not considered to be related to employment.
109. In correspondence to the insurer seeking a review of the two s 78 notices on 10 June 2020, the applicant's legal representatives again referred to the alleged sexual assault on 20 December 2019 as well as the lengthy subsequent investigation. It was asserted that the applicant was obliged to report the incident as an employee of the respondent and reference was made to the accused remaining in his usual role in his usual workplace.
110. On this occasion, reference was first made to the applicant being transferred to the Woolloomooloo office and removed from her pre-injury role. The treatment of the worker after reporting the assault including the transfer and "demotion" was said to have aggravated the applicant's pre-existing psychological injury. The report of Dr Takyar dated 15 May 2020 was attached.
111. The dispute notice issued on 23 June 2020 maintained the initial disputes. In addition, the insurer did not agree that employment was the main contributing factor to an aggravation, acceleration, exacerbation or deterioration of a disease injury as required by s 4(b)(ii) of the 1987 Act. The insurer considered that the main contributing factor to the applicant's psychological condition was "the assault of 20 December 2019 and not any subsequent aggravation to that condition."
112. The causative events were set out in the description of injury in the ARD lodged in these proceedings as follows:
- "The worker sustained psychological injury when she was sexually assaulted by a colleague at a work function on 20 December 2019.
- The sexual assault involved non-consensual kissing and also penetration.
- The applicant reported the assault to her employer and shortly thereafter was transferred to the CBD office from Parramatta and also removed from her preinjury role, further exacerbating her psychological injury."
113. Three different types of injury and three different dates of injury were identified, namely:
- (a) A personal injury occurring between 20 December 2019 to 14 August 2020;
  - (b) A disease injury with a deemed date of 20 December 2019, and
  - (c) An aggravation, acceleration or exacerbation or deterioration of disease with a deemed date of 20 December 2019.

114. The lack of clarity around the nature of the injury and the causative events relied upon was identified at the initial teleconference. No application to amend the ARD or discontinue the proceedings was made at that point.
115. At the commencement of the arbitration hearing, the applicant sought to amend the description of injury to rely only on an aggravation, acceleration or exacerbation or deterioration of disease pursuant to s 4(b)(ii) with a deemed date of 30 January 2020. The applicant sought to rely only on an aggravation of a psychological condition due to the treatment of the applicant by the respondent upon her return to work.
116. The application to amend the ARD was opposed by the respondent on the basis that it would materially alter the nature of the injury on which the applicant sought to rely to one which had not been claimed nor disputed by the insurer. The respondent submitted that had the injury been articulated in this way previously it may have undertaken further investigation of events in the workplace following the return to work and would have considered whether a defence under s 11A(1) of the 1987 Act was available.
117. After hearing the parties' oral submissions, the application to amend the ARD was declined for reasons delivered orally and recorded. In short, I agreed that the proposed amendment involved a material alteration of the claim. The incident notification forms, the correspondence with the insurer dated 10 June 2020, the ARD form and the discussion at the initial teleconference all indicated that the applicant relied on a series of events, including the alleged sexual assault.
118. The applicant elected to proceed with the claim in its current form, however, her oral submissions clearly focussed on events following the return to work.
119. In *Trustees of the Roman Catholic Church for the Diocese of Parramatta v Barnes*<sup>5</sup> Roche DP commented:
- “Cases are determined on the evidence and arguments presented (*Banque Commerciale SA (in liq) v Akhil Holdings Ltd* [1990] HCA 11; 169 CLR 279 at 296–297), not on the pleadings or particulars, which are only a ‘means to an end’ (Isaacs and Rich JJ in *Gould v Mount Oxide Mines Ltd* [1916] HCA 81; 22 CLR 490 at 517 (applied in *CMA Corporation Ltd v SNL Group Ltd* [2012] NSWCA 138 at [14] and [15])). Thus, if the particulars did claim separately for each incident, and I am firmly of the view that they did not, then, having regard to the way the case was argued, that makes no difference to the result.”
120. Section 354 of the 1998 Act, provides that the Commission is not a court of strict pleading and the task of the Commission is to determine proceedings “with as little formality and technicality as the proper consideration of the matter permits”. The Commission is not bound by the rules of evidence but is required to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.
121. I am satisfied that the events relied on by the applicant in her submissions were identified to the respondent prior to the commencement of these proceedings. The respondent had the opportunity to respond to this material and in doing so has appeared to comprehend that the applicant was claiming, amongst other things, an aggravation of a psychological condition caused by the events around and following her return to work. That aspect of the claim was specifically disputed in the 23 June 2020 notice. The respondent was able to respond to the arguments presented at the arbitration hearing and did not raise any objection to the manner in which the arguments proceeded.

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<sup>5</sup> [2015] NSWCCPD 35.

122. The applicant did not, in her submissions, rely on an argument that the alleged sexual assault or the criminal investigations that followed caused a compensable psychological injury. The respondent has expressly argued that they did not. The applicant did concede that she experienced an onset of symptoms constituting a diagnosable psychological condition as a result of those events. What the applicant's submissions ask the Commission to determine, however, is whether there was an aggravation, acceleration, exacerbation or deterioration in the course of employment of that condition, to which employment was the main contributing factor.
123. The respondent has submitted that there was no aggravation, acceleration, exacerbation or deterioration in the course of employment for the purposes of s 4(b)(ii) of the 1987 Act. Rather, everything that followed flowed from the alleged assault. The respondent's submissions suggest that it is not possible to discern from the applicant's evidence or the medical evidence on which she relies, a discrete aggravation of the applicant's psychological condition to which employment is the main contributing factor due to the conflation of work and non-work related events and a lack of specificity as to the events relied upon.
124. I accept that there is a conflation of work and non-work related events in much of the evidence before me. The initial incident notification form appeared to rely solely on the alleged assaults although reference was made to an investigation by the professional standards command. WorkCover certificates issued by Dr Lander on 30 December 2019 and 6 January 2020, describe only an injury caused by "a work-related incident occurring at a work-related function". This is clearly a reference to the alleged assaults.
125. The second incident notification form referred to the ongoing investigation, including the applicant providing statements at Gosford Police Station, undergoing intrusive intimate forensic procedures and witnesses who worked on the same floor as the applicant being interviewed.
126. There is a lack of clarity in this document around whether the investigation was a criminal investigation or an internal investigation by the respondent as an employer or both. A WorkCover certificate issued by Dr Lander on 20 January 2020 suggests there was an internal police investigation and that the applicant's injury was exacerbated while the perpetrator remained in the workplace.
127. Importantly, at this point in time, the applicant remained off work having previously been approved annual leave until 14 January 2020. The applicant remained on sick leave until 3 February 2020. I am not satisfied that any exacerbation of the applicant's injury caused by the investigation and the perpetrator remaining in the workplace was at this point an exacerbation "in the course of employment".
128. Dr Lander's evidence suggests that the applicant was initially relieved to be working from Woolloomooloo rather than the Parramatta headquarters. The applicant's Lexapro dose was increased around this time and on 29 February 2020 Dr Lander recorded an increase in motivation and energy with the increasing dose of medication. The applicant felt capable of increasing her days at work but on this occasion expressed concern to Dr Lander that an increase in work would be counter-productive in her current work environment.
129. The applicant has described her perception of the work environment at Woolloomooloo in her written statements. The applicant said she felt as though she was moved to preserve the perpetrator's working conditions and rights. The applicant felt like a burden for her boss to manage and felt there were doubts regarding her credibility. The applicant no longer had access to her professional support networks and other supports which were in or near Parramatta. The applicant perceived the duties she was allocated to be below her normal role. The applicant said she perceived that she had been sent to a "dumping ground".

130. Concerns with regard to the applicant's work environment being counter-productive to her recovery were also, on the applicant's uncontradicted evidence, raised with her boss in late February 2020. The applicant described a particular employee at the Woolloomooloo workplace who had trouble controlling his emotions and was swearing excessively after speaking with clients on the telephone. The applicant also described sitting next to a colleague whilst he spoke to the perpetrator on the telephone during February 2020.
131. It is apparent from the ordinary medical certificates issued by Dr Lander that the applicant gradually increased her working days. On 1 February 2020, Dr Lander had recommended that the applicant return to work one day per week starting from 4 February 2020 increasing to two days per week starting from 10 February 2020. Dr Lander did not recommend that the applicant increase to three days per week until 23 March 2020, although this was recommended on the basis that it included a trial of one day per week at the applicant's Parramatta workplace. In April 2020, Dr Lander continued to recommend that the applicant work three days per week including a trial of one day per week in her usual workplace. On 30 May 2020, Dr Lander recommended that the applicant increase to four days per week with medical capacity to work from her usual Parramatta workplace.
132. The applicant has given evidence that she expressed a desire to return to her Parramatta workplace to her boss but this was delayed on several occasions. The applicant has described a further aggravation of her psychological injury following a conversation with her boss in which he expressed disagreement with her workers compensation claim, which the applicant perceived as a withdrawal of support.
133. The clinical records of Dr Lander present a mixed picture during this period. On 14 March 2020, Dr Lander recorded a deterioration in the applicant's condition after being informed that the officer involved in the alleged assault would not be charged. Although the applicant missed the following day at work, the applicant was confident that she could return to work the following week. The applicant was said to feel positive about a medium to longer term career plan which the applicant had discussed with her boss. On 23 March 2020, Dr Lander recorded that the applicant was feeling happy about being asked to work from home. On 6 April 2020, Dr Lander recorded a discussion with Dr Bennett in which she described the applicant not feeling fully mentally and psychologically supported in the workplace and not being ready to increase beyond three days. On 9 May 2020, Dr Lander recorded that the applicant was experiencing ups and downs but overall going well.
134. During this time, the applicant was also seeing her psychiatrist, Dr Bennett. In her report of 13 August 2020, Dr Bennett described the applicant's psychological condition in the first month after the assault, during the period in which the applicant remained off work.
135. Dr Bennett has, however, also recorded consultations she had with the applicant with regard to her concerns following the return to work. Dr Bennett's evidence is consistent in this regard with the applicant's own evidence. Dr Bennett described the applicant feeling that Woolloomooloo was a dumping ground for staff with issues. The applicant was upset about being excluded from her own workplace. The applicant felt that her needs were being considered secondary. The delays in returning the applicant to her Parramatta workplace were causing distress. The applicant was worried that by not working in her usual role she had been demoted and this would have a long-term detrimental impact on her career progression. The applicant felt she would have been able to return to work quicker if she had been able to return to her own workplace.
136. Dr Bennett recorded that the applicant "continued to feel distressed that she has not been able to return to her workplace and this has exacerbated her psychiatric symptoms." The applicant submits and I accept that Dr Bennett has given a clear opinion that there has been an exacerbation for the purposes of s 4(b)(ii) caused by the removal of the applicant from her own workplace and the delay returning her to that workplace. Dr Bennett said the applicant

felt she was being punished and was at risk of losing her career. The applicant felt unsupported by her employer. In response to a direct question from the applicant's legal representative, Dr Bennett stated that the conduct of the employer had been the main contributing factor to the exacerbation and delay in the applicant's recovery.

137. Dr Takyar was asked the same question in a medicolegal report which was prepared on 12 May 2020. Like Dr Bennett, Dr Takyar devoted a considerable part of his report to the psychological symptoms caused by the events in December 2019. Dr Takyar did, however, also take a history of the applicant being removed from her work location and feeling punished and unsupported. The applicant felt she was put in a dumping ground and excluded. The applicant reported that she felt she would have returned to work quicker had she returned to her usual location. The applicant lacked access to her usual professional supports.
138. Dr Takyar expressed an opinion that described a change in the applicant's mental state in the context of both the alleged assault in December 2019 and the lack of organisational support from the employer in being removed from her workplace and placed in a position where she had no structure, meaningful work or access to her usual supports.
139. Dr Takyar said the applicant described feeling a sense of humiliation, lack of support, isolation and exclusion as a result of the transfer. Dr Takyar stated that the conduct of the employer after the assault was an "equal main contributing factor" to the applicant's psychological condition. Although I accept the respondent's submissions that Dr Takyar has in this regard appeared to apply an incorrect legal test, Dr Takyar's views were later clarified when he stated:

"If her condition is considered to have commenced in the context of the sexual assault, then the main contributing factor to the aggravation of that psychiatric condition would be considered to be the employer's conduct and lack of support."
140. I accept, reading Dr Takyar's report as a whole, that like Dr Bennett he has also expressed an opinion that events in the workplace after the applicant's return to work were the main contributing factor to an aggravation or exacerbation of the psychological condition sustained as a result of the alleged assaults in December 2019.
141. The opinions of Dr Bennett and Dr Takyar are consistent with the applicant's own evidence. Although Dr Lander's clinical records during this period presented more mixed picture of the applicant's psychological state, I accept that the clinical records of a general practitioner must be approached with caution on the basis that they are not prepared with subsequent legal proceedings in mind. I accept that Dr Bennett and Dr Takyar's opinions are broadly consistent with the opinion expressed by Dr Lander in her final WorkCover certificate dated 4 July 2020 in which it was stated that the respondent's treatment of the applicant after the sexual assault, particularly transferring her out of the workplace had detrimentally affected the applicant's recovery.
142. There is before me no contrary medical opinion from the respondent.
143. The respondent has submitted that its actions were reasonable and that it was required to balance the interests of both the applicant and its other employees. It was also submitted that there was no evidence that the applicant was in fact demoted or paid a lower rate of pay. I would be prepared to accept all of these submissions. They do not, however, lead me away from the conclusion that there was a work-related aggravation or exacerbation of the applicant's condition. No defence under s 11A(1) of the 1987 Act has been raised.

144. I am satisfied that there were real events which actually occurred in the workplace which were perceived by the applicant as creating an offensive or hostile working environment, and that an aggravation or exacerbation of the applicant's psychological condition followed. There is no requirement at law that the applicant's perception of the events must be reasonable rational or proportionate.
145. Considering the evidence and submissions as a whole, I am satisfied on the balance of probabilities that the applicant's employment between 4 February 2020 and 5 July 2020, was the main contributing factor to an aggravation or exacerbation of the psychological condition sustained by the applicant on 20 December 2019. I am satisfied that the applicant sustained an injury that satisfies the definition in s 4(b)(ii) of the 1987 Act.

### **Incapacity resulting from injury**

146. Section 33 of the 1987 Act provides:

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

147. A commonsense evaluation of the causal chain is required in order to determine whether incapacity for work has resulted from the accepted injury. In *Kooragang Cement Pty Ltd v Bates*<sup>6</sup> Kirby P said,

"The result of the cases is that each case where causation is in issue in a workers compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase 'results from', is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent death or injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is a commonsense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation."<sup>7</sup>

148. In *Calman v Commissioner of Police*<sup>8</sup> (*Calman*), the High Court found:

"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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<sup>6</sup> (1994) 35 NSWLR 452; 10 NSWCCR 796.

<sup>7</sup> (1994) 10 NSWCCR 796 at [810].

<sup>8</sup> [1999] HCA 60; (1999) 19 NSWCCR 40.

'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.'

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."<sup>9</sup>

149. *Calman* was referred to in *McCarthy v Department of Corrective Services*<sup>10</sup>, where Roche DP made observations concerning the appropriate test on causation for establishing an entitlement to weekly compensation:

"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.'"

150. The applicant in this case seeks weekly compensation from 1 February 2020 to 5 July 2020.
151. I am not satisfied based on the review of the evidence and findings above that the applicant was incapacitated for work as a result of the compensable injury between 1 and 3 February 2020. The evidence does not suggest that the applicant returned to work until 4 February 2020. Any incapacity prior that date would, in my opinion, result solely from a psychological condition which I have not found to be compensable.
152. It is clear that that psychological condition continued to cause incapacity for a period of time following the return to work. Dr Lander, Dr Bennett and Dr Takyar have all expressed opinions consistent with this view. The authorities above establish, however, that incapacity for work can result from more than one cause. The relevant question is whether incapacity has "resulted from" the compensable injury during the period of weekly benefits claimed.

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<sup>9</sup> at [39] – [40].

<sup>10</sup> [2010] NSWCCPD 27.

153. Notwithstanding the return to work on 4 February 2020 the first reference that I can discern to any possible incapacity relating to employment appears in the WorkCover certificate issued by Dr Lander on 29 February 2020. On this occasion, Dr Lander indicated that the current work environment was not ideal and an increase in days would be counter-productive.
154. Unfortunately, there are no WorkCover certificates from Dr Lander after this date until 4 July 2020 when the applicant was certified as fit for pre-injury duties from 6 July 2020. The ordinary medical certificates issued by Dr Lander do not give a clear indication of the causes of the applicant's incapacity at the time they were issued.
155. Dr Takyar and Dr Bennett have given opinions on the applicant's capacity at the time of their reports. In his report dated 15 May 2020, Dr Takyar gave the opinion that the applicant had capacity to continue her current work but would not be able to return to work in a position which put her within proximity of the male perpetrator. Dr Bennett gave a similar opinion in her report dated 13 August 2020.
156. Due to the conflation of the non-compensable psychological condition and the work injury found by me above, there is no clear opinion before me as to the extent of any incapacity resulting solely from the work injury.
157. Dr Lander, Dr Bennett and Dr Takyar have, however, consistently given the opinion that the work-related injury had delayed the applicant's recovery and slowed her return to work. I am satisfied, on the balance of probabilities, that the applicant was in the period between 29 February 2020 and 5 July 2020 partially incapacitated for work as a result of the compensable injury.
158. I am further satisfied that the applicant was in fact working to her full capacity in suitable employment during this period.
159. There is no evidence before me that the applicant has been paid weekly compensation to date. The materials relating to the applicant's earnings provided by both the applicant and the respondent indicate that 95% of the applicant's pre-injury average weekly earnings exceeded the maximum weekly compensation amount. The evidence also indicates that the applicant was in receipt of weekly earnings and paid sick and annual leave during the relevant periods. Payslips provided to the Commission after the arbitration hearing do not on their face appear to show any reduction in the applicant's actual gross earnings during the period of weekly compensation claimed.
160. During the first entitlement period, from 29 February 2020, the applicant will be entitled to an award of weekly compensation in accordance with s 36(2)(b). During the second entitlement period up until 5 July 2020 the applicant will be entitled to an award of weekly compensation in accordance with s 37(2)(b) of the 1987 Act.
161. The award of weekly compensation will be subject to the provisions in s 50 of the 1987 Act with respect to sick leave.
162. Neither party has provided a sufficiently detailed wages schedule identifying the amounts represented by the calculations in ss 36(2)(b) and 37(2)(b).
163. I will grant liberty to the parties to apply within 14 days in the event there is a dispute with respect to the calculation of the entitlement to weekly benefits in accordance with ss 36(2)(b) and 37(2)(b) based on my findings above.



## **Entitlement to s 60 expenses**

164. The applicant also seeks compensation pursuant to s 60 of the 1987 Act in respect of psychological treatment including consultations with Dr Lander and Dr Bennett. The schedule at page 248 of the ARD suggest that the applicant is seeking compensation for treatment which I do not accept would have been reasonably necessary as a result of the compensable injury given that some of the consultations pre-dated the return to work.
165. For the reasons given above, I find that the need for treatment on and from 29 February 2020 until 5 July 2020 would have resulted both from the non-compensable psychological condition and compensable work injury. In this period, I accept that the compensable injury would have materially contributed to the need for treatment by Dr Lander and Dr Bennett.
166. In these circumstances, it is appropriate that there be an order to the respondent to pay the applicant's reasonably necessary medical and related treatment expenses, incurred during the period 29 February 2020 and 5 July 2020, upon production of accounts, receipts and/or valid Medicare notice of charge.

## **SUMMARY**

167. The applicant's employment between 4 February 2020 and 5 July 2020 was the main contributing factor to an aggravation or exacerbation of the psychological condition sustained by the applicant on 20 December 2019 pursuant to s 4(b)(ii) of the 1987 Act.
168. The applicant was in the period between 29 February 2020 and 5 July 2020 partially incapacitated for work as a result of the compensable injury.
169. The applicant was in the period between 29 February 2020 and 5 July 2020 working to her full capacity in suitable employment.
170. During the first entitlement period, from 29 February 2020, there will be an award for the applicant for weekly compensation in accordance with s 36(2)(b) of the 1987 Act.
171. During the second entitlement period up until 5 July 2020, there will be an award for the applicant for weekly compensation in accordance with s 37(2)(b) of the 1987 Act.
172. Liberty to the parties to apply within 14 days in the event there is a dispute with respect to the calculation of the entitlement to weekly compensation in accordance with ss 36(2)(b) and 37(2)(b) of the 1987 Act.
173. The respondent to pay the applicant's reasonably necessary medical and related treatment expenses, incurred during the period 29 February 2020 to 5 July 2020, upon production of accounts, receipts and/or valid Medicare notice of charge, pursuant to s 60 of the 1987 Act.