WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **5880/19**
Applicant: **Jack Elvin Craigie**
Respondent: **Faircloth & Reynolds Pty Ltd**
Date of Determination: **11 February 2020**
Citation: **[2020] NSWWCC 40**

The Commission determines:

1. The applicant suffers from a secondary psychological injury which arose as a consequence of, or secondary to, the injury to his cervical spine deemed to have occurred on 9 September 2014.

2. The applicant has had no current work capacity since 14 August 2019 and is likely to continue indefinitely to have no current capacity.

3. The applicant is not prevented from recovering compensation because of his failure to attend on Dr G Vickery for examination.

4. The respondent is to pay the applicant pursuant to s 38 of the *Workers Compensation Act 1987* $880.30 per week from 14 August 2019 to 30 September 2019 and $885.70 per week to date and continuing.

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

Brett Batchelor
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 BRETT BATCHELOR, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Jack Elvin Craigie (the applicant/Mr Craigie) commenced work with Faircloth & Reynolds Pty Ltd (the respondent) in mid - 2007 as a factory hand /labourer. His job was to weld pins within ductwork as well as insulating them. This involved much bending and stretching inside the ductwork and heavy lifting onto and off the workbench.

2. Mr Craigie suffered an injury to his neck arising out of or in the course of his employment with the respondent, deemed to have occurred on 9 September 2014. The respondent does not dispute this injury. He also claims that he suffered secondary anxiety and depression as a consequence of the injury to his neck.

3. The applicant brought two earlier proceedings in the Commission against the respondent in respect of his employment, numbered 4729/16 and 2197/19. Matter number 4729/19 was resolved on 19 December 2016 with the issue of the following Certificate of Determination – Consent Orders (the 2016 Consent Orders):

> "**Consent Orders**
>
> 1. Award for the respondent in respect of any alleged primary psychological injury the applicant claims to have suffered as a result of employment with the respondent.
>
> 2. Award for the respondent in respect of any alleged lumbar spine injury the applicant claims to have suffered as a result of employment with the respondent, whether as a result of a specific incident or alternatively due to the nature and conditions of employment.
>
> 3. The claim is otherwise discontinued."

4. Notations to those Consent Orders provided for:

   (a) agreement by the respondent on a voluntary and without admission of liability basis to pay:

      (i) weekly compensation of at the rate of $850 per week from 20 July 2015 to 5 September 2016, agreed to total $50,000, and

      (ii) reasonably necessary medical and related treatment expenses pursuant to s 60 of the *Workers Compensation Act 1987* (the 1987 Act) up to a maximum of $2,000, upon production of accounts, receipts, or HIC Notice of Charge.

   (b) agreement and admission by the applicant that:

      (i) since 6 September 2016 he had suffered no incapacity for employment as a result of any injury allegedly sustained with the respondent (of which no injury was admitted), and suffered no incapacity for work ongoing, and

      (ii) he required no ongoing medical or related treatment expense as a result of any injury allegedly sustained with the respondent (of which none was admitted) from 19 December 2016 onward, and

(iii) upon payment of the amounts referred to in (i) and (ii) above, he would have received all entitlements to compensation to date as a result of alleged injury (of which none was admitted).

5. Matter number 2197/19 was resolved on 14/15 August 2019 with the issue of the following Amended Certificate of Determination – Consent Orders (the 2019 Consent Orders):

> "1. The respondent is to pay the medical expenses reasonably necessary as a result of injury up to $5,000 upon production of accounts, receipts and/or Medicare Notice of Charge.
>
> 2. The Application to Resolve a Dispute is discontinued without the requirement to file a Notice of Discontinuance.
>
> The following is not a Determination of the Commission, however the parties agree:
>
> A. Without admission of liability the respondent is to pay the applicant weekly compensation of $750 per week from 01.01.2017 to 11.02.2018 pursuant to s 37 of the 1987 Act.
>
> B. Upon payment of the compensation in the above Notations, the applicant admits that upon payment in accordance with notation A, he will have received all entitlements to weekly compensation under s 36 and s37 to date."

6. In the Application to Resolve a Dispute registered 12 November 2019 in the current proceedings (the Application), the applicant claimed weekly benefits pursuant to s 38 of the 1987 Act from 12 February 2018 to date and continuing. At the arbitration hearing, referred to hereunder, the commencement date for this claim was amended to 14 August 2019. A Reply to the Application dated 3 December 2019 was lodged with the Commission containing a request that the matter proceed to a teleconference to address the liability issues outlined in the respondent's notice issued on 4 October 2019 pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act)[1]. That notice was issued in response to a letter dated 26 August 2019 from the applicant's solicitor to the respondent's insurer, AAI Limited t/as GIO (GIO)[2], containing a claim for weekly benefits from 12 February 2018 to date and continuing, and "notionally" re-serving "all of the documents in our client's Application to Resolve a Dispute dated 6 May 2019." GIO was requested to make a work capacity decision within 21 days pursuant to s 38 and to provide a copy of the decision at its earliest convenience.

7. The solicitor for the respondent, in two letters dated 30 August 2019[3] and 3 September 2019[4] to the applicant's solicitor, made arrangements for the applicant to be examined by Dr Paul Phillips, psychologist, in Newcastle on 16 September 2019. In the second letter it was noted that the examination would take approximately five hours inclusive of breaks. The examination and assessment by Dr Phillips did take place and Dr Phillips' report dated 21 November 2019 is in evidence[5].

8. On the same date of the s 78 notice, 4 October 2019, the respondent's solicitor wrote to the applicant's solicitor advising of appointments arranged for the applicant:

> (a) to be further examined by Dr Phillips in Newcastle on 18 November 2019 (to finish testing);

[1] Application p 54, Reply p 44.
[2] Application p 50.
[3] Reply p 51
[4] Reply p 52.
[5] Reply p 68.

(b) to be examined by Dr Graham Vickery, psychiatrist, in Newcastle on 19 November 2019, and

(c) to be examined by Dr Anthony Smith, orthopaedic surgeon, in Coffs Harbour on 29 November 2019.

9. On 8 October 2019, the applicant's solicitor wrote to the respondent's solicitor[6] drawing attention to the s 78 notice, the attendance of the applicant on Dr Phillips on 16 September 2019 and the fact that Dr Phillips' report had not been served with the s 78 notice. The applicant's solicitor further advised that:

(a) in view of the fact that the respondent had been in possession of the applicant's medical evidence since 15 October 2018, and

(b) that the respondent had ample time to gather any further evidence it required prior to the issue of the s 78 notice,

he was instructed to object to the further medical appointments that had been arranged. He went on to say:

> "Any such appointments should have been made within the time provided by section 274 and 279 of the *1998 Act* and any reports should have been served with the Section 78 Notice in accordance with s73 of the *1998 Act* and Regulation 41 of the *2016 Regulation.*"

10. The applicant's solicitor also said in the letter of 8 October 2019:

> "The question of liability with respect to our client's neck injury and consequential secondary anxiety and depression condition was determined by the Consent Award which was issued by the Commission on 15 August 2019. Your client is estopped from further denying liability in relation to those injuries. Your client holds more than sufficient information to assess our client's capacity for work in the medical reports served. It has simply chosen to ignore that evidence."

11. On 12 November 2019, the respondent's solicitor wrote to the applicant's solicitor[7] advising that:

(a) in his view there was no proper basis for the applicant to refuse to attend the independent psychiatric and orthopaedic assessments arranged. The reason given was that the respondent was required to determine the claim within 21 days but noting that it was impossible to arrange those assessments within that timeframe given the applicant's residential location, and

(b) drawing attention to s 119 of the 1998 Act and the consequences of noncompliance with the section.

The appointment arrangement details for Dr Vickery and Dr Smith were confirmed with a request that confirmation of the applicant's attendance be given by midday on 13 November 2019 to avoid rescheduling of the appointments and cancellation fees.

12. The applicant attended the appointment with Dr Anthony Smith, but not the appointment with Dr Vickery. There is a report from Dr Smith dated 16 December 2019 in evidence, consequent upon the attendance of the applicant on the doctor on 29 November 2019 in Coffs Harbour.

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[6] Application p 58.
[7] Reply p 56.

13. The matter was the subject of a telephone conference on 10 December 2019 before Arbitrator Gerard Egan and stood over for a date for conciliation/arbitration in Coffs Harbour to be fixed in January 2020. Agreement as to the applicant's pre-injury average weekly earnings (PIAWE) of $1,066.97 was noted at the telephone conference.

ISSUES FOR DETERMINATION

14. The following issues remain in dispute:

    (a) the applicant's entitlement from 14 August 2019 to date and continuing to weekly benefits pursuant to s 38(2) of the 1987 Act. Resolution of that issue will involve a determination of whether the applicant is assessed as having no current work capacity and is likely to continue indefinitely to have no current work capacity;

    (b) whether the applicant suffers from a secondary psychological injury, that is, in consequence of the pain and disability from which the applicant has suffered as a result of the undisputed injury to the cervical spine, and

    (c) if, pursuant to s 119 of the 1998 Act, the applicant is prevented from recovering the weekly payments claimed by him because of his failure to attend on Dr Vickery for examination.

15. The parties agree that issues [14(a) and (c)] remain in dispute. As foreshadowed in [10] above, the applicant submits that the issue of whether the applicant suffers from a secondary psychological injury has been previously determined. The respondent does not concede this.

PROCEDURE BEFORE THE COMMISSION

16. The parties attended a conciliation conference and arbitration hearing in Coffs Harbour on 21 January 2020. 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.

17. Mr S Hickey of counsel appeared for the applicant briefed by Mr W Langler. The applicant was present. Mr S McMahon of counsel appeared for the respondent.

EVIDENCE

Documentary evidence

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

    (a) the Application and attached documents;

    (b) Reply and attached documents;

    (c) Application to Admit Late Documents dated 10 January 2020 lodged by the applicant with various Certificated of Capacity of Dr Zandor Miranda attached, and

    (d) Application to Admit Late Documents dated 15 January 2020 lodged by the respondent with report of Dr Anthony Smith dated 16 December 2019 attached.

Oral evidence

19. There was no application to adduce oral evidence or to cross-examine the applicant.

SUBMISSIONS

20. The submissions of the parties have been recorded and a transcript of the arbitration hearing on 21 January 2020 (T) is available. The submissions will not be repeated in full. In summary, they are as follows.

Applicant

21. The applicant relies on his evidence in four statements dated 30 July 2015[8], 10 June 2016[9], 30 April 2019[10] and 7 November 2019[11]. He emphasises the problems experienced in the workplace following his injury on 9 September 2014 and the three weeks he was obliged to take off work. He was then admitted to Coffs Harbour Hospital and certified for pre-injury duties on 10 February 2015. Mr Craigie refers to the problems he had on return to work with his neck and sore back, and he fact that he was getting stressed and angry, and more anxious. He refers to the racist taunts to which he was subject in the workplace, and his inability to put up with this. He refers to an incident in June 2015 when he was reported by another worker, Harrison Snow, for spitting into a factory bin to clear his throat of glass fibres that he perceived were coming from the ducts on which he was working. He cracked and started yelling at this worker and was put on report.

22. A further incident in July 2015 is referred to, after what the applicant describes as being constantly laughed at and derided by Harrison Snow. This culminated in an incident when Mr Craigie "snapped", told Mr Snow that they "should go outside and sort it out". He grabbed a knife, cut the cord of his radio, and walked out. He did not return to work.

23. Mr Craigie submitted a recurrence claim form to the insurer on 17 September 2015 in respect of injury to the neck and lower back, as well as stress. He says that he has not been able to return to any form on employment due to his physical and psychological injuries.

24. The applicant describes the ongoing problems he has with his physical and psychological symptoms. The applicant relies upon the treatment he was obliged to receive from neurosurgeon, Dr B Eftekhar, in 2014 in respect of his neck, the significant radiological findings in MRI scan of the cervical spine dated 20 September 2014 and subsequent investigations revealing severe degenerative disease in the cervical spine.

25. The applicant notes the treatment he received from Charles Lucas, psychologist, from August 2015 onwards. Mr Lucas diagnosed the applicant as suffering from a chronic adjustment disorder of a combined type which deepened into a secondary major depression. He also notes that he was treated by Dr Shaun D Clarke, anaesthetist and pain specialist, in his pain clinic from December 2016, and the treatment he received from that doctor for pain management.

26. The applicant recites that he suffers from constant pain in his neck every day and often suffers from headaches. He is depressed, suffers from sleeplessness and lethargy and ringing in his ears. He suffers from tingling in his arms and muscle spasms.

[8] Application p 29.
[9] Application p 10.
[10] Application p 13.
[11] Application p 20.

27. The applicant relies on the assessments of Professor Y A E Ghabrial (Dr Ghabrial) in 2016 and 2018. In 2016, Dr Ghabrial found that Mr Craigie remained restricted indefinitely from activities involving excessive use of upper limbs or any use of upper limbs above shoulder height as well as any activities involving lifting over 3kg - 4kg. In 2018 Dr Ghabrial assessed Mr Craigie as having sustained 18% WPI as a result of injury to the cervical spine.

28. The applicant refers in his statement dated 7 November 2019 of the stressful experience the five hour appointment with Dr Phillips proved to be. He says that he was physically and mentally exhausted by the end of the appointment. Because of this, he instructed his solicitor to dispute that he should attend a further appointment with Dr Phillips as well as appointments with Dr Vickery and Dr Smith.

29. The applicant relies on the opinion of Dr Jeff Bertucen, psychiatrist, in his reports dated 21 April 2017 (x2)[12], 15 August 2018 (x2)[13] and supplementary report dated 14 September 2018[14]. Dr Bertucen diagnoses the applicant as suffering from a chronic adjustment disorder with features of depressed mood and mixed emotions, and in his latest report says that the psychological injury must be regarded as secondary.

30. The applicant relies on the report of his current general practitioner, Dr Zandoor Miranda, undated[15] which summarises the treatment he has received since injuring his cervical spine on 9 September 2014, and on the certification by that doctor that he has no current capacity for any work.

31. The applicant submits that, having regard to:

    (a) the restrictions placed upon his employability by the injury to his cervical spine assessed by Dr Ghabrial;

    (b) by his secondary psychological injury assessed by Dr Bertucen;

    (c) the certification of work capacity by Dr Miranda, and

    (d) his age and work experience,

    he has had no capacity for any work for the period of the claim from 14 August 2019 to date.

32. The applicant relies on the decision of the Commission in *Wollongong Nursing Home Pty Ltd v Dewar*[16] (*Dewar*) which held that "suitable employment" must refer to a real job in employment for which the worker is suited.

33. In terms of s 38(2) of the 1987 Act, the applicant submits that if there is any question as to whether there has been some decision in relation to this section on the part of the insurer, it is implicit, or indeed expressed, that there has been a denial of liability and a decision made pursuant to s 38(2). That is, GIO does not accept that the applicant has total or partial incapacity for work resulting from the injury. This is apparent from the s 78 notice dated 4 October 2019. The applicant concedes that he can only succeed in his claim under s 38(2) or not at all.

34. The applicant relies on the Workers compensation guidelines[17] (the Guidelines) to submit that he was not properly notified that failure to attend examination by an independent medical examiner may lead to a suspension of weekly compensation and/or the right to recover compensation under the 1987 Act. He also submits that the (second) request request to

[12] Application pp 68 and 75.
[13] Application pp 77 and 83.
[14] Application p 86.
[15] Application p 143.
[16] [2014] NSWWCCPD 55.
[17] December 2018.

attend on Dr Vickery and Dr Smith was made on the 12 November 2019, on the day that proceedings were commenced in the Commission, and that it was "too late" at that stage to request a medical examination[18].

35. The applicant submits that the issue of primary psychological injury is not in issue in this case, having been the subject of an award in favour of the respondent in the 2016 Consent Orders. He submits that order [1] in the 2019 Consent Orders, read with the Direction dated 25 July 2019 made in those proceedings[19] created an estoppel preventing the respondent from denying that he had sustained a secondary psychological injury. It is submitted that this order for the payment of medical expenses related both to injury to the cervical spine and secondary psychological injury, and therefore was an admission by the respondent that the applicant had suffered a secondary psychological injury.

Respondent

36. The respondent submits that, notwithstanding there was an award in its favour on 19 December 2016 in respect of any alleged primary psychological injury the applicant claims to have suffered as a result of employment with it, it was a primary psychological injury that caused the applicant to stop work in July 2015, and not return since. The respondent notes that applicant alleges that he was subject to racist comments and derogatory remarks, and complaints about the poor standard of work coming out of the factory. There was a dispute with another employee, Harrison Snow, about the applicant spitting in a bin and a report to management about this. The applicant was spoken to by management, and the applicant felt enraged and "shaking with anger" as well as feeling belittled, humiliated and degraded against the background of racial slurs he was receiving, especially from Harrison Snow. He then goes off work and consults his general practitioner, who gave him time off work. The respondent submits that this sequence of events is supported by the history received by Dr Bertucen, and also by that received by the psychologist, Charles Lucas, who the applicant first consulted on 18 August 2015.

37. The respondent takes issue with the opinion of Dr Bertucen in his supplementary report dated 14 September 2018 produced in response to a question from the applicant's solicitor regarding the "primary" or "secondary" nature of the psychological injury as a consequence of the applicant's physical injury. The respondent submits that Dr Bertucen:

> "… steps away from his two prior reports and his opinion that the injury, that is the psychological injury, it was a primary injury as a result of workplace conflict and then he tries to stitch it up all to the physical complaints."[20]

38. This report of Dr Bertucen must be treated with caution, according to the respondent. Dr Bertucen's opinion in his earlier reports, when read with the reports of Charles Lucas, leads to a finding that the applicant's psychological condition arose as a result of workplace conflict.

39. The respondent relies on the assessment of Dr Phillips in his lengthy report dated 21 November 2019. The respondent submits that the methodology of testing the applicant referred to in the report produces an assessment that is accurate and reflective of the truth. The outcome of the testing reveals, on Dr Phillips' assessment, that the applicant does not have a diagnosable psychological condition, except one that the applicant is a person who is malingering. This finding of Dr Phillips casts doubt on the legitimacy of ongoing psychological complaints and symptoms reported by the applicant.

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[18] T p 78.25.
[19] Application p 48.
[20] T p 47.15 – 47.20.

40. On the question as to whether there has been an admission of secondary psychological injury as a result of the Direction dated 25 July 2019 and the 2019 Consent Orders, the respondent submits that Direction [3] of 25 July 2019 is simply a recording by the Arbitrator of what is the applicant's claim; there is no finding except as to the nature of the claim, but simply a delineation of the physical injury and the secondary psychological condition. Moving on to the 2019 Consent Orders, the respondent submits that Order [1] for the payment of medical expenses reasonably necessary "…as a result of injury" refers to the physical injury only. Further, Order [2] of 14/15 August 2019 "determines" that the Application to Resolve a Dispute "… is discontinued", which means that there is no actual finding of the Commission. For these reasons the respondent submits that the question of the secondary psychological injury is still a live issue between the parties. The respondent submits that there is an absence of any other record that might assist in determining this issue, for example payment of medical expenses in relation to psychological treatment.

41. On the question of incapacity, the respondent submits that Dr Bertucen records a history of the applicant being receptive to the idea of participating in part time work trials and finds that Mr Craigie is capable of participating in such trials but would struggle with more that 15 to 20 hours per week. Dr Bertucen's finding of incapability to return to work must be in relation to the earlier findings regarding maltreatment in the workplace. However that would not stop the applicant returning to work with another employer, given his work skills.

42. The applicant also notes that the assessment of Dr Ghabrial of the applicant's capacity for work must be looked at having regard to the fact that he found that the applicant had injured both his back and neck, whereas incapacity as a result of the neck injury is all that can be considered when assessing incapacity as a result of physical injury.

43. The respondent relies upon the opinion of Dr Smith in reports dated 24 December 2018 and 16 December 2019. In the earlier report the doctor finds that the applicant is as fit as any other man his age to work. Conceivable difficulty with overhead work that is repetitive and/or continuous or excessively heavy and repetitive bending or lifting is noted. This is against a background of Dr Smith's diagnosis of the applicant suffering from degenerative disease in his cervical and lumbar spine, unrelated to work. In the later report Dr Smith says that work could have been a factor in aggravation of the conditions in the cervical and lumbar spine. Again, Dr Smith assesses the applicant as being fir for work on a full-time basis in a job where he does not have to do repetitive manual work.

44. The respondent submits that the applicant would be fit for a wide range of jobs not involving heavy repetitive manual work, such as car park attendant, trolley collector, clerk, security guard and shop assistant in an industrial type setting where his experience in the field in which he was working would assist.

45. The respondent rejects the "global approach" which the applicant takes to his assessment of incapacity, which takes into account all of the matters complained of by him as being causally connected with his employment. When there is a breakdown of the applicant's complaints to those found to be work related, the applicant does not have total incapacity for work.

46. The respondent rejects the submission that apparent failure to comply with s 119 of the 1998 Act should not prevent the applicant from recovering the weekly compensation he claims. It submits that the refusal to attend, in particular, on Dr Vickery engages s 119. The respondent concedes that, while the length of the applicant's assessment by Dr Phillips on 16 September 2019 may be relevant on the question of the reasonableness of the request to attend a further appointment, the length of the assessment does not make the request to attend a further appointment unreasonable. The respondent submits that it is still entitled to have the applicant assessed.

Applicant in response

47. On the s 119 issue, the applicant relies on the unreasonableness of the request made to him on 12 November 2019 to attend on Dr Vickery and Dr Smith. In the event, he did attend on Dr Smith in Coffs Harbour, but not on Dr Vickery. The point of the submission, as I understand it, is that this is the day on which proceedings were commenced in the Commission, and that there is an "overlap", and at that stage it is too late to request a medical examination.

48. The applicant also relies upon Dr Bertucen's comment upon the report of the consultant psychiatrist Dr Melissa Barrett, dated 24 September 2015, in his report dated 21 April 2017. Whilst conceding that the report is not in evidence, the applicant notes that Dr Bertucen does express agreement with the opinion of Dr Barrett that the applicant's adjustment disorder with depressed mood arose in the context of chronic pain as well as the effects of restricted duties upon him in regards to his perception that he had lost control in the workplace and lost his standing in the work place, on the background of reports of name calling. That is a contemporaneous report of Dr Barrett that supports a finding of secondary psychological condition.

FINDINGS AND REASONS

49. It is convenient to determine the issue as to whether the applicant suffers from a secondary psychological injury before proceeding to the issue of whether the applicant has had no current work capacity since 14 August 2019 and is likely to continue to have no current work capacity (s 38(2) of the 1987 Act).

Is the respondent estopped from denying secondary psychological injury?

50. This issue is referred to in [10], [35] and [40] above.

51. The Direction dated 25 July 2019 in mater number 2197/19 is as follows:

> "1. The claim for lumps [sic] sum compensation is discontinued.
>
> 2. Conciliation Arbitration commenced in Coffs Harbour on 25 July 2019. Mr Hickey, instructed by Mr Langler appeared for the applicant, and Mr Perry, instructed by Mr Cavenagh appeared for the respondent. Mr Stokes, from the respondent was also present.
>
> 3. The applicant claims weekly compensation and medical expenses from a neck injury, with a secondary psychological component, on 9 September 2014."

52. The 2019 Consent Orders are set out at [5] above. Apart from these two documents, there is no other evidence to suggest that the respondent has made an admission that the applicant suffers from a secondary psychological condition (such as a list of payments in respect of such condition). The applicant submit that the word "injury" in Order [1] of 14/15 August 2019 refers to both the undisputed injury to the cervical spine and the secondary psychological condition. The respondent denies this, pointing to the delineation of "…the neck injury, with a secondary psychological component, on 9 September 2014" in Direction [3]. The respondent also points to the discontinuance of the proceedings on 14 August 2019 to confirm that there has been no determination.

53. If the applicant is found to have suffered a secondary psychological injury in consequence of the injury to the cervical spine, the date of injury would be 9 September 2014. Therefore I do not think that reference to the "secondary psychological component" in Direction [3] means that the respondent, in consenting to payment of medical expenses, has conceded liability for the secondary psychological injury. In my view the more logical reading of Order [1] in the 2019 Consent Orders, without more, is that the respondent has agreed to pay the medical expenses as a result of injury to the cervical spine on 9 September 2014.

54. In making this finding I appreciate that s 8 of the *Interpretation Act 1987* provides that words in the singular include the plural and vice versa.

55. I do not think that the discontinuance of proceedings pursuant to the so called Order [2] in the 2019 Consent Orders has any significance. An applicant in the Commission does not need an order or leave to discontinue all or part of any claim[21]. The respondent has clearly consented to payment of medical expenses up to $5,000 upon production of accounts, receipts and/or Medicare Notice of Charge. The discontinuance of proceedings noted subsequently to the order for payment of medical expenses does not change the obligation on the respondent to comply with Order [1] of the 2019 Consent Orders.

56. The respondent is not estopped from denying that the applicant suffers from a secondary psychological injury by the combined effect of the Direction dated 25 July 2019 and the 2019 Consent Orders.

Secondary psychological injury

57. The respondent, whilst acknowledging that it received an award in its favour on 19 December 2016 in respect of any primary psychological injury the applicant claims to have suffered as a result of employment with it, submits that its case is that the applicant clearly suffers from a primary psychological injury[22]. The respondent does not seek a finding of primary psychological injury, having previously obtained that, but a finding that the applicant does not suffer from a secondary psychological injury.

58. Section 65A(5) of the 1987 Act contains the following definitions of primary psychological injury, psychological injury and secondary psychological injury:

> "***primary psychological injury*** means a psychological injury that is not a secondary psychological injury.
>
> ***psychological injury*** includes psychiatric injury.
>
> ***secondary psychological injury*** means a psychological injury to the extent that it arises as a consequence of, or secondary to, a physical injury."

59. The respondent draws attention to the reports of Charles Lucas who treated the applicant from shortly after he ceased work in July 2015. There is a lengthy report from Mr Lucas to the applicant's solicitor dated 7 August 2018 in evidence[23]. Mr Lucas was supplied with extensive documentation, including lay evidence and medical reports, with the request for a report. Most of this material appears to be in evidence in the current proceedings, although I note for example that I have not been able to locate the two reports of Dr Ash Takyer in the evidence in the current proceedings. Nevertheless, it seems that Mr Lucas would have had a good overview of the applicant's case from the material supplied to him. The history recorded by him accords with the applicant's evidence.

[21] Rule 15.7 of the Workers Compensation Commission Rules 2011.
[22] T p 42.15 and p 55.10–55.20.
[23] Application p 106.

60. Mr Lucas treated Mr Craigie over the period from 18 August 2015 to 31 July 2018. During that time he had not been referred to any other specialist and his treatment consisted of trauma focussed cognitive behaviour therapy and stress management strategies, along with debrief and support. At the date of the report, Mr Lucas finds Mr Craigie only marginally improved, both from a physical and emotional viewpoint. He quotes extensively from his reports to Dr Lin Ye and Dr Zandoor Miranda.

61. In a report to Dr Zandoor Miranda on 25 May 2018 Mr Lucas says:

> *"All the indications arising from your history, presentation and objective assessments, support a diagnosis of complex posttraumatic stress disorder with a secondary major depression of moderate intensity. It is considered that your lengthy exposure to the bullying, intimidation and discrimination within the workplace was of sufficient intensity and duration to represent a significant threat to your physical and mental well-being, such that, it would meet the requirements for the development of your condition with respect to the cumulative impact of exposure. The discrete decompensation you graphically describe, which occurred in the workplace, represents the rapid disintegration of your defence system, which is still significant to this time in terms of the experience of intrusive images thoughts, flashbacks and nightmares; avoidance and emotional numbness including, detachments from family and friends; persistent negative thoughts and mood states and ideation at times; agitation. irritability, anger, exaggerated startle reflex and pronounced sleep difficulties."*

62. Later in the report, Mr Lucas says in response to a question as to whether the applicant's employment is a substantial contributing factor to the alleged injury:

> "All the information suggests that Mr Craigie's employment is indeed a substantial contributing factor to the development of his condition and, in fact, as I noted to Dr Zandor Miranda in my report of the 25/05/2018,
>
> *"The historical psychostressors underlying the development of the condition were substantively connected to your workplace and the nature of your work and included, the pain and movement restrictions associated with your neck condition, against a background of reported discrimination, bullying and intimidation based on your race and culture from fellow workers, who appeared to resent the authority that management had vested in you because of your experience and level of skill.*
>
> *The history indicates that as a consequence of these stressors and the cumulative impact over time, you were finding it increasingly more difficult to cope against a further background of the pressure to complete an ever increasing workload in a timely manner, which finally resulted in the serious and potentially catastrophic incident, after which, you left the workplace and succumbed to deep depression with ideation and strong anxiety which trapped you to your home to the extent that you would only leave to drive your wife to work, or to drive her to the shops, during which time you stayed in the car avoiding contact with others as much as possible."*

63. These opinions tend to indicate that the applicant's psychological condition was as a result of the discrimination, bullying and intimidation based on his race and culture to which the applicant was subject in the workplace, although pain and movement restrictions associated with the applicant's neck condition are also mentioned against a background of the reported bullying, discrimination and intimidation.

64. Dr Bertucen has supplied a number of reports. In his report dated 21 April 2017, after taking a history that is largely consistent with the applicant's evidence, says that it is a matter of speculation as to whether or not Mr Craigie would have experienced the neck injury if he had not been employed by the respondent, and also a matter of speculation as to whether he would have suffered the psychological injury if had been working on a more supportive (less racially aggressive) environment. He says that Mr Craigie appears to have experienced a secondary psychological injury as a result of his neck problem and may well have coped if not for the allegedly racially abusive atmosphere in the workplace, which appears to have finally breached his weakening psychological defences by he middle of 2015. Therefore Dr Bertucen expresses the opinion that the applicant would not be suffering a psychiatric condition if he had not worked for the respondent. On the basis of this reasoning the doctor finds the applicant's employment was a substantial contributing factor causing his psychological condition.

65. On the basis of this reasoning, Dr Bertrucen appears to diagnose a secondary psychological condition consequent upon the neck injury, and one with which he may well have coped if he had been working in a more supportive environment, and a psychiatric condition consequent upon the racially challenging atmosphere in which Mr Craigie worked for the respondent. The latter finding would support one of a primary psychiatric injury. This opinion is confirmed in a later report of Dr Bertrucen dated 15 August 2018 where he states:

> "Given the absence of prior psychiatric history (i.e. prior to commencing employment with Faircloth and Reynolds in 2007), I accept Mr Craigie's version of events that bullying and taunting at work have led to the psychological injury. There is nothing to suggest that Mr Craigie's current psychological condition represents an aggravation or exacerbation of a pre-existing psychiatric illness. The current psychological injury/condition has therefore been substantially caused by the events in the former workplace."

66. In a supplementary report dated 14 September 2018 Dr Bertucen was asked a specific question regarding the "primary" or "secondary" nature of the psychological injury in consequence of the physical injury. He said that he would be obliged to say that the psychological injury must be regarded as secondary, based on the following reasoning:

> "Mr Craigie reported a progressive worsening of neck and lower back pain, which led to various treatments and a gradual reduction of his work capacity. There was nothing in the original injury to the neck or back, which could be considered a 'primary' psychological injury (e.g., post traumatic stress disorder within the context of a severe motor vehicle accident, etc.). The psychological injury must therefore be regarded as secondary because he did not suffer depression immediately at the time of the injury, and the depressed mood was, in my opinion, a consequence of progressive workplace incapacity, perceived bullying and teasing from co-workers at his reduced capacity, and finally a series of racial taunts."

67. The situation described by Dr Bertucen is somewhat akin to that described by Deputy President Roche in *Cannon v The Healthy Snack People Pty Ltd*[24] *(Canon)* at [103]:

> "Therefore, if a worker on suitable duties, because of a work related physical injury, develops a psychological injury as a result of harassment while on those duties, the resulting psychological injury has not arisen as a consequence of, or secondary to, the physical injury, but has resulted from the harassment. Section 65A is intended to prevent the double recovery of lump sum compensation in circumstances where a worker has suffered a physical injury and, as a consequence of that physical injury (the pain and/or the discomfort and/or loss or impairments caused by that injury), has developed a secondary psychological condition. It does not prevent the recovery of lump sum compensation in circumstances where, as a result of a physical injury, a worker is placed on suitable duties and, as a result of an "extraneous or extrinsic" event, such as harassment or bullying while on those duties, develops a psychological injury."

68. The difficulty in gleaning from the reports of Dr Bertucen an answer as to whether the applicant's psychological condition is a primary or secondary psychological injury is that he is being asked to answer a legal question of causation. This is apparent from his answer in [66] above in his supplementary report dated 14 September 2018 to the specific question "… regarding the 'primary' or 'secondary' nature of the psychological injury as a consequence of his physical injury."[25] Dr Bertucen does not include in his report the "specific question". However his answer, in my view, misses the point (and this is in no way intended to be critical of him). He says that the psychological injury must be regarded as secondary because the applicant "… did not suffer depression immediately at the time of the injury, and the depressed mood was, in my opinion, a consequence of progressive workplace incapacity, perceived bullying and teasing from co-workers at his reduced capacity, and finally a series of racial taunts." If Mr Craigie suffered a psychological condition "… as a consequence of, or secondary to, a physical injury", that is in terms of the definition in s 65(5) of the 1987 Act, a secondary psychological injury.

69. The applicant does not resile from the proposition that it was the abuse to which he was subject which caused him to leave work in July 2015[26]. He however emphasises that, on the evidence of Dr Bertucen's initial opinion, supported by his comment on a report of Dr Melissa Barrett dated 24 September 2015 expressed in his later report dated 18 August 2018[27], Dr Bertucen goes the next step and agrees with Dr Barrett that he was suffering from:

> "an adjustment disorder with depressed mood arising in the context of chronic pain… as well as the effects of restricted duties upon him in regards to his perception that he had lost control in the workplace and lost his standing in the workplace, on the background of reports of racial name calling."

70. In the current proceedings the Commission is tasked with the finding as to whether or not the applicant is suffering from a secondary psychological injury. There has already been an award in favour of the respondent in respect of primary psychological injury, and the respondent does not seek a finding on that issue in the current proceedings. We are not apprised of the reason(s) for that earlier award. It may have been for example because it was perceived that the applicant was not able to succeed on his claim in respect of primary psychological injury because of the defence pleaded in the earlier proceedings number 4729/16 pursuant to s 11A(1) of the 1987 Act[28].

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[24] [2009] NSWWCCPD 32.
[25] Application p 86.
[26] T p 83.05-83.10.
[27] Application p 81.
[28] See s 74 notice dated 15 October 2015 p 35 Reply.

71. The respondent relies on the evidence of Dr Phillips to submit that care should be exercised in accepting the applicant's evidence.

72. Dr Phillips assessed the applicant on 16 September 2019 and produced his report dated 21 September 2019. The "Executive Summary" at the commencement of that report is as follows:

> "The administered testing across the MMPI-2 and MMPI-2-RF indicated Mr Craigie was malingering and proper clinical practice as outlined in the DSM-IV Handbook of Differential Diagnosis1, DSM-IV TR Handbook of Differential Diagnosis, and DSM-5 Handbook of Differential Diagnosis is such that a practitioner should not be prepared to accept that Mr Craigie has a valid diagnosis."[29]

73. The diagnostic conclusion of Dr Phillips based on triangulation of the psychometric testing is "Axis 1 i. Malingering". In his "Recommendations" at the end of the report he says that Mr Craigie's performance on current testing does not support that his symptom report can be taken at face value and that the correct label for the results of the current testing is malingering. Dr Phillips says that "Malingering is a 'billable medical code that can be used to indicate a diagnosis on a reimbursement claim' according to the ICD9." He goes on to say:

> "It is also noteworthy that Malingering is a diagnosis in DSM III, DSM-IV, DSM-IV-TR, DSM 5, ICD 9, ICD 10, and ICD 11. This means if detected by the tests to be present or absent this applies to both systems equally, i.e., it is irrelevant which system is used by the clinician with regards to malingering. It is also noted that ruling out malingering is the first step in the six steps of diagnosis from the handbooks of differential diagnosis. For further exploration see Appendix A. Therefore, the diagnosis of malingering is well within the domain of expertise of a mental health clinician when diagnosing mental illnesses and if following the handbooks of differential diagnosis is mandatory to rule out before proceeding to any other diagnosis." (authorities omitted)

74. "MMPI" refers to psychological testing known as "Minnesota Multiphasic Personality Inventory". The testing carried out on Mr Craigie lasted approximately five hours and he found it physically and emotionally exhausting. For this reason he disputed that he should go to any further appointments. It is not apparent from Dr Phillips' report as to why there was a request from the respondent to attend for further testing. However, the respondent does not now rely on the failure to attend for this further testing in alleging that the applicant is barred by s 119 of the 1998 Act from recovering compensation. It relies on the failure to attend on Dr Vickery, which issue will be addressed hereunder.

75. MMPI testing has been discussed in two recent cases in the NSW Court of Appeal and Supreme Court. These are *Brighten v Traino*[30] (*Brighten*) at [73]-[90] and *Burke v Metlife Insurance Limited*[31] (*Burke*) at [39]-[42].

76. In *Brighten,* the Court appears to have been mildly critical of psychometric testing, including MMPI 2, administered to the plaintiff by Dr Leonard Lee, psychiatrist. At [74] the Court noted that Dr Lee concluded on the basis of the MMPI 2 test that there was a high probability endorsed by the plaintiff that she endorsed items inaccurately by reporting symptoms and behaviours that are rarely seen even in psychiatric inpatients. Dr Lee had also administered other psychometric tests referred to in [73] of *Brighten*.

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[29] Reply p 68.
[30] [2019] NSWCA 168.
[31] [2019] NSWSC 177.

77. At [79], the Court said:

> "It is troubling that the scepticism that the trial judge adopted to every aspect of the plaintiff's case evaporated in the face of this seriously disturbing material. Dr Lee must have applied the 'faking good, faking bad' analysis, because he dismissed any report of distress absent 'objective' evidence of clinical criteria. Yet he did so, it appears, on the basis of neuropsychological testing the validity of which was impenetrable and unproven in court. There is no reason to suppose that this court, although it did not hear Dr Lee's oral evidence, is in a significantly weaker position than was the trial judge to assess the material set out above."

78. At [90], the Court found that having regard to other evidence in respect of the plaintiff's psychological condition, the plaintiff suffered from co-morbid depression and anxiety.

79. In *Burke* at [42], Rees J said of the MMPI 2 test (with reference to the evidence of the two specialists whose evidence was relied upon by the parties):

> "How these scores should be interpreted in Mr Burke's case was the subject of strong disagreement between Dr Hepner and Professor Mattick. I think perhaps Dr Hepner put it best, and I do not think that Professor Mattick would necessary [sic] disagree with her comment that:
>
> > I think it's a matter of considering all of the evidence. It's a matter of stepping through the proper interpretive process, examining the content of the items, and also looking at the broader context and the whole chain of events."

80. Notwithstanding the respondent's reliance on the evidence of Dr Phillips, it submits that the psychological condition from which the applicant suffers is a primary psychological injury, not a secondary psychological injury.

81. The applicant was treated by Dr Melissa Barrett, psychiatrist, in 2015 and by Charles Lucas, psychologist over the period from August 2015 to 31 July 2018. Both practitioners found that the applicant was suffering from a psychological injury, as did Dr Bertucen. I accept this evidence and so find.

82. I am not required to make findings in respect of primary psychological injury. Although the respondent submits that this is the injury from which suffers, it simply seeks a finding that Mr Craigie's injury is not a secondary psychological injury.

83. In my view there is sufficient evidence, evaluated on a commonsense basis in accordance with what the Court of Appeal said in *Kooragang Cement Pty Ltd v Bates*[32], to show that Mr Craigie's injury is a secondary psychological injury, that is, secondary to the physical injury he suffered to his cervical spine. Dr Barrett is of this opinion as is Mr Lucas and Dr Bertucen. There may be more than one cause of the psychological condition from which the applicant suffers. This is acknowledged by him. But there is sufficient evidence to show that he suffered from a psychological injury secondary to his physical injury.

Capacity

84. The respondent submits that both Dr Ghabrial and Dr Bertucen find that the applicant is fit for some form of part-time light work. It submits that he is fit for a range of suitable employment jobs referred to in [44] above.

[32] (1994) 35 NSWLR 452.

85. Suitable employment pursuant to the definition of that term in s 32A of the 1987 Act, means employment in work for which the worker is currently suited having regard to (relevantly):

(a) the nature of the worker's incapacity and details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker, and

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

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

regardless of:

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

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

(f) the nature of the worker's pre-injury employment, and

(g) the worker's place of residence.

86. Dr Smith, who last saw the applicant on behalf of the applicant on 29 November 2019[33] at the request of the respondent, says that he is fit for work on a full time basis in a job where he does not have to do heavy repetitive manual work. This is against a background of Dr Smith's finding that Mr Craigie has no injury but is getting symptoms from spinal osteoarthritis from time to time because he aggravated that from time to time with various activities on his part. "This will occur at work and outside work" according to Dr Smith.

87. Dr Ghabrial assessed the applicant as having sustained 18% WPI in respect of injury to the cervical spine, including 3% for activities of daily living. He advised Mr Craigie to avoid heavy lifting, excessive bending and excessive twisting as a result of his injuries. It seems to me that some of these activities would relate to the non-compensable injury to the lumbar spine, in respect of which Dr Ghabrial assessed 5% WPI on 6 April 2016. Nevertheless, as submitted by the applicant, he has a significant injury to his cervical spine.

88. The applicant believes he is totally incapacitated for work, noting that his past work experience and skills have been mostly in the air conditioning industry which involves physically demanding labour intensive work[34]. He says that he could not do this work any longer because of the restrictions and pain in his neck. He is 60 years old. He says that his anxiety and depression have also affected his ability to work with other people, and that he does not believe he could handle working in a workshop environment with other employees anymore because of his psychological problems. This last comment may not be relevant when assessing the applicant's fitness for work as that may have stemmed from the bullying and racial vilification he experienced whilst working for the respondent as opposed to psychological problems resulting from his neck in jury.

89. Dr Bertucen notes in his report dated 15 August 2018 that the applicant still feels psychologically incapable of returning to work on the open labour market due to persisting symptoms of low mood and demoralisation, anxiety and trepidation regarding further maltreatment in other work environments, reclusiveness and impaired attention, concentration and memory. Nonetheless the applicant related to Dr Bertucen that he was

[33] AALD dated 15 January 2020.
[34] Application p 21.

receptive to the idea of participating in part-time work trials (15 to 20 hours per week), which were to be arranged over the following few months by his rehab provider. I have not been taken to any evidence of such trials nor have I been able to locate such evidence in the material in evidence.

90. Dr Bertucen finds that the applicant is incapable of returning to work with his pre-injury employer, however technically he would be capable of similar work for another employer given his lengthy expertise. He finds a capability of participating in work trials but says that he would struggle with more than 15 to 20 hours per week.

91. Having regard to Dr Ghabrial's assessment of Mr Craigie's fitness for work as a result of his injury to his cervical spine, the applicant could not return to work similar to that in which he was employed by the respondent.

92. There are in evidence WorkCover certificates of capacity covering the period from 23 September 2014[35] onwards. The certificates issued by the applicant's current general practitioner, Dr Z Miranda, commence with one dated 3 October 2018[36] which contains a diagnosis of "Neck Pain/Cervical Spondylosis" and certifies no current capacity for any work from 1 July 2018 to 31 October 2018. The following certificate contains a diagnosis of "Chronic Neck Pain, Anxiety and Depression" and certifies no current capacity for any work from 1 November 2018 to 30 November 2018. Succeeding certificates up until the 31 December 2019[37] contain the same diagnosis and certification of work capacity.

93. In *Dewar,* Deputy President Roche examined from [54] onwards the concept of "suitable employment" in light of the 2012 amendments to the 1987 Act, which inserted s 32A to that Act. He said that care must be exercised in relying on the cases of *Lawarra Nominees Pty Ltd v Wilson*[38] and *Moran Health Care Services Pty Ltd v Woods*[39](*Woods*). The approach in those cases took into account the labour market in which the worker was working or might reasonably be expected to work. That is no longer relevant under s 32A. At [60] the Deputy President said:

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

(The reference to Mason P was to what his Honour said in *Woods*)

94. At [63], the Deputy President said that the task of identifying suitable employment requires the identification of whether there are any "real jobs" which, having regard to the matters in sub-s (a) of the definition, the worker is able to do, regardless of whether those jobs are available to the worker or are of a type or nature that is generally available in the employment market.

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[35] Application p 260.
[36] Application p 307.
[37] AALD dated 10 January 2020.
[38] [1996] NSWSC 584.
[39] [1997] NSWSC 147.

95. In my view, having regard to the applicant's incapacity and his age, education skills and work experience, there is no suitable employment for which he is currently suited. His work history appears in the report of Charles Lucas to the applicant's solicitor dated 7 August 2018, referred to above at [59]. The applicant grew up in Moree and attended Moree High School for a time before leaving early to work in the local abattoirs and labouring in the cotton fields. When the family moved to Coffs Harbour around 20 years ago, he managed to find work in the local building industry, leading up to his employment with the respondent where he remained for eight years. He was employed there as a factory hand cutting and securing insulation for air conditioning systems. Apart from any skills that the applicant obtained in that employment, he is unskilled and has had no training for employment other than perhaps the heavy abattoir work in which he engaged as a young man. He is essentially unsuited for any other work than unskilled or semi-skilled labouring positions, for which he has no physical capacity. I do not accept that work for which Mr Craigie is currently suited is represented by any of the occupations suggested by the respondent in submissions at [44] above.

96. I find that the applicant has no current work capacity and is likely to continue to have no current work capacity.

Section 119 of the 1998 Act

97. The respondent submits that the applicant refused to submit himself for an examination by Dr Vickery in Newcastle on 19 November 2019, and that therefore his right to recover compensation is suspended. There was discussion at the arbitration hearing as to guidelines covering the requirement of a worker to submit to medical examination by a medical practitioner. The applicant's solicitor provided me with "Workcover Guidelines on Independent Medical Examinations and Reports" published in the NSW Government Gazette number 30 on 12 March 2012. However as far as I can determine, the appropriate guidelines applicable to this case are those referred to in [34] above, that is, dated December 2018 (the Guidelines).

98. Section 119(4) provides that a worker must not be required to submit himself or herself for examination by a medical practitioner under that section otherwise than in accordance with the Workers Compensation Guidelines or at more frequent intervals than may be prescribed by the Workers Compensation Guidelines. Section 376 of the 1998 Act makes provision for the issue of Workers Compensation Guidelines.

99. Part 7 of the Guidelines deals with independent medical examinations and reports. Part 7.5 sets out requirements for notification to the worker. These include that the written advice to the worker must include:

- the likely duration of the examination
- advice that a failure to attend the examination or an obstruction of the examination may lead to a suspension of:
  - weekly compensation, and/or
  - the right to recover compensation under the 1987 Act.
- advice that the worker can request a copy of the report as well as documents that were provided to the IME
- advice that their nominated treating doctor will be provided with a copy of the examination report
- advice that the workers compensation legislation gives the worker or a nominee a right to a copy of any report relevant to a decision made by a referrer to dispute liability for or reduce compensation benefits

- what to do if the worker does not believe that the examination is reasonable.

100. The respondent's solicitor made two requests to the applicant's solicitor for the applicant to attend on Dr Vickery in Newcastle on 19 November 2019. These were on 4 October 2019 (with which a s 78 notice was served denying liability for the applicant's claim), and 12 November 2019. The notice dated 12 November 2019 referred to s 119 of the 1998 Act and asserted that there was no proper basis for the applicant to refuse to attend on Dr Vickery and Dr Smith. It was acknowledged in that letter that the respondent was required to determine the claim within 21 days, but that it was impossible to arrange psychiatric assessment and orthopaedic assessment within that timeframe given the applicant's residential location. However apart from that reference and acknowledgement, there was no reference to any of the other matters referred to [99] above in the correspondence of 4 October 2019 and 12 November 2019. Whilst it may be suggested that as the correspondence was directed to the applicant's solicitor reference to those matters was not necessary, the requirement in Part 7.5 of the Guidelines is mandatory.

101. It is also relevant in my view that the respondent had made a decision on liability when it issued the request on 4 October 2019.

102. For these reasons I do not find that the applicant is prevented from recovering compensation for his failure to submit himself to an examination by Dr Vickery on 19 November 2019.

Determination by the Commission

103. No issue is taken by the respondent with the jurisdiction of the Commission to determine the work capacity of the applicant. This issue is referred to in the applicant's submissions at [33] above. The repeal of s 43(3) of the 1987 Act, effective from 1 January 2019, invests the Commission with jurisdiction to adjudicate on a work capacity decision.

Award for weekly benefits

104. The applicant submits that if he is successful in his claim for weekly benefits, the appropriate award is 80 per cent of the last two rates in the last column of the "Applicant's Schedule of Indexed Pre-Injury Average Weekly Earnings" document headed "INDEXED PIAWE"[40]. There is no dispute as to PIAWE. The applicant is therefore entitled to an award in his favour of $880.30 per week from 14 August 2018 to 30 September 2019 and of $885.70 from 1 October 2019 to date and continuing pursuant to s 38 of the 1987 Act.

SUMMARY

105. The applicant suffers from a secondary psychological injury which arose as a consequence of, or secondary to, the injury to his cervical spine deemed to have occurred on 9 September 2014.

106. The applicant has had no current work capacity since 14 August 2019 and is likely to continue indefinitely to have no current capacity.

107. The applicant is not prevented from recovering compensation because of his failure to attend on Dr Vickery for examination.

108. The respondent is to pay the applicant pursuant to s 38 of the 1998 Act $880.30 per week from 14 August 2019 to 30 September 2019 and $885.70 per week from 1 October 2019 date and continuing.

[40] Application p 350 and T p 37.15.