WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **6386/19**
Applicant: **Carol Kennedy**
Respondent: **Woolworths Group Limited**
Date of Determination: **13 March 2020**
Citation: **[2020] NSWWCC 76**

The Commission determines:

1. The applicant's primary psychological injury was predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the respondent with respect to the provision of employment benefits and discipline pursuant to s 11A(1) of the 1987 Act.

2. The applicant had no current work capacity and remained in need of medical treatment as a result of her spinal injury on and from 13 July 2019.

The Commission orders:

1. Award for the respondent in respect of the claim for primary psychological injury.

2. The respondent to pay the applicant weekly benefits pursuant to s 37(1)(b) of the *Workers Compensation Act 1987* from 13 July 2019 to date and continuing based on a PIAWE figure of $857.46 as periodically adjusted or indexed.

3. The respondent to have credit for any payments already made in the period above.

4. The respondent to pay the applicant's reasonably necessary medical expenses arising as a result of her spinal injury, pursuant to s 60 of the *Workers Compensation Act 1987*, upon production of accounts, receipts and/or Medicare Notice of Charge.

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.

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Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Ms Carol Kennedy (the applicant) was employed by Woolworths Group Limited (the respondent) as a shop assistant at an off-license liquor store. In October 2017, the applicant made a claim for compensation in respect of a spinal injury caused by the nature and conditions of her employment, including repetitive heavy lifting. Liability for an injury, deemed to have occurred on 24 October 2017, was accepted. The applicant eventually returned to work on suitable duties.

2. On 28 September 2018, the applicant made a claim for compensation for a primary psychological injury resulting from bullying and harassment. Liability for the primary psychological injury was declined by dispute notice issued pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) on 16 April 2019.

3. On 29 April 2019, a dispute notice was issued in respect of the spinal injury declining liability to pay further weekly compensation and medical expenses on the basis that the effects of the injury had ceased.

4. The present proceedings were commenced by an Application to Resolve a Dispute (ARD) filed in the Commission on 4 December 2019. The applicant sought weekly benefits on an ongoing basis from 10 July 2018, medical expenses including the costs of and incidental to a L4/5 spinal fusion surgery and lump sum compensation under s 66 of the *Workers Compensation Act 1987* (the 1987 Act) in respect of permanent impairment resulting from the psychological injury.

PROCEDURE BEFORE THE COMMISSION

5. The parties appeared for teleconference on 10 January 2020 and conciliation conference and arbitration hearing on 10 February 2020. The applicant was represented by Ms Eraine Grotte of counsel, instructed by Mr John Peisley. The respondent was represented by Mr Joshua Beran of counsel, instructed by Mr David Hughes.

6. During the conciliation conference, leave was granted for amendments to be made to the ARD to:

    (a) discontinue to the claim for the proposed spinal surgery;

    (b) identify a deemed date of injury for the psychological injury of 26 July 2018; and

    (c) commence the claim for weekly benefits at 13 July 2019.

7. The parties agreed on a pre-injury average weekly earnings (PIAWE) figure of $857.46 and agreed the weekly benefits claim would commence in the second entitlement period. The parties also agreed that a general order for medical expenses would be appropriate in the event of favourable determinations for the applicant in respect of the injuries.

8. 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

9. The parties agree that the following issues remain in dispute:
    (a) whether the applicant's psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to discipline and provision of employment benefits pursuant to s 11A(1) of the 1987 Act;

    (b) extent and quantification of any incapacity resulting from the injuries;

    (c) entitlement to medical expenses as a result the injuries, and

    (d) entitlement to lump sum compensation in respect of the psychological injury.

EVIDENCE

Documentary evidence

10. 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 3 February 2020;

    (d) documents attached to an Application to Admit Late Documents filed by the applicant on 10 February 2020, and

    (e) list of payments filed by the respondent on 10 February 2020.

Oral evidence

11. Although Summonses to Attend were issued to two witnesses, no application was made to cross-examine them or adduce oral evidence at the arbitration hearing.

Applicant's evidence

12. The applicant's evidence is set out in written statements made on 17 October 2018 and 30 May 2019.

13. The applicant said that from early 2017 she had to do repetitive, heavy lifting at work and, in late October 2017, this resulted in her suffering severe lower back pain. The applicant initially underwent some physiotherapy then sought further treatment from her general practitioner. After her workers compensation claim was accepted, the applicant worked light duties and periodically had time off work. The applicant underwent treatment including nerve blocks and radiofrequency treatment.

14. The applicant said she experienced difficulty with her return to work coordinator, Ms Cheryl Cook. The applicant said Ms Cook bullied her and mismanaged her claim, forcing her back to work despite knowing that she was having difficulties. The applicant said that early on, Ms Cook had said to her that if she was not present at the applicant's appointments with her general practitioner she would not accept her medical certificates. The applicant felt this was unfair and unreasonable and said that Ms Cook would argue with her general practitioner in relation to what was put on the certificates. The applicant said there were occasions when

she felt her back was quite bad, such that she could not work, but Ms Cook would tell the doctor to write a certificate that she was fit for light duties. Often the applicant's doctor would yield and do as Ms Cook said.

15. On one occasion in November 2017, the applicant's doctor had agreed to visit her at home but on Ms Cook's insistence, the applicant had to drag herself out of bed and walk down the stairs of her unit block in pain to wait for Ms Cook to drive her to an appointment.

16. The applicant was to undergo nerve blocks at hospital under a general anaesthetic on 11 May 2018 and 18 May 2018. The applicant was scheduled to see her specialist on 24 May 2018 for review. The applicant requested two weeks off work from 11 May 2018 on the advice of her specialist. The applicant said that Ms Cook told her she was not having two weeks off and would pick her up and take her to the general practitioner on the Saturday after the nerve blocks. The applicant felt that Ms Cook was being rigid, unreasonable and uncaring. In the end, the general practitioner certified the applicant as unfit for those two weeks.

17. At some point, Ms Cook told the applicant that the longer she was on workers compensation, the more it affected her store's record and figures. It seemed to the applicant that the longer her back injury claim went on, the harsher she was being treated.

18. Toward the end of June 2018, it was clear that the nerve blocks had not helped and the applicant was advised to undergo radiofrequency treatment in August 2018. The applicant took her hospital admission forms to her supervisor, Mr Paul Craven, and told him that her specialist had said it could take up to eight weeks to recover. The applicant said that Mr Craven told her, "rubbish, you don't have that much time off for heart surgery". The applicant did not mean that she needed eight weeks off but that her specialist, Dr Manohar, had advised that it would take up to eight weeks to feel any benefit.

19. During June 2018, the applicant felt as though Mr Craven was treating her differently and was annoyed with her. When they worked together, every time the applicant spoke to him, he was at odds with everything she said and made negative remarks. The applicant described an example where Mr Craven told the applicant she was racist for mentioning that a stall vendor with whom the applicant had a difficult interaction was Asian. On another occasion, Mr Craven told the applicant she was sexist after she jokingly complained about her son-in-law.

20. The applicant began to feel down and stressed with work due to the attitude of Ms Cook and Mr Craven towards her as well as her constant back pain. The applicant began to break down in tears at work and at home. Mr Craven had seen the applicant crying at work numerous times but did not comfort the applicant and she could tell he didn't care.

21. On 2 July 2018, the applicant went to a doctor's appointment as she was feeling sick and vomiting. The applicant was found to have very high blood pressure. The applicant had not had high blood pressure previously and felt she was sick and vomiting with high blood pressure due to the stress of work. The applicant called Mr Craven to say she would not be coming into work as she was sick. Mr Craven suggested that it might have been a false positive and asked her to come to work after having her blood pressure checked in the morning. The next day, the applicant's blood pressure was still quite high. The applicant then had two weeks off work feeling very ill and vomiting, with her heart racing. The applicant was on sick leave and placed on high blood pressure medication.

22. Around this time, the applicant was on a return to work program with a 5 kg lifting capacity and restrictions of no bending, twisting or squatting. The respondent had imposed further restrictions preventing her from doing any lifting and doing no shelf restocking. The applicant was only able to serve customers at the counter but there was nothing to do when there were no customers in the shop.

23. When the applicant returned to work on 16 July 2018, she was called in to attend a performance conduct meeting with Ms Cook and Mr Craven. At the meeting, the applicant was told that she had been seen on CCTV bending down and "facing" bottles on the bottom shelf which was in contravention of her return to work capacity. The applicant was given a formal written warning. The applicant burst into tears as she thought she would be losing her job. The applicant accepted that she must have done what they said but was not shown the actual footage. The applicant said she would have bent down to do the work out of habit. The applicant felt the written warning was over-the-top and very harsh. The applicant was devastated and felt her mental health was deteriorating.

24. At the same meeting on 16 July 2018, there was a discussion about the applicant bringing in knitting to do when there were no customers in the store. The applicant said that whenever a customer came in she would put down the knitting and engage with them. The applicant recalled that Ms Cook laughed when she said that neither of them had told her she should not do knitting at work.

25. On 24 July 2018, the applicant was asked to attend a further conduct meeting the next day. The applicant said,

> "…'*ohh what have I done now?*' Paul then said '*do you think you have done anything wrong*' and I said '*no I don't think so, I haven't*'. He then said '*so sitting and doing knitting for 45 minutes is not doing anything wrong*'."

26. The applicant felt upset, stressed and angry and, on the evening of 24 July 2018, called People Services to report that she was having issues. The applicant was advised to call the area coach, Ms Elaine Marman. The applicant called Ms Marman the next day and was advised to send an email about her situation, which the applicant did. The applicant said she told Ms Marman that she felt bullied and harassed by Mr Craven and that he was trying to upset her to the point of quitting her job.

27. At the further conduct meeting on 25 July 2018, the applicant was supported by her daughter and a union representative named Michelle. The applicant was told that she had been seen on CCTV footage talking on her mobile on 16 July 2018 and not engaging with customers. The applicant was also caught knitting on the job for 45 minutes. The applicant said,

> "Following that I said to Paul '*I have 2 questions for you, are you going to continue watching me on CCTV*' to which he said yes.
>
> I then said second question '*I feel like you are trying to piss me off enough until I say I have had enough and you can have your job I'm done*' and when I said this I burst into tears. Paul did not respond to this at all and he did not say it was not the case.
>
> In the meeting Michelle said to Paul, '*hang on can I ask a question, Paul on the CCTV are you watching all of the staff at BWS or just Carol*'. Paul then replied '*no just Carol*'."

28. The applicant told Ms Cook and Mr Craven that she felt like Mr Craven was bullying and harassing her at work but they did not respond.

29. As result of the meeting, the applicant felt that Mr Craven was always watching her on CCTV, which made her feel quite uncomfortable and targeted. This felt like an invasion of privacy and it was upsetting to know that Mr Craven was watching her previous shift on CCTV the next morning. The applicant felt that Mr Craven was trying to catch her out on any little thing and was not watching anyone else.

30. The applicant recalled that she had spoken on the telephone to a former manager asking advice about the conduct meeting that she had had earlier on 16 July 2018. The applicant did not believe it was while customers were around or at the counter. The applicant did not believe there was any written policy on phone use at work. The general rule was only to use the phone out the back or out of the store, but this was not always possible when the applicant was working alone.

31. The applicant said that during the meeting Mr Craven had told her that he didn't want to sack her as there was too much work. Mr Craven said there were 17 things needed to sack someone in the applicant was already up to 12. Mr Craven at one point raised his voice and said how "pissed off" he was when he saw the applicant knitting. He said, "*I could have called you straight away and told you not to bother coming back to work*". This upset the applicant a lot.

32. The applicant was not given an outcome at the meeting on 25 July 2018. The applicant thought that she would be advised of the outcome, including whether or not she would be getting another warning. Sometime later, the applicant asked Mr Craven if they needed her to come back in to see what they had decided. Mr Craven said that it was "all sorted". The applicant said this made her feel relieved as she thought there would be no action taken against her. Later that evening, however, Mr Craven asked the applicant to attend a further meeting on 27 July 2018. The applicant felt devastated as she had thought it was all finished.

33. Later on, Ms Cook came in to see how the applicant was. The applicant asked Ms Cook why she could not have an outcome from the meeting that day instead of being forced to wait another two days. The applicant told Ms Cook that this was making her feel upset, and that she hated feeling that way and hated being there.

34. At 6.48 pm that day, Mr Craven called the applicant on her mobile phone at work to talk to her about something work-related. The applicant took the call. Later, the applicant wondered why he had not called her on the store phone since he had reprimanded her previously about using a mobile phone.

35. On 27 July 2018, the applicant contacted Ms Cook to say she would not be coming in due to stress. The applicant was told she would need to fill in new paperwork. The applicant also told Ms Cook that a colleague had told her that Mr Craven had told another colleague that he was out to get rid of her. Ms Cook later called that colleague who denied saying this.

36. The applicant attended her general practitioner on 30 July 2018 and spoke with an Employee Assistance Program counsellor on 31 July 2018.

37. On 2 August 2018, the applicant met with her specialist, Dr Manohar, who told her that she needed two weeks off after each radiofrequency procedure scheduled to take place later that month. The applicant attended an appointment with her general practitioner and Ms Cook to get a new certificate. When the applicant told her doctor that she needed four weeks off, Ms Cook said no because that was an estimated recovery time only. Ms Cook asked the doctor to write a certificate for one week only, which the doctor did.

38. When the applicant saw Dr Manohar at the hospital for the procedure, he confirmed that she definitely needed four weeks off and that her general practitioner needed to toughen up and write her a certificate for the three weeks after the first certificate. Eventually, the applicant's general practitioner wrote her a certificate for the period until 31 August 2018.

39. On 29 August 2018, the applicant's mother passed away.

40. On 30 August 2018, the applicant told Dr Manohar that she was still in quite a lot of pain. He supported her having another week off work. When the applicant told her general practitioner this at an appointment with Ms Cook later that day,

> "Cheryl then looked at me and my GP and said '*no hang on you can't have another week off on WorkCover because your mother passed away*'. I then said "*well no I'm not trying to have another week off work to rort WorkCover because my mother passed away, my specialist told me this morning that he supports me having another week off due to my back pain, because I'm still in considerable pain*"."

41. The applicant's doctor then said he would certify the applicant as fit for light duties for four hours per day. The applicant was later given one week of bereavement leave. The applicant felt this should have been paid as workers compensation. The applicant felt very upset and as though Ms Cook was being very controlling and manipulative at a sensitive time. The applicant's next general practitioner's appointment was scheduled for 6 September 2018, however, this was the day of the applicant's mother's funeral.

42. At the rescheduled appointment on 7 September 2018, the applicant's doctor said the applicant could return to work four hours per day. Ms Cook asked whether that could be extended as she had seen the applicant shopping at St Clair's Woolworths a couple of days before the funeral. The applicant said,

> "I was so upset when Cheryl said that, I was crying and I lost my temper and I responded to Cheryl by saying '*I've been shopping for a funeral are you for fucken real*' after which Cheryl just looked at me. Then as usual my doctor wrote a certificate as Cheryl wanted. (In regard to Cheryl seeing me shopping on 5 September 2018, it was at St Clair Woolworths when I ordered some sandwich platters for the wake after my mother's funeral which I picked up the next morning on Thursday 6 September 2018 before the funeral)."

43. Afterwards, the applicant spoke with Mr Craven to arrange another week off work as annual leave. During the conversation, Mr Craven spoke to the applicant in a rude tone of voice and said, "*to be fair to Cheryl I saw you shopping as well*".

44. The applicant attended a meeting on 14 September 2018 with People Services and Ms Marman to discuss the issues she was having at work. On 8 October 2018, the applicant received a letter from Ms Marman indicating that her claims of bullying and harassment were not substantiated.

45. The applicant went back to work on 16 September 2018. When Ms Cook asked the applicant how she was, she burst into tears. Ms Cook said the applicant should go home, but the applicant did not have much leave left. The applicant said,

> "I went home and I had the next week off feeling stressed and depressed from everything at work and after that I just thought I can't handle this anymore. I ended up speaking with a lawyer and get a backdated certificate for the weeks off I had off which should have been on workers compensation instead of Ms Cook having me use my leave entitlements."

46. The applicant later withdrew her consent to Ms Cook attending her doctor's appointments.

47. The applicant last attended work on 24 September 2018 as her doctor had given the applicant a certificate as fit for light duties at Ms Cook's request. During the shift, the applicant was in pain and feeling ill due to stress. The applicant has not returned to work since.

48. In her statement of 30 May 2019, the applicant provided responses to the evidence of Ms Cook and Mr Craven.

Ms Cook's evidence

49. Ms Cheryl Cook signed a written statement on 17 October 2018.

50. Ms Cook stated that following the departure of her former manager, she had noticed that the applicant displayed a negative attitude towards her store generally and at times seemed somewhat disgruntled. Ms Cook said the applicant made a claim in late 2017 for a back injury she alleged she suffered during her employment. Ms Cook became the applicant's return to work coordinator and she was accredited in this field.

51. Ms Cook denied forcing the applicant to get out of bed to attend a doctor's appointment. Ms Cook also denied saying that if she was not at an appointment she would not accept a medical certificate. Ms Cook recalled picking the applicant up for a doctor's appointment on one occasion as she could not drive.

52. Ms Cook denied being domineering and forceful at the applicant's appointments. Ms Cook said she behaved professionally and just conversed with the applicant and the doctor. The doctor had always evaluated the applicant's situation and made his own decision about her certification after examining her. Ms Cook denied telling the applicant's doctor what to write on certificates.

53. Ms Cook denied telling the applicant that she could not have two weeks off work after her nerve block procedures. Ms Cook denied telling the applicant that the longer she was on workers compensation the more affected her store. Ms Cook denied becoming annoyed with the applicant or giving the applicant any reason to have this perception.

54. Ms Cook said the decision to issue the applicant with a written warning was not taken lightly. The warning was issued because the applicant continually performed duties outside her certificate of capacity and ignored many verbal warnings. Ms Cook said she did not want the applicant to do anything which would worsen her back injury and the respondent had a duty of care to ensure her safety.

> "Essentially after numerous previous requests to Carol not to work outside of her capacity she failed to comply we had to issue her with an official written warning. We did not want to do this but had to try to compel her to work within her capacity for her own safety."

55. Ms Cook said that if the applicant had asked to see the CCTV footage she would have shown it to her.

56. With regard to the meeting on 25 July 2018, Ms Cook said,

> "I recall Paul did say yes he would continue checking her on the CCTV as he had reasonable doubt about Carol working safely in compliance with her certificates of capacity. I recall Paul actually had a copy of the BWS CCTV policy for employees which states monitoring of staff in these situations is permitted."

57. Ms Cook assumed the delay in giving the applicant the outcome of that meeting was because Mr Craven wished to consult People Services. Ms Cook was unaware of any gossip involving Mr Craven and the applicant.

58. Ms Cook said that at the consultation on 2 August 2018, the insurer's case manager was dialled in and did all the talking. It was the case manager, not Ms Cook who instigated the one week certificate after the radiofrequency treatment.

59. With regard to the appointment on 30 August 2018, Ms Cook said,

> "According to my notes Dr Loh did indicate he was going to write Carol a COC certifying her unfit for one week however I did speak up and I told Dr Loh that in recent times I had seen Carol at the workplace during which her physical presentation appeared to be improving in her mobility but that at the doctor's appointments she always appears much worse in her physical presentation."

60. Ms Cook said that she was conscious of the applicant's mother's passing and at the end of this appointment asked if she would like some time off as bereavement leave.

61. With regard to the appointment on 7 September 2018 Ms Cook said,

> "I do recall that I did ask Dr Loh whether he thought Carol had a capacity for increased hours above 4 hours, to which he said yes and he raised her hours to 6 hours. When I spoke with Dr Loh about this there was no malice and I was just being upfront and doing my job and at the end of the day it is up to Dr Loh to decide Carol's certification.
>
> There was also a point during that appointment when I did tell Dr Loh that I had seen Carol out and about shopping, and it is correct that Carol did become angry and say to the effect *'I've been shopping for a funeral are you for fucken real*'. I was shocked by this and I didn't say anything and Carol did appear upset & aggressive but I don't recall her crying."

62. Ms Cook confirmed that the applicant broke down crying on 16 September 2018. Ms Cook recalled the applicant saying that she was very worried about her father who wasn't eating due to grief at her mother's passing. Ms Cook said she was aware that the applicant had a number of personal issues in her life since late 2017.

Mr Craven's evidence

63. Mr Craven confirmed that he was the applicant's store manager. Mr Craven denied treating the applicant harshly after her back injury but said his treatment of her did change as her conduct required performance appraisal and discipline. Mr Craven maintained that his treatment of the applicant was appropriate.

64. Mr Craven said,

> "I do not believe that I was odds with everything Carol said and argued with anything she said from June 2018 onwards. It was around June 2018 that I saw Carol doing certain duties outside of her restrictions on her COC and there were times when the shop looked too tidy and shouldn't have been so tidy if Carol was complying with her restricted duties.
>
> So in around mid-June 2018 I began checking the in store CCTV to monitor Carol's compliance with her restrictions to find that she was very frequently not complying and performing all manner of duties in breach of her restrictions such as lifting and bending.

> Due to this there were numerous times in June 2018 when myself and Cheryl Cook spoke with Carol and instructed her to not do any duties outside of her restrictions, however she did not comply and kept working beyond her restrictions numerous times after being spoken to. We tried to impress the importance of this however she obviously didn't listen to us and realise the importance and our position whereby we couldn't allow her to keep placing herself at risk of worsening her back injury etc."

65. Mr Craven confirmed that he believed the applicant had spoken derogatively about an Asian lady in a racist manner and called the applicant out on this. He did the same when the applicant was talking in a sexist manner. Mr Craven did not deny saying words to the effect that eight weeks off work after a radiofrequency procedure seemed excessive although he denied saying "rubbish".

66. Mr Craven confirmed that he had seen the applicant crying in the workplace:

> "Regarding seeing Carol crying at work, this true I have seen Carol cry many times, I would say from the beginning of 2018 onwards from which time I have had to have some serious conversations with her. It has seemed to me that Carol cries very easily and every time I have had to have a serious conversation with her she would cry and then I would have to curtail my discussion with her. Usually whenever she would cry I would ask her if she needed a break etc. To be honest after I while I wondered if Carol's crying was authentic or contrived as she did it so often."

67. Mr Craven did not recall commenting that the applicant's high blood pressure reading may have been a false positive but said he may have made that remark. Mr Craven said the applicant's request for time off for this reason came just days after the initial performance meeting regarding not working within her restrictions on 29 June 2018. Mr Craven said,

> "Regarding the CCTV there around 15 different occasions in one day when Carol was doing duties outside of her certified restrictions including one occasion when she was on her hands and knees facing stock on the bottom shelf.
>
> There was another occasion caught on the CCTV of her climbing on a shelf to reach something on the top shelf of a fridge. When I saw these things on the CCTV I was shocked at what Carol was doing and startled that she could be working so far out of her restrictions and that she was actually able to do these things with her back injury.
>
> So, essentially these issues were broached with Carol at the 29 June 2018 meeting following which it was determined after I consulted with People Services that a written warning would be issued to Carol. The warning would have been issued to Carol in the days after that meeting however she went off work on sick on leave for two weeks."

68. Mr Craven said that during the meeting on 16 July 2018 he offered to show the applicant the CCTV footage multiple times but she declined. Mr Craven confirmed that he told the applicant he would continue checking the CCTV footage as he could not trust that she would comply with her restrictions.

69. Mr Craven said he did not want the applicant knitting at work as it would be unprofessional and “weird” for customers to walk in and see the applicant knitting. Mr Craven said CCTV footage had shown the applicant talking on her mobile phone while serving customers. On one occasion the applicant was seen talking on her phone for possibly 50 minutes or more. Mr Craven said he was generally lenient about staff using mobile phones, for example, for a family emergency or to take a call from him but was not lenient about staff talking on the phone for long periods in the store or while serving customers.

70. Mr Craven conceded that he was becoming frustrated with the applicant at the time of the meeting on 25 July 2018 and the applicant’s description of his comments may generally be accurate.

71. With regard to the outcome of the meeting on 25 July 2018, Mr Craven said,

> “After the meeting I was in the process of clarifying the process of issuing the final warning to Carol. I do recall her approaching me but I did not tell her it was all sorted and from memory I simply told her that we were done for the day and that she could go back to work. I certainly didn't give her the impression that there would be no further action.”

72. Mr Craven denied telling anyone he was out to get rid of the applicant. Mr Craven denied speaking rudely to the applicant.

Respondent’s other evidence

73. There are in evidence a large number of file notes, meeting minutes and plans relating to the applicant’s claim.

74. A handwritten file note dated 27 March 2018, indicated that the applicant had told Ms Cook that Mr Craven had given her instructions with regard to her restrictions. These were that she was to “only serve, sit for 5 mins per hour or as required and to face shelf 3 and 4 only.”

75. A file note signed by Ms Cook dated 3 May 2018 refers to a doctor’s appointment she attended with the applicant as the applicant was “extremely nervous regarding her upcoming nerve block on her back”. Ms Cook recorded,

> “Discussed this with her doctor and Carol said we were concerned about her two weeks off, I pointed out to her and the doctor that it was in fact Carol who was worried about the time off and I said she need to take as long as required as per her specialist that it was not an issue that the only person that was concerned about time off was her and Carol agreed saying that she was concerned.
> …
> At the begin of the appointment I felt Carol was not happy with the interaction that she was having regarding her injury with me but after being very direct and honest with the doctor I felt Carols demeanour change and go back to normal. I did really highlight that I was here to help and would continue to do so. It's quite hard to manage her injury as she doesn’t work for our store she works for BWS and doesn't seem very happy there so not sure what it has been like for her in her store but I do regularly touch base with her and her Store Manager who appears very accommodating and helpful when managing her injury.”

76. A handwritten file note dated 25 June 2018, records a meeting between the applicant, Ms Cook and Mr Craven. The note says

> "Spoke to Carol regarding working to her restrictions with all present as she is prolonging her recovery. Carol has been caught working out of her restrictions by Paul. Sore in upper back yesterday not lower. Paul spoke about what she can do serving on the register only and sitting in between serving. Said if Carol feels as though she needs to go to the doctors to let us know."

77. An unsigned, handwritten document, dated 26 June 2018, notes the following:

> "17:49:13 carry 6 pack for customer
> 18:00:50 retrieve 1L Canadian Club from bottom shelf for customer
> 18:06:57 climbs onto shelf to get long necks from top shelf!!!
> 18:10:20 fills 6 pack from cool room
> 18:12:05 bends/squats to face bottom shelf of fridge
> 18:13:20 fills more 6 packs, second trip carries 2 x 6 packs at once
> 18:34:02 fills cartons of R+D's
> 18:38:48 bends to face bottom shelf of wine fridge
> 18:39 fills wine fridge bottom shelf
> 18:43:31 down on floor getting wine from bottom shelf on hands + knees"

78. A file note of a meeting between Ms Cook, Mr Craven and the applicant on 29 June 2018 records a discussion as follows:

> "Cheryl asked questions Carol answered.
>
> 1. What is you understanding of your restrictions?
> Serving on checkouts, bagging products, presentation of wine at shelf 3 and 4 and because she can face she thought she could fill one bottle at a time. On monday 25/6/18 Carol confirmed with Cheryl that she was able to face 3 and 4 only. Carol also then confirmed on wednesday with Cheryl that she wasn't able to put the load away.
>
> 2. What is your understanding of bending, squatting and twisting?
> No I can't do it but what about lifting the door Ask for help
>
> 3. Is there anything preventing you from taking your breaks? No
>
> 4. Then why did you not take your breaks on sunday? I don't know why I only took 10 mins
>
> 5. Why are you continuing to work outside your restriction? I don't know
>
> 6. Do you understand the seriousness of this? Yeah but it's frustrating
>
> 7. Carol you have a personal responsibility to yourself to maintain a safe work environment but yet we have spoken to you on many occasions about working outside your restrictions is there something we can do to assist you with your recovery? No
>
> 8. Discussed CCTV footage of Carol working outside her restrictions and Carol just said I know.

9. Explained to Carol the seriousness of this and asked what she thought should be the outcome and what would she do differently? Everything so i wouldn't be in here in trouble

Concerns regarding Carols lack of concern and accountability of her behaviour. Carol does not seem to really care about what is happening and seems to feel she is able to do whatever she likes. Informed Carol that we would have a follow up meeting with a final outcome [sic]"

79. A letter to the applicant dated 16 July 2018 from Mr Craven refers to meetings on 29 June 2018 and 16 July 2018 where they discussed the applicant's "inappropriate behaviours and failure to follow your suitable duties plan". The letter notes that there had been at least two previous conversations in regard to these matters. The letter informed the applicant that after considering her responses, they had decided to issue her with a written warning that if there were any further instances of unacceptable behaviour in the future without an acceptable explanation, further disciplinary action may be taken including termination of her employment. The applicant was reminded of the availability of the Employee Assistance Program counselling service.

80. An email from a Case Manager from the insurer dated 2 August 2018 refers to a case conference that day:

"RF Injections approved, having left side completed tomorrow and right side in 2 weeks on the 17th

- CM questioned NTD on if 2 weeks recovery after each injection was reasonable

- TM Interrupted and said that this is what the NTS had advised as per questions that Devan had said

- CM disagreed and said that Devan had queried how long it would take for her to recover and not how long she would need off after the injection

- TM said we need to go off NTS advice anyway

- CM disagreed again and asked the NTD if 2 weeks was reasonable and what is the usual recovery timeframe for this. He confirmed 1-2 weeks and said that he is happy to review TM after 1 week to see if she is able to return to work.

- CM asked if anyone had any questions, No questions were asked.

Cheryl - can you please let me know what the NTD has issued the certificate for? If he has put two weeks I would like us both to give Carol a bit of a push to return to the Doctor after a week."

81. A file note of a meeting between the applicant, Ms Cook and Mr Craven on 16 September 2018 states:

"Discussed RTW plan with Carol, Carol got quite upset when I asked how she was, she clearly needs more time to the grieve the loss of her mother. We offered her to take more time off and looked in her success factors for leave balances. She only has enough leave for one week and is worried that she won't be able to have any more time off if needed I did say she could have leave without pay but she said she couldn't afford that so I suggested she call Centrelink or her super fund."

82. A letter to the applicant dated 8 October 2018 refers to a meeting which took place on 14 September 2018 to discuss the allegations of bullying and harassment behaviour towards the applicant on the part of Mr Craven. The letter stated,

> "In the meeting you raised concerns that Paul Craven was displaying bullying behaviour towards you. I asked that you provide examples of the bullying, and in response you mentioned that on 24 July 2018, Paul had said he was 'pissed off' at you for knitting in the store during your shift. You also mentioned that later that same day, Paul had raised his voice while talking to you. Sarah explained the definition of bullying and said that, while it is important that leaders display appropriate behaviour at all times, based on the evidence you provided we were not able to substantiate the bullying claims. We also discussed the performance management process which Paul had placed you on, as a result of you not adhering to your return to work program and your use of a mobile device and knitting during your work hours. You acknowledged in the meeting that the performance management action Paul took was reasonable due to these performance concerns."

83. A copy of a notice to all employees regarding video surveillance states:

> "Please be aware that this STORE uses Closed Circuit Television (CCTV) video surveillance equipment. This equipment is required to protect staff and customers and to ensure their safety and security as well as the security of the store.
> …
>
> Cameras will not be used to pry on a person's activities without cause, and appropriate disciplinary action will be taken if video surveillance is used in an inappropriate or unethical manner."

Dr Loh

84. The applicant's general practitioner, Dr David Loh, prepared a report for the applicant's solicitor dated 6 July 2019.

85. Dr Loh said he first saw the applicant on 21 November 2017 for her back injury. The applicant reported back pain after completing a shift at work. The applicant had seen the work physiotherapist twice in the last month and had bilateral back pain with no sciatica. The applicant was seen with a return to work coordinator, Ms Cook and was treated with Palexia and certified fit for light duties. The applicant was referred for MRI. The MRI showed no central canal stenosis but a shallow central disc bulge at L3/4 without annular fissuring. The applicant was referred to see a pain specialist, Dr David Manohar, for management of her back pain.

86. Dr Loh reported consultations with the applicant throughout December and early 2018. The applicant attended a case conference with Ms Cook on 1 March 2018 when they discussed the results of a CT scan showing L5/S1 disc protrusion which had not been noted previously.

87. Further case conferences with Ms Cook were noted on 5 April 2018 and 3 May 2018. With regard to the latter conference, Dr Loh noted that Ms Cook was worried about the applicant having one week off work from 11 May to 18 May 2018 post injection. The applicant was certified fit for pre-injury duties from 4 to 10 May 2018 and off work from 11 to 25 May 2018. Dr Loh noted that the applicant was stressed about her nerve blocks on 9 May 2018 and had been unable to speak to Dr Manohar about the procedure as he was subpoenaed to court for another case.

88. Dr Loh noted that another case conference with Ms Cook took place on 24 May 2018 where the applicant was certified fit for light duties.

89. On 15 June 2018, the applicant complained of pain in her upper thoracic spine after unloading 2.5 pallets by herself as her boss had left early.

90. There was another case conference with Ms Cook on 21 June 2018. At a case conference on 19 July 2018, Dr Loh noted,

> "She goes in on 3 Aug and 17 Aug 18 for radiofrequency ablation. She stated that she had pushed herself too hard and she had worsened her pain and now she is serving customers only."

91. On 20 July 2018, the applicant told Dr Loh that her current manager, Paul, "was on her back" and that was diminishing her enjoyment of work. On 26 July 2018,

> "…she stated that she was in a work performance meeting on 25 Jul 18 where it was revealed to her that Paul was watching her previous night shift on CCTV. Paul was only watching her and not the other employees. She had been accompanied by the union delegate, Michelle into the meeting. She had confronted Paul to see if he was attempting to upset her to make her quit her job. Paul also scheduled a new meeting on 27 Jul 18 and another decision on 29 Jul 18. She was getting psychological counselling from work."

92. At a case conference with Ms Cook on 30 July 2018, Dr Loh noted,

> "Ms Cook explained to her that the CCTV monitoring was related to job performance and had nothing to do with her work cover condition. She stated that the store manager had picked up on Ms Kennedy use of her mobile phone.
> …
> She was advised to attend the conflict resolution process at work to resolve this CCTV monitoring by her manager."

93. Dr Loh noted there was a case conference with Ms Cook and teleconference with the case manager from EML on 2 August 2018. The applicant was going for left-sided cortisone and left-sided radiofrequency ablation the next day, with the right side two weeks later. The applicant was unfit to work from 3 to 9 August 2018.

94. On 9 August 2018, there was a case conference with Ms Cook. Dr Loh said,

> "I explained to Ms Cook that the back injection could take up to eight weeks to work. She had right back tenderness with her back forward flexion to her knees. She had intact knee and ankle reflexes. She was unfit to work from 10 Aug 18 until 31 Aug 18."

95. At a case conference on 30 August 2018, Dr Loh noted,

> "Ms Cook made the observation that Ms Kennedy was able to walk around freely when she was talking to Ms Cook outside of the surgery when she was pronounced to be unfit to work. I had to reiterate to Ms Cook of my phone call with Dr Manohar who advised Ms Kennedy to be off work. She had bilateral back. pain with sciatica to her right leg hamstring for two weeks. She was having pain from hip to hip."

96. Ms Cook again referred to the applicant being able to walk about in the shop at a case conference on 7 September 2018.

97. On 25 September 2018, the applicant stated that she had seen a solicitor with regard to her case. As she had persistent back pain, the applicant felt she should not be taking leave from her annual leave but as workers compensation. Dr Loh said,

> "… she had reported of harassment at work with the viewing of CCTV footage of her at work and threatening her with dismissal as well for the past three months. On a depression of 0 to 10 with 0 being in the pits and 10 being on top of the world she felt a four. She did not report of suicidal thoughts. She reported poor sleep and early morning awakening. She reported these symptoms over 12 weeks and she was advised to rest from work from 25 Sep 18 until 25 Oct 18. She was referred to see Wendy Wright psychologist in Mount Druitt. She also revoked all authority for Ms Cook to talk to me about her case."

98. Dr Loh noted that there continued to be consultations with the applicant reporting back pain and depressive symptoms throughout the remainder of 2018 and the first part of 2019.

99. Dr Loh diagnosed the applicant as having major depression and adjustment disorder with depressed mood, severe L4/5 facet joint degeneration, mild T7/8, T8/9 and T9/10 facet joint degeneration and left paracentral disc herniation at T7/8.

100. With regard to causation, Dr Loh said,

> "Her depression was worsened by work subjecting her to CCTV surveillance and creating a suspicious work environment for her. Her chronic back pain symptoms also worsened her symptoms. Her work injury of repetitive lifting bad caused back pain flare up of her degenerative arthritis."

101. Dr Loh found the applicant unfit for pre-injury duties due to both depression and chronic back pain. The applicant was also not fit for alternative duties for both depression and chronic back pain symptoms.

102. In an earlier report to the insurer dated 16 November 2018 Dr Loh, discussed the applicant's psychological condition:

> "Her acute stress induced depression would stem from her working under constant scrutiny of her manager Paul from video surveillance and creating difficult work conditions for her by threats of dismissal. Cheryl, her work coordinator had overstepped her role by stating that Carol was over exaggerating her pain with statements like that she did not appear to be in pain in other situations. It had caused a toxic relationship to the extent that Carol had banned Cheryl from attending case conferences with her and also stopped Cheryl from discussing her case with me."

Dr Singh

103. The applicant was referred to consultant psychiatrist, Dr Rajneesh Singh, who provided a report to Dr Loh on 14 November 2018. Dr Singh reported,

> "Carol described what seems to be her ongoing conflicts with the current management at work, she reports being bullied as well as being called sexist and racist at times. She further feels quite disturbed by the fact that there is constant surveillance being kept of her through the CCTV at work and seemingly being harassed at other times. She says this resulted in the onset of her depressive symptoms in July this year laced with low mood, decreasing interest in her usual pleasurable activities along with sleep disturbance which often also resulted in marked mental and physical exhaustion."

104. Dr Singh took a history of a previous diagnosis of depression in the context of marital separation in around 2000:

> "She reports she took antidepressants initially for a brief period but then restarted on it a few years later. She reports being on the same medication in the dosage of 45 mg daily for the most part of the last few years and having responded quite well, however, in recent times she doesn't believe the medication has helped with her depression and anxiety."

105. Dr Singh made a diagnosis of recurrent major depressive disorder with panic symptoms with the differential diagnosis of adjustment disorder with depressed mood in the context of her recent work issues.

106. On 14 December 2018, Dr Singh reported that the applicant continued to experience persistent depressed mood, anhedonia, tearful spells and intermittent panic attacks. The applicant's medication was adjusted.

107. In a report to Dr Loh, dated 20 February 2019, Dr Singh said the applicant seemed to be "slightly more upbeat" but remained impaired from a mental health point of view to return to any form of employment.

108. In a report dated 24 April 2019, Dr Singh reported that the applicant presented as a reasonably well. The applicant was quite bright and reactive throughout the interview but did describe ongoing problems with anxiety. The applicant acknowledged the impact of her ongoing back pain.

Dr Manohar

109. Consultant physician and interventional pain physician, Dr David Manohar has prepared a series of reports for Dr Loh regarding the applicant's condition and the treatment he provided. Dr Manohar summarised the applicant's spinal condition in letter to the insurer dated 19 March 2018 as follows:

> "There are two issues. The first issue is the spondylotic changes which were asymptomatic prior to this work. They have now been rendered symptomatic. The second issue is the disc protrusion which is irritating the nerve root which will be a direct cause from the bending, lifting and twisting."

Dr Coughlin

110. Neurosurgeon, Dr Marc Coughlin has prepared a number of reports in evidence in relation to the applicant's spinal condition. In a report to Dr Loh dated 16 February 2019, Dr Coughlin took a history as follows:

> "In October 2017 after a particularly heavy bout of work which involved repetitive lifting of cases of beer she noticed sudden onset of significant back pain. She had ongoing physiotherapy for a month but unfortunately this was not settling so then she decided to see a doctor. The pain is mostly in the thoracic spine but also in the lower lumbar spine. She has had 2 nerve blocks and she has had 2 radiofrequency denervations with Dr Manahar but no relief unfortunately thus far."

111. Dr Coughlin ordered a SPECT bone scan which showed severe facet joint arthropathy at L4/5. Dr Coughlin opined,

> "Unfortunately, she has failed to improve with multiple interventions including the facets injections.

> I have recommended she give consideration to an anterior lumbar interbody fusion targeting L4/5. This would be the most appropriate way of potentially ameliorating her chronic pain."

Dr Baker

112. Consultant psychiatrist, Dr John J Baker has prepared a medicolegal report for the applicant, dated 14 December 2018.

113. Dr Baker took a history that included the applicant believing that she had been unfairly treated by her return to work officer who requested to sit in on her appointments with Dr Loh. The applicant felt she was being bullied her and harassed. Her self-esteem was damaged by the return to work officer's behaviour and she believed she was not trusted by her employer. The applicant stated that Dr Loh would frequently submit to the return to work officer's demands.

114. Dr Baker's history also included the following:

> "Ms Kennedy reported that she was contacted by a friend who had said that a male work colleague had become angry and threatening towards him. The same man had bullied and harassed Ms Kennedy. Ms Kennedy became anxious and she took time off work and returned to her doctor for advice before returning to work two days later. On her return to work the male colleague allocated her all the heavy lifting. The heavy lifting of unchilled and chilled stock in the cold refrigeration room caused her to develop back pain which she has continued to experience without improvement after she has received conservative management for this physical condition. She stated that the manager would yell at her and was in conflict with her causing her to become agitated, tearful, fearful and unsure how she would continue her employment in this unsettled workplace. Ms Kennedy stated that this male work colleague would often leave the premises during shift to unknown whereabouts. She said that this led the store to be under-resourced and she felt unsafe working in such a public place, alone."

115. The applicant told Dr Baker that the male colleague had told her she was racist and sexist and had threatened to have her sacked. The applicant was requested to attend a meeting on 16 July 2018 to discuss why she was knitting when there were no customers in the store. The applicant tried to explain without success that she was on light duties and had completed all light duty tasks allocated to her.

116. Dr Baker recorded:

> "She had difficulty persisting with the work of filling the empty fridge with unchilled stock. She had to have recurrent rests as she found the work too heavy. She stated that she found herself in conflict with her workplace colleagues and was told that one of them was watching her movements constantly on the instore CCTV. She said that the male employee was only following her movements in the shop and she felt as if he was intentionally invading her privacy and waiting for glimpses of behaviour that he was interested in. Ms Kennedy reported that she was an avid knitter. To manage her hands and strengthen them she would knit when there were no customers in the store. She reported that this rehabilitative strategy had assisted her in her recovery from past injuries that had affected her hands, shoulders and neck. Ms Kennedy's knitting became a focus of complaint by the male colleague who stated that she was not permitted to engage in recreational activities at work."

117. Dr Baker recorded that when the applicant's mother died she asked for time off work:

> "Ms Kennedy was told by her return to work officer that she was not permitted to have time off due to her mother's death."

118. The applicant presented to Dr Baker as irritable, frustrated and tearful. The applicant cried throughout the assessment. The applicant did not understand why she had been targeted by her work colleague and was fearful of returning to work as she believed she would continue to be bullied, harassed and made to work unsafe duties that would exacerbate her physical injuries.

119. Dr Baker diagnosed major depressive disorder and said that the applicant's employment substantially contributed to her primary psychiatric injury as described in the report. Dr Baker considered the applicant would struggle to work in any role for more than one day per fortnight and would struggle to retrain due to poor concentration, poor motivation, low self-esteem and low energy.

120. Dr Baker assessed the applicant as having 15% whole person impairment as a result of the psychological injury diagnosed by him.

Dr Guirgis

121. Consultant orthopaedic surgeon, Dr Medhat Guirgis has provided medicolegal reports for the applicant dated 20 November 2018, 9 July 2019 and 6 November 2019.

122. Dr Guirgis took a history of the applicant's employment duties including repeated heavy lifting and lifting bending activities in unloading pallets of beer boxes, pallets of wine and shelfing, and cleaning fridges. Dr Guirgis gave the opinion that,

> "There were ongoing symptoms and signs and disabilities related to injuries sustained as a result of the nature and conditions of her employment as discussed earlier including chronic cumulative microsprain/strain of the musculoligamentous and annular structures of the thoracic and lumbar areas of her spine. There was MRI evidence of multilevel degenerative changes most marked at T7-8 in the thoracic area of the spine and at L2-3 level in the lumbar area of the spine. Such changes would render the spine more vulnerable to the effect of the traumatic stresses generated by activities like the ones described earlier."

123. Dr Guirgis considered that employment remained a substantial contributing factor to the injury.

124. With regard to the applicant's capacity, in his first report, Dr Guirgis found,

> "From the pure physical point of view, she might be fit for suitable duties. On top of the organic basis of this patient's complaints, the whole picture became complicated by the development of symptoms of posttraumatic stress disorder as a result of bullying and unfavourable work environment, the comments on which will be left to the appropriate specialists. There were also symptoms and signs of chronic pain, the onset of which was triggered by tissue damage, represented here a neuro-psychological event lying in the same category as anxiety and depression, with each emotional state having its own neurochemical correlates. The combination of physical disabilities, post-traumatic stress disorder from bullying, and chronic pain syndrome resulted in a failure to cope presentation forcing her off work since August 2017."

125. In his 6 November 2019 report, Dr Guirgis considered the opinion of the respondent's expert, Associate Professor Shatwell:

> "Yes there was no history of a single major traumatic event that would account for the onset of her symptoms, but was rather the ultimate failure of the underlying developing asymptomatic subclinical, sub-failures, that were happening in her spine related to the nature of her employment including cyclic bending, repetitive lifting of small loads, cyclic bending/lifting of small loads. Such activities gradually but progressively reduced the collagen-based tissue failure tolerance in her spine.
>
> If we follow Dr Shatwell's logic, the exacerbation was supposed to be finished when she stopped exposing the spine to the insulting micro-traumatic events and that her current presentation was now caused by 'the spinal degenerative disease' which is constitutional. If so one would expect her to go to the original asymptomatic condition of having the normal age related biological changes in her spine which are normally supposed to be asymptomatic and the majority of people in her age are living happy without even knowing that such changes were happening in the spine.
>
> That logic defies the scientific evidence emerging that changing the biological changes to pathological changes involve permanent irreversible post-traumatic neurovascular, microstructural, and biomechanical changes in the spine putting the spine under the umbrella of 'Pathology'."

126. Dr Guirgis maintained his opinion that employment remained a substantial contributing factor the applicant's injuries and resultant disabilities.

Dr Bisht

127. With regard to the psychological injury, the respondent relies on a medicolegal report by clinical psychiatrist, Dr Yajuvendra Bisht, dated 5 December 2018. Dr Bisht took a history of events broadly consistent with the other evidence.

128. Dr Bisht made a diagnosis of adjustment disorder with mixed anxious and depressed mood but said the disciplinary process had been the main contributing factor to the applicant's psychiatric condition. Dr Bisht thought the applicant's back pain also contributed to her condition but was not the main contributing factor.

129. Dr Bisht felt the applicant could, from a psychiatric perspective, return to pre-injury duties but should not have direct contact with her manager for three to six months.

Associate Professor Shatwell

130. With regard to the spinal injury, the respondent relies on medicolegal reports prepared by orthopaedic surgeon, Associate Professor Michael Shatwell, dated 14 December 2018, 20 February 2019 and 9 April 2019.

131. In his first report, Associate Professor Shatwell made a diagnosis as follows:

> "Ms Kennedy has degenerative spinal disease in the mid and lower thoracic region and also in the lower lumbar region.
>
> There is no diagnosis of injury. Pain came on in October 2017 without any specific incident though I note Ms Kennedy alleges she was doing a great deal of heavy lifting during her time with BWS over the previous 18 months. She was employed on a part-time basis for about 22 hours per week.

> The diagnosis at the present time is degenerative thoracolumbar spinal disease with symptoms exacerbated by work activities."

132. Associate Professor Shatwell did not consider the applicant was fit for pre-injury duties but if she was motivated to return to work it would be with a permanently modified work certificate with a lifting limit of 5 kg in a job that allowed her to sit and stand as necessary for control of her symptoms.

133. In his report dated 9 April 2019, Associate Professor Shatwell expressed the view:

> "I do not consider that Ms Kennedy's condition of degenerative spinal disease is related to any injury or the nature of her work with BWS on a part-time basis for 22 hours per week for a period of 18 months.
>
> I do not consider there was any aggravation of the underlying condition by work activities. Symptoms of back pain developed over a period of time due to the progressive nature of spinal degenerative disc disease. This constitutional degenerative disease would have developed had Ms Kennedy been working or not."

Respondent's submissions

134. Mr Beran confirmed that the respondent relied on actions with regard to the provision of workers compensation benefits and discipline for the purposes of s 11A(1) in respect of the applicant's psychological injury.

135. Mr Beran noted that the applicant had made complaints with regard to the manner in which the respondent had discharged its obligations under Chapter 3 of the 1998 Act. Mr Beran said those obligations were taken very seriously by the respondent. When the applicant was found to be working outside her restrictions, she was counselled. The applicant took umbridge at the respondent complying with its obligations, alleging that it constituted bullying and harassment.

136. Mr Beran took me through a timeline of events and noted that the respondent began to view CCTV footage of the applicant working when it was identified that the applicant may be working outside her return to work plan, something that was later conceded by the applicant. The use of CCTV footage in the circumstances of this case was in accordance with the *Workplace Surveillance Act 2005* and therefore lawful and reasonable. Notice of the use of CCTV cameras was given and a copy of that notice appeared in the Reply.

137. Mr Beran noted that on 29 June 2018 the applicant attended a meeting with regard to working outside her restrictions. On 16 July 2018 she was counselled and advised that a formal warning would follow. That warning was given on 25 July 2018 and then the applicant went off work on 26 July 2018. Mr Beran submitted that the timing of the applicant's incapacity was telling as to the whole or predominant cause of her psychological injury. Mr Beran submitted that Dr Loh's evidence showed that the applicant first complained of psychological symptoms or bullying harassment to Dr Loh on 20 July 2018. The complaint was only with respect to the use of the CCTV footage.

138. In addition, Mr Beran submitted that a number of the events relied on by the applicant were frankly and absolutely denied by the respondent.

139. Mr Beran submitted that the evidence showed that the employer was quite accommodating with regard to her application for bereavement leave when her mother died, which was contrary to the applicant's complaints.

140. Mr Beran submitted that one of the applicant's chief complaints was that she was not able to attend her general practitioner without Ms Cook. Mr Beran submitted that Dr Loh's evidence indicated that there were many attendances without Ms Cook. Ms Cook attended case conferences with Dr Loh as part of the respondent's obligations under the 1998 Act.

141. Mr Beran submitted that Ms Cook had denied essentially every allegation made by the applicant. Ms Cook's evidence was supported by file notes which showed what really occurred. The same could be said with respect to Mr Craven's evidence although he did concede commenting that the applicant was racist or sexist in response to remarks made by the applicant. Mr Beran submitted that this could be viewed as action with respect to discipline.

142. Mr Beran submitted that the veracity of the applicant's evidence was also brought into question by the history given to Dr Baker. There was no evidence to support that the applicant's return to work officer refused to accept her medical certificates. There was no evidence of a male colleague allocating her all the heavy lifting or becoming angry and threatening. Mr Beran submitted that the applicant relied on events that either did not occur or which constituted reasonable action for the purposes of s 11A(1) of the 1998 Act.

143. Mr Beran noted that a history was given to Dr Singh of the applicant being on daily antidepressant medication for most of the last few years. That history was not given to Dr Bisht or Dr Baker. The failure to disclose her pre-existing psychological condition and the inconsistent history of allegations given to Dr Baker rendered his report to be unreliable but also impacted on the credibility of the applicant's own evidence.

144. Mr Beran noted that other aspects of the applicant's evidence had been refuted. The applicant complained that on one occasion she was forced to attend an appointment in person with Dr Loh by Ms Cook. Ms Cook refuted that allegation saying that she had driven the applicant there because she couldn't drive. The applicant complained that Mr Craven had been treating her differently. Mr Beran submitted that this was only because the applicant was the subject of disciplinary action.

145. Mr Beran submitted that the applicant had admitted to knitting at work, talking on her phone and working outside her restrictions. The applicant's evidence suggested that she was devastated, upset and angry in the context of the disciplinary action. Mr Beran suggested that this was relevant to an assessment of the whole or predominant cause of the applicant's psychological injury and the reasonableness of the respondent's actions.

146. Mr Beran noted that Dr Bisht had given the opinion that the disciplinary process was the main contributing factor to the applicant's psychological injury. Mr Beran submitted that this opinion would support a finding that the disciplinary process was the whole or predominant cause of the injury. Dr Bisht considered that the applicant could return to pre-injury duties except that she was not to have direct contact with her manager. This suggested that the applicant would have the same earning capacity in another store.

147. Mr Beran submitted that if a choice had to be made between the opinions of Dr Bisht and Dr Baker, Dr Bisht was to be preferred because of the deficient history given to Dr Baker.

148. Mr Beran noted that Dr Singh also noted that the applicant presented as reasonably well suggesting at least partial capacity. Mr Beran submitted that the certificates of capacity were *bare ipse dixit*.

149. With regard to the applicant's capacity in respect of her physical injury, Mr Beran referred me to the reports of Dr Shatwell and his view that a temporary aggravation of degenerative changes had ceased. Mr Beran noted that Dr Manohar recorded complaints of pain mainly emanating from the thoracic spine. Any incapacity resulting from thoracic symptoms which came on after the applicant ceased work should not be taken to be as a result of the work injury.

150. Mr Beran noted that Dr Shatwell found that the applicant had some capacity to work with permanent restrictions.

Applicant's submissions

151. With respect to the applicant's primary psychological injury, Ms Grotte took me to the reports of Dr Loh. Ms Grotte said it was apparent that Ms Cook had attended the first meeting with Dr Loh on 21 November 2017 and attended again on 22 November 2017. Ms Cook attended also on 13 December 2017, 1 March 2018, 5 April 2018, 3 May 2018, 24 May 2018, 21 June 2018 and 19 July 2018 and after the applicant ceased work. Ms Grotte noted that whenever Ms Cook attended the conferences, the applicant was certified as fit to return to duties.

152. Ms Grotte submitted that Dr Loh's evidence confirmed that Ms Cook had involved herself inappropriately in the applicant's case, questioning the medical assessments and recommendations. Ms Grotte said it was outrageous that Ms Cook had attempted to influence Dr Loh on the basis of her lay observations of the applicant. At one conference Dr Loh described Ms Cook "quipping" and interfering by reference to having seen the applicant picking up sandwiches for her mother's funeral at a supermarket. Ms Cook overstepped her role and this created a seriously toxic relationship leading to the applicant revoking authority for Ms Cook to attend case conferences with Dr Loh. Ms Grotte said that Ms Cook's conduct in managing the applicant's physical injury could not be characterised as reasonable action.

153. Ms Grotte noted that the applicant complained of Mr Craven being "on her back" and making it difficult for her to go to work to Dr Loh on 20 July 2018. On 26 July 2018, the applicant complained about Mr Craven watching her on CCTV and attending a meeting on 25 July 2018. The applicant felt she was being singled out for special treatment to force her to leave work voluntarily.

154. Ms Grotte accepted that the employer had an obligation to take reasonable care to ensure that the applicant did not reinjure herself and worked safely but said that at some point the respondent's actions turned into harassment. The level of involvement in the applicant's case was extreme. The applicant was entitled to confidentiality and should have been able to speak frankly with her doctor. Ms Cook's involvement in the applicant's consultations with Dr Loh prevented that and were unreasonable.

155. Ms Grotte said the notice with respect to the use of CCTV footage was undated and there was no information as to how it was made available to the applicant. The notice suggested that CCTV would be used to detect criminal activity and to protect customers and staff. The applicant was never shown the CCTV footage. Ms Grotte acknowledged there were handwritten notes by Mr Craven as to what he saw on the footage and said there was no factual dispute as to the activities the applicant was seen to be engaged in. Ms Grotte said the real issue was that the notice did not warn the applicant that CCTV footage would be used to monitor an injured person to ensure they were working within the restrictions. The notice was aimed at something completely different.

156. Ms Grotte submitted that Dr Loh's reports gave a good picture of the breakdown of the applicant's relationship with Ms Cook; the lack of privacy in dealing with her own treatment; and constant questioning about the genuineness and veracity of her physical injury. On top of that, the applicant was dealing with Mr Craven and his use of CCTV footage to monitor her.

157. Ms Grotte submitted that the email from the insurer's case manager regarding certificates dated 2 August 2018 was reflective of the respondent's entire attitude towards the applicant's claim. The treatment recommended was being questioned; the applicant was being pushed back to work and not allowed sufficient time to recover. Lay people without medical qualifications were interfering to such an extent that their conduct amounted to harassment.

158. Ms Grotte submitted that the applicant's statement was consistent with Dr Loh's reports and was credible. Although the respondent had argued that the refutations in Ms Cook's and Mr Craven's statements would be preferred, an analysis of the applicant's evidence and the contemporaneous medical records suggested that the applicant's evidence was more likely to be correct. It was to be expected that Ms Cook and Ms Craven would deny that their conduct was inappropriate.

159. Ms Grotte submitted that it was harsh and excessive for the applicant to be given a formal written warning for working out of her restrictions on one day in the context of the applicant's circumstances. The applicant was also warned about using her mobile phone when Mr Craven's evidence indicated that he was otherwise lenient with regard to mobile phone usage.

160. Ms Grotte noted that evidence had been provided that the respondent continued to harass the applicant to try to get her to return to work, by making veiled threats that her employment would be terminated. This was said to represent the attitude of the respondent towards the applicant generally.

161. Ms Grotte submitted that the applicant's psychological injury resulted from the over-involvement of Ms Cook in the management of the applicant's spinal injury, including actively engaging with the general practitioner to change certifications; the use of CCTV footage; harsh treatment and hostility directed at the applicant by Mr Craven; and the excessive and harsh use of written warnings causing the applicant to be fearful of losing her job.

162. Ms Grotte conceded that the applicant did not disclose her pre-existing history to Dr Baker but said it was revealed to Dr Singh and Dr Bisht. Dr Baker's report did explicitly indicate whether he had asked the applicant about her past history or considered it relevant.

163. Ms Grotte noted that Dr Singh considered the applicant could work one day per fortnight as a result of her psychological injury but said this was not consistent with the certificates indicating total incapacity. Ms Grotte suggested that the applicant was totally incapacitated as a result of both the psychological and spinal injuries. Dr Singh also considered that the applicant required further treatment. Dr Singh's diagnosis was consistent with that made by Dr Baker.

164. Ms Grotte submitted that although Dr Bisht had expressed the view that the disciplinary process was the main contributing factor to the applicant's injury, the evidence indicated that the applicant's psychological injury was multifactorial. There was an accumulation of events starting from when the spinal injury began to be managed by the respondent. The disciplinary process was not the whole or predominant cause of injury nor was the disciplinary action taken by the respondent reasonable.

165. With regard to the spinal injury, Ms Grotte noted that the applicant had consistently complained of thoracolumbar pain. Thoracic pain had always been part of her claim but the symptoms changed from time to time. Dr Coughlin's reports confirmed this. Ms Grotte said that the applicant had degenerative changes in her spine which had been aggravated and that aggravation had continued unabated. The applicant continued to be issued certificates of capacity in relation to her spinal injury. Investigations of the applicant's spine revealed pathology consistent with the applicant's complaints. Ms Grotte noted that the applicant had undergone a series of procedures to her spine including radiofrequency ablation and injections, none of which were undertaken by the applicant lightly.

166. Ms Grotte submitted that contrary to the respondent's acceptance of liability, Dr Shatwell made no diagnosis of injury. Ms Grotte submitted that it was apparent that Dr Shatwell did not understand legal definition of injury and that the applicant's degenerative condition may have been exacerbated by work. Dr Shatwell did not explain the basis on which he formed the view that any exacerbation had ceased. Dr Shatwell's view was not supported by any other evidence. The applicant continued to receive treatment for her spinal injury and surgery had been recommended for the unabating symptoms.

167. Ms Grotte noted that Dr Guirgis found that the combination of the applicant's physical disabilities, post-traumatic stress disorder from bullying, and chronic pain syndrome resulted in a failure to cope, forcing her off work.

168. To the extent that the applicant had any residual capacity, Ms Grotte submitted that the applicant would have capacity to earn minimum wage for one day a fortnight in suitable duties.

Respondent's submissions in reply

169. Mr Beran noted that the applicant remained employed and it was reasonable for the employer make contact with her to enquire as to the applicant's ability to perform the inherent requirements of her role.

170. Mr Beran noted that the applicant complained of thoracic spine pain since June 2018. By this time, the applicant was already performing light duties. The injury accepted by the respondent was an injury caused by the nature and conditions of employment up until late 2017.

171. Mr Beran noted that Mr Craven's evidence was that the applicant was offered the chance to view the CCTV footage but declined. Mr Beran said the respondent did not use the CCTV footage without cause. The applicant was observed performing work outside her restrictions.

172. Mr Beran submitted that it was Ms Cook's job to assist injured workers to return to work. Dr Loh was a medical practitioner and he had issued the certificates based on his qualified medical opinion. Dr Loh did not indicate that he took any umbridge at Ms Cook's interventions.

173. Mr Beran noted that Dr Singh's diagnosis was consistent with that given by Dr Bisht.

174. Mr Beran submitted that reading Dr Guirgis' and Dr Singh's evidence together, the applicant continued to have partial capacity.

FINDINGS AND REASONS

Primary psychological injury

175. 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 relevantly defined in s 4 as:

> "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"

176. "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."

177. A worker who receives a psychological injury which meets the statutory definitions will not, however, be entitled to compensation if the defence in s 11(A)(1) of the 1987 Act is made out:

> "(1) No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers."

178. Subsection 11(A)(1) is a disentitling provision and an employer who wishes to rely upon it carries the onus of establishing that defence[1].

179. The requirements of s 11A(1) were considered in *Manly Pacific International Hotel v Doyle*[2] where Fitzgerald JA (Mason P agreeing) at [4] said:

> "…the Compensation Court was required to decide whether (i) the whole or predominant cause of Mr Doyle's psychological injury was the appellant's action with respect to Mr Doyle's transfer from one position to another, and, (ii) if so, whether the appellant's action with respect to Mr Doyle's transfer was reasonable."

180. In considering the question of causation, Snell DP in *Hamad v Q Catering Ltd*[3] found that in many cases there will need to be medical evidence to establish that the employer's action was the "whole or predominant cause" of the injury:

> "The extent to which aspects of the appellant's history contributed to causing the psychological injury was not, in the circumstances, something which could be decided in the absence of medical evidence. There may be cases in which causation of a psychological injury can be established without specific medical evidence, for example where there is a single instance of major psychological trauma, with no other competing factors. The need for medical evidence, dealing with the causation issue in s 11A(1) of the 1987 Act, will depend on the facts and circumstances of the individual case. In the current case, as in most, there are a number of potentially causative factors raised in the appellant's statement and the medical histories. Proof of whether those factors, which potentially provide a defence under s 11A(1), were the whole or predominant cause of the psychological injury, required medical evidence on that topic.

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[1] *Pirie v Franklins Ltd* [2001] NSWCC 167; *Department of Education and Training v Sinclair* [2005] NSWCA 465.
[2] [1999] NSWCA 465; 19 NSWCCR 181.
[3] [2017] NSWWCCPD 6; BC201701872.

> The extent of any causal contribution, from matters not constituting actions or proposed actions by the respondent with respect to discipline, could not be resolved on the basis of the Arbitrator's common knowledge and experience."

181. There is no dispute in this case that the applicant sustained a psychological injury arising out of or in the course of employment. There are diagnoses of a psychological condition by Dr Loh, Dr Singh, Dr Baker and Dr Bisht. Although there is evidence that the applicant had a pre-existing psychological condition and had been prescribed antidepressant medication over a period of several years prior to the events which are the subject of these proceedings, the doctors appear to agree that the applicant had a psychological injury caused by matters related to her employment.

182. The dispute to be determined is whether the psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the respondent with respect to the provision of employment benefits and/or discipline for the purposes of s 11A(1). In this regard, the respondent argues that its management of the applicant's compensation claim and her return to work following her spinal injury constituted action with respect to the "provision of employment benefits". I note that no submissions were made by the applicant taking issue with this characterisation of the respondent's actions. Accordingly, I have proceeded on the basis that the respondent's characterisation is apposite.

183. The applicant identifies a number of events as causative of her psychological injury. These were summarised by Ms Grotte as including the over-involvement of Ms Cook in the management of the applicant's spinal injury including actively engaging with the applicant's general practitioner to change certifications; the use of CCTV footage to monitor the applicant; harsh treatment and hostility directed toward the applicant by Mr Craven; and the excessive and harsh use of written warnings, causing the applicant to be fearful of losing her job.

184. There are significant factual discrepancies in the evidence with regard to many of these events. Accordingly, it is necessary to make factual findings with regard to the relevant events in order to determine whether the respondent has discharged the onus of establishing that the psychological injury was wholly or predominantly caused by reasonable action by the respondent.

Ms Cook's involvement in the management of the applicant's spinal injury

185. I am satisfied on the evidence before me that Ms Cook, the applicant's return to work coordinator, attended case conferences with the applicant and her general practitioner, Dr Loh on 21 November 2017, 22 November 2017, 13 December 2017, 1 March 2018, 5 April 2018, 3 May 2018, 24 May 2018, 21 June 2018, 19 July 2018, 30 July 2018, 2 August 2018, 9 August 2018, 30 August 2018 and 7 September 2018. That is, from late 2017 and in the first half of 2018, case conferences with Ms Cook were held on approximately a monthly basis. More frequent case conferences were held in July, August and September 2018, around the time the applicant went off work in relation to her psychological symptoms.

186. The applicant has claimed that Ms Cook told her early on that if she was not present at the applicant's appointments with her general practitioner she would not accept her medical certificates. Ms Cook denies saying this to the applicant. The evidence of Dr Loh confirms that the applicant did in fact attend a number of consultations without Ms Cook. These consultations appear to have occurred, for example, on 25 November 2017, 7 December 2017, 18 December 2017, 28 December 2017, 10 January 2018, 1 February 2018, 8 February 2018, 12 April 2018, 24 April 2018, 9 May 2018, 15 June 2018, 20 July 2018, 26 July 2018, 27 July 2018 and 29 August 2018. There is no evidence that Ms Cook attended any appointments with the applicant's specialists, including Dr Manohar, Dr Coughlin or her physiotherapist.

187. The evidence does not indicate to me, therefore, that the applicant was denied an opportunity to speak confidentially and frankly with Dr Loh. I am not satisfied that Ms Cook requested to sit in on all appointments with Dr Loh. I am also not satisfied in the circumstances that Ms Cook told the applicant that she would not accept WorkCover certificates unless she had attended all consultations with Dr Loh.

188. It does appear to have been the case that Ms Cook expected to hold case conferences on a regular basis with Dr Loh. The respondent says the purpose of the case conferences was to assist the applicant's return to work following her spinal injury and discharge its obligations under the 1998 Act. Whilst it is perhaps unusual for a return to work coordinator to hold face-to-face conferences with a worker's nominated treating doctor on such a frequent basis, I am satisfied that the action of holding case conferences, particularly in the later part of 2017 and first half of 2018 was of itself reasonable.

189. The applicant complains that Ms Cook's conduct during and around the conferences was unreasonable. The applicant complains that Ms Cook forced her to attend a face to face consultation with Dr Loh on one occasion in November 2017, when he had agreed to perform a home visit. The applicant complains that Ms Cook argued with Dr Loh in relation to what was put on the certificates and would pressure Dr Loh to certify the applicant as having greater capacity than she felt capable of. Particular examples were given around the time the applicant was scheduled to undergo nerve block procedures in May 2018 and radiofrequency procedures in August 2018.

190. Ms Cook has denied forcing the applicant to get out of bed to attend a doctor's appointment. Dr Loh's evidence does not assist me in making a factual finding in relation to this event. If it did happen, it appears there was some miscommunication between the applicant and Ms Cook as to the circumstances of the appointment.

191. Ms Cook said she behaved professionally and just conversed with the doctor and the doctor made his own decision about the applicant's capacity. Ms Cook denied telling the applicant's doctor what to write on certificates or being domineering and forceful at the appointments.

192. Dr Loh's evidence confirms there were some case conferences where there were discussions between Ms Cook and Dr Loh with regard to the applicant's certifications.

193. Dr Loh's evidence indicates that at a case conference on 3 May 2018, Ms Cook was worried about the applicant having one week off work from 11 May to 18 May 2018 after her first nerve block injection. Dr Loh notes that the applicant had been worried about the procedure as she had been unable to speak to Dr Manohar. The applicant was ultimately certified as unfit for work from 11 to 25 May 2018.

194. Ms Cook prepared her own file note of this conference. That note indicates that the applicant had told Dr Loh that the respondent was concerned about her having two weeks off. Ms Cook records that she told the applicant that she needed to take as long as was required as per her specialist and that it was not an issue. The certification ultimately given was for two weeks.

195. Having regard to the evidence of Ms Cook and Dr Loh, I am not satisfied that Ms Cook told the applicant that she could not have two weeks off work as claimed by the applicant. I am satisfied that Ms Cook's conduct in this conference was reasonable.

196. Dr Loh also refers to Ms Cook intervening at a case conference on 30 July 2018 with regard to applicant's complaint about CCTV monitoring of her. Ms Cook is recorded to have alleged that the CCTV monitoring was unrelated to the applicant's WorkCover condition. I note that at that point in time, the applicant had not made a claim for workers compensation in respect of a psychological injury. That occurred after the applicant consulted a solicitor in late

September 2018. I am not persuaded that it was unreasonable for Ms Cook to have made that comment in the circumstances as they then stood.

197. There is also evidence before me of a case conference with Ms Cook and a Case Manager from EML on 2 August 2018. The applicant claims that at this conference with Ms Cook said the applicant could not have four weeks off after a scheduled radiofrequency procedure because that was an estimated recovery time only and that Ms Cook asked the doctor to write a certificate for one week, which Dr Loh did. The applicant's description of this case conference is at odds with the evidence of Ms Cook and an email of the same date from the insurer's Case Manager. Both Ms Cook and that email suggest that it was in fact the insurer's Case Manager and not Ms Cook who took issue with the certification. Dr Loh's report does not shed further light onto what took place at this conference. I am satisfied on this evidence that Ms Cook behaved in a reasonable manner during this conference although it is apparent that the EML Case Manager was successful in asserting influence over the certification.

198. The evidence does indicate to me that case conferences took place after this date, in particular on 30 August 2018 and 7 September 2018, at which Ms Cook made observations suggesting or implying the applicant may be feigning or exaggerating her physical symptoms. The applicant's evidence is consistent with the evidence of Dr Loh in relation to these case conferences. There is considerable force in the argument that such conduct was unreasonable given Ms Cook's lack of medical qualifications and given the circumstances of the applicant known to Ms Cook at the time, including the stress that she was under as a result of matters occurring at work and the illness and subsequent loss of the applicant's mother on 29 August 2018. I am not satisfied that Ms Cook's conduct during these case conferences constituted reasonable action.

199. It is important to note, however, that at the time of these conferences, the applicant had already gone off work due to her psychological symptoms. The question I am tasked with determining is whether the applicant's psychological injury was wholly or predominantly caused by reasonable action by the employer. The applicant's claim in these proceedings is of a psychological injury deemed to have occurred on 26 July 2018. Chronologically, it is not possible for that injury to have been caused by Ms Cook's conduct at the conferences on 30 August 2018 and 7 September 2018, although that conduct may have exacerbated the applicant's symptoms.

200. As a result of the foregoing analysis, I am satisfied that, to the extent the applicant's psychological injury was caused by Ms Cook's involvement in the management of the applicant's spinal injury, that involvement constituted reasonable action with regard to the provision of employment benefits.

201. I am not satisfied however, that Ms Cook's involvement in the management of the applicant's spinal injury was of itself the whole or predominant cause of the applicant's psychological injury. It is necessary to consider the other events identified as causative of the injury.

Use of CCTV footage and written warnings

202. The applicant's evidence suggests that she first became aware of the use of CCTV footage to monitor her activities at work during a meeting on 16 July 2018. At the same meeting, the applicant was issued with a formal written warning as she had been seen bending down and facing bottles on the bottom shelf in contravention of her return to work restrictions.
203. The impression given by the applicant's evidence is that the CCTV footage had been used without cause to try to catch the applicant doing something wrong. Her evidence also suggests that she was unexpectedly issued with the formal written warning for one, relatively minor, breach of her restrictions.

204. Mr Craven's evidence provides a different perspective on this meeting. Mr Craven points out that this meeting was not the first occasion on which discussions had been held with the applicant with regard to her restrictions.

205. Mr Craven has given evidence that in June 2018 he saw the applicant performing duties outside her restrictions and at other times saw evidence that she may have done work outside those restrictions. It was in this context that Mr Craven began checking the CCTV footage.

206. Mr Craven and Ms Cook both said the applicant had been given many verbal warnings about performing duties outside her restrictions but continued to do so. A handwritten file note dated 25 June 2018 records a meeting in which the applicant was spoken to regarding her restrictions.

207. A file note dated 27 March 2018 but which appears should be dated 27 June 2018, indicates that the applicant was reminded again of her restrictions and specifically told not to unpack a load, even though there was nobody else available to do it.

208. Mr Craven described a further meeting on 29 June 2018, after the applicant had been seen on CCTV footage performing duties outside her restrictions on 15 occasions in one day. Mr Craven's evidence and handwritten notes indicate that those breaches included facing stock on the bottom shelf on her hands and knees and climbing a shelf to reach something on a top shelf. A file note of the meeting on 29 June 2018 confirms that the CCTV footage and the applicant's restrictions were discussed with her on that occasion.

209. The applicant has not denied that she was working outside her restrictions in the manner indicated by Mr Craven. Dr Loh's evidence confirms that this was occurring and in fact impacting on the applicant's spinal symptoms. On 15 June 2018, Dr Loh recorded that the applicant had unloaded 2.5 pallets by herself as her boss had left early and she was now experiencing symptoms further up her thoracic spine. On 19 July 2018, the applicant was recorded to have reported that she had "pushed herself too hard" and had worsened her pain.

210. My analysis of the evidence above indicates that the applicant was in fact working outside her restrictions in June 2018. This additional work was having an actual negative impact on her spinal symptoms. The applicant was seen by the employer to be working outside her restrictions and on other occasions there was evidence of her having done so. Although there is no evidence before me as to whether the applicant was aware of the respondent's CCTV policy, I am prepared to accept that such a policy was in place as it was shown to the applicant at a later meeting. The policy indicates that the CCTV equipment would be used, amongst other things, to "protect staff" and "ensure their safety". I am satisfied that the CCTV footage was used reasonably in these circumstances. The respondent had reason to believe that the applicant was working in a manner which was unsafe and the CCTV footage was used to confirm this. Mr Craven says he offered to show the applicant the footage demonstrating this on multiple occasions during the meeting on 16 July 2018 but the applicant declined.

211. I am also satisfied that the issuing of a written warning to the applicant about working outside her restrictions on 16 July 2018 was reasonable in the circumstances. I am satisfied that there were multiple discussions and meetings about the applicant working outside her restrictions prior to 16 July 2018. The applicant was seen to have worked in serious contravention of those restrictions in multiple instances notwithstanding previous discussions and meetings about the issue. I am satisfied that it was incumbent upon the respondent to take further action to prevent unsafe work practices. A formal written warning was, in these circumstances, an appropriate and reasonable measure. Nothing in the terms of the warning itself or the evidence about the manner in which it was delivered suggests that it was given in an unreasonable way.

212. The evidence before me indicates that the applicant was warned that CCTV footage would continue to be used to monitor her compliance with restrictions at the 16 July 2018 meeting.

213. The applicant has given evidence about a further conduct meeting on 25 July 2018. No file notes with regard to this meeting appear to be in evidence. The applicant said she attended the meeting with a union representative and was told that she had been seen on CCTV footage talking on her mobile phone whilst engaging with customers and knitting on the job for 45 minutes.

214. The applicant has confirmed that she talked on the phone with a former manager about the conduct meeting she had attended on 16 July 2018. The applicant did not believe, however, that it was while customers were around. The applicant also did not deny knitting at work but again did not believe that it was while serving customers.

215. Mr Craven has given evidence that the applicant was seen talking on her phone for possibly 50 minutes or more, whilst serving customers. The evidence also suggests that the applicant was seen knitting for approximately 45 minutes whilst in the store. Mr Craven has said that it would appear unprofessional for the applicant to be knitting at work. Although Mr Craven conceded that he was generally lenient about staff using mobile phones it was not appropriate for staff to be talking on their phone for long periods in the store or while serving customers.

216. Having regard to the nature of the applicant's employment, being one of customer service in a retail store, I am satisfied that it was reasonable for the respondent to counsel the applicant in relation to her conduct. There is no evidence before me that the applicant was actually issued with a further or final written warning with regard to this conduct although she was asked to attend a further meeting on 27 July 2018. I am satisfied that the holding of a meeting to discuss this conduct, at which the applicant was permitted to bring a union representative and her daughter, was in itself reasonable action.

217. The evidence does suggest that aspects of that meeting were conducted in a manner which was unprofessional and unreasonable. Mr Craven has conceded getting frustrated with the applicant and has not denied that the applicant's description of how the meeting transpired was accurate. The applicant has claimed that Mr Craven at one point raised his voice and had said how "pissed off" he was when he saw the applicant knitting. Mr Craven was alleged to have said "I could have called you straight away and told you not to bother coming back to work." I accept that the tone of the discussion suggested to the applicant that her employment was at risk because of her conduct.

218. The applicant has also complained about not being given an outcome from the meeting immediately. There appears to have been a miscommunication between Mr Craven and the applicant as to whether any further action was to be taken after the meeting on 25 July 2018. The applicant initially believed the matter was "all sorted" but was later invited to attend another meeting on 27 July 2018. Mr Craven has explained that the delay in giving the applicant an outcome from the meeting was due to his need to clarify the process of issuing a final warning with People Services. Mr Craven denied giving the applicant the impression that there would be no further action. I am not persuaded, in the circumstances that the applicant was deliberately misled as to the outcome of the meeting or that there was any unreasonable delay in communicating the outcome to her.

219. It is not apparent that a final warning was in fact issued and the applicant did not attend the meeting on 27 July 2018 as she did not go to work.

Harsh treatment and hostility

220. The applicant has claimed generally that she was subjected to a range of hostile and harsh treatment by Mr Craven, including being labelled sexist and racist. The applicant felt Mr Craven treated her differently and was annoyed with her. The applicant felt that during June 2018, Mr Craven was at odds with everything the applicant said and made negative remarks. The applicant said she felt Mr Craven was uncaring and did not comfort her when she was crying at work. The applicant also claims Mr Craven told a colleague he wanted to "get rid of her".

221. Mr Craven's evidence is consistent with the applicant's with respect to some of these events. Mr Craven did not deny calling the applicant sexist or racist, explaining that he felt that the applicant had indeed made sexist or racist comments. Mr Craven agreed that he did treat the applicant differently but said it was due to her performance and discipline issues. Mr Craven also confirmed that he often saw the applicant crying at work but said his usual response was to ask the applicant if she needed a break. Mr Craven's evidence suggests that he did suspect that the crying may be inauthentic or contrived.

222. Mr Craven denied telling anyone he was out to get rid of the applicant. He also denied treating the applicant harshly, arguing with her or being at odds with everything the applicant said. Mr Craven did, however, concede that he was frustrated with the applicant during the meeting on 25 July 2018.

223. In the circumstances, I am satisfied that there were interactions between the applicant and Mr Craven in which he described her as racist and sexist. I am also satisfied that there was significant tension in the working relationship between the applicant and Mr Craven from June 2018 onwards. Other documents in evidence confirm that the applicant had appeared unhappy in the workplace since the departure of a previous manager. Given my other concerns about the reliability of the applicant's evidence I do not accept that Mr Craven told anyone he wanted to get rid of the applicant.

224. It is noted that Dr Baker took a history of other events that are not referred to anywhere else in the evidence, including the applicant's written statements. Dr Baker, for example, recorded that the applicant was allocated all the heavy lifting by a male colleague who it may be assumed was Mr Craven. The applicant said this male colleague would often leave the workplace leaving her feeling unsafe working in a public place, alone. Dr Baker also recorded that the applicant was not permitted to have time off due to her mother's death.

225. Given the inconsistencies between these aspects of Dr Baker's history and the other evidence, I am not satisfied that the applicant was allocated all the heavy lifting after her spinal injury, denied bereavement leave or left alone in unsafe circumstances in the store.

Whole or predominant cause

226. The applicant's evidence indicates that it was an accumulation of events which led to her psychological injury. It is apparent, however, that the events relating to the use of CCTV and the respondent's action in relation to the applicant working beyond her restrictions, talking on her mobile phone and knitting at work had a particular impact upon her.

227. The applicant's own evidence indicates that she began to feel unwell shortly after the 29 June 2018 meeting. The applicant gave evidence that on 2 July 2018 she was found to have very high blood pressure which she attributed to stress at work. The applicant took two weeks of sick leave as a result.

228. The written warning regarding working outside the applicant's restrictions was issued on 16 July 2018 following the applicant's return to work. The applicant's evidence confirmed that she experienced a strong psychological response to the meeting on 16 July 2018. The applicant described bursting into tears and feeling as though she would lose her job. The applicant felt the warning was over-the-top and very harsh, felt "devastated" and that her mental health was deteriorating.

229. The applicant described feeling upset, stressed and angry on 24 July 2018 when asked to attend a meeting on 25 July 2018. At that meeting, the applicant felt bullied and harassed. When the applicant was asked to attend a further meeting on 27 July 2018, the applicant described feeling "devastated". The applicant told Ms Cook that she felt upset, hated feeling that way and hated being at work. On 27 July 2018, the applicant told Ms Cook that she would not be coming into work due to stress.

230. Chronologically, therefore, the disciplinary meetings on 29 June 2018, 16 July 2018 and 25 July 2018 appear to have triggered periods of incapacity as a result of increased psychological symptoms.

231. The treating medical evidence before me confirms that these particular events were significant in the onset of the applicant's psychological injury. Dr Loh has expressed the view that the applicant's depression was worsened by being subjected to CCTV surveillance and a suspicious work environment. Dr Singh took a history of the onset of depressive symptoms in July 2018 resulting from constant surveillance being kept of her through the CCTV footage at work and seemingly being harassed at other times.

232. Dr Loh and Dr Singh also identified the applicant's perception that Ms Cook had overstepped her role and other ongoing conflicts with management, including being called sexist and racist, as factors contributing to the applicant's injury. Neither practitioner has, however, expressed a view as to the predominant cause of the applicant's injury.

233. Dr Baker also identified a range of matters as contributing to the applicant's psychological injury, some of which I have rejected above as factually inaccurate. It is difficult, therefore, to discern from Dr Baker's report whether any particular events were more significant than others.

234. The applicant's expert, Dr Bisht has expressed the view that the disciplinary process was the main contributing factor to the applicant's psychiatric condition. I am prepared to accept that although this opinion was not expressed in the language of s 11A(1), it amounts to an opinion that the disciplinary process was the predominant cause of the applicant's injury.

235. In my view, however, Dr Bisht has taken far too simplistic a view of the events contributing to the applicant's psychological injury. Despite taking a history which included difficulties around Ms Cook's involvement in the management of the applicant's injury and general tensions in the working relationship between the applicant and Mr Craven, Dr Bisht did not expressly consider their role in causing the applicant's psychological injury. Dr Bisht provided no explanation as to the basis on which he reached the view that the disciplinary process was the main contributory factor.

236. Considering the lay and medical evidence as a whole, my own view is that the psychological injury was indeed caused by the accumulation of the events as found by me above. Some of those events, including the general tensions and difficult interactions in the working relationship between the applicant and Mr Craven, fall outside the range of actions potentially relevant for the purposes of s 11A(1).

237. As indicated above, I do not accept that all of the respondent's actions with regard to the provision of employment benefits or discipline were reasonable. I find that from 30 July 2018 onwards, the case conferences involving Ms Cook and Dr Loh became much more frequent than would ordinarily be reasonable. I accept that there were case conferences on 2 August 2018, 30 August 2018 and 7 September 2018 in which there were unreasonable attempts to influence the doctor's certifications. The interventions by the EML Case Manager and Ms Cook on those occasions were unreasonable, in part, because of the applicant's known circumstances at the time but also because of their attempt to influence the outcome of the conference by reference to unfair lay observations of the applicant's abilities.

238. These conferences did, however, all occur after the deemed date of injury and after the applicant had already ceased work due to her psychological symptoms.

239. I accept that the applicant perceived Ms Cook's involvement in the management of her injury prior to these conferences as also unfair or unreasonable. For the reasons given above, however, I am satisfied that Ms Cook's actions up until late July 2018 were in fact reasonable.

240. I have also found above that most of the respondent's actions with regard to monitoring the applicant's compliance with her work restrictions, including the use of CCTV footage, the written warning and the holding of disciplinary meetings on 25 June 2018, 29 June 2018 and 16 July 2018 were reasonable.

241. I have found aspects of the meeting on 25 July 2018 to be unreasonable. These include Mr Craven raising his voice and using inappropriate and offensive language. I am, however, satisfied that it was reasonable to hold a meeting to discuss the applicant's use of her mobile phone at work and knitting. I also accept that Mr Craven's conduct after the meeting and the proposal to hold a further meeting at which to discuss the outcomes on 27 July 2018 were reasonable.

242. After carefully weighing the evidence as a whole, I conclude that reasonable actions with respect to the provision of employment benefits or disciplinary action were not the whole cause of the applicant's psychological injury. I find that the applicant's psychological injury was, in part, caused by actions falling outside s 11A(1) of the 1987 Act and actions which, whilst constituting action with respect to the provision of employment benefits and discipline, were not reasonable. I am satisfied, however, that the applicant's psychological injury was predominantly caused by action with respect to the provision of employment benefits and discipline which was reasonable.

243. I am satisfied that the respondent has discharged its onus in establishing the defence under s 11A(1). As a result, the applicant's psychological injury is not compensable under the 1987 Act. There will be an award for the respondent in respect to the claim for primary psychological injury.

Spinal injury

244. What remains to be determined in these proceedings is whether the applicant is entitled to weekly benefits as a result of her spinal injury.
245. Section 33 of the 1987 Act provides that 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 weekly payments during the period of incapacity.

246. In order to determine the applicant's entitlement to weekly compensation in the relevant period, I must determine whether, the applicant had, at the relevant times, "no current work capacity" or "current work capacity" as defined in s 32A of the 1987 Act.

247. Section 32A of the 1987 Act defines the relevant terms as follows:

> "**current work capacity**, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment.
>
> **no current work capacity**, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to work, either in the worker's pre-injury employment or in suitable employment.
>
> **suitable employment**, in relation to a worker, means employment in work for which the worker is currently suited:
>
> (a) having regard to:
>
> (i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and
> (ii) the worker's age, education, skills and work experience, and
> (iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and
> (iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and
> (v) such other matters as the WorkCover Guidelines may specify, and
>
> (b) regardless of:
>
> (i) whether the work or the employment is available, and
> (ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and
> (iii) the nature of the worker's pre-injury employment, and
> (iv) the worker's place of residence."

248. The claim for weekly benefits before me commences on 13 July 2019. It is common ground between the parties that the present claim commences in the second entitlement period and the applicable PIAWE figure is $857.46.

249. A difficulty arises in making a determination as to the extent of the applicant's incapacity resulting from her spinal injury because, to a large degree her evidence, assumes that there is also a compensable psychological injury. In view of my findings above, I am required to exclude consideration of any incapacity resulting from the applicant's primary psychological for present purposes.

250. Whilst there was some discussion at the arbitration hearing as to whether the spinal injury which was accepted by the respondent included any condition in the applicant's thoracic spine, it is clear that the applicant has degenerative spinal disease in her mid and lower thoracic region and in her lumbar spine. Associate Professor Shatwell, in his first report appeared to accept that the symptoms of the applicant's thoracolumbar disease were exacerbated by her work activities. That opinion was not materially altered in Associate Professor Shatwell's report of 20 February 2019. Associate Professor Shatwell appeared to express a completely different view, however, in his most recent report, where he concluded, "I do not consider there was any aggravation of the underlying condition by work activities."

251. Associate Professor Shatwell has provided no real explanation for the change in his opinion. I am also not satisfied on reading his reports that Associate Professor Shatwell has fully appreciated that an aggravation, acceleration, exacerbation or deterioration in the applicant's thoracolumbar disease is capable of constituting an "injury" under s 4(b)(ii), provided employment is the main contributing factor to the aggravation etc. Certainly, Associate Professor Shatwell's most recent report appears at odds with the views of the applicant's treating doctors and Dr Guirgis.

252. Dr Loh's evidence demonstrates that the applicant has consistently presented to him complaining of back symptoms since late 2017. Dr Loh has diagnosed severe L4/5 facet joint degeneration, mild T7/8, T8/9 and T9/10 facet joint degeneration with left paracentral disc herniation at T7/8. Dr Loh has said that the applicant's work caused a "flare up" of the applicant's degenerative arthritis. Dr Loh considered that the applicant's chronic back pain had caused incapacity for pre-injury duties and contributed to her being unfit for any alternative duties.

253. Dr Loh's view of the applicant's condition is consistent with the view expressed by Dr Manohar. It is also consistent with Dr Coughlin's opinions. Dr Coughlin has said that the applicant experienced a sudden onset of significant back pain in October 2017 after a particularly heavy bout of work, which had failed to improve despite multiple interventions. Dr Coughlin now proposes a L4/5 interbody fusion surgery to ameliorate the applicant's chronic pain.

254. Dr Guirgis appears to have reached a similar view, although his expression and reasoning is somewhat difficult as a lay person to follow. Dr Guirgis considered that the applicant might be fit for suitable duties from a purely physical point of view but said there were also signs and symptoms of a chronic pain syndrome contributing to the applicant's incapacity.

255. There is other evidence of secondary psychological symptoms resulting from the applicant's pain in Dr Loh's reports and that of Dr Bisht.

256. The weight of evidence before me therefore indicates that the applicant sustained an injury to her thoracolumbar spine pursuant to s 4(b)(ii) which has not ceased but continues to be symptomatic and incapacitating despite the cessation of pre-injury duties for the respondent.

257. I am not satisfied on the evidence that the applicant has capacity to return to pre-injury duties. The real issue is the extent of any incapacity to work in suitable duties as a result of the spinal injury.

258. Apart from Associate Professor Shatwell, whose final report I find unreliable for the reasons set out above, the only other direct medical evidence going to this issue are a series of WorkCover certificates of capacity issued by Dr Loh. On 25 September 2018, Dr Loh issued a certificate certifying the applicant as having no current work capacity from 30 August to 30 September 2018 as a result of lumbar spine pain. An earlier certificate in evidence certifies the same from 14 June 2018 to 14 September 2018.

259. From 1 October 2018 to 30 October 2018, the applicant was certified as fit for suitable duties with restrictions for 30 hours per week. I can see before me no certificates with respect to the period 1 November 2018 to 4 February 2019 relating only to the back injury although there are certificates indicating total incapacity as a result of the psychological injury in this period.

260. From 5 February 2019 to 24 April 2019, the applicant was certified as having no current capacity as a result of lumbar spine pain. I have no certificates relating solely to the spine Sin evidence after 24 April 2019, but there is nothing in the evidence to suggest any material change or improvement in the applicant's physical condition after that date.

261. Based on the evidence above, I am satisfied that the applicant had no current work capacity as a result of her spinal injury from 13 July 2019 to date and continuing. The applicant will be entitled to an award of weekly benefits pursuant to s 37(1)(b) of the 1987 Act as it applies in this case, from 13 July 2019, based on a PIAWE figure of $857.46 as indexed or adjusted in accordance with the legislation.

262. It follows from my findings above that the applicant will also remain entitled to compensation for her reasonably necessary medical and related expenses pursuant to s 60 of the 1987 Act in respect of her spinal injury. A general order to this effect is appropriate.

SUMMARY

263. The applicant's psychological injury was predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the respondent with respect to the provision of employment benefits and discipline pursuant to s 11A(1) of the 1987 Act.

264. The applicant had no current work capacity and remained in need of medical treatment as a result of her spinal injury on and from 13 July 2019.