WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **6743/19**
Applicant: **George Tanios**
Respondent: **Sydney Trains**
Date of Determination: **30 March 2020**
Citation: **[2020] NSWWCC 99**

The Commission determines:

1. The applicant sustained a psychological injury pursuant to ss 4(b)(i) and 11A(3) of the *Workers Compensation Act 1987* (the 1987 Act).

2. The psychological injury was not 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 pursuant to s 11A(1) of the 1987 Act.

3. The applicant had no current work capacity as a result of the psychological injury from 3 July 2019 to date and continuing.

The Commission orders:

1. The respondent to pay the applicant weekly benefits from 3 July 2019 to date and continuing pursuant to s 36(1)(b) and s 37(1)(b) of the 1987 Act at the maximum weekly compensation amount, with credit for any payments already made.

2. The respondent to pay the applicant's reasonably necessary medical expenses pursuant to s 60 of the 1987 Act upon production of accounts, receipts and/or valid Medicare Notice of Charge.

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

Rachel Homan
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF RACHEL HOMAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

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

STATEMENT OF REASONS

BACKGROUND

1. Mr George Tanios (the applicant) was employed by Sydney Trains (the respondent) as a train driver and driver trainer. The applicant claims that he sustained a psychological injury as a result of bullying and harassment by a superior at work.

2. The applicant's claim for compensation was disputed by the respondent in a notice issued pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), dated 8 October 2019.

3. The present proceedings were commenced by an Application to Resolve a Dispute (ARD) filed in the Commission on 19 December 2019. The applicant sought weekly benefits on an ongoing basis from 3 July 2019. Leave was subsequently granted to the applicant to amend the ARD to include a claim for general medical expenses pursuant to s 60 of the *Workers Compensation Act 1987* (the 1987 Act).

PROCEDURE BEFORE THE COMMISSION

4. The parties attended a conciliation conference and arbitration hearing on 24 February 2020. The applicant was represented by Mr Jim Jobson of counsel, instructed by Ms Miki Milicevic. The respondent was represented by Mr Misha Hammond of counsel, instructed by Ms Jessica Mikaelian.

5. 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

6. During the conciliation conference, the parties reached agreement that in the event of a favourable determination for the applicant, the maximum statutory rate should be applied in respect of the claim for weekly benefits. The parties agreed that a general order for s 60 expenses would be appropriate and agreed on a deemed date of injury of 2 July 2019.

7. The following issues remained in dispute and require determination:

    (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 respondent with respect to the provision of employment benefits pursuant to s 11A(1) of the 1987 Act;

    (b) the extent and quantification of any incapacity resulting from injury, and

    (c) the applicant's entitlement to medical expenses pursuant to s 60 of the 1987 Act.

EVIDENCE

Documentary evidence

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

    (a) ARD and attached documents;

    (b) documents attached to an Application to Admit Late Documents (AALD) filed by the applicant on 23 January 2020;

    (c) the Reply, attached to an AALD filed by the respondent on 30 January 2020, and

    (d) documents attached to an AALD filed by the applicant on 17 February 2020.

9. During the conciliation conference, there was a discussion regarding the admissibility of a witness statement by Ms Catherine Kerrison or parts of that statement. In particular, the applicant objected to parts of paragraphs 12, 13, 14, 16 and 17 of the statement on the grounds that they contained opinion or hearsay evidence. The parties were ultimately content for the document to be admitted in the proceedings albeit with the applicant's objections noted. The statement was the subject of oral submissions.

10. No application to adduce oral evidence or cross-examine any witness was made. It was noted at conciliation, however, that the applicant had written to the respondent on 20 February 2020 requiring the attendance of Ms Kerrison for the purposes of cross-examination at the hearing on 24 February 2020. No Summons to Attend was lodged in the Commission or served on the respondent. Ms Kerrison did not attend the hearing.

Applicant's evidence

11. The applicant's evidence is set out in written statements made by him on 8 August 2019, 9 December 2019 and 12 February 2020.

12. The applicant commenced employment with the respondent in 1985, initially as an assistant electrician. In 1999, the applicant became a train driver and later a "trainer driver". The applicant's duties as a trainer driver involved instructing and teaching new drivers how to drive and operate trains. Most of the applicant's work was performed in the cabins of trains, which had two seats, one of which was set facing forward and the other facing the rear of the cabin. The trainee driver would sit in the forward-facing seat whilst the trainer sat in the rear-facing seat. The trainer was required to continually turn his or her head in order to be able to look ahead out of the train. Some train cabins had trainer's seats that would turn but not all trains had this feature.

13. Over time, the applicant began to feel discomfort in his neck, shoulders and lower back, which he believed was caused by sitting in the fixed seat facing the rear of the cabin and having to constantly twist to look forward.

14. On 19 July 2017, the Commission determined that the applicant had 23% whole person impairment as a result of the physical injuries he sustained at work. The applicant underwent treatment and returned to work on restricted duties under a Return to Work plan prepared in accordance with WorkCover medical certificates. The applicant periodically underwent medical assessments by Sonic Health, arranged by the respondent.

15. The applicant was eventually able to return to full hours and duties, however, his general practitioner had recommended that he not start work before 10.00 am due to the effects of the medication the applicant was prescribed. The applicant's roster was prepared in accordance with this restriction. The respondent ran a 24-hour roster and the applicant usually worked shifts from 12.00 pm onwards. The applicant had not started a shift prior to 10.00 am for some four years apart from a few occasions. The applicant recalled feeling disoriented, dizzy and not quite right on those days.

16. The applicant said he had worked with a colleague, Ms Catherine Kerrison for approximately 19 years. Early on, the applicant formed the impression that Ms Kerrison might not like him and so he stayed away from her. Ms Kerrison later became his crew area manager. The applicant said he had not had any difficulties with his former manager.
17. In about April 2019, the applicant began to experience increasingly severe neck pain after performing trainer duties that involved turning and twisting his neck. The applicant sent an email to the training roster clerk on 10 April 2019 requesting that he be rostered without a trainee for the next few weeks due to his neck pain. The applicant received no response to his request.

18. On or around 19 June 2019, the applicant spoke to his shift manager about the pain and discomfort in his neck and lower back. The applicant requested that an email be sent to the roster clerk to give the applicant a break from the training duties.

19. About two weeks later, the applicant went to the office to see his shift manager and Ms Kerrison was there. The applicant described the interaction that followed:

> "She said words to the effect '*George, where are you from'* in a laughing manner. I replied, '*Why do you ask this question?*' Catherine Kerrison replied ''*Oh I was in a meeting in the city and your name was mentioned*.' I replied '*I am Coptic Egyptian*'."

20. The applicant said the conversation seemed unusual and strange to him and he began to think about why his name would be brought up in a meeting. The applicant felt that something was going on which he had not been told about and he began to feel concerned.

21. Over the next two weeks, two of the applicant's co-workers told him that they had overheard Ms Kerrison discussing him on the phone. One co-worker told the applicant to be careful as he thought they were going to sack the applicant. The other co-worker said a similar thing.

22. The applicant became more and more concerned that he was going to be without a job. The applicant ruminated about this the whole day and night and could not sleep. The applicant's appetite fell away. The applicant did not know what he had done wrong or what he could do to fix it.

23. On 2 July 2019, the applicant was approached by Ms Kerrison after signing on at work. The applicant followed her to an office and began to feel more anxious and very nervous. The applicant described the interaction as follows:

> "I sat down and Catherine Kerrison said to me words to the effect '*You are taking medication such as Lyrica, Mobic, Nurofen, Panadol. I want you to go and see your doctor and change your medication to a lower dose and for him to remove all the restrictions from the WorkCover Certificate*', I remained silent. I felt myself starting to sweat and feel nauseous. She then went on to say words to the effect '*I was one of you before. I know what is going on. Go visit your doctor and change your medication and have him remove your restrictions completely*'."

24. The applicant said he tried to explain that he had been assessed on a regular basis by the doctor at Sonic Health as arranged by the respondent. Ms Kerrison responded,

> "We don't know anything about your condition. You have been privileged to start at 10:00am while the other drivers start earlier in the morning."

25. The applicant found the manner in which Ms Kerrison spoke to him intimidating and her body language threatening. The applicant felt she was accusing him of lying about the severity of his injury in order to receive a roster with the latest starting shift. The applicant said his head was spinning and he just sat there. The applicant began to sweat and could feel the anxiety rising in him. The applicant told Ms Kerrison that he didn't think he was going to be able to remember all of this and asked her to send him an email.

26. After the meeting, the applicant went to get a drink of water and sit down. He was feeling unwell and knew that his job was on the line. The applicant wondered what he would do. He still had a daughter at university to support and thought no one would give him a job at his age with his injuries.

27. The applicant started his shift but felt sick all day and could not stop thinking about what had occurred. The applicant could not eat his lunch and went to see his general practitioner, Dr Carl Bazergy, who referred him to a psychologist, Mr Fernando Gomez. The applicant saw Mr Gomez for a number of sessions before being referred to a psychiatrist, Dr Monir Younan.

28. The applicant went to work on 3 July 2019 having hardly slept the previous night. The applicant felt anxious, nauseous and had a severe headache. He could not stop thinking about what happened the day before. The applicant felt he was being accused of being a liar or that Ms Kerrison might think he had an addiction to his medication. The applicant felt ashamed and as though his job was on the line if he did not comply with what Ms Kerrison wanted him to do.

29. The applicant said his treating doctors had recommended a return to work on reduced hours but not at the same depot as Ms Kerrison. It was their opinion that the longer the applicant was off work, the worse his psychological condition would be. The applicant was told, however, that he had to return to the same depot despite the doctor's recommendations.

Evidence form the applicant's treating practitioners

30. A document purporting to be a WorkCover certificate issued by the applicant's orthopaedic surgeon, Dr Medhat Guirgis, dated 25 July 2019 states,

> "He presented today in a state of severe anxiety and depression because of the way Crew Manger Mortdale (Catherine Kerrison) treating him at work. Her attitude towards him and her frequent remarks that she was issuing indicating that she knew what was going on which I take as being on the verge of defamation for his treating orthopaedic consultant and his Nominated treating doctor. I believe that for sure we are delivering GOOD MEDICINE and I wonder what are the qualifications of this lady that would give her the authority to question the medications or restrictions in his capacity certificates. He indicated that after 35 years' service he was not expecting to be treated that way by one of his juniors bullying and intimidating him."

31. A report from clinical psychologist, Mr Fernando Gomez, dated 2 August 2019, indicated that he saw the applicant on 17 July 2019 and 31 July 2019. The applicant had described to Mr Gomez, a recent conversation with his crew manager in which it was intimated that the applicant was not genuinely impaired by his injury. The applicant was asked to consult his medical specialists and explore alternative medications. Mr Gomez said he had been provided with an email addressed to the applicant from the crew manager dated 2 July 2019, confirming that her intention was to increase his capacity to pre-injury duties and requesting a review of his medication so as to allow him to start shifts at any time. Mr Gomez said this conversation and the follow-up email triggered the applicant's current symptoms of anxiety and depression. The applicant perceived these demands as harassment and an effort to get rid of him.

32. Mr Gomez gave the opinion that the applicant presented with symptoms of depression/anxiety associated with questions regarding the nature of his injury and the expressed request to modify his treatment so as to allow unrestricted duties. Mr Gomez said it would be inadvisable for the applicant to return to the same management structure.

33. The applicant's consultant psychiatrist, Dr Monir Younan, prepared a report on 6 August 2019. Dr Younan reported that the applicant had described developing symptoms after the incident at work involving Ms Kerrison on 2 July 2019. After the incident, the applicant had received a payslip for $0, although this was later corrected.
34. Dr Younan said the applicant appeared traumatised, depressed and almost tearful at times during the consultation. His talk was rushed and excessive. The applicant reported sleep disturbance and experiencing nightmares involving the manager. The applicant reported loss of appetite, loss of weight and loss of libido as well as preoccupation with memories of what happened.

35. Dr Younan made a provisional diagnosis of adjustment disorder with mixed anxiety and depressed mood with the depressive part of the diagnosis almost merging into major depression. Dr Younan said the applicant required ongoing psychiatric treatment and was totally and permanently unfit for work under this manager.

36. On 20 August 2019, Dr Younan prepared a certificate indicating that the applicant was prescribed Lovan and Allegron. Dr Younan confirmed that the applicant's ability to drive trains was not impaired as a result of taking the medications.

37. On 18 September 2019, Dr Younan reported that the applicant remained depressed and even more anxious than previously. The uncertainty about his future was causing a high degree of anxiety. Dr Younan considered that the most effective therapeutic intervention would be to work under a different manager. The applicant was provided with supportive counselling and his prescription for Allegron increased.

38. On 24 October 2019, Dr Younan issued a certificate to the respondent indicating he had reviewed the applicant's psychiatric conditions and medications. The applicant was found to be extremely anxious and apprehensive but it was recommended that he resume work with the conditions of three days driving and two days training per week, hours gradually increasing, under different management. The applicant's work should start after 9.00 am.

39. On 29 October 2019, Dr Younan prepared a report for the respondent indicating that the medication, Allegron, prescribed to the applicant would not affect his ability to drive the train. Dr Younan objected to a request to know the exact medication prescription, required dosage and recommendation of time of day to be taken, on the basis that it insinuated that the respondent's Chief Health Officer was more knowledgeable or in a better position to assess the applicant than himself. Dr Younan said he had assessed the applicant's functioning in the morning and found him fit to resume work.

40. Dr Younan prepared a report for the applicant's solicitors on 12 November 2019. Dr Younan said he had consulted with the applicant on seven occasions since 6 August 2019. Dr Younan set out a history consistent with the other evidence and provided an opinion as follows:

> "Mr Tanios, in response to the meeting with Ms Kerrison at which he perceived her language and body language as threatening and intimidating, he suffered what I diagnosed as adjustment disorder with anxious and depressed mood. As per Mr Tanios' last visit on the 11th November 2019, I found him more depressed and more anxious and the diagnosis then is major depressive disorder with anxious distress. While previously I considered him fit to resume work provided under different management, I now believe that he is not fit for returning to work."

41. The applicant's general practitioner, Dr Carl Bazergy prepared a report for the applicant's solicitors dated 9 January 2020. Dr Bazergy said the applicant first consulted him in respect of the injury on 4 July 2019 and recited a history consistent with the other evidence. Dr Bazergy said that the applicant described feeling harassed as a result of the meeting with Ms Kerrison. The applicant described difficulty concentrating, feeling confused, difficulty sleeping at night, depressed mood, emotional lability, anxiety and poor appetite. Dr Bazergy considered that the applicant's symptoms were consistent with a diagnosis of major depressive disorder with anxious distress. Dr Bazergy said,

> "The cause of the condition is a direct result of the feelings of harassment attributable to his meeting with Ms Kerrison, as well as the accusations of lying and the intimidating body language by Ms Kerrison during the meeting."

42. With regard to the applicant's capacity for work, Dr Bazergy said,

> "George's condition has worsened since his initial presentation, at least partly if not mainly as a result of George not being offered suitable duties by his workplace, that is, suitable duties which are not with or at the same location as Ms Kerrison, whereby he now has a very poor short-term memory with worsened concentration and severe irritability. As a result of the poor short-term memory and poor concentration and considering George's role as a train driver and instructor and the potential impact on public safety, George is currently completely unfit for work."

43. WorkCover certificates of capacity issued by Dr Bazergy indicate that from 4 July 2019 to 15 October 2019, the applicant had no current work capacity as a result of his psychological injury. Between 15 October 2019 and 21 November 2019, the applicant was certified as having capacity to perform pre-injury hours with restrictions that included not starting before 10.00 am and not to work with his previous manager. The applicant was again certified as having no current work capacity for any employment from 21 November 2019 to 18 February 2020.

Direction to take sick leave

44. Attached to the ARD is an email to the applicant from an officer of the respondent, Cindy Collins, dated 25 October 2019, with the subject, "Direction to take sick leave pending clarification regarding impact on Category 1 rail safety work".

45. The email refers to a meeting on 21 October 2019 at which the applicant's medication, Allegron, was discussed. It was agreed that clarification as to the effects of that medication was required. The email states:

> "As agreed, ST have consulted our Chief Health Officer (CHO) who advises that the medication is not suitable to be taken in the morning prior to commencing Category 1 Rail Safety work. He further recommends that your treating doctor review the medication and dosage currently prescribed to you, and consider an alternative, non-sedative anti-depressant.
> …
>
> Accordingly, you are directed to not attend work as you are currently unable to demonstrate that you are fit to perform your role, nor are there any reasonable adjustments or any suitability for any temporary assignments. You are directed to take sick leave in accordance with the Sydney Trains Attendance & Leave Policy…"

Dr Himalee Abeya

46. Consultant Psychiatrist, Dr Himalee Abeya prepared an Independent Clinical Assessment on behalf of Sonic Health for the respondent on 30 August 2019.

47. Dr Abeya took a history consistent with the applicant's evidence. Dr Abeya noted that the applicant did not have any psychiatric history. The applicant now reported worsening symptoms of depression and anxiety on a background of perceptions of feeling harassed at work. The applicant reported that this had mostly come from his crew manager, Ms Kerrison, and matters came to a head with a difficult conversation in July 2019. Dr Abeya said,

> "This appears to have led to quite acute and significant depressive symptoms in the background of gradually lowered mood. The diagnosis would lie between an adjustment disorder with mixed depressive and anxiety symptoms and a major depressive disorder with anxious distress."

48. Dr Abeya noted that the applicant had been receiving treatment with a psychiatrist who had commenced him on low-dose antidepressant therapy. The applicant had also had two sessions with a psychologist. Dr Abeya consider the applicant was likely to have a reasonable prognosis provided he was not exposed to similar situations which could give rise to the recent perceptions again.

49. Dr Abeya considered the applicant had the capacity to return to some form of work with the respondent but with temporary restrictions including no work with Ms Kerrison. The applicant was considered temporarily unfit for his pre-injury duties as a trainer driver but was fit for other types of work with the respondent including Category 2 or 3 Rail Safety Work. Dr Abeya considered this work would be very beneficial for the applicant.

Factual investigation report

50. The respondent relies on a Factual/Circumstance Investigation, dated 8 August 2019, prepared by MJM Corporate Risk Services.

51. Attached to the report are emails relating to the applicant's request for rostering changes as well as an email from Ms Kerrison to the applicant dated 2 July 2019, which states:

> "I have arranged for your roster to be arranged so that you won't have a trainee with you so that we can test the restrictions that your treating doctor has nominated, as in 4 days of continuous driving.
>
> This arrangement will take place commencing Sunday 7th July and will continue for 4 weeks.
>
> At the completion of the 4 weeks, Moussa will arrange a case conference with your NTD with a view to increasing your capacity to pre-injury duties. At the same time, I need you to discuss your current medication options with your Doctor. The previous letter of advice is 2 years old, and as such, circumstances may have changed.
>
> Please have your doctor provide details about current medications and dosages. Please also ask your doctor to consider whether there are more suitable medications that you could be taking that would allow you to commence work at any time of the day, without the reported side effects of the Lyrica. Please provide this letter from your doctor by Friday 12th July.
>
> My aim is to work with you to get you back to unrestricted and full fitness for duty, as your case has been open and ongoing with no improvement for a considerable period of time.
>
> Please let me know if any of the above will present any difficulty."

52. Also attached is a written statement made by Ms Kerrison on 31 July 2019.

53. Ms Kerrison stated that she had been employed by the respondent for about 20 years and had been the crew manager at the Mortdale train crew depot for approximately six months. Ms Kerrison had responsibility for leading the shift manager team and train crew at Mortdale depot. This involved management of the depot budget, providing strategic advice to shift managers and the ongoing management of workers compensation and disciplinary matters.

54. Ms Kerrison said she was aware that the applicant suffered workplace injuries to his neck back and wrist several years ago and had made workers compensation claims. The applicant had been unable to return to his full, unrestricted pre-injury duties and hours of work. For the last two years, in accordance with his general practitioner's restrictions, the applicant had been driving trains or teaching new drivers in a restricted capacity. Those restrictions had included not driving for more than four continuous days, then on the fifth day either teaching new drivers or having a day off. The applicant had not started a shift before 10.00 am due to the effects of medication which his doctor had prescribed.

55. Ms Kerrison said these restrictions, in particular the restriction on starting before 10.00 am made it difficult to roster the applicant as a train driver/driver trainer, however, rostering staff had always attempted to meet this requirement.

56. Ms Kerrison stated,

> "Part of my role as the Crew Manager is to conduct reviews, usually on a weekly basis, of the workers compensation and other off roster issues, such as discipline cases etc. Following this process, I conducted a review of Mr Tanios's workers compensation situation. As part of this, I consulted with Doctor Casolin, who is Sydney Trains' Chief Health Officer. I explained to him about Mr Tanios's restriction of not being able to start work until 10 am, as per his doctor's letter from two years ago. This led to me asking Doctor Casolin if it would be appropriate to request Mr Tanios to have his doctor to conduct a review of his medication, etc and provide an updated report.
>
> Doctor Casolin suggested that perhaps Mr Tanios could take his pain medication dosage earlier in the evening or, alternatively he could consult his doctor about changing to another medication that has fewer side effects. In regards to Doctor Bazergy's letter being approximately 2 years old, Doctor Casolin advised that the side-effects of the medication could well have improved by now so a new letter from Doctor Bazergy with his recommendations in regards to Mr Tanios's medication, current impairment and fitness for work, etc. was warranted.
>
> Taking into account the advice that I received from Doctor Casolin, I therefore decided that I would speak to Mr Tanios and request him to see his doctor about his medication and to provide an updated report of medications currently taken, as well as their likely impairment. I believe that this was quite a reasonable and normal request. I have asked other employees to do similar, as it is an appropriate part and expectation of managing his workers compensation claim."

57. Ms Kerrison denied being rude, bullying or threatening or insinuating that the applicant was lying about his medical situation during the conversation on the morning of 2 July 2019. Ms Kerrison stated:

> "I then went on to explain that I was trying to achieve the best outcome for him. I had received advice from the Chief Medical Officer that since the letter from his GP was about 2 years old, we were requesting that his doctor conduct a review of his medications and provide an update letter outlining his medications, etc.
>
> At some point during our conversation, Mr Tanios' requirement to not start work before 10 AM was discussed. I explained that this was an informal flexible work agreement, which has been provided to him so as to assist him as much as possible, however it was never intended to be a long term arrangement, but rather a short term solution to assist him to get to back to full pre-injury duties. Whilst it is advantageous to Mr Tanios, it is somewhat of a disadvantage to other Driver Trainers who want to start later in the morning. I am mindful of trying to ensure that rosters need to be fair for all of the drivers.
>
> I was very polite, positive and supportive throughout that meeting. I was not bullying, harassing or threatening as Mr Tanios has alleged. When the meeting finished he appeared to be both physically and emotionally okay. He thanked me, especially in relation to my recommendation that he would be driving alone for 4 days without a trainee."

58. Other documents annexed to the factual investigation report include a certificate from Dr Viswanathan Mahadev to Sonic Health, dated 21 December 2018, regarding the applicant's prescribed medications and requesting a start time after 10.00 am; a letter from Dr Bazergy to Sonic Health, dated 18 April 2019, regarding the applicant's physical injuries, prescribed medications and treatments and fitness for employment; and various WorkCover certificates of capacity relating to the applicant's physical injuries.

59. The report also attached an "Interim Health Assessment Result" dated 4 April 2019 and "Final Health Assessment Result", dated 23 April 2019 regarding the applicant's fitness for employment and conditions. A detailed "Return to Work Plan" with a start date of 5 June 2019, describing the applicant's current treatment and restrictions as a result of his physical injuries is also in evidence.

Dr Sathish Dayalan

60. The respondent relies on a medicolegal report prepared by psychiatrist, Dr Sathish Dayalan dated 18 September 2019.

61. Dr Dayalan took a history consistent with the other evidence and made a diagnosis as follows:

> "Mr Tanios presents with depressive symptoms such as low mood, insomnia, reduced appetite and low self-esteem and anxiety symptoms including ruminations and increased irritability. It appears that these symptoms were subsequent to interactions with his manager wherein he had felt harassed and intimidated. His presentation and history would be supportive of a diagnosis of Adjustment Disorder with Mixed Depressive and Anxiety symptoms. I note this is consistent with the psychiatric diagnosis offered by his treating psychiatrist, Dr Yuonan [sic]."

62. Dr Dayalan expressed the opinion:

> "The meeting on 02/07/2019 was probably the predominant cause of his injury but cannot be regarded as the whole cause. As noted from the investigation report, he had felt targeted ever since he had made request to be exempted from certain duties at the workplace."

63. With regard to the applicant's capacity for work, Dr Dayalan said,

> "Mr Tanios would be capable of returning to his duties provided that he did not report to his current crew manager. Any support and reassurance that he would not lose his job if he had to continue working with restrictions would assist with his return to work."

Respondent's submissions

64. Mr Hammond confirmed that there was no dispute that the applicant suffered a psychological injury. The respondent did, however, consider that the injury was wholly or predominantly caused by the meeting with Ms Kerrison on 2 July 2019 and this involved reasonable action with respect to the provision of employment benefits.

65. Mr Hammond said it was clear from the expert psychiatric evidence that the meeting was the whole or predominant cause. Doctors Younan and Abeya came to a consistent view in that regard.

66. With regard to the characterisation of the relevant action, Mr Hammond noted that the applicant had been starting shifts no earlier than 10.00 am for a period of around two years in accordance with doctors' restrictions. The meeting with Ms Kerrison was for the purpose of reviewing the applicant's restrictions. Mr Hammond submitted that being able to start shifts at a particular time was an "employment benefit".

67. With regard to the reasonableness of the respondent's action, Mr Hammond noted that the applicant painted a different picture of what occurred and what was said during the meeting to Ms Kerrison. Ms Kerrison had given evidence to establish the s 11A(1) defence. Ms Kerrison said the meeting was conducted in an appropriate manner and she was surprised by the applicant's reaction to the meeting. Mr Hammond submitted that it was reasonable to review the applicant's work restrictions. Mr Hammond submitted that the applicant's reaction or perception of the meeting was not relevant for the purposes of s 11A(1).

68. With regard to the question of capacity, Mr Hammond noted that on 8 August 2019, Dr Younan found the applicant was unfit to work under his manager. Mr Hammond said this opinion was consistent with the applicant being able to perform suitable duties. Dr Abeya reached a similar view. Mr Hammond submitted that, other than the meeting on 2 July 2019, the applicant's duties involved little interaction with Ms Kerrison. Mr Hammond submitted that it was hard to identify any incapacity in light of the doctors' opinions.

69. Mr Hammond noted that WorkCover certificates of capacity were in evidence but said I would prefer the opinions of the expert psychiatrists.

Applicant's submissions

70. Mr Jobson noted that in his November 2019 report, Dr Younan indicated that although he previously considered the applicant fit to return to work, he had changed his opinion. Dr Younan's ultimate position was that the applicant was unfit for work.

71. Mr Jobson referred me to the decisions in *Northern New South Wales Local Health Network v Heggie*[1] and *Department of Education and Training v Sinclair*[2] and submitted that the onus was on the respondent to prove the s 11A(1) defence.

72. Mr Jobson said the parties were in agreement as to the whole or predominant cause of the injury but submitted that the dispute notified by the respondent did not identify what the particular employment benefits were. Mr Jobson noted that none of the other actions in s 11A(1) were relevant.

73. Mr Jobson noted that two months prior to the meeting with Ms Kerrison, Sonic Health were asked to provide an assessment of the applicant's physical injuries. Mr Jobson said it was incorrect that the applicant's restrictions had not been reviewed for more than two years. It was clear that Ms Kerrison wanted the applicant to be able to start shifts at any time of the day but the applicant's doctors took a different view. Mr Jobson submitted that the applicant's restrictions had been previously investigated and it was not the role of the applicant's manager, Ms Kerrison to intervene in the manner which she did. Mr Jobson described Ms Kerrison's intervention as unreasonable, in so far as she suggested that the applicant should go to his doctors to have his medication changed. Mr Jobson noted that Ms Kerrison was not a claims advisor. There was correspondence from the applicant's claims advisor in evidence. Ms Kerrison essentially went off on a frolic of her own. Mr Jobson said there was no evidence that Ms Kerrison had authority to undertake the action she did.

[1] (2013) 12 DDCR 95; [2013] NSWCA 255; BC201311746.
[2] [2005] NSWCA 465.

74. Mr Jobson submitted that the words Ms Kerrison was alleged to have used during the meeting on 2 July 2019, suggesting that he was a "shirker" were not reasonable. The applicant's evidence with regard to the conversation should be accepted.

75. Mr Jobson submitted that Ms Kerrison's real problem was rostering issues. Mr Jobson submitted that this was a matter that did not fall within the actions listed in s 11A(1). Mr Jobson noted that the applicant was an injured worker with a serious physical disability. The applicant had returned to work on restrictions placed upon him by his doctors in order to get him back to work. The fact that Ms Kerrison thought it might not be fair to everyone to have the applicant start after 10.00 am was irrelevant.

76. Mr Jobson noted that with respect to incapacity, Dr Abeya had indicated that the applicant was not fit to work with Ms Kerrison. The respondent made no attempt to return the applicant to an alternative depot or other duties. In those circumstances, Mr Jobson said I should make an award consistent with the applicant being totally unfit, noting that the applicant remained employed by the respondent.

Respondent's submissions in reply

77. Mr Hammond submitted that under the Act in its current form, it was irrelevant whether the applicant had been offered suitable duties by the respondent. It was necessary to assess the applicant's capacity for employment in a vacuum.

78. Mr Hammond submitted that Ms Kerrison's authority and job role were set out in her written statement. Mr Hammond submitted that Ms Kerrison was clearly acting within her functions.

79. Mr Hammond said the comment "I was one of you once", if it was said at all, should be regarded as made in reference to the fact that Ms Kerrison previously worked on the trains. With regard to the difference between Ms Kerrison's version of the conversation and the applicant's, Mr Hammond submitted that the applicant had taken things out of context and overreacted to statements. The meeting was reasonable in the circumstances and conducted in a reasonable fashion. Unfortunately, the applicant had reacted negatively to the meeting.

FINDINGS AND REASONS

Is the psychological injury compensable?

80. 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"

81. "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."

82. 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."

83. Subsection 11(A)(1) is a disentitling provision and an employer who wishes to rely upon it carries the onus of establishing that defence[3].

84. The requirements of s 11A(1) were considered in *Manly Pacific International Hotel v Doyle*[4] 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."

85. The test of reasonableness is an objective one[5]. In *Commissioner of Police v Minehan*[6] Foster AJA (Sheller and Santow JJA agreeing) cited with approval a passage from an unreported decision of Geraghty J in *Irwin v Director-General of School Education*[7]:

> "The question of reasonableness is one of fact, weighing all the relevant factors. The test is less demanding than the test of necessity, but more demanding than a test of convenience. The test of 'reasonableness' is objective, and must weigh the rights of employees against the objective of the employer. Whether an action is reasonable should be attended, in all the circumstances, by a question of fairness".

86. In *Northern New South Wales Local Health Network v Heggie*[8] Sackville AJA considered a number of authorities dealing with s 11A(1) and distilled the following propositions:

> "The following propositions are consistent both with the statutory language and the authorities that have construed s 11A(1) of the WC Act:
>
> (i) A broad view is to be taken of the expression 'action with respect to discipline'. It is capable of extending to the entire process involved in disciplinary action, including the course of an investigation.

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[3] *Pirie v Franklins Ltd* [2001] NSWCC 167; *Department of Education and Training v Sinclair* [2005] NSWCA 465.
[4] [1999] NSWCA 465; 19 NSWCCR 181.
[5] *Jeffery v Lintipal Pty Ltd* [2008] NSWCA 138.
[6] [2003] NSWCA 239.
[7] (unreported 18 June 1998)
[8] (2013) 12 DDCR 95; [2013] NSWCA 255; BC201311746.

(ii) Nonetheless, for s 11A(1) to apply, the psychological injury must be wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer.

(iii) An employer bears the burden of proving that the action with respect to discipline was reasonable.

(iv) The test of reasonableness is objective. It is not enough that the employer believed in good faith that the action with respect to discipline that caused psychological injury was reasonable. Nor is it necessarily enough that the employer believed that it was compelled to act as it did in the interests of discipline.

(v) Where the psychological injury sustained by the worker is wholly or predominantly caused by action with respect to discipline taken by the employer, it is the reasonableness of that action that must be assessed. Thus, for example, if an employee is suspended on full pay and suspension causes the relevant psychological injury, it is the reasonableness of the suspension that must be assessed, not the reasonableness of other disciplinary action taken by the employer that is not causally related to the psychological injury.

(vi) The assessment of reasonableness should take into account the rights of the employee, but the extent to which these rights are to be given weight in a particular case depends on the circumstances.

(vii) If an Arbitrator does not apply a wrong test, his or her decision that an action with respect to discipline is or is not reasonable is one of fact."

87. There is a consensus of opinion in this case that the applicant sustained a psychological injury which would satisfy the requirements of s 4(b)(i) and s 11A(3) of the 1987 Act.

88. There is also consensus that the predominant cause of the applicant's injury was the interaction with Ms Kerrison on 2 July 2019. The evidence from the experts involved in this case suggests, and I accept, that this particular interaction was not the whole cause of the applicant's psychological injury. The meeting occurred in the context of a series of events dating from April 2019 when the applicant requested a roster change. I accept that the applicant had an interaction with Ms Kerrison in June 2019 as well as conversations with two co-workers which caused the applicant to perceive that he was going to lose his job of 35 years. I accept the applicant's evidence that prior to the meeting on 2 July 2019 he was already experiencing psychological symptoms as a result of these interactions. I accept, however, that the meeting on 2 July 2019 caused an acute and significant increase in the applicant's symptoms.

89. The applicant has provided a detailed account of the meeting on 2 July 2019 which has been consistently recited in the histories given to the practitioners involved in his case. The applicant's evidence as to the content of his discussions with Ms Kerrison on that occasion is to a large extent consistent with the email sent by Ms Kerrison later that day and Ms Kerrison's written statement.

90. There is, however, a discrepancy between the evidence of the applicant and Ms Kerrison with regard to Ms Kerrison's tone and demeanour during the meeting. The applicant has said that he found the manner in which Ms Kerrison spoke to him intimidating and her body language threatening. Ms Kerrison, on the other hand, denied being rude, bullying or threatening. Ms Kerrison said she was very polite, positive and supportive throughout the meeting.

91. The applicant and Ms Kerrison have both described their perception of Ms Kerrison's manner during the course of the meeting. It is not possible for me to ascertain whether one or other of their perceptions is more accurate. The applicant's evidence does not, however, identify any particular aspect of Ms Kerrison's tone or body language which was objectively intimidating or threatening. I am not satisfied in those circumstances that Ms Kerrison spoke to the applicant in an objectively intimidating tone or used body language that was objectively threatening.

92. The applicant also claims that Ms Kerrison said particular words to him, which intimated that his capacity for work was greater than was reflected in the restrictions set by his doctors. The applicant has given evidence that Ms Kerrison said words to the effect, "I was one of you before. I know what is going on. Go visit your doctor and change your medication and have him remove your restrictions completely."

93. Ms Kerrison has denied insinuating that the applicant was lying about his medical situation during this meeting but has not expressly denied saying the words identified by the applicant. The applicant's evidence that this type of language was used receives support from the certificate issued by Dr Guirgis on 25 July 2019. Although Dr Bazergy's clinical records are not in evidence, his report dated 9 January 2020, indicates that he consulted with the applicant on 4 July 2019 and that the applicant stated that at the meeting on 2 July 2019,

> "Ms Kerrison said to George '*Go to your doctor and tell him to remove all restrictions and change your medications to non-drowsy medications and to remove the privilege that does not allow you to start in the mornings. I was one of you before. I know what's going on. Go and see you doctor to change the medications and to remove the restrictions*.'"

94. In view of this evidence and in the absence of an explicit denial from Ms Kerrison, I am prepared to accept that a conversation to the effect described by the applicant took place. Whilst I am not satisfied that the particular words described by the applicant are necessarily, precisely what was said, I accept that there was an insinuation, objectively discernible, that the applicant may have a greater capacity for work than was reflected in his restrictions, or that there may be simple and reasonable steps which the applicant could take to have those restrictions removed. Ms Kerrison's own evidence confirms that she requested that the applicant ask his doctor whether there were more suitable medications that he could be taking to allow him to commence work at any time of day. Ms Kerrison stated that the applicant's case had been open and ongoing with no improvement for a considerable period of time and she wished to get the applicant back to unrestricted, full duties.

95. It does not appear, however, that Ms Kerrison had a full appreciation of the nature of the applicant's physical injuries or was apprised of recent developments in the applicant's case.

96. The evidence before me demonstrates that the applicant had been assessed by an Approved Medical Specialist (AMS) in 2017 as having permanent impairment as a result of his physical injuries. The degree of permanent impairment as assessed by the AMS was sufficient to place the applicant in the category of a "worker with high needs" under the 1987 Act. In those circumstances there should have been no surprise that the applicant's case had been open and ongoing for a considerable period of time.

97. It is not clear that Ms Kerrison appreciated that the applicant's case had been reviewed more recently than was suggested. Ms Kerrison's email and her written statement suggested that the most recent letter of advice from the applicant's doctor was two years old.

98. A report prepared by occupational physician, Dr Andrew Frean, for Sonic Health, attached to the ARD dated 5 September 2019, indicated that he had last assessed the applicant on 6 June 2018 and provided a report on 12 June 2018. Dr Frean's report refers to the certificate from Dr Mahadev dated 21 December 2018 which indicated that the applicant was taking Lyrica and was unfit to commence work before 10.00 am.

99. The certificate from Dr Mahadev, dated 21 December 2018, is attached to both the ARD and the Reply and stated that the applicant's medication could cause some dizziness until the effect wore off and, as such, the applicant was unfit to commence work before 10.00 am.

100. There are other documents attached to the Reply which indicated that a medical assessment of the applicant had been performed by Sonic Health in April 2019. A report from Dr Bazergy to a doctor at Sonic Health dated 18 April 2019, described the applicant's treatment including medications taken in respect of his physical injuries, as well as his current restrictions. The restrictions identified by Dr Bazergy did not include a start after 10.00 am. There are also WorkCover certificates attached to the Reply in respect of the applicant's physical injuries, covering the first half of 2019. A Return to Work Plan had been signed by the applicant on 12 June 2019.

101. In reviewing the evidence, I accept that it was reasonable for Ms Kerrison to have a discussion with the applicant about the 10.00 am start time. The 10.00 am start time does not appear to have been reflected in the more recent restrictions identified by Dr Bazergy, the assessment by Sonic Health or the Return to Work Plan at that stage. The discussion described by both the applicant and Ms Kerrison on 2 July 2019, however, went well beyond that.

102. I find on the evidence that Ms Kerrison made inaccurate representations about the currency of the information provided to the respondent about the applicant's condition. Ms Kerrison's suggestion that the most recent advice from the applicant's doctor was two years old was incorrect. Dr Mahadev provided a certificate to the respondent in December 2018, that is, less than eight months prior to the meeting with the applicant in July 2019. The applicant had even more recently undergone a thorough assessment by Sonic Health in April 2019, provided regular certificates and reports from Dr Bazergy and had signed a Return to Work plan less than three weeks before the meeting.

103. I am also not satisfied that it was reasonable for Ms Kerrison to suggest that the applicant's medication should be reviewed and an updated report provided by his doctor. Given the review that had very recently taken place, I am not satisfied that a new letter from Dr Bazergy was objectively warranted.

104. As a consequence, I find that during the meeting on 2 July 2019, Ms Kerrison made comments that objectively insinuated that the applicant may have greater capacity than was reflected in his restrictions; made misrepresentations about the currency of the medical information provided to the respondent about the applicant's physical condition, treatment and capacity; and made an unreasonable request for a review of the applicant's medications, current condition and fitness for work. I do not accept, however, that Ms Kerrison's body language or demeanour during the meeting was objectively intimidating or threatening.

105. Weighing the evidence and having made the findings above, overall, I am not satisfied that the respondent has discharged the onus of establishing that 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 for the purposes of s 11A(1).

106. I find the applicant's psychological injury is compensable.

Incapacity

107. The applicant seeks weekly compensation form 3 July 2019 to date and continuing.

108. In order to determine the applicant's entitlement to weekly payments it is necessary to determine whether he had "no current work capacity" or "current work capacity" as defined in s 32A of the 1987 Act during the period of weekly benefits being claimed.

109. 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."

110. As noted by Mr Hammond and as reflected in my review of the evidence above, the evidence from the applicant's treating practitioners and the independent experts involved in his case suggests that for a period of time after the deemed date of injury, the applicant may have had some capacity to work. There does appear to have been a consistent view that the applicant would have benefited from a return to work. The primary restriction uniformly identified was that the applicant was not to return to work under the management of Ms Kerrison.

111. The evidence before me indicates that this restriction was not accommodated by the respondent. Correspondence dated 25 October 2019, attached to the ARD, indicates that at a meeting on 21 October 2019, the applicant was advised that the respondent's Chief Health Officer had formed the view that the medication, Allegron, prescribed to the applicant as a result of the injury, was not suitable to be taken in the morning prior to commencing Category 1 Rail Safety Work. The Chief Health Officer had recommended that the applicant's treating doctor review the medication and dosage and consider alternative, non-sedative antidepressants. The applicant was directed not to attend work as he was unable to demonstrate that he was fit to perform his role, nor were there any reasonable adjustments or suitable temporary assignments. The applicant was directed to take sick leave.

112. The WorkCover certificates of capacity issued by Dr Bazergy, indicated that from 4 July 2019 to 15 October 2019 the applicant had no current work capacity. Although Dr Bazergy considered that the applicant did have current work capacity between 15 October 2019 and 21 November 2019, the applicant was again certified as having no current capacity for any employment from 21 November 2019. The more recent reports from Dr Younan suggest a deterioration in the applicant's symptoms and agreement with Dr Bazergy that the applicant now lacked any capacity for employment.

113. The applicant's evidence is that he had been employed by the respondent for 35 years, for most of that period as a train driver or driver trainer. At the time of the injury, the applicant was 64 years old. I am not satisfied that there was any employment in work outside the respondent for which the applicant was suited having regard to the nature of his injury, age, skills and work experience. I am further satisfied having regard to the evidence from the respondent's Chief Health Officer that there was no work in employment with the respondent for which the applicant was suited. I make these findings notwithstanding the evidence from the applicant's treating doctors and independent experts.

114. In all the circumstances and having regard to the evidence as a whole, I find that from 3 July 2019 to date and continuing, the applicant had a present inability arising from his injury such that the applicant was not able to return to work, either in his pre-injury employment or in suitable employment.

115. The applicant will be entitled to an award of weekly benefits pursuant to ss 36 and 37 of the 1987 Act on the basis that the applicant had 'no current work capacity'.

116. In the first entitlement period, on the basis that the applicant had no work current work capacity, the rate of weekly payments is determined by the calculation set out in s 36(1)(b) of the 1987 Act:

> **"**(1) The weekly payment of compensation to which an injured worker who has no current work capacity is entitled during the first entitlement period is to be at the rate of:
>
> (a) (AWE × 95%) − D, or
> (b) MAX − D,
> whichever is the lesser."

117. In the second entitlement period, on the basis that the applicant had no current work capacity, the rate of weekly payments is determined by the calculation set out in s 37(1)(b) of the 1987 Act:

> **"**(1) The weekly payment of compensation to which an injured worker who has no current work capacity is entitled during the second entitlement period is to be at the rate of:

(a) (AWE × 80%) − D, or
(b) MAX − D,
whichever is the lesser."

118. The parties have agreed that the applicant's pre-injury average weekly earnings as adjusted in the calculations above exceeded the maximum statutory rate. That amount as adjusted pursuant to s 34 of the 1987 Act was, in the relevant periods:

3 July 2019	to	30 September 2019	$2,177.40
1 October 2019	to	date	$2,195.70

119. There is no evidence before me of any non-pecuniary benefits provided to the applicant by the respondent.

120. There is no evidence before me that any weekly benefits have previously been paid to the applicant in respect of the injury which is the subject of these proceedings. However, to the extent that any weekly benefits have been paid, the respondent will have credit for those payments. Sections 49 and 50 of the 1987 Act will apply in respect of any leave payments.

Medical expenses

121. The applicant has also sought compensation for incurred medical expenses pursuant to s 60 of the 1987 Act. In view of my findings above, it is appropriate to make an award of a general nature that the respondent is to pay the applicant's reasonably necessary medical expenses pursuant to s 60 of the 1987 Act upon production of accounts, receipts and/or valid Medicare Notice of Charge.

SUMMARY

122. The applicant sustained a psychological injury pursuant to ss 4(b)(i) and 11A(3) of the 1987 Act.

123. The psychological injury was not 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 pursuant to s 11A(1) of the 1987 Act.

124. The applicant had no current work capacity as a result of the psychological injury from 3 July 2019 to date and continuing.

125. The respondent to pay the applicant weekly benefits pursuant to ss 36 and 37 of the 1987 Act and incurred medical expenses pursuant to s 60 the 1987 Act.