# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

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| **Matter Number:** | **3415/20** |
| **Applicant:** | **Polgampola (Nandana) Abeyratna** |
| **Respondent:** | **Iron Mountain Australia Group Pty Ltd** |
| **Date of Determination:** | **15 September 2020** |
| **Citation:** | **[2020] NSWWCC 321** |

The Commission determines:

1. The applicant suffered a psychological injury in the course of his employment with the respondent, with a deemed date of injury of 6 February 2019.

2. The defence relying on section 11A(1) of the *Workers Compensation Act 1987* with respect to transfer is not made out.

3. The claim for permanent impairment compensation is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for determination of the permanent impairment arising from the following:

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   | Date of injury: | 6 February 2019 (deemed) |
   | Body systems referred: | Psychological injury |
   | Method of assessment: | Whole person impairment. |

4. The documents to be referred to the AMS to assist with their determination are to include the following:

   (a) This Certificate of Determination and Statement of Reasons;

   (b) Application to Resolve a Dispute and attachments;

   (c) Reply and attachments; and

   (d) Respondent's Application to Admit Late Documents dated 12 August 2020 and attachments.

5. As a result of the injury set out in (1) above, the applicant has suffered incapacity for employment.

6. At the time of his injury, the applicant's Pre-injury Average Weekly Earnings totalled $1,106.31 per week.

7. The applicant was paid weekly compensation by the respondent from the date of injury to 9 August 2019, a period of 26 weeks.

8. From 10 August 2019 to date, the applicant has remained totally incapacitated for employment.

9. The respondent is to pay the applicant weekly compensation pursuant to section 37 of the *Workers Compensation Act 1987* for the period 10 August 2019 to 8 February 2020 (being 26 weeks) at the rate of $885.05 per week, being 80% of the applicant's Pre-injury Average Weekly Earning.

10. The respondent is to pay the applicant weekly compensation pursuant to section 37 of the *Workers Compensation Act 1987* from 11 August 2019 to date and continuing at the rate of $770.78 per week, being 80% of the applicant's ordinary time Pre-injury Average Weekly Earnings.

11. The respondent is to pay the applicant's reasonably necessary medical and treatment expenses pursuant to section 60 of the *Workers Compensation Act 1987*.

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

Cameron Burge
**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 CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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

## STATEMENT OF REASONS

### BACKGROUND

1. The applicant brings a claim in respect of a psychological injury suffered in the course of his employment with the respondent between May 2016 and 6 February 2019 (the deemed date of injury). He seeks payment of weekly compensation, permanent impairment compensation and reasonably necessary medical expenses.

2. The fact of the applicant's injury and that he suffers major depression is not in issue, however, the respondent raises a defence alleging the applicant's injury was wholly or predominantly caused by its reasonable actions with regard to transfer of the applicant when one of the its plants closed down. He ceased work on 6 February 2019.

3. The applicant's Pre-injury Average Weekly Earnings (PIAWE) is agreed at $1,106.31. In addition to weekly benefits, the applicant seeks an order that the claim for permanent impairment compensation be remitted to the Registrar for a referral to an Approved Medical Specialist (AMS) and that the respondent pay his medical expenses pursuant to section 60 of the *Workers Compensation Act 1987* (the 1987 Act).

4. The applicant's claim was initially accepted, however, on 16 July 2019, the respondent issued a section 78 Notice denying liability.

### ISSUES FOR DETERMINATION

5. The parties agree the following issues require determination:

   (a) whether the applicant's injury was wholly or predominantly caused by the reasonable actions of the respondent in connection with transfer (section 11A of the 1987 Act);

   (b) if the answer to (a) above is in the negative, what is the level of incapacity, if any, suffered by the applicant as a result of the injury? and

   (c) if the answer to (a) above is in the negative, has the applicant's injury reached maximum medical improvement?

### PROCEDURE BEFORE THE COMMISSION

6. 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.

7. The matter was listed for a Conciliation/Arbitration Hearing before me on 20 August 2020. At the hearing, Mr R Stanton of counsel instructed by Mr J Matthews, solicitor appeared for the Applicant, and Mr P Stockley of counsel instructed by Mr D Stiles, solicitor appeared for the respondent.

### EVIDENCE

#### Documentary evidence

8. The following documents were placed into evidence and taken into consideration by the Commission in making this determination:

   (a) Application to Resolve a Dispute (the Application) and attached documents;

(b) Reply and attached documents, and

(c) Respondent's Application to Admit Late Documents (AALD) dated 12 August 2020 and attachments.

**FINDINGS AND REASONS**

## Section 11A

9. Section 11A(1) of the 1987 Act relevantly provides:

> "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…"

10. An employer which seeks to make out a defence pursuant to section 11A carries the onus of establishing that defence: see *Pirie v Franklins Ltd* [2001] NSWCC167 and *Department of Education and Training v Sinclair* [2005] NSWCA 465 (*Sinclair*).

11. "Wholly" and "predominantly" are separate concepts and a finding of one or the other needs to be considered. In *Smith v Roads & Traffic Authority of NSW* [2008] NSWWCCPD 130 (*Smith*) the Arbitrator made a finding that the subject injury was "wholly or predominantly" caused by action taken by the respondent employer. Snell ADP (as he then was) said at [62] that the concepts of "wholly" and "predominantly" are different concepts and if such findings were to be made "it needed to be one or the other."

12. The phrase "wholly or predominantly caused" has been held to mean "mainly or principally caused." The test of causation to be applied is as described in "*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR452".

13. In *Hamad v Q Catering Limited* [2017] NSWWCCPD 6 (15 March 2017) (*Hamad*), the respondent employer was unable, on the available evidence and in the absence of any medical evidence dealing appropriately with the topic, to discharge its onus in proving the worker's psychological injury resulted "wholly or predominantly" from its reasonable action taken or proposed to be taken with respect to discipline.

14. The effect of the decision in *Hamad* is that reliance on factual material alone will not always be sufficient to make out a section 11A defence. Where factual evidence is adequate, it is often in cases where there is an allegation of a single event which has given rise to psychological injury.

15. In Hamad, Snell ADP said at [88]:

> "… 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 applicant'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. 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."

16. It follows from the Deputy President's decision in *Hamad* that medical evidence in a case such as the present one is required which addresses those relative causal contributions before a finding as to whether the reasonable actions of a respondent wholly or predominantly caused the injury at issue. In such a case, it follows that the extent of the history taken into account by the medical experts will be important in determining the voracity of their opinions regarding medical causation.

17. In order to successfully raise a defence under section 11A, the respondent must not only show the requisite causal connection between its actions and the applicant's injury, it must also satisfy the Commission that its actions were reasonable.

18. Considering the meaning of reasonableness, Geraghty J in *Irwin v Director-General of Education* NSWCC 14068/97, 18 June 1998 said:

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

19. In a similar vein, Judge Truss said in *Ivanisevic v Laudet Pty Ltd* (unreported, 24 November 1998) "In my view when considering the concept of reasonable action, the Court is required to have regard not only to the end result but to the manner in which it was effected."

20. These passages were quoted with approval by Foster AJA (Sheller JA and Santow JA agreeing) in *Commissioner of Police v Minahan* [2003] NSWCA 239 (*Minahan*), where his Honour said:

> "I prefer the construction which has been accorded to it in the decisions in the Compensation Court referred to in this judgment and in his Honour's judgment. The words "reasonable action", in a statute dealing with Workers Compensation rights of employees should be given a broad construction, unfettered by considerations as to whether the employee can or cannot also bring an action at Common Law against the employer, founded upon breach of a duty of care." (at [42])

21. In *Ritchie v Department of Community Services* [1998] 16 NSWCCR 727, Armitage J said:

> "It is apparent that the test in this case is an objective one, where one must weigh the consequences of the respondent's conduct against the reasons given for it. It follows of course from the objective nature of the test that the evidence given by the applicant as to the perceived unreasonableness of the respondent's conduct or from the respondent as to the reasonableness of its conduct from its perspective will not be determinative of this issue."

22. Reasonableness is judged having regard to fairness appropriate in the circumstances, including what went before or after a particular action (Burke J in *Melder v AusBowl Pty Ltd* [1997] 15 NSWCCR 454). Armitage J in *Jackson v Work Directions Australia Pty Ltd* [1998] NSWCC 45 stated "only if the employer's action in all the circumstances was fair could it be said to be reasonable" (See also *Northern NSW Local Health Network v Heggie* [2013] NSWCA 255 (*Heggie*), where it was held that the reasonableness of a person's actions is assessed by reference to the circumstances known to that person at the time the action is taken.

23. In this matter, for the following reasons I am not satisfied the respondent has established the whole or predominant cause of the applicant's accepted injury was its reasonable actions with regards to transfer.

24. Not surprisingly, given the authorities set out above, this is a matter in which a number of incidents are said to give rise to the applicant's psychological injury.

25. In his statement, the applicant lists, among other incidents, the fact that he was threatened by a colleague in the course of his employment, leading to the dismissal of that colleague. As Mr Stanton noted, that can in no way be said to be linked to the applicant being transferred.

26. The applicant deals in his statement with the transfer to other facilities within the company and noted he was offered work as a driver for 12 months while a new facility at Oakdale was built and accepted that role. He was also told he would be transferred to Oakdale once the facility was complete. Although the applicant initially had concerns regarding undertaking the driving work and sent a request to the human resources department concerning the role on 29 March 2018, he nevertheless undertook the employment and was provided with a work van to carry it out.

27. At [40] to [51] of his statement, the applicant sets out a number of issues which he had whilst doing the driving work. He said:

> "[41] I wasn't properly advised of the timetables for deliveries, and the break times, and when I should come back and scan to pick up deliveries. I had to record this out myself.
>
> [42] In about July 2018, my supervisor said to me that I would now be required to do driving work but also some warehousing work. I would be required to do one and a half hours of warehousing work before the start of the driving, plus driving of a distance of 250 to 300 km. I complied with this and started doing both driving and warehousing.
>
> [43] I made a complaint in writing setting out that I thought doing both driving and warehousing was too much work. I requested that a meeting be scheduled with human resources and the person who originally set out that I would be doing the driving work, to explain to me why it was that I was now required to do warehousing work as well as driving.
>
> [44] No such meeting was scheduled.
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> [45] This request by me was made on 30 July 21018.
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> [46] On 1 August 2018, I went and saw my GP namely Dr Anoma Bandara of the Blacktown Family Medical Centre.
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> [47] I told Dr Bandara I was fully exhausted and tired.
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> [48] I also told Dr Bandara I was feeling depressed.
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> [49] Dr Bandara referred me to a psychologist namely Ms Seime Dilek of the Blacktown Family Medical Centre.
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> [50] I consulted with Ms Dilek.
>
> [51] I was put off work on 1 and 2 August 2018 as I was feeling too depressed to go to work. I then went back to work on 3 August 2018."

28. Mr Stanton submitted, and I accept, that the problems which the applicant was experiencing in or about mid 2018 did not relate to the transfer, but rather with issues relating to his everyday work. Put simply, the applicant felt he was being overworked and apparently sought to raise this with HR. It was at this point in time that he sought treatment in relation to his psychological condition.

29. A review of the clinical material does not specifically indicate a visit to the general practitioner on 1 August 2018 relating to the psychological injury, however, I accept the applicant did consult his general practitioner on that date, as when Dr Bandara completed the applicant's first certificate of incapacity on 6 February 2019, she diagnosed depression/anxiety and stated of date of injury as "over the period of the last few months." In answering when the applicant was first seen in relation to his injury, the doctor's reply was "1/08/18."

30. It is apparent, in my opinion, that the applicant's injury had its genesis in mid-2018 surrounding issues relating to his employment and the duties which he carried out, rather than with specific matters of transfer.

31. Likewise, in December 2018, the applicant described a colleague Ms McPhail as having engaged in bullying of him. Ms McPhail denies bullying the applicant; however, his negative reaction to that real situation in the workplace has nothing to do with the question of transfer.

32. Similarly, the applicant describes a fellow worker Mr Ranmalu abusing him on 6 January 2019 for incorrectly unloading boxes at the Moorebank warehouse. According to the applicant, he requested in writing a toolbox meeting from the supervisor in order to "get to know more about each worker's role in order to understand and prevent such incidents." According to the applicant, the supervisor instead requested the applicant go to the respondent's premises at Greystanes to meet with another supervisor. That meeting took place on 10 January 2019, and at it the supervisor told the applicant that although the company had previously agreed that he was going to the new Oakdale premises after a year, they were not going to send him there because the culture at Oakdale is different to the applicant's.

33. In the applicant's own words, he took offence to that comment. Although this causative incident to the applicant's injury does, in my opinion, relate to the question of transfer, in no way can the comments of the supervisor in referring to a different "culture" between the applicant and the new premises at Oakdale be considered reasonable. In my view, that explanation is not a reasonable one for declining the applicant access to work at the new Oakdale premises in circumstances where he had previously been offered in writing a role there.

34. The applicant made a complaint about the meeting to human resources, and a meeting was held on 18 January 2019, and another on 25 January 2019, at which time the supervisor advised that when he had used the word "culture," he was referring to business culture, not ethnic culture. The applicant says he then asked the supervisor what business culture the applicant was unsuited to and did not receive an explanation.

35. On no objective view can that conduct by the supervisor be considered reasonable. The mere fact that a further meeting had to be held in order to explain that the supervisor was not referring to the applicant's ethnic culture is itself suggestive that the news of the initial decision not to transfer him to Oakdale was not conveyed reasonably. Likewise, the supervisor's failure to clarify in what way the applicant was unsuited for work at Oakdale is also unreasonable.

36. The applicant left work a short while after this series of meetings, on 6 February 2019. That was when his loss as a result of his injury crystallised. However, in my view, that is not the time when his injury came about. Rather, it is apparent from the applicant's general practitioner that he was receiving medical treatment as early as August 2018 for his

psychological condition caused by his employment, which in turn was caused by the nature and extent of his duties rather than anything at all to do with the denial of transfer.

37. Likewise, Mr Stanton submitted that the respondent telling the applicant that he would be transferred to the Oakdale facility and then reneging on it without substantive explanation is unreasonable. I accept that submission.

38. The respondent provided statements from a number of witnesses. Each of them expressed the view that the applicant was prone to making complaints, however, as Mr Stanton noted whilst those persons may wonder why complaints are being made, it is apparent the applicant was troubled by the issues which he raised, and he is entitled as an employee to raise them. Likewise, the evidence of Mr Rankin and Mr Paoletti, raised a number of matters which plainly troubled the applicant, none of which relate to issues of transfer. Similarly, Mr Valenzisi noted in his statement that the applicant "placed himself under a lot of pressure." I reiterate, that has nothing to do with the question of transfer.

39. Relevantly, Mr Stanton noted that the respondent had originally accepted liability notwithstanding that it was in receipt of the factual material from its witnesses. There was no suggestion at that time that the question of transfer was an issue in the applicant's injury. Mr Stanton noted, and I accept, that the question of transfer only became an issue when Dr Bisht provided an independent medical examiner report for the Respondent in 2019.

40. Whilst I accept the accuracy of Mr Stanton's submission, given the line of authority to which I have referred above, I do not consider it inappropriate for a respondent to have relied upon a medical opinion as to causation of an injury of this nature before issuing a notice declining liability. Indeed, had the respondent not done so it would have fallen foul of the decision in *Hamad*.

41. Nevertheless, I do not accept Dr Bisht's opinion. Dr Bisht took a history at page 2 of his report which set out the threat to the applicant by a colleague, and also being verbally abused by workmates while doing the courier driving job. According to Dr Bisht, "he said he started to experience significant psychological symptoms towards the end of 2017/beginning of 2018." When asked what the main factors impacting on the success of any treatment for the applicant's injury, Dr Bisht's said:

> "The main factors impacting his return to work are the disagreement with the industrial processes followed by the employer, and the severity of the symptoms. With regard to his symptoms, I am of the opinion that Polgampola would be fit to perform his preinjury role on a part-time basis, i.e., 20 hours per week. However, at the same time, due to his disagreement with the industrial process followed by the employer, he is not keen to return to work."

42. When asked specifically whether the applicant's injury was wholly or predominantly as a result of the actions undertaken by the respondent around the issue of transfer, Dr Bisht said:

> "In my opinion, the injury is predominantly a result of the disagreement that Polgampola has had with his employer, regarding actions taken by the employer in relation to industrial processes, mainly the transfer to Moorebank facility/alteration of role."

43. With respect, that summary by Dr Bisht does not accord with the detailed history provided by the applicant concerning the manner in which he was treated in the course of his employment by colleagues and also regarding the nature and extent of his duties once he began working as a driver. I reiterate, in my view none of those aspects relate to the issue of transfer.

44. Both IMEs in this matter, Dr Bisht and Dr Oldtree-Clark, agree the applicant suffers from a work-related psychological injury. The difference between them lies in Dr Bisht indicating the applicant's injury was predominantly caused by actions relating to transfer. For his part, Dr Oldtree-Clark says the primary cause was “conflicts at work.” Dr Oldtree-Clark took a history involving the threats to the applicant and also conflict with colleagues, together with over-work. According to Dr Oldtree-Clark, the applicant “assumes that it was because he is Sri Lankan in origin and has dark skin.” Whilst that may be the applicant’s perception, I do not believe it is necessary for me to determine whether that is in fact the case. Rather, the respondent must demonstrate on the balance of probabilities that it was the issue of reasonable actions taken with regard to transfer which have caused the applicant’s injury. That fact-finding exercise relates to the cause of the injury itself, rather than to the immediate precipitating factor to any given period of incapacity.

45. For the reasons which I have advised, I do not believe that the respondent has discharged its onus of proof in that regard.

**Capacity**

46. Having found in favour of the applicant on the question of liability, the issue then arises as to his capacity for employment.

47. Mr Stanton’s submission was primarily that the medical evidence unanimously disclosed a serious depressive illness, and accordingly the applicant has no current capacity.

48. In support of that submission, the applicant relied upon the report of a treating psychiatrist, Dr Kumar, who in the latest report dated 15 March 2020 says the applicant is currently unfit for work as he continues to experience depressive symptoms, for which pharmacological and psychological treatments have either been ineffective or have caused side-effects. Dr Kumar described the applicant's prognosis as poor.

49. Mr Stanton submitted that if the Commission found the applicant had some capacity, it would only be to work in a less skilled position at a rate of approximately $20 per hour for roughly 10 hours per week at most.

50. I note that Dr Bisht, IME for the respondent also indicates the applicant only has partial capacity for employment.

51. For the respondent, Mr Stockley submitted that the Commission would accept the views of Dr Bisht combined with those of Dr Saad, who provided a report relating to the applicant’s fitness for work. In that document, Dr Saad recorded that both he and the applicant agreed that he is medically fit to return to full-time work as a warehouse assistant and courier driver, however, the applicant would only agree to return to work “once all his workplace grievances have been addressed and resolved."

52. Mr Doak submitted that from the date of the report, the Commission would find the applicant has the capacity to earn at least as much as 80% of his PIAWE from 23 August 2019.

53. Taking into account the totality of the medical evidence, I am of the view the applicant remains totally incapacitated for employment. Although Dr Saad indicates the applicant agreed he could return to work, it is important in my view to note the qualifying statement that the applicant would only agree to return to work once his grievances have been addressed and resolved. In the context of a psychological injury linked to his workplace, that is in my view an important qualifier. It is strongly supportive of the otherwise unanimous medical opinion that the applicant continues to suffer from the effects of his major depressive condition. That is in turn consistent with the view of his treating specialist who continues to be of that opinion as at March 2020, when he opined the applicant was totally unfit for employment.

54. Having regard to all the medical evidence in this matter, I am satisfied that the applicant has been totally incapacitated for employment from 10 August 2019 to date, and accordingly the respondent will be ordered to pay him weekly compensation in accordance with the orders set out on page 1 of this Certificate of Determination.

## Permanent Impairment Claim

55. Another matter in issue in this case is whether the applicant has reached maximum medical improvement. Having found in favour of the applicant on the question of liability, I will remit the matter to the Registrar and ask the permanent impairment claim to be referred to an AMS to determine whether the applicant has reached maximum medical improvement, and if so to determine the applicant's level of permanent impairment.

## Medical and Treatment Expenses

56. The applicant seeks a general order in relation to his section 60 medical expenses. Having found in his favour, I intend to order the respondent pay the applicant's reasonably necessary medical and treatment expenses upon production of accounts, receipts and/or Medicare Australia Notice of Charge.