WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1907/20**
Applicant: **Marlene Galea**
Respondent: **Secretary, Department of Communities and Justice**
Date of Determination: **27 July 2020**
Citation: **[2020] NSWWCC 253**

The Commission determines:

1. The applicant suffered a psychological injury in the course of her employment with the respondent, with a deemed date of injury of 26 July 2013.

2. The injury referred to in (1) above is referred to an Approved Medical Specialist (AMS) to determine the degree of permanent impairment arising from the following:

   Date of Injury: 26 July 2013 (deemed)
   Body systems referred: Psychological injury
   Method of assessment: Whole person impairment

3. 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.

4. The applicant suffered an injury on 24 December 2015 in the nature of Takotsubo Cardiomyopathy arising out of her employment with the respondent, to which her employment was a substantial contributing factor.

5. The injury referred to in (4) above was a heart attack injury within the meaning of section 9B of the *Workers Compensation Act 1987*.

6. The requirements of section 9B (1) of the *Workers Compensation Act 1987* have been satisfied.

7. The permanent impairment arising out of the applicant's heart attack injury is 20% whole person impairment.

8. The respondent is to pay the applicant permanent impairment compensation in the amount of $48,940 in respect of a 20% whole person impairment suffered as a result of the applicant's heart attack injury suffered on 24 December 2015.

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.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Marlena Galea (the applicant) suffered an accepted psychological injury in the course of her employment as a disability support worker with Secretary, Department of Communities and Justice (the respondent). The injury arose out of both a protracted assault on the applicant by a patient and from the actions of her co-workers. That injury has a deemed date of 26 July 2013.

2. On 24 December 2015, the applicant was in a local shopping centre when she saw a former colleague. As a result of seeing that former colleague, the applicant developed Takotsubo Cardiomyopathy (TCM), which the parties agree is a heart attack injury for the purposes of section 9B of the *Workers Compensation Act 1987* (the 1987 Act). The applicant claims the heart attack injury was a frank injury or in the alternative a consequential condition to her accepted psychological injury.

3. On 8 May 2019, the respondent issued a section 78 notice denying liability for the TCM on the basis it was not a work-related injury, that her employment was not a substantial contributing factor to the injury and that nature of the applicant's employment did not give rise to a significantly greater risk of her suffering an injury that had she not been employed in employment of that nature.

ISSUES FOR DETERMINATION

4. The parties agree that the following issues remain in dispute:

   (a) whether the applicant's TCM is a work-related injury (section 4 of the 1987 Act);

   (b) if so, whether the applicant's employment was a substantial contributing factor to the TCM (section 9A of the 1987 Act);

   (c) if the answer to (a) above is in the affirmative, whether the provisions of section 9B of the 1987 Act have been satisfied, and

   (d) if the applicant's TCM is not a work-related injury, whether it is a consequential condition to her accepted psychological injury.

5. The parties agree that in the event there is a finding in favour of the applicant in relation to the TCM, I may proceed to assess her level of permanent impairment arising from it. Both Independent Medical Examiners (IMEs) agree that the applicant's level of whole person impairment as a result of the TCM is 20%.

PROCEDURE

6. The matter was listed for hearing before me on 10 June 2020. I used my best endeavours to assist the parties in reaching a resolution of the matters in issue between them, however, I was unable to do so. The matter therefore proceeded to hearing.

7. Mr D Adhikary instructed by Mr A Byrne appeared for the applicant, and Ms L Goodman instructed by Mr B McLean appeared for the respondent.

8. After the hearing, the parties attended to further written submissions, the applicant on 10 June 2020 and the respondent on 17 June 2020. Those submissions addressed the issue of consequential condition. The other issues were addressed by counsel in oral submissions at the hearing.

EVIDENCE

Documentary evidence

9. The documents in evidence before the Commission consisted of the following:

   (a) Application to Resolve a Dispute (the Application) and attachments, and
   (b) Reply and attachments.

Oral evidence

10. There was no oral evidence called at the hearing.

FINDINGS AND REASONS

Whether the applicant's TCM is a work-related injury (section 4 of the 1987 Act)

11. "Injury" is relevantly defined in section 4 of the 1987 Act as a personal injury arising out of or in the course of employment. There is a useful review of the authorities concerning the issue of injury in *Castro v State Transit Authority* (NSW) [2000] NSWCC 12 (*Castro*). That case makes clear that what is required to constitute "injury" is a "sudden or identifiable pathological change." In *Castro*, a temporary physiological change in the body's functioning (atrial fibrillation: irregular rhythm of the heart), without pathological change, did not constitute injury. The reasoning in *Castro* has been consistently applied in cases in this jurisdiction, such as *Trustees of the Society of St Vincent de Paul (NSW) v Maxwell James Kear as administrator of the estate of Anthony John Kear* [2014] NSWWCCPD 47 (*Kear*) in which it was stated:

    > "In any event, the authorities do not support the proposition that, on its own, an elevation in blood pressure is a personal injury. That is because, without more , it is not a sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state."

12. An applicant is able to rely on injury simpliciter despite the existence of an underlying disease, as was highlighted in the High Court's decision in *Zickar v NGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 (*Zickar*). In that case, the worker suffered brain damage due to the rupture, at work, of a congenital aneurysm. The congenital condition could be characterised as a disease, however, that would not have satisfied the requirements of cause (B) of the definition in section 4 as it then was. The worker succeeded in the High Court on the basis that the rupture itself could be described as an injury simpliciter (in other words, a personal injury). The Court held that the presence of a disease did not preclude reliance upon that event as a personal injury. Toohey, McHugh and Gummow JJ agreed with a passage in *Accident Compensation Commission v McIntosh* [1991] 2 VR 253 that "It is nonetheless a rupture – something quite distinct from the defect, disorder or morbid condition, which enables it to occur." (at [262]).

13. The effect of the decision in *Zickar* is that the terms "personal injury" and "disease" are not mutually exclusive categories. A sudden identifiable physiological change to the body brought about by an external or internal event can be a personal injury and the fact that the change is connected to an underlying disease process does not prevent the injury being a personal injury.

14. On balance, I am satisfied the applicant's TCM arose out of her employment with the respondent. Although the applicant had left the respondent's employ before the incident on 24 December 2015, the background to this matter was such that her seeing a former colleague in the shopping centre caused the TCM. I make that finding for the following reasons.

15. There is no issue TCM is a cardiac condition which is brought on by emotional/psychological stressors. That much is agreed by Prof Haber, IME for the applicant, treating psychiatrist, Dr Robinson, Dr Herman, the respondent's IME cardiologist and Dr O'Sullivan, the respondent's IME neurologist. There is no medical evidence which contradicts that opinion.

16. The circumstances of the onset of the applicant's TCM are somewhat unusual given she had ceased employment some time before the incident at issue. As Ms Goodman conceded, it is nevertheless still possible for the injury to *arise out of* the applicant's employment, even after that employment had ceased. Ms Goodman noted, in my view correctly, that there must nevertheless be a causal connection between the employment and the injury at issue.

17. When assessing issues of causation in the workers' compensation context, the test is as set out by Kirby P (as he then was) in the oft-cited passage in *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 (*Kooragang*) where his Honour said:

> "The result of the cases is that each case where causation is an issue in a workers compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase 'results from', is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent death or injury, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. **What is required is a common-sense evaluation of the causal chain**. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation." (at 810; emphasis added).

18. The factual background to the applicant's accepted psychological injury is relevant in examining whether there is any causal link between that accepted injury and the TCM.

19. There is no issue that in the course of her employment, the applicant was assaulted by a patient in a minibus on 23 June 2013. She was the only staff member on the minibus with the patient, and the assault was protracted, lasting nearly an hour during which time the applicant was trapped with the patient who assaulted her. She was eventually released when a co-worker drove by and saw the ongoing incident.

20. On 21 June 2013, just two days before the assault, the applicant became aware of what can only be described as an utterly reprehensible course of conduct on the part of her colleagues towards her. To quote from the uncontested evidence in the applicant's statement at page 23 of the Application:

> "9. On 21 June 2013 a co-worker by the name of Sonny Biggs said 'Have you got hepatitis yet?' I asked, 'What do you mean?' And that's when they told me what Angela Hewitt had done.
>
> 10. A few months prior to 21 June 2013 I had made a bread and butter pudding and put it in the staff fridge.
>
> 11. Sonny Biggs told me that Angela Hewitt had placed a glove on her hand and retrieved saliva from the mouth of a young, heavily disabled boy and spread the saliva over the pudding that I had made and eaten.…
>
> 13. I felt humiliated and very worried and I just could not believe people could do such things to other people. I do my work well and take pride in my work. I couldn't believe that a co-worker could do this to a heavily disabled boy a s well as myself.

14. I then told my supervisors and went home. I then went to my GP in order to have blood tests performed as a result of the possible infection."

21. The appalling conduct of Ms Hewitt was apparently known to a number of other co-workers, none of whom saw fit to mention it at the time. That any set of people, let alone those charged with the care and control of the disabled, would act in such a way is almost beyond belief. When the applicant reported her co-workers' conduct, she was subjected to further hostility from Mr Biggs on 26 July 2013, when he had the utter temerity to feel aggrieved that the applicant, having been subjected to a wilful attempt by her colleagues to infect her with a chronic infectious disease, made a complaint about her co-workers, including him. According to the applicant's statement, which I again emphasise is uncontested, Mr Biggs verbally harassed her, including saying "I don't want to talk to you. I don't want to have anything to do with you. I don't want to work with you. You dobbed me in and got me in a lot of trouble."

22. As incomprehensible as it is that someone in Mr Biggs' position could portray themselves as the victim in such a situation and see fit to lash out the applicant, there is no issue the confrontation took place and that it happened in the course of the applicant's employment with the respondent. It was the culmination to her being incapacitated for employment.

23. As a result of the cumulative effects of each of the incidents recounted above, the applicant left her employment. She stated she felt vulnerable, anxious and threatened by her co-workers. She says she told her employer she did not wish to see any of those involved in the attempt to infect her with hepatitis. As with her recounting of the assault and the incidents involving her co-workers, that evidence is uncontradicted.

24. The applicant was diagnosed with post-traumatic stress disorder and an adjustment disorder as a result of the accepted workplace injury. Having left work, in June 2014 the applicant had a stroke. It is not claimed that the stroke is linked to the applicant's employment. She has not worked at all since the stroke.

25. On 23 December 2015, the applicant saw an ex-colleague at a shopping centre and became extremely upset. According to the applicant in her supplementary statement at page 30 of the Application:

"13. I worked with Roberta [the colleague the applicant saw] and she was mean to me. She was friends with Sharon, Sonny Biggs and Angela Hewitt. Roberta was part of the group that knew Angela Hewitt put the hepatitis infected saliva on my cake and never did anything about it or told me not to eat it. I still think about these people often.

14. When I suddenly saw her, I was very shocked and surprised. I suddenly felt very distressed and started finding it hard to breathe and my chest felt tight.

15. These feelings didn't go away and I was worried that I was having some kind of heart attack so I went to Gosford/Wyong Hospital the next day.

16. I was admitted to the Emergency Department and diagnosed with Takotsubo Cardiomyopathy. I understand that this is a heart condition caused by a sudden stressful or surprising event. In my case it was seeing my ex-work colleague."

26. The medical evidence supports a finding that the applicant's TCM, otherwise known as "broken heart syndrome", is a cardiac condition secondary to psychological factors, in particular extreme emotion. Dr Robinson, treating psychiatrist, records the applicant becoming upset, pale and shaking when discussing her former co-workers and feelings of extreme distress when she saw her former colleague in December 2015.

27. Dr Herman, the respondent's cardiologist IME provided a report dated 22 January 2019. In that report, Dr Herman noted the applicant's incomplete recovery, with apical hypokinesis and persistent impaired left ventricular function. In relation to causation, Dr Herman said at page 56 of the Application:

> "In my opinion, the worker's employment (as a disability support worker) did give rise to her current heart condition…
>
> In the setting of a significant psychological injury, the chance meeting with a work colleague provokes a significant psychological stress.
>
> Emotional stress is well-known trigger for the provocation of a Takotsubo's (stress-induced) cardiomyopathy in middle-aged ladies who are predisposed…
>
> Had she not experienced prior work-related psychological trauma, meeting a work colleague unexpectedly will probably not have provoked the emotion triggering the cardiomyopathy."

28. When asked to give reasons as to the basis of any causal connection between the pre-existing psychological condition and the TCM, Dr Herman stated:

> "In my opinion, her pre-existing psychological condition (post-traumatic stress disorder in relation to bullying and harassment at work) was a key factor in provoking anxiety which subsequently led to her Takotsubo Cardiomyopathy.
>
> Whilst stress-induced cardiomyopathy is usually associated with ST elevation on ECG in the absence of critical coronary artery disease, the typical apical ballooning noted at echo is consistent with her diagnosis.
>
> The disorder is frequently precipitated by intense psychological stress and primarily occurs in postmenopausal women. Usually, patients recover completely within one – four weeks (not the case in Ms Galea who has residual left ventricular dysfunction and mild symptoms)."

29. The causal connection accepted by Dr Herman is supported by the applicant's IME, Prof Haber, in his report dated 22 March 2017. In his supplementary report dated 4 October 2019, Prof Haber says:

> "She has a condition called Takotsubo Cardiomyopathy which is well-known to be emotionally brought on and it does not occur spontaneously. Therefore she had a significantly greater risk of suffering this cardiac condition than had she not been employed in employment of that nature."

Dr Haber's opinion in this regard is also relevant to the discussion surrounding section 9B which follows later in these reasons, and I have taken it into account in addressing that issue together with that of injury.

30. Ms Goodman submitted the applicant had not satisfied the onus of proof in establishing her TCM was a workplace injury. I reject that submission. In my view, the medical evidence clearly supports a finding that had the applicant not been subjected to the factors which caused her accepted psychological injury, then she would not have suffered the episode of TCM which has left her with impaired cardiac function.

31. I accept Mr Adhikary's submission that the TCM was a frank injury, in that there was a pathological change brought about when the applicant saw her former colleague. Given the state of the medical and lay evidence, in my view, the applicant has clearly established on the balance of probabilities that her cardiac injury arose out of her employment with the respondent. This is not, in my view, an aggravation of a psychological disease process.

Rather, it is a physical condition which has come about as a result of the applicant encountering her former colleague. The psychological work injury is a precipitating factor to the TCM (indeed, the medical evidence clearly establishes it is the main contributing factor to it), but the TCM is a separate condition to the accepted injury rather than an aggravation of it.

32. The development of TCM in the applicant constitutes a sudden identifiable pathological change to the body brought about by the work-related external event of seeing her former colleague. As such, in my view, it is a personal injury within the meaning of section 4 of the 1987 Act.

Whether the applicant's employment is a substantial contributing factor to the injury (section 9A of the 1987 Act)

33. As Ms Goodman noted, the question of whether employment is a substantial contributing factor to a section 4 injury is a separate one to whether that injury arose out of employment. Often, the facts relevant to both enquiries are identical, however, the fact-finding exercise is different.

34. Liability for an employer to pay compensation is limited by the requirement under section 9A that employment is a substantial contributing factor to the injury. Section 9A was introduced shortly after the High Court's decision in *Zickar*. Whether employment is a substantial contributing factor to an injury is a question of fact and is a matter of impression and degree (see *Dayton v Coles Supermarkets Pty Ltd* [2001] NSWCA 153 at [29] (*Dayton*); *McMahon v Lagana* [2004] NSWCA 164 at [32] (*McMahon*)) to be decided after a consideration of all the evidence. See also *WorkCover Authority of New South Wales v Walsh* [2004] NSWCA 186.

35. It is important to recognise in section 9A that the employment must be a substantial contributing factor to the injury, not to the incapacity, need for treatment or loss (see *Rootsey v Tiger Nominees Pty Ltd* [2002] NSWCC [48]).

36. It is also important to remember that the relevant employment must be *a* substantial contributing factor to the injury, not *the* substantial contributing factor. The Court of Appeal held in *Mercer v ANZ Banking Corporation* [2000] NSWCA 138 that there may be more than one substantial contributing factor to a single injury, of which employment need only be one.

37. Mr Adhikary submitted, and I accept that were it not for the applicant's employment as a disability support worker, her encounter with a former colleague would not have mattered and she would not have suffered from TCM.

38. Ms Goodman submitted that there were no work-related factors which took place at the shopping centre when the encounter with the former colleague occurred. I disagree with that submission, as the medical evidence establishes that if were it not for the applicant's employment, the TCM would not have happened because is a causal link between the accepted workplace psychological injury and the advent of the cardiac injury. That opinion is held unanimously by every doctor qualified in these proceedings.

39. Ms Goodman referred to the decision in *Badawi v Nexon Asia Pacific Pty Limited trading as Commander Australia Pty Limited* [2009] NSWCA 324 and noted the mere fact of being employed is not enough in order to satisfy section 9A. That is indeed correct. She submitted that what is required is a causative relationship. I also accept that submission, however, in my view, the applicant's uncontested statement evidence together with the medical opinions to which I have previously referred establish the presence of such a causal connection and I therefore find the requirements of section 9A are satisfied.

Whether the nature of the applicant's employment gave rise to a significantly greater risk of suffering TCM (section 9B of the 1987 Act)

40. Section 9B of the 1987 Act relevantly provides:

> "(1) No compensation is payable under this Act in respect of an injury that consists of, is caused by, results in or is associated with a heart attack injury or stroke injury unless the nature of the employment concerned gave rise to a significantly greater risk of the worker suffering the injury than had the worker not been employed in employment of that nature."

41. Subsection 9B (2) then lists a number of conditions which qualify as a heart attack injury. In this matter, there is no question that the applicant's TCM and subsequent ventricular impairment qualify as a "heart attack injury."

42. Mr Adhikary submitted that a crucial piece of evidence regarding the requirements under section 9B is Dr Herman's opinion found at page 56 of the Application to which I have referred at [27] above, namely had the applicant not experienced the prior work-related psychological injury, "meeting a work colleague unexpectedly will probably not have provoked the emotion triggering the cardiomyopathy." That opinion is also supported by Dr Haber in his supplementary report found at page 67 of the Application.

43. There is no doubt TCM is caused by psychological issues. In this case, those issues were in turn caused by the applicant's employment. In examining whether there was a significantly greater risk of the applicant suffering her cardiac injury than had she not been employed in work of that nature. I accept Mr Adhikary's submission that when one looks at the employment, it is not sufficient to simply examine the duties which she was required to perform, but also the interactions with both patients and co-workers which that employment entailed.

44. I accept the nature of the applicant's employment gave rise to a significantly greater risk of heart attack injury in that it included being placed in circumstances which gave rise to the assault, and to the appalling conduct regarding the attempted hepatitis infection and her interaction with Mr Biggs. Had those aspects of her employment not happened, the applicant would in turn not have sought to dissociate herself from her co-workers and the TCM would not have occurred. All of the relevant medical evidence supports a finding that were it not for the prior psychological stressors brought about at work, the applicant would not have suffered from TCM. Such evidence is, in my opinion, strongly suggestive of a significantly increased risk of injury as a result of the employment than had the applicant not worked for the respondent.

45. In *De Silva v Secretary, Department of Finance, Services and Innovation* [2015] NSWWCC 279, Senior Arbitrator Snell (as he then was) said at [105]:

> "Section 9B (1) does not require a significant risk. It requires a comparison of (1) the risks to which the nature of the employment concerned gives rise, and (2) the risk had the worker not been employed in employment of that nature. It is necessary that the first of these be 'significantly greater' than the second, if compensation is to be payable."

The decision in De Silva was followed in the Presidential decision in *Renew God's Program Pty Ltd v Kim* [2019] NSWWCC PD45. It is settled law that section 9B involves an evaluative task, applying the comparison which is inherent in the section. It involves an assessment of comparative risk and is not a test of true causation.

46. The applicant's employment exposed her to heightened risk because it brought about the psychological stressors which the unanimous medical evidence establishes gave rise to TCM. Had the nature of that employment not exposed her to those factors, in my view there would have been significantly less risk of the heart attack injury taking place.

47. What is required is an evaluative task comparing the risks associated with the applicant's employment and those had she not been so employed. In my opinion, given the interpersonal conflicts and assault which the parties agree gave rise to the psychological injury, I have little difficulty in finding the nature of the applicant's employment resulted in a significantly greater risk to her. The medical evidence in this matter, from the appropriately qualified IMEs of both parties is that if had the applicant not suffered her psychological injury, she would not, in turn, have suffered TCM. There is no question that the psychological injury was in turn caused by the nature of the applicant's employment.

48. In my view, it follows as a logical progression that had the applicant not been exposed to the factors contained within her employment which caused her psychological injury, she would in turn not have suffered her cardiac injury. Accordingly, I am satisfied that the requirements of section 9B have been met.

Date of Injury

49. The applicant pleaded the heart attack injury in the alternative as a disease, a consequential condition and a frank injury. Having accepted the applicant's submission, the TCM was a frank injury, the correct date of the heart attack injury in this matter is 24 December 2015, namely the date of presentation at the hospital after the encounter with the former work colleague. It was this encounter and the advent of the TCM at that time which caused the sudden physiological change to the applicant which gave rise to the injury and satisfied the requirements of section 4 of the 1987 Act.

Assessment

50. The parties agreed that I could assess the whole person impairment arising from the TCM, in the event I found in the applicant's favour. Both cardiologists retained by the parties in this matter assessed the applicant as suffering from 20% whole person impairment. I accept that uncontested evidence, and therefore find the applicant suffered a 20% whole person impairment as a result of the heart attack injury which she suffered on 24 December 2015.

Compensation for physical and psychological injuries

51. Ms Goodman submitted the applicant was not entitled to combine any impairment arising from the accepted psychological injury with that arising from the TCM owing to the operation of section 65A (4) of the 1987 Act. That subsection relevantly provides:

> "If a worker receives a primary psychological injury and a physical injury, **arising out of the same incident**, the worker is only entitled to receive compensation under this Division in respect of impairment resulting from one of those injuries… " (my emphasis)

The section then goes on to state that the degree of permanent impairment resulting from the primary psychological injuries to be assessed separately from that which results from the physical injury, and that an injured worker is entitled to receive compensation for impairment resulting from which of the two injuries result in the greater amount of compensation being payable.

52. Ms Goodman submitted that the circumstances of this matter was such that the TCM is a physical condition related to the psychological injury, and therefore the provisions of section 65A(4) of the 1987 Act apply. For the following reasons, I reject that submission.

53. Section 65A(4) does not apply in circumstances where I have found the TCM is a frank injury. There is no doubt the accepted psychological injury took place on 26 July 2013, however, having found the TCM is a separate frank injury which took place on 24 December 2015, in my view the applicant is entitled to claim for both injuries.

54. Moreover, I note Mr Adhikary's submission that the applicant does not seek to combine any impairments, and his reliance on the decision of Powell JA in *Australian Conveyor Engineering Pty Ltd v Mecha Engineering Pty Ltd* [1998] NSWCC 51 (18 December 1998) (*Mecha*). In that case, the applicant had a frank injury which also aggravated a pre-existing disease together with a nature and conditions of employment injury with a later employer which further aggravated that disease. The frank injury was not treated as an aggravation and two discrete injuries were found. In his judgement, Powell JA referred to the High Court's decision in *Zickar* and said at [39]:

> "The effect of the decision of the majority [in *Zickar*] is, thus, first, that, if there can be identified an incident which involves – either by being itself the change, although bringing about the change – a physical change in the worker, then – even though that change may be no more than the culmination of a progressive disease, and not the product of some external force – that damage is to be regarded as an 'injury' within the meaning of paragraph (a) of the definition of "injury" in section 4 of the Act…"

55. In *Mecha*, the medical evidence demonstrated that whilst the worker's lumbar spine had begun to degenerate, he sustained a fall on 11 February 1992 which rendered those previously asymptomatic changes as symptomatic. That injury was held by the majority to be a frank injury under section 4(A) of the 1987 Act rather than the aggravation of a disease process pursuant to section 4(B)(II).

56. In my view, the circumstances of this case are even stronger than those in *Mecha*. Whilst the applicant's accepted psychological injury might have been a causal precipitating factor, it is not the same injury as the TCM, which is physical in nature, nor did it arise in the same incident.

57. Accordingly, I find that the provisions of section 65A(4) do not apply, and the applicant is entitled to claim permanent impairment compensation in respect of both the accepted psychological injury and the disputed TCM. In so finding, I note the applicant's counsel submitted there was no suggestion she was seeking to combine the assessments of the two injuries.

SUMMARY

58. For the above reasons, the Commission will make the findings and orders as set out on page 1 of the Certificate of Determination.