

WORKERS COMPENSATION COMMISSION
AMENDED CERTIFICATE OF DETERMINATION
UPON RECONSIDERATION

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

Matter Number: 5929/18
Applicant: Srdjan Peric
Respondent: State of New South Wales (NSW Health Pathology)
Date of Determination: 14 October 2019
Date of Amendment: 21 October 2019
Citation: [2019] NSWCC 332

The respondent has requested reconsideration of the award made in the Amended Certificate of Determination dated 18 July 2019 on the basis that the award for weekly payments was made upon an incorrect understanding of the factual situation. The Amended Certificate Determination provided for an award of weekly payments based upon an understanding that there was agreement between the parties that the applicant had no capacity for work from 26 June 2016 to 8 September 2017. In fact, the applicant agrees, and it is the case, that the consent of the respondent was limited to consent to amendment of the period of claim for weekly payments to close that claim as at 8 September 2017 and the respondent submitted that Mr Peric was not wholly incapacitated throughout that period.

The error having been made clear, it is appropriate that the award of weekly payments made in the amended Certificate of Determination dated 18 July 2019 be reconsidered and a further Certificate of Determination be issued upon reconsideration. The certificate has been further amended pursuant to the slip rule.

The Commission upon reconsideration determines:

1. The respondent is to pay the applicant weekly compensation:
 - (a) from 26 June 2016 to 25 September 2016 at the rate of \$2,042.80 per week pursuant to section 34 and section 36(1)(b) of the *Workers Compensation Act 1987* (the 1987 Act)
 - (b) from 26 September 2016 to 8 September 2017 at the rate of \$1,742.40 per week pursuant to section 37(1)(a) of the 1987 Actin respect of incapacity resulting from injury on 2 March 2016.
2. The respondent is to pay the applicant's reasonably necessary treatment expenses in respect of injury on 2 March 2016 pursuant to section 60 of the 1987 Act.

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

W Dalley
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 WILLIAM DALLEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. This claim for weekly payments was the subject of an earlier hearing which was limited to the issue of liability for compensation in respect of psychological injury alleged to have occurred on 2 March 2016 in the course of employment with the state of New South Wales (NSW Health Pathology) (the respondent).
2. That issue was resolved in favour of Srdjan Peric (the applicant) and a Certificate Determination was issued on 10 April 2019. The background was noted in that Certificate as follows:
 - “1. Srdjan Peric (the applicant/Mr Peric) was employed as a Laboratory Manager at Nepean Hospital, a public hospital within the New South Wales public health system. Mr Peric developed a psychological condition and made a claim against the state of New South Wales (the respondent) in respect of that injury which was deemed to have occurred on 14 April 2015.
 2. An Application to Resolve a Dispute was filed in the Commission and ultimately resolved with the parties agreeing that Mr Peric had suffered a psychological injury deemed have occurred on the claimed date.
 3. Subsequently Mr Peric did not return to his position as a Laboratory Manager at Nepean Hospital but was directed to perform alternative duties at Westmead Hospital in January 2016.
 4. On 2 March 2016, Mr Peric was directed at 1.30 pm to attend a meeting with the Director of Operations, Pathology West, to take place at 3.30 pm. Mr Peric attended the meeting alone and was handed a letter which he was instructed to read. The letter informed Mr Peric that an investigation had been conducted and had found that complaints that he made were frivolous and vexatious and constituted serious misconduct.
 5. At the conclusion of the meeting Mr Peric was instructed to hand in his security pass, collect his belongings and leave the building. After collecting his belongings Mr Peric was escorted from the premises by the Director of Operations and the Finance Manager, Mr Van de Bemp.
 6. Mr Peric suffered an emotional reaction and consulted his general practitioner, Dr Robert Watson. He was referred to a psychologist, Suzanne Kairouz, for treatment.
 7. Mr Peric did not return to work and made a claim for weekly payments and reimbursement of treatment expenses which was rejected by the workers compensation insurer. The insurer denied the claim, asserting that Mr Peric had not suffered a psychological injury or, if it was found that he had suffered such an injury, that injury had been wholly or predominantly caused by the reasonable action taken by the employer with respect to discipline and/or dismissal.
 8. The insurer also denied it was liable for reimbursement of reasonably necessary treatment expenses and asserted that Mr Peric was capable of undertaking his full pre-injury employment.
 9. An Application to Resolve a Dispute was filed in the Commission alleging psychological injury on 2 March 2016 and claiming continuing weekly payments from 25 June 2016 and reimbursement of treatment expenses.
 10. The respondent, by its Reply, maintained its grounds for denial of the claim.”

3. The issue of liability having been established, the matter was stood over to allow the parties to discuss the remaining issue, the amount of any entitlements to weekly payments flowing from the injury on 2 March 2016. The parties were unable to agree and the matter proceeded to a further hearing.
4. At the subsequent hearing the applicant sought and was granted leave to amend the claim for weekly payments to restrict that claim to the period from 26 June 2016 to 8 September 2017.

ISSUES FOR DETERMINATION

5. The parties agree that the only issue remaining in dispute is the amount of the entitlement to weekly payments resulting from injury on 2 March 2016 in the period 26 June 2016 to 8 September 2017. That issue turns upon the appropriate calculation of the pre-injury average weekly earnings of the applicant.

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.

EVIDENCE

Documentary evidence

7. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute and attached documents;
 - (b) Documents attached to Application Admit Late Documents dated 29 January 2019 by the respondent;
 - (c) Reply and attached documents; Documents attached to Application to Admit Late Documents dated 31 January 2019 by the applicant;
 - (d) WorkCover NSW Certificates of Capacity dated 1 June 2017 by Dr Robert Watson tendered at the hearing and admitted without objection, and
 - (e) Nineteen fortnightly pay slips (in respect of 18 pay periods) issued by the respondent in respect of the applicant in the period commencing on 23 February 2015 to 10 March 2016 tendered at the hearing and admitted without objection.

Oral evidence

8. No application was made to oral evidence or to cross examine any witness.

FINDINGS AND REASONS

9. Counsel for Mr Peric submitted that the pre-injury weekly earnings, calculated in accordance with section 44C of the Workers Compensation Act 1987 (the 1987 Act) were \$2,178 per week.
10. Counsel for the respondent relied upon the document produced by the respondent entitled "Pre-Injury Average Weekly Earnings (PIAWE) Calculations" which calculated the amount as \$952.28 per week. That document incorporated a worksheet which set out figures in respect of the period commencing on 4 March 2015 to 2 March 2016, a period of 52 weeks.
11. The document records that Mr Peric was paid fortnightly. The document records total payments in respect of 1,976 hours (52 weeks at 38 hours per week).

12. The applicant disputed the accuracy of the worksheet submitting that no provision was made for days when Mr Peric had been absent from work due to a prior injury. The payslips in evidence record the fact that Mr Peric had not been able to work on many occasions which were recorded as “leave without pay” in the payslips. Counsel for the applicant submitted that those periods when Mr Peric had not worked should be excluded from the calculation of pre-injury average weekly earnings.
13. Counsel for the applicant noted that there were 18 relevant pay advices provided by the respondent with eight pay advices unavailable. The 36 weeks covered by the relevant pay slips included seven pay periods (14 weeks) in which Mr Peric had not worked. Counsel for the applicant submitted that it could be considered that Mr Peric would have been paid his normal weekly salary in the missing periods.
14. Counsel for the respondent submitted in answer that Mr Peric had voluntarily taken himself out of employment and so was not entitled to exclude those weeks when he had not been at work in accordance with section 44D(2)(a).
15. For the reasons set out below I accept the submission of the applicant with respect to the periods covered by the payslips in evidence.
16. Section 44C(1) relevantly provides:

“44C Definition—pre-injury average weekly earnings

- (1) In this Division, pre-injury average weekly earnings, in respect of a relevant period in relation to a worker, means the sum of:
 - (a) the average of the worker’s ordinary earnings during the relevant period (excluding any week during which the worker did not actually work and was not on paid leave) expressed as a weekly sum, and
 - (b) any overtime and shift allowance payment that is permitted to be included under this section (but only for the purposes of the calculation of weekly payments payable in the first 52 weeks for which weekly payments are payable).

17. It is common ground that Mr Peric was paid a salary and no overtime or shift allowance payments were applicable.

18. Section 44D provides:

“44D **Definitions applying to pre-injury average weekly earnings—relevant period**

- (1) Subject to this section, a reference to the relevant period in relation to pre-injury average weekly earnings of a worker is a reference to:
 - (a) in the case of a worker who has been continuously employed by the same employer for the period of 52 weeks immediately before the injury, that period of 52 weeks, or
 - (b) in the case of a worker who has been continuously employed by the same employer for less than 52 weeks immediately before the injury, the period of continuous employment by that employer.
- (2) The relevant period, in relation to pre-injury average weekly earnings of a worker who, during the 52 weeks immediately before the injury, voluntarily (otherwise than by reason of an incapacity for work resulting from, or materially contributed to by, an injury that entitles the worker to compensation under this Act):
 - (a) alters the ordinary hours of work, or
 - (b) alters the nature of the work performed by the worker,and, as a result, the worker’s ordinary earnings are reduced, does not include the period before the reduction takes effect.

- (3) If, during the period of 52 weeks immediately before the injury, a worker:
- (a) is promoted, or
 - (b) is appointed to a different position,
- (otherwise than on a temporary basis) and, as a result, the worker's ordinary earnings are increased, the relevant period in relation to the worker begins on the day on which the promotion or appointment takes effect."

19. The payslips produced by the respondent in respect of the pre-injury 52-week period record relevant hours under a number of headings; hours worked, public holidays, sick leave, annual leave and leave without pay. As at the date of injury the payslips appear to record the following hours:

PPE	Worked	P Holiday	LWOP	Sick	Ann Leave	Total	Amount	Payslip Number
8/03/2015	68	8	0	0	0	76	4,249.80	1
22/03/2015	76	0	0	0	0	76	4,249.80	2
5/04/2015	44	8	0	24	0	76	4,249.80	3
19/04/2015	12	8	0	56	0	76	4,249.80	4
3/05/2015	-4	0	0	80	0	76	4,249.80	5
17/05/2015	-4	0	0	80	0	76	4,249.80	6
31/05/2015	-4	0	72.5	7.49	0	75.99	195.63	7
14/06/2015	37.6	8	0	0	30.4	76	4,826.15	8
28/06/2015	-0.139	0	2.78	0	73.34	75.981	4,093.90	9
12/07/2015	0	0	76	0	0	76	0.00	
26/07/2015	-4	0	80	0	0	76	2,063.35	10
9/08/2015	0	0	76	0	0	76	0.00	
23/08/2015	0	0	76	0	0	76	0.00	
6/09/2015	0	0	76	0	0	76	0.00	
20/09/2015	0	0	76	0	0	76	0.00	
4/10/2015	0	0	80	0	0	80	4,356.00	1
18/10/2015	0	0	78	0	0	78	-2,063.35	2
1/11/2015	0	0	76	0	0	76	0.00	
15/11/2015	0	0	80	0	0	80	-4,356.00	3
29/11/2015	0	0	76	0	0	76	0.00	
13/12/2015	0	0	76	0	0	76	0.00	
27/12/2015	0	0	76	0	0	76	0.00	
10/01/2016	32	0	44	0	0	76	1,834.10	4
24/01/2016	20	0	56	0	0	76	1,146.32	5
7/02/2016	-28	0	28	0	0	0	-1,604.86	6
7/02/2016	68	8	0	0	0	76	4,356.00	7
21/02/2016	76	0	0	0	0	76	4,356.00	8
6/03/2016	76	0	0	0	0	76	4,356.00	9

20. The lines in the above table highlighted in grey are not the subject of any payslip in evidence. The consecutive payslip numbers begin with the first payslip included for the fortnight ended 8 March 2015 with the payslip number 10 issued in respect of the pay period ended 26 July 2015. The numbering again commences at one with the payslip for the pay period ended 4 October 2015 and the ninth was issued in respect of the pay period for the fortnight ended 6 March 2016.
21. The missing periods do not appear to bear payslip numbers, suggesting that no payslips were issued for the periods:
 - (a) 29 June 2015 to 12 July 2015
 - (b) 27 July 2015 to 9 August 2015
 - (c) 10 August 2015 to 23 August 2015
 - (d) 24 August 2015 to 6 September 2015
 - (e) 7 September 2015 to 20 September 2015
 - (f) 19 October 2015 to 1 November 2015
 - (g) 16 November 2015 to 29 November 2015
 - (h) 30 November 2015 to 13 December 2015
 - (i) 14 December 2015 to 27 December 2015.

The year to date balances recorded on the respective payslips in evidence confirm that no payments were made in respect of the pay periods for which no payslips were available.

22. The payslips in evidence together with the absent periods support the applicant's submission that only 22 weeks are accounted for as having been worked, taken as annual leave or sick leave.
23. That calculation is supported by the further document entitled "NSWH Workers Compensation Average Earnings Report – Enhanced" (Earnings Report) in evidence. That document records that Mr Peric was on leave without pay in the period 18 May 2015 to 24 January 2016 for a total of 1,097.29 hours (30.87 weeks).
24. That figure tallies with the applicant's submission that Mr Peric was actually working, on holiday pay or sick leave for no more than 22 weeks.
25. Further evidence that Mr Peric worked less than 52 weeks in the year preceding the subject injury on 2 March 2016 is provided by the consent award dated 15 December 2015 in respect of Mr Peric's earlier injury. The Certificate of Determination records agreement for payments of weekly compensation for a 15-week period as follows:
 - (a) \$2,174.55 from 20 April 2015 to 20 July 2015, and
 - (b) \$1,831.20 from 21 July 2015 to 6 August 2015in respect of Mr Peric's earlier psychological injury.
26. It is a reasonable inference that those 15 weeks were not worked by Mr Peric and that his absence from work was not voluntary, but due to the earlier injury.
27. The applicant submits that the averaging to be performed pursuant to section 44C(1)(a) requires the total pay in the 52-week period to be averaged over 22 weeks. That calculation, it is submitted, yields a pre-injury average weekly wage of \$2,221.43. (Total wage \$48,871.49 divided by 22 = \$2,221.43).
28. I am satisfied that the evidence of the payslips, the earlier consent award and the Earnings Report establish that, in the 52 weeks prior to the subject injury, Mr Peric did not work and was not on paid leave for at least 30 weeks.

29. Counsel for the respondent submitted that Mr Peric had voluntarily altered his ordinary hours of work in that period of 52 weeks so that the “relevant period” as defined by section 44D should include those 30 weeks pursuant to section 44D(2).
30. I do not accept that submission. The submission is not supported by evidence and there is clear evidence to the contrary with respect to the period from 20 April 2015 to 6 August 2015 when Mr Peric did not work due to his earlier injury and was compensated pursuant to a consent award at the rate appropriate to his having had no capacity for employment in that period.
31. The basic rule remains that the party asserting a fact has the evidentiary onus of proving that fact. The respondent’s wage records recognise that Mr Peric was classified as being on “leave without pay” for some 30 weeks during the year preceding the subject injury. I do not accept that an employer would permit a worker to voluntarily absent himself from work for more than half the year without putting some sort of performance management process into place. There is no question that the applicant in the period 20 July 2015 to 6 August 2015 was not voluntarily off work but in that period had no capacity due to his earlier psychological injury.
32. In his statement dated 12 June 2018, Mr Peric said:

“My previous injury was also the subject of the work injury management disputes. I was advised by New South Wales Health Pathology, Pathology West that I was unable to return to my former position as a Laboratory Manager at Nepean Hospital for the reason that it is unsafe for me to do so were had outstanding complaints of bullying and harassment against people under Pathology West.”
33. Mr Peric said that he had been advised that his pre-injury position (that is the earlier injury) had been made redundant and was no longer available from mid October 2015.
34. The applicant’s statement records that although he was due to return to work in September or October 2015 he did not do so as no duties were provided. He said: “However I was only afforded alternative duties at Westmead Hospital from about 7 January 2016 to March 2016.” He said that he had been seconded temporarily to Westmead as it was not safe for him while his complaints were investigated.
35. In the circumstances, I could not be satisfied that Mr Peric had voluntarily withdrawn from employment. The consent award in December 2015 clearly recognised that Mr Peric’s withdrawal from employment was attributable to incapacity for work resulting from the earlier injury. Although the respondent did not concede that the balance of the period during which he was off work was attributable to injury, it does not appear that his absence was voluntary but rather was due to no position being found for him at a time when the respondent did not accept that he was suffering incapacity due to injury.
36. I am satisfied that it is appropriate to calculate Mr Peric’s pre-injury average weekly earnings in accordance with section 44C(1)(a) by excluding from the 52-week period the 32 weeks during which Mr Peric did not actually work and was not on paid leave.
37. Counsel for the applicant asserted that Mr Peric had been paid a total of \$48,871.49 at an average of \$2,221.43 per week.
38. The Preinjury Average Weekly Earnings (PIAWE) calculation relied upon by the respondent relied upon total earnings of \$49,518.56 as set out in the worksheet in evidence.
39. The Average Earnings Report for the period 1 March 2015 to 2 March 2016 records a total of \$52,149.90 paid to Mr Peric in respect of salary, annual leave and sick leave.
40. The figure asserted by the applicant is the most conservative of these figures and it is appropriate to adopt that figure as the earnings upon which the calculation of pre-injury average weekly earnings should be based.

41. I am satisfied for the reasons set out above that the “relevant period” for the purposes of section 44C(1)(a) commences on 3 March 2015 and ceases on 2 March 2016 and, from that period, 30 weeks should be excluded being weeks that Mr Peric did not actually work and was not on paid leave.
42. Accordingly, the pre-injury average weekly earnings are to be determined by averaging the sum of \$48,871.49 over 22 weeks resulting in an average sum of \$2,221.43 per week. However, the applicant conceded that this calculation included leave loadings and accepted that the pre-injury average weekly earnings were to be appropriately calculated as \$2,178 per week in accordance with the claim made in the proceedings. I accept that concession.

Incapacity

43. Counsel for Mr Peric submitted that the applicant had no current work capacity throughout the period of the claim. The applicant submitted that any period of capacity to perform work was severely limited by psychological injury as noted by the treating psychologist, The psychologist, Suzanne Kairouz, in her report dated 30 November 2017 said “It is my opinion that the client’s capacity for work is severely limited due to psychological injury”. Dr Bertucen reported that Mr Peric required continuing psychological and other support to reduce his symptoms. Counsel for the applicant submitted that Dr Bertucen had favoured a gradual return to work. He had assessed Mr Peric as having moderate impairment with regard to employability.
44. Counsel for the respondent submitted that the nominated treating doctor, Dr Watson, had certified Mr Peric as fit for some type of employment from 1 November 2016 three days per week for six hours per day and as fit for pre-injury duties from 1 June 2017. That evidence should be accepted as Dr Bertucen had not seen Mr Peric until the end of the period claimed.
45. In his statement dated 12 June 2018, Mr Peric said: “I have been incapacitated for work since the events of 2 March 2016. These events were humiliating to me and shook me to my core.” He noted that he had been paid his normal salary until 24 June 2016 when his employment was terminated. He noted that he had not worked since that time and had been receiving treatment from his general practitioner, Dr Robert Watson, and from his psychologist, Suzanne Kairoz.
46. In his report dated 8 September 2017 Dr Bertucen noted the history of injury and treatment. He reported that Mr Peric had recently returned from an extended stay in Europe for two or three months which had provided significant relief. He said:

“His mood currently could be described as dysphoric and anxious, although largely in my opinion, due to practical considerations, i.e. financial, consequences of the separation and lack of employment, and organising his CV for renewed employment. His Beck Depression Inventory Score on the day of interview was 30, which is suggestive of high – moderate levels of depressive symptomatology.”
47. On mental state examination Dr Bertucen reported:

“Attention, concentration and eye contact were adequate and appropriate and speech rate, volume and content within normal limits. He was a concise and articulate historian with a complete grasp/comprehension of the English language and only a light accent. Mood could be described as dysphoric/moderately depressed; however, he presented a reasonably reactive although subdued affect. There was no formal thought disorder, evidence of psychosis, self-harming ideation or features of elevated mood/hypomania. He was oriented to time, place and person and his sensorium was clear.”
48. Dr Bertucen diagnosed Mr Peric as having chronic adjustment disorder with features of depressed mood and anxiety which had over time evolved into a major depressive disorder now in partial remission. He attributed improvement to the removal of the original stressors and noted the parallel stressor of the break-up of Mr Peric’s marriage.

49. Dr Bertucen reported that Mr Peric was “now psychologically capable of returning to work as a laboratory manager although not for the previous employer.” Dr Bertucen noted:
- “Mr Peric has recently returned from a trip to Europe and his mood state at the moment is therefore perhaps more buoyant than it would have been before his departure. Given the current issues that Mr Peric faces (homelessness, lack of employment) it is likely that his mood state will deteriorate over the next few months. Accordingly, therefore I would recommend he be referred promptly to a consultant psychiatrist for monitoring of mood, overall assessment and advice regarding pharmacotherapy.”
50. In assessing whole person impairment arising from subject injury Dr Bertucen considered the area of function labelled “employability” in the New South Wales workers compensation guidelines for the evaluation of permanent impairment¹. He assessed moderate impairment (class 3) and said:
- “In my opinion, Mr Peric could probably return to work as a laboratory manager but not in the public sector. He has the psychological capacity to commence work part-time forthwith that may need 4 – 6 weeks to build up to his previous level of competence.”
51. In his subsequent report dated 23 January 2018 Dr Bertucen was asked to comment on “the extent to which you consider the events of 2 March 2016 led to our client being incapacitated for employment.” Dr Bertucen replied:
- “I consider that, as above, the manner and speed of Mr Peric’s dismissal indeed lead to a subsequent period of incapacity for employment. The time of our interview however (8 September 2017), Mr Peric states he had once again begun to apply for work in his pre-injury field.”
52. The treating psychologist, Suzanne Kairoz, had been treating Mr Peric since 31 March 2015 following his earlier psychological injury. She provided a report dated 30 November 2017. She noted that treating general practitioners had diagnosed depression and said that she supported that view.
53. Ms Kairouz noted the incident on 2 March 2016 and the subsequent termination of employment. She recorded his history noting that Mr Peric had grown up in Serbia and completed a medical science degree at the University of Pristina in 1988. Following his arrival in Australia she noted that Mr Peric had completed a bridging degree in Medical Science and Pathology at Charles Sturt University and subsequently completed a Master’s Degree in Pathology.
54. Ms Kairouz recorded Mr Peric’s employment from 2000 to 2006 as Director of South Coast Pathology, from 2007 to 2009 as Head of Haematology for Healthscope, in 2010 as a Senior Hospital Scientist at Pathology West and in 2012 appointment as Laboratory Manager for Nepean Pathology.
55. Ms Kairouz reported:
- “Mr Peric’s reported symptoms include: depressed mood, anxiety, racing heart, nausea, panic attacks, intrusive thought patterns, recurrent thoughts regarding workplace incidences (sic), frequent bouts of crying and distress, sleep disturbance, fatigue, difficulty concentrating, tightness in throat, difficulty breathing at times, aversions to work, exhaustion, hopelessness, suicidal ideation and impaired functioning.”
56. Ms Kairouz diagnosed adjustment disorder with anxiety and depressed mood. She was asked to provide her opinion as to Mr Peric’s current work capacity and reported “It is my opinion that the client’s capacity for work is severely limited due to his psychological injury.” She believed that he needed continuing psychological, medical, financial and emotional support to reduce his symptoms and to improve his mental condition “in order to begin his life virtually from scratch”. She described Mr Peric as “highly intelligent and resilient” but believed that his prognosis was uncertain because of the impact of the work injury.

¹ fourth edition – 1 April 2016 page 55 and 56

57. A series of WorkCover NSW certificates of capacity were in evidence issued by the treating general practitioner, Dr Watson. Dr Watson certified Mr Peric as having no current work capacity from 7 March 2016 to 5 October 2016.
58. In a certificate dated 4 October 2016 Dr Watson certified Mr Peric as having capacity for “some type of employment” from 5 October 2016 for six hours per day three days per week. He recommended referral to a workplace rehabilitation provider. Dr Watson noted restriction “not with pathology West but in a position commensurate with experience and qualifications within New South Wales health pathology. Pre-injury position and status.”
59. Certificates in similar terms were issued by Dr Watson up to 22 March 2017. A further certificate dated 1 June 2017 records Mr Peric as fit for pre-injury duties. The next review date is planned to be 1 December 2017. The reason for the long period is stated to be “stable, hearing completed”.
60. Weighing that evidence, I am satisfied that Mr Peric had no capacity for work in the period of the claim. The phrase “no current work capacity” is defined in section 32A of the 1987 Act: “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 is defined in that section to mean:
- “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 Workers Compensation 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.”
61. Mr Peric was aged 50 at the time of the subject psychological injury. He had recently returned to work with the assistance of a rehabilitation provider following an earlier psychological injury.
62. His statement and the report from November 2017 of the treating psychologist, Ms Kairouz, confirms that Mr Peric had postgraduate tertiary qualifications with a Master’s degree. The positions that he had occupied since the year 2000 had been in senior positions as Director of South Coast Pathology, Head of Haematology, Senior Hospital Scientist and Laboratory Manager.
63. The nature of Mr Peric’s incapacity is spelt out by the treating psychologist who set out the physical consequences of Mr Peric’s psychological injury. These are noted above as including sleep disturbance, fatigue, difficulty concentrating and impaired functioning.

64. The psychologist was of the opinion that Mr Peric's capacity for work was "severely limited" due to his psychological injury.
65. As noted above, Dr Bertucen, who examined Mr Peric at the time when his claim for weekly payments closed felt that, at that time, Mr Peric's mood was described as dysphoric and anxious although these were largely due to practical considerations. The psychiatrist assessed high to moderate levels of depressive symptomatology on testing. The psychiatrist diagnosed current major depressive disorder now in partial remission. He felt that it was likely that Mr Peric's mood state would deteriorate as he was examining him following return from an overseas trip which he felt had improved Mr Peric's mental state. Dr Bertucen recommended referral to a consultant psychiatrist for monitoring of mood, overall assessment and advice regarding medication.
66. Dr Bertucen assessed Mr Peric as moderately impaired with respect to employment at that time. Although he noted that, at the time of assessment, Mr Peric had begun to apply for work in his pre-injury field.
67. Although the work capacity certificates issued by Dr Watson prior to 1 June 2017 speak of a capacity for some employment the general practitioner qualifies that by advising referral to a rehabilitation provider and qualifying the fitness for employment on a part-time basis to work commensurate with his previous status.
68. Dr Watson issued a certificate on 1 June 2017 certifying Mr Peric as fit for his pre-injury duties. He noted that Mr Peric's condition at that time was "stable" with "hearing completed".
69. There does not appear to be any report by the psychologist to Dr Watson at about 1 June 2017 and is unclear how he assessed Mr Peric as being fit for his pre-injury occupation.
70. I accept the evidence of Ms Kairouz and Dr Bertucen that Mr Peric had ongoing symptoms up to 8 September 2017 at least and continued to require treatment.
71. In *Wollongong Nursing Home Pty Ltd v Dewar*² Roche DP said:
- "In context, the phrase 'employment in work', in the definition of suitable employment, 'in relation to a worker', must refer to real work in the labour market. That is, it must refer to a real job employment for which the worker is suited."
72. In the last 19 years, Mr Peric has worked exclusively in the health area in a management/scientific role. He has no experience of labouring type work or retail or clerical work in that time. It is clear from the report of the psychologist and Dr Bertucen that Mr Peric had suffered a serious blow to his self-respect and consequently to his capacity to work as a result of the subject psychological injury.
73. I am satisfied that "suitable work" would be work in a scientific role with managerial responsibility provided that Mr Peric had the assistance of a rehabilitation provider and ongoing treatment to enable him to return to the workforce in what would probably be a less senior position that he had previously occupied and which would require skilled professional medical support to permit him to function and overcome the deficits in concentration, his fatigue attributable to loss of sleep and his depression.
74. I am satisfied that the absence of a rehabilitation provider as recommended by Dr Watson and the ongoing symptoms described by Ms Kairouz would prevent Mr Peric from obtaining employment whether on a full-time or part-time basis.
75. I am not satisfied that a position involving employment for 18 hours a week in a scientific or technical role constitutes a "real job" but I have not based my reasoning on that aspect but rather whether the consequences of the injury including both the emotional state and the physical symptoms are such as to have prevented Mr Peric from engaging in employment in the period of the claim. The evidence of Ms Kairouz and Dr Bertucen establishes that this is the case.

² [2014] NSWCCPD 55

76. Throughout much of the period of the claim Mr Peric was receiving psychological counselling from Ms Kairouz and that assistance was ongoing at the end of the period of the claim. No occupational rehabilitation services had been provided to Mr Peric in respect of the subject injury.
77. I have taken into account the certificates of capacity issued by Dr Watson certifying Mr Peric as fit for some work 18 hours per week. It seems to me that Dr Watson has not taken into account whether such work would be suitable for Mr Peric, given his experience, background and qualifications. Mr Peric's experience and qualifications fit him for work of a highly technical nature such as in a laboratory or technical facility. Employment of this nature would require high degree of concentration which I am satisfied on the basis of the reports of Ms Kairouz and Dr Bertucen Mr Peric did not have.
78. I do not accept the opinion of Dr Watson expressed in the certificate issued on 1 June 2017 which certifies Mr Peric as fit to his pre-injury duties from that date on. It is clear that Mr Peric's pre-injury duties were of a highly technical nature and the evidence of Ms Kairouz and Dr Bertucen, which I prefer, details the problems of concentration as well as physical fitness which flowed from the subject psychological injury.
79. For this reason, I am satisfied that from 26 June 2016 to 8 September 2017 Mr Peric had no current work capacity. There is no "deductible amount" as defined in section 35(1). Mr Peric is therefore, prima facie, entitled to be paid 95% of his pre-injury average weekly earnings in the first entitlement period. That sum is \$2,069.10 per week (\$2,178 x 95%).
80. The entitlement to benefits is governed by section 34 which fixes the maximum weekly payment in the first entitlement period from 26 June 2016 to 25 September 2016 at \$2,042.80. Mr Peric is therefore entitled to be compensated pursuant to section 36 (1)(b) of the 1987 Act in the sum of \$2,042.80 during the first entitlement period.
81. From 26 September 2016 to 8 September 2017, Mr Peric is entitled to be paid pursuant to section 37(1)(a) at the rate of 80% of his pre-injury average weekly earnings represented by the sum of \$1,742.40 per week.
82. The Application to Resolve a Dispute includes a claim for reimbursement of treatment expenses pursuant to section 60 of the 1987 Act. The respondent conceded that, in the light of the finding on liability, it was appropriate that a general order be made for the payment or reimbursement of reasonably necessary treatment expenses resulting from the subject injury.
83. That concession is appropriate and the applicant is entitled to an award pursuant to section 60.

