WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **5660/19**
Applicant: **Tammy Payten**
Respondent: **Riverina Fresh Pty Limited**
Date of Determination: **3 March 2020**
Citation: **[2020] NSWWCC 59**

The Commission determines:

1. The applicant did not suffer a consequential (secondary) psychological injury as a result of the accepted injury to her lumbar spine on 4 May 2018.

2. The applicant suffered a primary psychological injury in the course of her employment with the respondent on 28 November 2018 (deemed) within the meaning of section 4(b)(i) of the *Workers Compensation Act 1987*, to which employment was the main contributing factor.

3. The applicant has had no current work capacity within the meaning of section 32A of the *Workers Compensation Act 1987* from 28 November 2018.

The Commission orders:

4. The respondent is to pay the applicant weekly compensation in respect of the primary psychological injury on 28 November 2018 as follows:

    (a) $887.98 per week from 28 November 2018 to 27 February 2019 under section 36(1) of the *Workers Compensation Act 1987*.

    (b) $747.78 per week from 28 February 2019 to date under section 37(1) of the *Workers Compensation Act 1987*.

    (c) Such weekly payments to continue in accordance with the provisions of the *Workers Compensation Act 1987*.

    (d) The respondent to be given credit for any payments made.

    (e) Liberty to apply within 14 days in relation to the calculation of weekly benefits.

5. The respondent is to pay the applicant's reasonably necessary medical and related expenses as a result of her primary psychological injury on 28 November 2018 under sections 60 of the *Workers Compensation Act 1987*.

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

Anthony Scarcella
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 OFANTHONY SCARCELLA, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

G Bhasin

Gurmeet Bhasin
Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. The applicant, Ms Tammy Payten, is a 45-year-old woman who was employed by Riverina Fresh Pty Limited (the respondent) as a production worker / milk operator.

2. On 4 May 2018, Ms Payton injured her back in the course of her employment with the respondent whilst stretching and twisting to remove a part from a machine that she was operating. Ms Payton's back injury was not disputed by the respondent. There were references in some of the evidence and at the conciliation/arbitration as the date of injury being 7 May 2018. The date of injury has no effect on the determination I am required to make.

3. In or about August 2018, Ms Payten commenced a graduated return to work with the respondent on light duties in relation to her work-related back injury. In or about November 2018, she returned to work with the respondent on her pre-injury duties without restrictions, whilst still undergoing physiotherapy treatment for her injured back.

4. Ms Payten alleged that, following her back injury on 4 May 2018, she suffered a primary psychological injury due to a lack of support and harassment in the workplace. Ms Payten last worked for the respondent on 28 November 2018.

5. On a date which was not clear on the evidence, but probably on or about 29 November 2018, Ms Payten made a claim against the respondent for compensation under the *Workers Compensation Act 1987* (the 1987 Act) in respect of her alleged primary psychological injury.

6. On 20 February 2019, the respondent, through its insurer, Employers Mutual Limited (EML), issued a Dispute Notice pursuant to section 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) denying injury within the meaning of section 4 of the 1987 Act and denying an entitlement to reasonably necessary medical and related treatment expenses as a result of injury within the meaning of sections 59 and 60 of the 1987 Act.[1]

7. On 13 June 2019, the respondent terminated Ms Payton's employment.[2]

8. On 16 August 2019, Ms Payten, through her lawyers, requested a review of the decision contained in EML's Dispute Notice dated 20 February 2019 under section 287A of the 1998 Act.[3]

9. On 30 August 2019, EML issued a Dispute Notice pursuant to section 78 of the 1998 Act maintaining its decision to deny liability and in addition, raised disputes under sections 9A, 4(b)(ii) and section 33 and of the 1987 Act. EML also disputed that Ms Payten suffered a consequential (secondary) psychological injury as a result of the accepted injury to her lumbar spine on 4 May 2018.[4]

10. Ms Payten lodged an Application to Resolve a Dispute (ARD) dated 29 October 2019 in the Workers Compensation Commission (the Commission) claiming weekly compensation from 21 February 2019 to date and continuing under sections 36 and 37 of the 1987 Act and medical and related expenses under section 60 of the 1987 Act, as a result of the alleged primary psychological injury sustained in the course of her employment with the respondent. She nominated the date of injury as being 28 November 2018, being the last day she worked for the respondent.

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[1] Application to Resolve a Dispute dated 29 October 2019 at pages 24-31.
[2] Applicant's Application to Admit Late Documents dated 19 November 2019 at page 1.
[3] Application to Resolve a Dispute dated 29 October 2019 at page 32.
[4] Application to Resolve a Dispute dated 29 October 2019 at pages 33-37.

ISSUES FOR DETERMINATION

11. The parties agreed that the following issues remained for determination:

    (a) Did Ms Payten suffer a primary psychological injury with a deemed date of 28 November 2018 within the meaning of section 4(b) of the 1987 Act? In the alternative, did Ms Payten suffer a consequential (secondary) psychological injury as a result of the accepted injury to her lumbar spine on 4 May 2018?

    (b) Is Ms Payten entitled to weekly payments for total or partial incapacity within the meaning of section 33 of the 1987 Act arising from her alleged psychological injury? If so, did she have a current work capacity to work in suitable employment within the meaning of section 32A of the 1987 Act during the periods claimed? What is the extent and quantification of her entitlement to weekly compensation within the meaning of sections 35, 36 and 37 of the 1987 Act?

    (c) Are Ms Payten's medical and related treatment expenses reasonably necessary as a result of injury within the meaning of sections 59 and 60 of the 1987 Act?

Matters previously notified as disputed

12. The issues in dispute were notified in the Dispute Notices referred to above.

Matters not previously notified

13. There were unnotified matters that were resolved by agreement between the parties. Those matters are referred to below.

PROCEDURE BEFORE THE COMMISSION

14. The parties attended a conciliation conference/arbitration in Wagga Wagga on 13 January 2020. Mr Ty Hickey of counsel appeared for Ms Payten and Ms Kayt Hogan of counsel appeared for the respondent.

15. During the conciliation phase the parties agreed as follows:

    (a) Ms Payten's pre-injury average weekly earnings were agreed at $934.72.

    (b) Any award for weekly benefits should commence from the deemed date of injury on 28 November 2018 and the respondent should be given credit for any payments made.

    (c) If there is an award in Ms Payten's favour, the making of a general order under section 60 of the 1987 Act is appropriate.

16. During the conciliation phase, the respondent foreshadowed an application under section 289A(4) of the 1998 Act to seek leave to amend its Dispute Notices to allege that Ms Payten had suffered a psychological injury secondary (consequential) to the injury to her lumbar spine on 4 May 2018. Initially, Ms Payten foreshadowed her objection to the proposed application. The parties undertook further discussions and it was agreed that Ms Payten would consent to the proposed application and in turn, the respondent would consent to Ms Payten amending the ARD to plead, in the alternative, a secondary (consequential) psychological injury.

17. Accordingly, I made the following orders:

    (a) Leave granted to the respondent to amend its Dispute Notices to allege a psychological injury secondary (consequential) to the injury to the applicant's lumbar spine on 4 May 2018.

    (b) Leave granted to the applicant to amend the ARD to plead, in the alternative, a psychological injury secondary (consequential) to the injury to the applicant's lumbar spine on 4 May 2018.

18. I am satisfied that the parties to the dispute understood the nature of the application and the legal implications of any assertion made in the information supplied. I 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

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

    (a) ARD dated 29 October 2019 and attached documents;

    (b) applicant's Application to Admit Late Documents dated 19 November 2019 and attached documents;

    (c) Reply dated 20 November 2019 and attached documents;

    (d) applicant's Application to Admit Late Documents dated 18 December 2019 and attached documents, and

    (e) respondent's Application to Admit Late Documents dated 6 January 2020 and attached documents.

Oral evidence

20. Neither party sought leave to adduce oral evidence from or to cross-examine any witness.

Submissions

21. Ms Payten made oral submissions at the arbitration hearing which were sound recorded. The sound recording is available to the parties. Due to time constraints, there was insufficient time for the respondent to provide its oral submissions. Rather than stand the matter over part heard, I issued the following directions:

    "1. The respondent is to lodge and serve by 28 January 2020 written submissions in reply to the applicant's oral submissions made at the arbitration hearing on 13 January 2020.

    2. The applicant is to lodge and serve by 4 February 2020 any written submissions in reply.

    3. At the conclusion of the time allowed for submissions the dispute will be determined 'on the papers'."

22. The respondent lodged written submissions dated 27 January 2020 with the Commission.

23. Ms Payton lodged written submissions in reply dated 5 February 2020 with the Commission.

24. I will deal with the principal submissions made by the parties below.

FINDINGS AND REASONS

Did Ms Payten suffer a primary psychological injury with a deemed date of 28 November 2018 within the meaning of section 4(b) of the 1987 Act? In the alternative, did Ms Payten suffer a consequential (secondary) psychological injury as a result of the accepted injury to her lumbar spine on 4 May 2018?

25. As a result of the respondent's late concession in the conciliation phase that Ms Payten's psychological injury was a secondary or consequential one, the principal dispute was no longer whether she had suffered a psychological injury within the meaning of section 4(b) of the 1987 Act, but whether it was a primary psychological or secondary psychological injury.

26. The onus of establishing injury falls on Ms Payten and the standard of proof is on the balance of probabilities, meaning that I must be satisfied to a degree of actual persuasion or affirmative satisfaction: *Department of Education and Training v Ireland*[5] (*Ireland*) and *Nguyen v Cosmopolitan Homes*[6] (*Nguyen*).

27. The issue of causation must be based and determined on the facts in each case and requires a common sense evaluation of the causal chain: *Kooragang Cement Pty Ltd v Bates*[7] (*Kooragang*). As I understand it, when referring to applying "common sense", Kirby, P in *Kooragang* was not suggesting that it be applied "at large" or that issues were to be determined by "common sense" alone but by a careful analysis of the evidence, including a careful analysis of the expert evidence: *Kirunda v State of New South Wales (No 4)*[8] (*Kirunda*). The legislation must be interpreted by reference to the terms of the statute and its context in a fashion that best effects its purpose.

28. In dealing with the issue of whether Ms Payten suffered a primary psychological injury, I have considered the relevant legislation and legal principles referred to below.

29. Section 4(a) of the 1987 Act defines "injury" as a personal injury arising out of or in the course of employment. A personal injury includes a "disease injury".[9] A disease injury means a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease;[10] and the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease.[11]

[5] *Department of Education and Training v Ireland* [2008] NSWWCCPD 134.
[6] *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246.
[7] *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796.
[8] *Kirunda v State of New South Wales (No 4)* [2018] NSWWCCPD 45 at [136].
[9] Section 4(b) of the 1987 Act.
[10] Section 4(b)(i) of the 1987 Act.
[11] Section 4(b)(ii) of the 1987 Act.

30. As to the meaning of disease, in *Federal Broom Co Pty Ltd v Semlitch*[12] (*Semlitch*), Kitto J said:

> "In its ordinary meaning 'disease' is a word of very wide import, comprehending any form of illness; and there is no reason I can see for reading it in the present context as not extending to mental illness."[13]

This decision was applied by the Court of Appeal in *Cook v Midpart Pty Ltd t/as McDonalds Foster*[14].

31. In *Commissioner for Railways v Bain*[15] Windeyer J stated:

> "The word 'disease' seems to me apt to describe any abnormal physical or mental condition that is not purely transient …"[16]

32. The word "main" in the phrase "main contributing factor" means "chief" or "principal".[17] Roche DP in *State Transit Authority v El-Achi*[18] (*El-Achi*) said:

> "That a doctor does not address the ultimate legal question to be decided is not fatal. In the Commission, an Arbitrator must determine, having regard to the whole of the evidence, the issue of injury, and whether employment is the main contributing factor to the injury. That involves an evaluative process."[19]

33. In dealing with the issue of whether Ms Payten suffered a consequential (secondary) psychological injury as a result of the accepted injury to her lumbar spine on 4 May 2018, I have considered the relevant legal principles referred to below.

34. In this alternative argument, it is unnecessary for me to determine whether Ms Payten's psychological symptoms are in themselves 'injuries' pursuant to section 4 of the 1987 Act: *Moon v Conmah Pty Ltd* (*Moon*),[20] *Kumar v Royal Comfort Bedding Pty Ltd*[21] (*Kumar*) and *Bouchmouni v Bakos Matta t/as Western Red Services*[22].

35. Further, section 9A of the 1987 Act does not apply to a condition that has resulted from an injury: *Tiritabua v Bartter Enterprises Pty Ltd*[23].

36. I am required to conduct a common sense evaluation of the causal chain to determine whether the psychological symptoms complained of by Ms Payten have resulted from the accepted injury to her lumbar spine on 4 May 2018: *Kooragang*, through a careful analysis of the evidence and a careful analysis of the expert evidence: *Kirunda*.

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[12] *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626.
[13] *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626 at 632.
[14] *Cook v Midpart Pty Ltd t/as McDonalds Foster* [2008] NSWCA 151.
[15] *Commissioner for Railways v Bain* [1968] HCA 5; 112 CLR 246.
[16] *Commissioner for Railways v Bain* [1968] HCA 5; 112 CLR 246 at 272.
[17] *Meaney v Office of Environment and Heritage – National Parks and Wildlife Service* [2014] NSWWCC 339 at [138]-[147] and *Wayne Robinson v Pybar Mining Services Pty Ltd* [2014] NSWWCC 248 at [78]-[88].
[18] *State Transit Authority v El-Achi* [2015] NSWWCCPD 71.
[19] *State Transit Authority v El-Achi* [2015] NSWWCCPD 71 at [72].
[20] *Moon v Conmah Pty Ltd* [2009] NSWWCCPD 134 at [43], [45] and [50].
[21] *Kumar v Royal Comfort Bedding Pty Ltd* [2012] NSWWCCPD 8 at [35]–[49] and [61]).
[22] *Bouchmouni v Bakos Matta t/as Western Red Services* [2013] NSWWCCPD 4.
[23] *Tiritabua v Bartter Enterprises Pty Ltd* [2008] NSWWCCPD 145 at [47].

37. Ms Payten's principal submissions in relation to psychological injury may be summarised as follows:

(a) Ms Payten suffered a primary psychological injury within the meaning of section 4 of the 1987 Act but, if that submission were not accepted, then she must succeed on the alternative claim, namely, that she suffered a consequential (secondary) psychological injury as a result of the accepted injury to her lumbar spine on 4 May 2018.

(b) Ms Payten disclosed having been diagnosed with depression and obsessive-compulsive disorder some 15 years prior to the primary psychological injury on 28 November 2018. There is no evidence of any recent psychological or psychiatric injury or condition prior to 28 November 2018 and this is supported by the clinical records of Ms Payten's general practitioner, Dr Heber Azer (also occasionally referred to as Dr Heber or Dr Herber in the evidence). It is also consistent with the expert evidence of the medico-legal experts engaged by the parties, namely, Dr Christopher Canaris, Consultant Psychiatrist for Ms Payten and Dr Yajuvendra Bisht, Psychiatrist for the respondent.

(c) Ms Payten's claim relating to her treatment in the workplace focused, to a large extent, on the conduct of Mr Aaron Johnson, the respondent's Human Resources Manager and Work Coordinator. Mr Johnson's actions, demeanour, comments and failure to engage meaningfully in the rehabilitation process or the return to work program or in accordance with the respondent's own HSW Injury Management / Return to Work Procedure in relation to the back injury on 4 May 2018, led to the gradual onset of Ms Payten's psychological symptoms.

(d) There was a fairly consistent pattern of behaviour on the part of Mr Johnson with respect to his interactions with Ms Payten's treatment providers when the information provided to him was not to his liking. Such behaviour was demonstrated in the clinical records of the rehabilitation service provider, Mr Patrick Ireland of The Rehabilitation Company (RehabCo) and was consistent with the complaints made by Ms Payten with respect to her interactions with Mr Johnson.

(e) Mr Johnson's evidence glaringly omitted any discussion or engagement with the complaints made by Ms Payten. He understated his interaction with Ms Payten's general practitioner, Dr Heber Azer. The respondent did not remedy these issues by providing a further statement from Mr Johnson or statements from other individuals in the workplace.

(f) Ms Payten stated that she had minimal contact with Mr Johnson, other than when he was encouraging her to return to work as soon as possible. When there was interaction between them, she found them to be unpleasant. Mr Ireland's clinical records demonstrated that his interactions with Mr Johnson were unpleasant. The evidence also indicated that Mr Johnson's interactions with Dr Azer were also unpleasant.

(g) In Mr Johnson's view, he complied with the respondent's HSW Injury Management / Return to Work Procedure. When one has regard to that policy, it is clear that he did not.

(h) It was noteworthy that Dr Canaris and Dr Bisht obtained histories that focused on Ms Payten's obvious difficulties in the workplace and particularly, her difficulties with Mr Johnson, rather than any failure by her to adjust or otherwise deal with her back condition. Dr Bisht did not support the respondent's proposition of a secondary psychological injury.

(i) Dr Bisht opined that the departure of a work colleague was the main causative factor of Ms Payten's psychological condition. However, that event did not feature prominently or even vaguely in the contemporaneous material and/or complaints. Dr Bisht's opinion in that regard was against the weight of the evidence and it should be rejected.

(j) Dr Bisht referred to a factual investigation report from Huxley Hill Associates dated 20 December 2018 which was not in evidence. Dr Bisht recorded an incorrect history that Ms Payten had undergone a few sessions with a psychologist. Ms Payten's evidence is that she had not undergone any psychological treatment. This is supported by the information contained in the Medicare Notice of Charge, which does not record any such treatment.

(k) Dr Bisht's comment that there was no evidence of the employer demonstrating any unreasonable actions after Ms Payten's injury was sustained during the return to work program, demonstrated that he had adopted an advocate's role. He also concluded that there was no evidence of harassment in the workplace. Dr Bisht formed a clear view of the evidence as he interpreted it which in turn, infected his opinion. The factual investigation report was before him but not in evidence.

(l) Dr Bisht diagnosed Ms Payten with an adjustment disorder with mixed anxious and depressed mood. He attributed such diagnosis to Ms Payten's increased workplace stress but opined that the main work-related contributing factor was the departure of her work colleague, who she considered to be her main support and that, the other work-related factors referred to by Ms Payten were not substantial.

(m) Dr Canaris diagnosed an adjustment disorder with anxiety and depression. Assuming the broad accuracy of the history on offer, Ms Payten's condition was predominantly attributable to her workplace difficulties. Dr Canaris disagreed with Dr Bisht and expressed the opinion that he did not expect that the mere departure of a co-worker would cause a psychological injury.

(n) The respondent has not asserted that the relevant events that are the subject of these proceedings did not occur. The respondent appears to have distanced itself from Dr Bisht's opinion, insofar as he completely undermined the proposition of Ms Payten having suffered a secondary psychological injury. By putting forward a case of secondary psychological injury, the respondent had effectively dismissed Dr Bisht's opinion that the departure of a work colleague was the main causative factor. Dr Bisht also opined that Ms Payten's lower back injury was not the main contributor to the psychological injury.

(o) The respondent's proposition that Ms Payten suffered a secondary psychological injury as a result of her accepted workplace back injury is not supported by any medical opinion. In effect, it is supposition and is not a "self-evident" injury.[24] It arises in the context of a complex factual matrix over a period of time. Without medical evidence supporting the proposition and, particularly where Dr Bisht has dismissed it, the proposition cannot stand and should be rejected.

[24] *Lithgow City Council v Jackson* [2011] HCA 36.

38. The respondent's principal submissions in relation to psychological injury may be summarised as follows:

(a) Ms Payten's psychological condition was as a result of the accepted injury to the lumbar spine and, therefore, a secondary psychological condition.

(b) The myriad of issues raised by Ms Payten in her evidentiary statement dated 13 December 2018 presented difficulties for the case put forward by her. Reference is made in the evidentiary statement to waking thinking about work, relationships and money. However, subsequently, her evidence is that there were no relationship or financial problems. Such contradiction leads to doubt as to the cause of her psychological condition being the alleged lack of support and harassment in the workplace.

(c) Ms Payten suggested that her lumbar spine injury caused her to contract shingles. Further, she stated that her stress commenced when she injured her lumbar spine, which supports the proposition that her psychological condition is secondary to her lumbar spine injury. Ms Payten stated that she should have been treated better during her lumbar spine injury rehabilitation. This is a direct link to her physical injury. Ms Payten's physical injury is dominant in her evidentiary statement and telling as to causation.

(d) Ms Payten's submissions made much about her alleged interactions with Mr Johnson and the latter's correspondence with Mr Ireland of RehabCo. The interactions between Mr Johnson and Mr Ireland have absolutely nothing to do with Ms Payten. Ms Payten conceded that there was minimal contact between her and Mr Johnson. Therefore, it cannot be said that her interactions with Mr Johnson were causative of a primary psychological injury when she conceded minimal contact with Mr Johnson.

(e) No weight should be given to Ms Payten's evidence that she was made to feel incompetent in the emails received from Mr Johnson, as no such emails are in evidence.

(f) Whilst Ms Payten disclosed being diagnosed with psychological conditions whilst living in Adelaide 15 years ago, she did not disclose her reporting of panic attacks and anxiety to her treating general practitioner in 2013. This goes to issues of credit.

(g) On 26 October 2018, Ms Rhianna Newberry, Physiotherapist, noted that Ms Payten was very keen to return back to full work duties. In her evidentiary statement, Ms Payten stated that she requested a return to pre-injury duties because she "was feeling good". This statement is entirely contradictory to the case Ms Payten sought to make in relation to primary psychological injury, in that, she went on to allege that she was being so ill-treated, that she did not want to return to work.

(h) Ms Payten relied on the opinion of Dr Canaris. Ms Payten was unable to explain her anxiety around work and why she was anxious about a return to work. On 2 July 2018, Mr Ireland reported that Ms Payten had demonstrated signs of fear avoidance behaviour in the context of returning to work before she was physically capable to do so. That supported evidence of the psychological condition being related, or secondary to, the physical injury.

(i) Dr Canaris noted that neither he nor the respondent's forensic medical specialist, Dr Yajuvendra Bisht, Psychiatrist were in a position to know what really happened to Ms Payten at work. That is to say, the cause of the psychological condition is a factual dispute and the onus of establishing the case is on Ms Payten.

(j) Certificates of Capacity issued by Ms Payten's general practitioners referred to her symptoms of anxiety and depression commencing a few weeks after the initial lumbar spine injury, which was supportive of the psychological condition being related, or secondary to, the physical injury.

(k) In relation to the allegation of harassment in the workplace, it is telling that, on 21 November 2018, Dr Azer noted in Ms Payten's clinical records that there was no bullying.

(l) Mr Johnson's evidence refuted aspects of Ms Payten's version of events. Consistent with Ms Payten's concession that there was minimal contact between her and Mr Johnson, the latter stated that it was difficult to follow her up because she did not return phone calls. There was no need for Mr Johnson to address anything between May and November 2018 in his evidentiary statement because of the minimal contact.

(m) Reading Dr Bisht's report as a whole, it was not correct, as submitted by Ms Payten, that his reference to workplace stress was unrelated to her physical injury. Dr Bisht noted that there was apprehension about returning to work, which was consistent with the reported fear avoidance behaviours as a result of her alleged physical restrictions. Dr Bisht took a history that there was an onset of symptoms in May 2018. That is, with the physical injury. There was then a suggestion that the onset of such symptoms in May 2018 was a normal emotional response and the onset of the actual psychological injury was in November 2018. However, the report was somewhat equivocal.

(n) Due to the various inconsistencies, there has been a failure by Ms Payten to make out that there has been a primary psychological injury due to lack of support and harassment in the workplace. The matters raised above indicate a secondary psychological condition and are sufficient to cast doubt on the primary case put forward by Ms Payten.

39. I now turn to the application of the relevant legislation and the legal principles referred to above to the available evidence in this matter.

40. In its submissions, the respondent referred to Dr Canaris' comment that neither he nor the Dr Bisht were in a position to know what really happened to Ms Payten at work. The respondent submitted that, the cause of the psychological condition is a factual dispute and the onus of establishing the case is on Ms Payten. I agree with this submission and add that, it is a factual dispute which I must determine on the evidence.

41. In evidence, there is a statement by Ms Payten dated 13 December 2018 taken by an investigator appointed by EML.[25] There is also a statement by Ms Payten dated 16 October 2019 taken by an investigator appointed by her lawyers.[26] Further, there is a statement by Mr Johnson dated 13 December 2018 taken by an investigator appointed by EML.[27] I will now refer to the respective evidence of Ms Payten and Mr Johnson on the issue of causation.

[25] ARD at pages 1-6.
[26] ARD at pages 7-23.
[27] Reply at pages 1-6.

42. In her evidentiary statement dated 13 December 2018, Ms Payten made 11 allegations against the respondent which she attributed to the gradual onset of her primary psychological injury. Some of those allegations overlapped. They were summarised in the EML Dispute Notice[28] and reduced to six allegations. Ms Payten's allegations are dealt with in the evidence referred to below.

43. Ms Payten's evidence was that her direct supervisors were Ms Simone Solomon and Mr Rod Vidler. Her fellow milk operator on each shift was Mr Ian Senior. As at 4 May 2018, Ms Payten was training a new employee, Mr Dan Richards. There were no statements by Ms Solomon, Mr Vidler or Mr Richards in evidence.

44. Mr Johnson described himself as the respondent's Human Resources and Health and Safety Manager.

45. Ms Payten's evidence was that, on 4 May 2018, she injured her back in the course of her employment with the respondent whilst stretching and twisting to remove a part from a machine that she was operating. She was working with Mr Richards at the time. Her usual co-milk operator, Mr Senior, was away.

46. Ms Payten's evidence was that, about 10 minutes after injuring her back, she informed Mr Richards that she was going to report her injury. She found it difficult to breathe. She went to see Mr Johnson. Mr Johnson took her into the sick bay and told her to lay down on the bed. He assisted her up onto the bed, where she laid on her stomach. She agreed to Mr Johnson arranging for her to undergo a massage. Mr Johnson informed her that the appointment was in an hour's time. She remained on the bed until it was time to leave for the appointment. While she was waiting, Mr Johnson remained with her in conversation. She broke down and cried due to the severity of the pain. She expressed her concern to Mr Johnson because the following week she was due to start learning the operation of another machine and was concerned that her back injury might interfere with her achieving a production worker level 4 in her employment with the respondent. At the time, Ms Payten was a level 3 production worker, having progressed to that level after having started at a level 2.

47. Mr Johnson's evidence was that he offered Ms Payten the option of going to hospital or consulting a therapist in a rehabilitation centre. Ms Payten indicated that she did not care either way. Mr Johnson assured her that she would not be treated if the therapist thought that her injury required a visit to a hospital. Ms Payten indicated that she was happy to consult the therapist. Mr Johnson explained that the respondent had a process for early intervention in the event of minor strains. The respondent opted for rehabilitation because it could obtain an earlier consultation than with doctors or hospitals.

48. Ms Payten's evidence was that Mr Johnson drove her to Riverina Sport and Injury Rehabilitation Centre where she consulted Ms Simone Loiterton. Mr Johnson waited in his car during her consultation with Ms Loiterton. Ms Payten received deep tissue massage and described herself as being in excruciating pain throughout the session. After completing the session, Mr Johnson made another appointment for Ms Payten to consult Ms Loiterton the following Monday. On the drive back to the respondent's premises, Mr Johnson referred to the respondent liking "to cut the middleman out".[29] This evidence was consistent with the process for early intervention described by Mr Johnson in his evidence. When they got back to the factory, Ms Payten gathered her belongings and Mr Johnson drove her home. Mr Johnson advised her not to come into work on Monday if she was unwell and offered to give her a lift to the consultation with the therapist if required.

[28] ARD at pages 24-31.
[29] ARD at page 14 at [41].

49. Ms Payten's evidence was that, come the following Monday morning, she was in so much pain, she rang either Ms Solomon or Mr Vidler to advise that she would not be attending work. Mr Johnson telephoned her that morning and advised that Ms Solomon had informed him that she was not at work. He questioned Ms Payten's absence and she explained the severity of her pain and took Mr Johnson up on his offer to drive her to her appointment with Ms Loiterton. He agreed to do so but stipulated that she had to return to work. Ms Payten was concerned that the massage would aggravate her back. However, Mr Johnson advised that she only needed to return to work for a couple of hours. She expressed her concern about standing and working on a concrete floor. Ms Payten stated that she got into trouble for not coming into work.

50. Mr Johnson's evidence was that Ms Payten did not attend work on the Monday, nor did she make any contact to advise of her absence. Ms Payten was contacted by her supervisor, who was told that Ms Payten was not well enough to come to work and that she had sent a message to the other production supervisor in this regard on Sunday evening. Mr Johnson denied that Ms Payten was reprimanded for not attending work and that this was corroborated by the fact that he had spent time assisting her on that day. Mr Johnson spoke to Ms Loiterton and enquired whether she had advised Ms Payten not to return to work. Mr Johnson stated that Ms Loiterton advised that modified duties would be better for Ms Payten and that she should continue moving as part of her recovery. Mr Johnson telephoned Ms Payten on Monday morning and she informed him that she intended to attend her session with Ms Loiterton and then rest up. He advised Ms Payten that she should come to work on modified duties and that this could be discussed with Ms Loiterton.

51. Ms Payten's evidence was that Mr Johnson drove her to Riverina Sport and Injury Rehabilitation Centre. Ms Loiterton commenced massage and Ms Payten started to cry due to the pain. She found herself short of breath and experienced a sensation of pins and needles down her left arm 10 minutes into the massage. Ms Loiterton left her and then returned advising her to get dressed. Once dressed she went out to the reception where she observed Ms Loiterton speaking with Mr Johnson. Ms Loiterton advised Mr Johnson that he ought to take Ms Payten straight to hospital.

52. Mr Johnson's evidence was that he drove Ms Payten to the therapist for her appointment and waited in reception so that he could speak with the therapist. At some point, Ms Loiterton informed him that Ms Payten was suffering pain, shortness of breath, chest pains, a sharp pain down her left hand and pins and needles in her left hand during the therapy session and needed to consult a general practitioner. Mr Johnson stated that Ms Loiterton would not make any comment about Ms Payten's capacity to return to work.

53. Ms Payten's evidence was that Mr Johnson then drove her to Wagga Base Hospital, where she consulted a triage nurse and suggested that the nurse speak with Mr Johnson as he had had a conversation with Ms Loiterton about her situation. She was eventually examined by the doctor on duty, who referred to bruising and swelling on her back. She stated that the doctor also could not understand why she had undergone deep tissue massage with her back so swollen. She was given two injections and prescribed two varieties of medication and issued with a WorkCover Medical Certificate certifying her unfit for work for one week. The doctor recommended bed rest and the use of hot packs on her back and encouraged her to consult her general practitioner. She provided the certificate to Mr Johnson, who offered to make an appointment with one of the respondent's doctors. She advised Mr Johnson she would contact her own general practitioner. Following her hospital visit, Ms Payten made attempts to arrange for an appointment with Dr Azer. On the Tuesday and Wednesday, Mr Johnson was "ringing and hassling"[30] her about whether she had made an appointment with Dr Azer and wanted her to see the work doctor. She refused to see the work doctor. About a week after her hospital visit, Ms Payten was contacted by the hospital and advised that Mr Johnson was trying to access her medical records. Mr Johnson's evidence did not deal with the latter two mentioned events.

[30] ARD at page 15-16 at [51].

54. Ms Payten's evidence was that she obtained an appointment with Dr Azer on the Thursday following her hospital visit. Mr Johnson met her there. Dr Azer examined her and stated that she should not have undergone the deep tissue massage. Dr Azer issued a WorkCover certificate certifying her unfit for work for about one month. Prior to leaving the surgery, Mr Johnson advised that he wanted to speak to Dr Azer alone. Dr Azer called her back into her room explaining that she could not speak with Mr Johnson without Ms Payten being present. Ms Payten stated that Mr Johnson was very abrupt and rude to Dr Azer. Dr Azer provided an explanation. Mr Johnson wanted to know why Ms Payten could not go back to work on light duties. Dr Azer expressed the opinion that she needed time to heal. That discussion continued back and forth. This evidence was corroborated in Mr Ireland's handwritten Rehab Co clinical records.[31] Ms Payten felt that Mr Johnson was more concerned about a return to work than about her injury. She perceived a kind of arrogance about Mr Johnson in relation to the treatment process.

55. Mr Johnson's evidence in relation to Ms Payten's consultation with Dr Azer on the Thursday following her hospital visit started by explaining that part of his role as a return to work coordinator was to talk to doctors after appointments. However, he then stated that he asked Ms Payten whether she would prefer him to sit in on her consultation with Dr Azer. Ms Payten declined. Ms Payten came out of her consultation with Dr Azer and Mr Johnson approached the doctor about Ms Payten's work capacity. Dr Azer explained that it was all on the certificate; that it was muscular and that she had no capacity to work. Mr Johnson expressed the view that Dr Azer was dismissive of him.

56. Ms Payten's evidence was that on 18 May 2018, she developed a rash and her back was still really sore. Dr Azer diagnosed shingles and allegedly advised that it was probably caused from trauma to her back followed by the deep tissue massage.

57. Dr Azer's clinical records on 13 June 2018 recorded Ms Payten as complaining about feeling run down and not coping with all that was happening. The respondent submitted that this supported the proposition of a psychological injury secondary to the back injury on 4 May 2018. I do not accept this submission. By 13 June 2018, Ms Payten was already experiencing pressure from Mr Johnson to return to work. He had been monitoring her progress and involving himself in Ms Payten's treatment. Whilst he may have been well-meaning, Ms Payten was beginning to feel uncomfortable with what she described as his arrogance about the treatment process and what she perceived was his great concern to return her to work rather than ensuring that her injury was properly treated. Ms Payten's concern about her initial treatment process was reflected in the Wagga Base Hospital discharge summary which recorded her as being unsure that she had done the right thing in terms of injury management.[32]

58. Mr Payten stated that in about June/July 2018, she commenced physiotherapy. In or about August 2018, commenced a graduated return to work with the respondent on light duties in relation to her work-related back injury. In October 2018, she holidayed in Thailand and was feeling good after the weeks she had spent away. On her return, she asked for the physical restrictions to be removed from her WorkCover certificate. In or about November 2018, she returned to work with the respondent on her pre-injury duties without restrictions, whilst still undergoing physiotherapy treatment for her injured back. She felt that her back was "heaps better"[33] and that she had "strengthened her core".[34] However, once she returned to work, she would feel sick the night before each workday. She had never experienced this feeling before. She advised Dr Azer that she was experiencing panic attacks; feeling distressed about returning to work; and that the thought of returning to work was making her feel sick. She persevered at work and spoke to Mr Ireland numerous times about how she was feeling about returning to work and this is corroborated in the Rehab Co clinical records to which I will refer later.

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[31] Applicant's Application to Admit Late Documents dated 18 December 2019 at page 162.
[32] Applicant's Application to Admit Late Documents dated 18 December 2019 at page 220.
[33] ARD at page 17 at [65].
[34] ARD at page 17 at [65].

59. Ms Payten's evidence was that following her return to work with the respondent, Mr Senior enquired of her whether there was anything wrong and commented that she was not her normal self. Mr Senior left the employment of the respondent in October 2018. She only saw Mr Johnson once or twice following her return to work but neither he, nor her bosses came to check to see how she was going. She felt unsupported. She received no encouragement from her bosses or Mr Johnson. Her trainee, Mr Richards, was telling her how to do her job and it all became too much for her. She was anxious, depressed and stressed out. In November 2018, Ms Payten had a "run in"[35] with Mr Richards, as she had enough of him trying to tell her how to do her job.

60. Dr Azer's clinical records on 21 November 2018 recorded that Ms Payten was tearful and that she complained about being scared to go back to work; feeling unsupported by work and stressed about returning to work. Dr Azer also recorded that since her back injury there were negative comments about her at work but no bullying. Dr Azer recorded that Ms Payten felt flat, tearful; panicked at times; and that she was resentful for what had happened to her before and during her injury. She observed that Ms Payten was suffering from poor sleep; depressed mood; panic attacks; and that some days were harder than others. Dr Azer corroborates Ms Payten's evidence in this regard.

61. Ms Payten stated that on about 22 November 2018, she advised Mr Johnson that she had been put on medication as she was highly depressed and suffering from anxiety and panic attacks. She explained her issue with Mr Richards and how it was exacerbating her condition. She felt that Mr Johnson demonstrated no compassion when suggesting that she just needed to push through it. Mr Johnson did ask if she wanted to make a formal complaint and she advised him that she did not wish to do so. As soon as she left the meeting with Mr Johnson, she rang Mr Ireland to inform him what had occurred. Ms Payten was aware that her fellow workers were gossiping about her not doing her fair share of work. She was concerned that the respondent would try to get rid of her.

62. Mr Johnson's evidence was that Ms Payten was cleared to return to pre-injury duties on 28 November 2018. At about that time, he was informed that Ms Payten was suffering depression and anxiety. On 28 November 2018, Ms Payten reported to him that she had a personality clash with another employee and that some of her frustration in this regard arose because of her doctor's diagnosis of depression the previous week. Ms Payten also raised the issue that this co-worker was on a level 4 and that she was only on a level 3. She told Mr Johnson that she had reported her depression to Mr Ireland. Mr Johnson stated that he contacted Mr Ireland, who denied that Ms Payten had reported her depression to him. This was corroborated in the Rehab Co clinical records to which I will refer later. However, Mr Johnson then stated that when Mr Ireland contacted him that afternoon, he was advised that Ms Payten had been cleared for work but had been issued with another injury certificate for her depression.

63. In his case closure report dated 11 December 2018 on behalf of Rehab Co, Mr Ireland recorded that Ms Payten had reported a number of psychosocial issues throughout the return to work process and advised that she had discussed coping strategies with Dr Azer.[36] This is consistent with Ms Payten's evidence.

64. Mr Johnson complained of delays in obtaining information from Mr Ireland. He also complained about not receiving certificates or updates from him and that updates were not timely. He stated that it had been difficult to follow-up with Ms Payten because she did not return calls. The respondent had tried to provide a return to work process, which included low-impact duties. He kept an open dialogue with the rehabilitation providers and endeavoured to do the same with Dr Azer. He kept in contact with Ms Payten's supervisor

[35] ARD at page 18 at [72].
[36] Applicant's Application to Admit Late Documents dated 18 December 2019 at page 295.

following the return to work plan and was provided with feedback that she was progressing well. Mr Johnson stated that he had followed company policy and the legislative process in dealing with Ms Payten's injury.

65. In evidence, is the respondent's HSW Injury Management / Return to Work Procedure issued on 27 October 2016 (the HSW Procedure).[37] When one reviews the HSW Procedure, it is clear that Mr Johnson strayed from it during Ms Payten's injury management process. Clause 3 of the HSW Procedure, amongst other things, provided that if an injury required medical treatment, the shift supervisor or team leader was to telephone emergency services and arrange for the worker to be taken to an emergency medical treatment facility. However, Mr Johnson, following the respondent's alleged process for early intervention in the event of minor strains, opted to take Ms Payten to Ms Loiterton for rehabilitation treatment because she could obtain an earlier consultation than with doctors or hospitals. Mr Johnson did not explain the method he used to assess Ms Payten's injury as a minor strain. Such early intervention process did not appear in the HSW Procedure. Clause 10 of the Procedure refers to the HSW manager consulting with the injured worker and scheduling a doctor's appointment at the earliest convenience, taking into consideration the patient's preferred medical practitioner. On the evidence, Mr Johnson did not comply in this regard and on Ms Payten's evidence, he was pressuring her to attend on the respondent's doctor. One of Mr Johnson's responsibilities referred to in the HSW Procedure was that he was to develop sustainable working relationships with the relevant insurer, department managers, the injured worker, treating medical practitioners, rehabilitation providers and other service providers. The evidence demonstrates that Mr Johnson had somewhat strained relationships with Dr Azer, Mr Ireland and Ms Payten.

66. Some entries in the Rehab Co clinical records provided an insight into Mr Johnson's pattern of behaviour in the injury management process. An entry in the clinical records referred to a telephone conversation between Mr Ireland and Ms Payten on 5 June 2018 and noted that the latter was very pleased to receive Mr Ireland's telephone call as she had been very confused about the process.[38]

67. In the Rehab Co clinical records there appears an email from Mr Johnson to EML dated 18 May 2018 stating that he will "hold fire" on requesting a rehab provider and would advise early the following week if he wished to progress down that path.[39] There was no evidence to explain why Mr Johnson decided to delay the commencement of Ms Payten's rehabilitation. On 18 June 2018, Mr Ireland recorded that he attended a consultation with Dr Azer and Ms Payten. He noted that Ms Payten confided during the session that she was experiencing a high level of anxiety about returning to work due to Mr Johnson's behaviour and not feeling welcome in the workplace.[40] On 15 August 2018, Mr Ireland recorded notes of a telephone conversation with Mr Johnson where he noted, amongst other things, that Mr Johnson did not seem too pleased and enquired as to what the diagnosis of Ms Payten's injury was.[41]

68. On 12 September 2018, Mr Ireland recorded in the Rehab Co clinical records, notes of a telephone conversation with Ms Payten, who advised that Mr Johnson had reprimanded her supervisor because she had trained some new staff on "stickering" at the request of her supervisor earlier in the week. The supervisor was also reprimanded because he allowed Ms Payten to leave work early due to a personal issue. Mr Ireland noted that a workplace meeting should be held to sort out the issues. However, Ms Payten did not want Mr Johnson to know that she had reported the issues to Mr Ireland because her supervisor would get into more trouble.[42]

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[37] ARD at pages 39-43.
[38] Applicant's Application to Admit Late Documents dated 18 December 2019 at page 468.
[39] Applicant's Application to Admit Late Documents dated 18 December 2019 at pages 463-464.
[40] Applicant's Application to Admit Late Documents dated 18 December 2019 at pages 458-459.
[41] Applicant's Application to Admit Late Documents dated 18 December 2019 at page 438.
[42] Applicant's Application to Admit Late Documents dated 18 December 2019 at page 433.

69. On 2 October 2018, Mr Ireland recorded in the Rehab Co clinical records, notes of a telephone conversation with Mr Johnson wherein the latter was not very happy about Ms Payten's return to work progress as, in his opinion, it was behind schedule. Mr Johnson was advised that the physiotherapist did not want to increase Ms Payten's lifting capacity. Mr Ireland advised that he would liaise with the physiotherapist to ascertain whether he could obtain a timeframe and a clearer picture for a return to work to full duties.[43]

70. On 26 November 2018, Mr Ireland recorded in the Rehab Co clinical records, notes of a meeting with Ms Payten, who again made it very clear that she did not want to deal with Mr Johnson at work and wanted to commence counselling as soon as possible.[44]

71. On 28 November 2018, Mr Ireland recorded in the Rehab Co clinical records, notes of a meeting with Ms Payten and Dr Azer. Ms Payten reiterated her concern of having to deal with her return to work coordinator, Mr Johnson. He noted that she became very emotional when describing her symptoms, anxiety and panic attacks related to work and specifically, when dealing with Mr Johnson.[45] On the same date, Mr Ireland recorded notes of three telephone conversations with Mr Johnson within a short period of time. Mr Johnson hung up on Mr Ireland twice. Mr Ireland noted that Mr Johnson was very unhappy about the closure of the physical injury claim and the opening of the psychological injury claim. He advised that he would be seeking an independent medical examination immediately and hung up. Two minutes later, Mr Johnson telephoned again and requested clarification as to whether Ms Payten was to receive any treatment. Mr Ireland advised that Ms Payten had been referred to Thrive Psychology. Almost immediately after completing the telephone conversation, Mr Johnson rang again questioning the capacity certified on the new medical certificate. Mr Ireland advised that Ms Payten had capacity for eight hours on Mondays, Tuesdays and Wednesdays. Mr Johnson hung up on Mr Ireland again.[46]

72. In evidence, there is a report by Dr Bisht dated 11 February 2019.[47] Dr Bisht took a history of Ms Payten's presenting illness which was largely consistent with her evidence. Dr Bisht diagnosed Ms Payten with an adjustment disorder with mixed anxious and depressed mood. He opined that Ms Payten demonstrated a normal emotional response to her work-related lower back injury, which would explain her psychological symptoms in the first few months after the lower back injury. Considering the timeline of events, including the timing of the filing of a claim for psychological injury, he was of the opinion that the lower back injury was not the main contributor to the psychological injury. However, Dr Bisht was of the opinion that the main work-related contributing factor was the departure of her work colleague, Mr Senior, who she considered to be her main support. Although referred to in the evidence, Mr Senior's departure did not feature highly, and I found Dr Bisht's opinion in this regard surprising. According to Dr Bisht, the other work-related factors mentioned by Ms Payten were not substantial. Dr Bisht formed the view that there was no evidence of lack of support or harassment by the respondent. I will deal with the latter mentioned comment later.

73. Dr Bisht reported that there was no pre-existing psychological condition at the time of the onset of Ms Payten's current condition. He made reference to Ms Payten's obsessive compulsive disorder and to a past diagnosis of depression as recorded in her general practitioner's notes in 2011.

[43] Applicant's Application to Admit Late Documents dated 18 December 2019 at pages 430-431.
[44] Applicant's Application to Admit Late Documents dated 18 December 2019 at page 419.
[45] Applicant's Application to Admit Late Documents dated 18 December 2019 at page 416.
[46] Applicant's Application to Admit Late Documents dated 18 December 2019 at page 415.
[47] Reply at pages 7-14.

74. In evidence, there is a report by Dr Canaris dated 13 July 2019.[48] Dr Canaris took a detailed history of injury from Ms Payten, which was largely consistent with her evidence. Dr Canaris diagnosed Ms Payten with an adjustment disorder with anxiety and depression. Dr Bisht made a similar diagnosis. Dr Canaris also provided an alternative diagnosis, being one of major depressive disorder with prominent anxiety symptoms. Based on the history provided, Ms Payten's condition was predominantly attributable to her workplace difficulties. He described those workplace difficulties as being a workplace that was unsympathetic to Ms Payten's injury and a safety officer who was intimidating and intrusive. In addition, there was a general workplace culture permeated with gossip and backbiting. Dr Canaris disagreed with Dr Bisht's opinion that the injury was attributable to the departure of a supportive colleague. He further opined that he would not expect the mere departure of a co-worker to cause a psychological injury.

75. Dr Canaris noted that Ms Payten had a possible vulnerability due to her history of involvement in abusive relationships. However, the difficulties she reportedly experienced in the workplace would have sufficed to have caused a psychological injury even in the absence of vulnerability.

76. Both Dr Bisht and Dr Canaris concluded that there had been no aggravation, acceleration exacerbation or deterioration of a pre-existing psychological condition.

77. I prefer the opinion of Dr Canaris over that of Dr Bisht in relation to the issue of causation. The documentation available for review by Dr Bisht included a Certificate of Capacity issued by Dr Azer, Dr Azer's clinical notes to 28 November 2018 and the Huxley Hill Associates Factual Investigation dated 20 December 2018. The latter document was not in evidence before me. I agree with Ms Payten's submission that Dr Bisht interpreted the material available before him as demonstrating no evidence of lack of support or harassment by the respondent without explaining how he had come to such a conclusion. He adopted the role of an advocate. In any event, it is a matter for my consideration and determination on the evidence. I give no weight to Dr Bisht's view that there was no evidence of lack of support or harassment by the respondent. Having taken a detailed history of injury from Ms Payten, Dr Canaris accepted that history. He explained that Ms Payten reported significant workplace difficulties coming on in the aftermath of a physical injury at work, in a workplace that was unsympathetic to the injury and with a safety officer who was intimidating and intrusive. In addition, there was a general workplace culture permeated with gossip and backbiting. Despite the fact that her back injury improved, Ms Payten became increasingly anxious and depressed in this workplace setting and left her employment.

78. I accept Ms Payten as a witness of truth, who did her best to provide a history of her psychological injury, her treatment and her complaints to her treatment and rehabilitation providers and the forensic medical specialists. The histories she provided of injury, treatment and complaints of symptoms were, in the main, consistent. Whilst I have no reason to doubt Mr Johnson's credibility, I have concerns about the reliability of some of his evidence because of the inconsistencies I have referred to above. Accordingly, where the evidence of Ms Payten and Mr Johnson are inconsistent, I prefer the evidence of Ms Payten.

79. Neither Dr Canaris nor Dr Bisht supported the proposition that Ms Payten had suffered a psychological injury of gradual onset secondary to her back injury on 4 May 2018. I do not accept the respondent's submission that Dr Bisht's evidence was equivocal in this regard.

[48] ARD at pages 54-61.

80. Having regard to the whole of the evidence, applying a common sense test and for the reasons referred to above, I am not satisfied, on the balance of probabilities, that there is a sufficient causal chain connecting Ms Payten's psychological condition to the accepted injury to the lumbar spine on 4 May 2018 and I find accordingly.

81. Whilst Ms Payten's allegation of bullying and allegation relating to Mr Johnson's emails making her feel incompetent were not made out on the evidence, I make the following findings:

    (a) During the injury management process, Ms Payten perceived that her employer was unsympathetic to her workplace back injury.

    (b) During the injury management process, Ms Payten perceived that Mr Johnson, through his actions and demeanour, was intimidating and intrusive.

    (c) During the injury management process, Ms Payten perceived that there was a general workplace culture permeated with gossip and backbiting, which threatened her ongoing employment.

82. The significance of a worker's perception of the actions of an employer has been considered by the Commission in *AAP Information Services Pty Ltd v Hanson*;[49] and *State Transit Authority (NSW) v Chemler* (*Chemler*); [50] *Leigh Sheridan v Q-Comp*;[51] *Callingham v Tophos Pty Ltd*;[52] and *Wiegand v Comcare Australia* (*Wiegand*).[53]

83. In considering the issue of establishing psychological injury in circumstances of the worker's perception of events at work, Roche DP in *Attorney General's Department v K* (*K*)[54], provided the following useful summary of the relevant authorities on this issue:

    "(a) employers take their employees as they find them. There is an 'egg-shell psyche' principle which is the equivalent of the 'egg-shelled skull' principle (Spigelman CJ in *Chemler* at [40]);

    (b) A perception of real events, which are not external events, can satisfy the test of injury arising out of or in the course of employment (Spigelman CJ in *Chemler* at [54]);

    (c) if events which actually occurred in the workplace were perceived as creating an offensive or hostile working environment, and a psychological injury followed, it is open to the Commission to conclude that causation is established (Basten JA in *Chemler* at [69]);

    (d) so long as the events within the workplace were real, rather than imaginary, it does not matter that they have affected the worker's psyche because of a flawed perception of events because of a disordered mind (President Hall in *Sheridan*);

    (e) there is no requirement at law that the worker's perception of the events must have been one that passed some qualitative test based on an 'objective measure of reasonableness' (Von Doussa J in *Wiegand* at [31], and

[49] *AAP Information Services Pty Ltd v Hanson* [2009] NSWWCCPD 24.
[50] *State Transit Authority (NSW) v Chemler* [2007] NSWCA 249.
[51] *Leigh Sheridan v Q-Comp* [2009] QIC 12.
[52] *Callingham v Tophos Pty Ltd* [2008] NSWWCCPD 140.
[53] *Wiegand v Comcare Australia* [2002] FCA 1474.
[54] *Attorney General's Department v K* [2010] NSWWCCPD 76.

(f) it is not necessary that the worker's reaction to the events must have been 'rational, reasonable and proportionate' before compensation can be recovered." (at [52])

84. In *Baker v Southern Metropolitan Cemeteries Trust*[55], applying the passage from *K* set out above, the Commission noted at [114] that in a case where it is alleged that the hostile work environment resulted from numerous events over a long period, the claim does not fail because one or two of the events may not have occurred or occurred precisely as alleged. In such a case, I must consider the evidence and determine whether Ms Payten perceived that a hostile work environment existed. I find that Ms Payten perceived that a hostile work environment existed and that it resulted in a primary psychological injury and that her employment was the main contributing factor.

85. I am satisfied on the balance of probabilities, to a degree of actual persuasion or affirmative satisfaction, that, within the meaning of section 4(b)(i) of the 1987 Act, Ms Payten suffered the gradual onset of a psychological condition resulting in an adjustment disorder with anxiety and depression in the course of her employment with the respondent with a deemed date of 28 November 2018, being the last day she worked for the respondent. I am also satisfied that Ms Payten's employment was the main contributing factor to the gradual onset of her psychological condition for the reasons stated above.

Is Ms Payten entitled to weekly payments for total or partial incapacity within the meaning of section 33 of the 1987 Act arising from her alleged psychological injury?

86. Section 33 of the 1987 Act provides that if total or partial incapacity for work results from an injury, the compensation payable by the employer under the Act to the injured worker shall include weekly payments during the period of incapacity.

87. An assessment of Ms Payten's capacity involves a consideration of whether she has no current work capacity, or a current work capacity as defined in section 32A of the 1987 Act.

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

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

[55] *Baker v Southern Metropolitan Cemeteries Trust* [2015] NSWWCCPD 56.

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."

89. Section 43 of the 1987 Act in existence prior to the *Workers Compensation Legislation Amendment Act 2012* and the authorities suggested that regard was to be had to "the realities of the labour market in which the employee was working or might reasonably be expected to work".[56]

90. Since the 2012 amending Act, it is clear that "total incapacity" differs from "no current work capacity". "No current work capacity" requires a consideration of the worker's capacity to undertake not only his or her pre-injury duties, but also suitable employment, irrespective of its availability. This was confirmed by Roche DP in *Mid North Coast Local Health District v De Boer*[57]and in *Wollongong Nursing Home Pty Ltd v Dewar*[58] (*Dewar*).

91. Ms Payten's principal submissions in relation to work capacity may be summarised as follows:

(a) Both Dr Canaris and Dr Bisht opined that Ms Payten was totally incapacitated for work since leaving work on 28 November 2018.

(b) Contrary to the respondent's submissions, Dr Bisht was not of the opinion that Ms Payten retained a current residual work capacity but rather that she may retain such a capacity in the future with appropriate treatment and a graded return to work program.

(c) Whilst, initially, there are medical certificates from the general practitioner that certified Ms Payten as having some work capacity, it is clear on the evidence that her condition had remained as it was throughout. There was an issue as to how the general practitioner had been completing the certificates. This is evidenced in the exchanges between Mr Ireland, Mr Johnson and EML in the RehabCo clinical records. Eventually, the general practitioner overcame the issue and certified Ms Payten as having no work capacity thereafter.

92. The respondent's principal submissions in relation to work capacity may be summarised as follows:

(a) Serious questions were raised in relation to the issue of Ms Payten's alleged incapacity for work by her evidence that she was informed that the only way she could be paid was not to work at all.

(b) The Certificates of Capacity in evidence were confusing. Capacity is seen to fluctuate in the certificates and was consistent with Ms Payten's allegations that she had to be totally incapacitated for payments to be made to her. There was no sufficient explanation for the variances in work capacity in the certificates and one must be sceptical about the claim of total incapacity. Ms Payten bears the onus. The evidence in this regard is not clear and therefore, insufficient to support a claim for total incapacity.

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[56] *Arnott's Snack Products Pty Ltd v Yacob* [1985] HCA 2; 155 CLR 171.
[57] *Mid North Coast Local Health District v De Boer* [2013] NSWWCCPD 41.
[58] *Wollongong Nursing Home Pty Ltd v Dewar* [2014] NSWWCCPD 55.

(c) The respondent disputed the assertion that there was an ongoing incapacity for work due to the absence of treatment that Ms Payten could not afford. Mental Health Care Plans are available and provide free or low-cost treatment.

(d) Incapacity has not been established on an ongoing basis due to the inconsistencies referred to above.

93. I now turn to the application of the relevant legislation and the legal principles referred to above to the available evidence in this matter.

94. If Ms Payten has 'no current work capacity' as has been submitted by her counsel, I must assess whether she was able to return to both her pre-injury duties and suitable employment since 28 November 2018.

95. Ms Payten described her pre-injury duties with the respondent as a production worker / milk operator as filling four varieties of milk into bottles or containers of various sizes. She also had to change certain parts on the machine she was operating, depending on the type of bottle or container being used, by pulling the machine apart and replacing the relevant interchangeable part. It took an average of about 20 minutes to change machine parts. There was quite a lot of manual handling in changing over product. Ms Payten's duties included placing plastic lids for the milk bottles in a dispenser on the machine. She monitored the machine she was operating as bottles came through a blow moulder on a conveyor; through a milk filling machine; followed by the placement of plastic lids from the dispenser; through to the case packer for crating; and then transferred to the cool room by conveyer. Monitoring the machine was important as every now and then, a problem would arise when crushed or punctured bottles interrupted the process. On these occasions, Ms Payten was required to resolve the problem. She had to clean the floors every hour by hosing them down with chemicals and foaming the floors. Every 15 minutes, she was required to take a weight sample of two bottles by weighing them on a scale and recording the details. She had to fill 10 litre milk bags and put them in a crate and send them along on a conveyor and she lined the crates for the 10 litre milk bags and inserted cardboard in the crates. Sometimes, she was required to flush the lines to the vats with water so that the various kinds of flavoured milk were not mixed with each other. She was regularly lifting boxes. Ms Payten's evidence as to the nature of her duties with the respondent was unchallenged and corroborated in Mr Patrick's Rehab Co Recover at Work Plan No 3.[59] I accept Ms Payten's evidence in this regard.

96. Ms Payten's evidence was that she continues to suffer from anxiety and panic attacks. Some days are worse than others. She described her general mood and emotion as "feeling pretty numb".[60] She plays games on her computer at home to stop her mind from racing. She does not talk to her children. She avoids going out and if she does, takes someone with her. She becomes agitated and frustrated. Whilst she tolerates people around her, she prefers her own company. She feels that people are looking at her in a different way and she panics whilst talking to people. She does not know how to be around people, even the ones she knows. She does not feel that she is herself anymore. She lacks the ability to concentrate and her confidence is low. She regularly becomes teary and feels like an empty shell. Some nights, she does not sleep at all. Sometimes, she feels like she does not want to wake up from her sleep. When her anxiety sets in, it overrides the effect of her prescription medication (Seroquel and Aropax). Ms Payten's physical symptoms include headaches and heart palpitations. She has increased her smoking from 5 to 20 cigarettes per day. She no longer cares about her presentation and on occasions, does not shower for two to three days and sits in her pyjamas all day. Ms Payten's evidence as to the nature and extent of her symptoms and restrictions was unchallenged. The evidence was largely corroborated by Dr Azer, Dr Canaris and Dr Bisht in the symptoms they recorded at the time of their respective consultations with Ms Payten. I accept Ms Payten's evidence in this regard.

[59] Reply at page 18.
[60] ARD at page 20 at [89].

97. In relation to her current work capacity, Ms Payten's evidence was that she wants to work. She is bored and knows that mentally and physically she needs to work. However, she does not feel that she can work because of the symptoms described above. I accept Ms Payten's evidence in this regard and reject the respondent's submission that it was inconsistent with her stating that she felt good after her holiday in Thailand. It is clear from Ms Payten's evidence that her reference to feeling good related to the state of her back injury.

98. Dr Azer made no reference in her documentary evidence to Ms Payten being psychologically fit to return to her pre-injury duties from 28 November 2018. I will deal with the argument relating to Dr Azer's initial Certificates of Capacity later.

99. Dr Bisht opined a favourable prognosis for a return to Ms Payten's pre-injury capacity in three to four months' time after a graded return to work if she underwent weekly to fortnightly psychotherapy for the latter mentioned period and continued to take her medications. He opined that the main obstacle for full recovery and return to work was the severity of her symptoms.[61]

100. Dr Canaris opined that Ms Payten was not well enough to work in her current condition and that her absences from work to date (27 June 2019) had been both reasonable and necessary.[62]

101. Ms Payten has not undergone any psychotherapy. I will deal with the argument relating to Ms Payten's submission that there was an ongoing incapacity for work as a result of the absence of affordable treatment later.

102. I find that Ms Payten's pre-injury duties with the respondent involved significant manual handling and the operation of machinery which required her concentration and vigilance. Taking into consideration Ms Payten's symptoms, restrictions and medications together with the medical evidence, I am satisfied and find that she has been unable to return to her pre-injury duties from 28 November 2018.

103. The next matter for consideration is whether Ms Payten was fit for suitable employment as defined in section 32A of the 1987 Act. This requires a consideration of the nature of the incapacity and the details provided in the medical evidence, the worker's age, education, skills and work experience, any return to work plan and any occupational rehabilitation services that have been provided, irrespective of whether the work is available to her or of a type or nature that is generally available in the employment market.

104. The nature and extent of Ms Payten's incapacity is in dispute. Ms Payten's evidence was that before she returned to work on light duties in August 2018, she had "a feeling of not wanting to go back to work."[63] She was placed on a graduated return to work and returned to her pre-injury duties without restrictions in about October 2018. Ms Payten wanted to work but not at the respondent's factory where she had injured herself. Once she returned to work following her back injury, she would feel sick the night before each workday. She had never experienced this feeling before. I have already set out above Ms Payten's evidence in relation to her ongoing symptoms and restrictions and accepted that evidence.

[61] Reply at pages 13-14.
[62] ARD at page 60.
[63] ARD at page 17 at [66].

105. Initially, Dr Azer's Certificates of Capacity (dated 28 November 2018,[64] 28 December 2018[65] and 2 January 2019[66]) referred to Ms Payten as suffering from reactive depression and anxiety and certified her as having some work capacity during the period 28 November 2018 to 4 February 2019. However, the Certificates of Capacity did not specify the nature or duration of the work capacity. Each of the Certificates of Capacity referred to Ms Payten's need for psychological counselling, cognitive behaviour therapy, structured problem-solving and review by a psychologist. During the period 4 February 2019 to 3 October 2019, Dr Azer certified Ms Payten as either, having no work capacity or as being unfit for work.[67] There are no Certificates of Capacity from Dr Azer covering the period since 4 October 2019. This is not unusual in circumstances where EML declined liability for the psychological injury in early 2019.

106. In an entry on 28 November 2018, Mr Patrick recorded in the Rehab Co clinical records that Dr Azer had certified Ms Payten as having a work capacity of eight hours per day on Mondays, Tuesdays and Wednesdays based on the diagnosis of clinical depression and anxiety.[68] It is not clear on the available evidence how Mr Patrick came to the conclusion that Dr Azer had certified Ms Payten as having the work capacity referred to above. In contrast, there is an email from Mr Johnson to EML dated 7 January 2019 stating that there were "issues" with Dr Azer's Certificates of Capacity because they indicated some capacity for work but did not define capacity restrictions or work hours.[69] Thereafter, the Rehab Co clinical records disclosed in email exchanges between various parties uncertainty in relation to Ms Payten's specific hours of work capacity. On 17 January 2019, Mr Patrick had a telephone conversation with Ms Payten about Dr Azer's Certificate of Capacity advising that she had some work capacity. He noted that Ms Payten advised that it was an error. Mr Ireland then discussed having it corrected. He noted that Ms Payten was to call and discuss the issue with Dr Azer or make an appointment to see her as soon as possible.[70] Mr Ireland then emailed Mr Johnson and expressed the opinion that it was evident that Dr Azer had not completed the Certificate of Capacity correctly.

107. Whilst I agree with the respondent's submission that the initial Certificates of Capacity in evidence created confusion, I do not accept that this means that Ms Payten's work capacity was fluctuating and consistent with her allegations that she had to be totally incapacitated for weekly benefit payments to be made to her. Ms Payten came to such a conclusion based on her understanding of a conversation with a representative of EML. However, the evidence in the Rehab Co clinical records referred to above not only indicate confusion in relation to the certification of work capacity but that it had been an error on the part of the general practitioner and that the error was eventually corrected when Dr Azer returned from leave. In such circumstances, I find nothing sinister in what transpired over that protracted period of time.

108. Ms Payten's evidence in relation to the extent of her incapacity is corroborated, on a qualified basis by Dr Bisht. He opined a favourable prognosis for a return to Ms Payten's pre-injury capacity in three to four months' time after a graded return to work and if she underwent weekly to fortnightly psychotherapy for the latter mentioned period and continued to take her medications. He opined that the main obstacle for full recovery and return to work was the severity of her symptoms.[71]

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[64] ARD at pages 259-261.
[65] ARD at pages 306-308.
[66] ARD at pages 309-311.
[67] ARD at pages 312-315 and Applicant's Application to Admit Late Documents dated 19 November 2019 at pages 4-11.

[68] Applicant's Application to Admit Late Documents dated 18 December 2019 at pages 415-416.
[69] Applicant's Application to Admit Late Documents dated 18 December 2019 at pages 378-379.
[70] Applicant's Application to Admit Late Documents dated 18 December 2019 at page 375.
[71] Reply at pages 13-14.

109. Ms Payten's evidence in relation to the extent of her incapacity is also corroborated by Dr Canaris. Dr Canaris opined that Ms Payten was not well enough to work in her current condition and that her absences from work to date (27 June 2019) had been both reasonable and necessary.[72] He noted that Ms Payten was referred to a psychologist but was declined workers compensation and hence could not follow up on this. Dr Canaris also noted that Ms Payten had been unable to access a psychologist due to financial constraints. He felt that she warranted weekly consultations that, over time, could taper to monthly sessions, depending on her clinical progress. Dr Canaris opined that Ms Payten's prognosis depended significantly on her ability to access appropriate care and an equitable resolution of her claim. I find Dr Canaris' opinion in relation to the extent of Ms Payten's incapacity persuasive.

110. Ms Payten's evidence is that she has been unable to consult a psychologist because she cannot afford it.[73] Ms Payten submitted that if EML had approved and she had received the psychological treatment recommended by Dr Azer, she may have improved her chances of an early return to work. On 28 November 2018, Dr Azer referred Ms Payten to Thrive Psychology[74]. There is no evidence that Ms Payten received any treatment by the psychologists at Thrive Psychology. On 5 February 2019 Dr Azer referred Ms Payten to Dr Adesanya, Psychiatrist.[75] There is no evidence that Ms Payten received any treatment from Dr Adesanya. The Medicare Notice of Charge does not disclose consultations with Thrive Psychology or Dr Adesanya.

111. The respondent disputed that there was an ongoing incapacity for work due to the absence of treatment that Ms Payten could not afford and submitted that Mental Health Care Plans were available to provide free or low-cost treatment. I find the latter submission unpersuasive in circumstances where the respondent now argues that Ms Payten has suffered a secondary work-related psychological injury. There is evidence in the Rehab Co clinical records referring to various communications between Ms Payten, Mr Ireland and EML attempting to follow up acceptance of the psychological injury claim and approval of Dr Azer's treatment recommendations without success. There were references in the same clinical records to telephone discussions and emails about whether EML should open a new claim file or retaining the old claim file. That is, whether the claim was considered to be a primary psychological injury or a secondary psychological injury. I accept Ms Payten's evidence that she could not afford to pay for the treatment recommended by Dr Azer. The medical evidence is that Ms Payten requires treatment for her psychological injury in order to improve her chances to make a durable return to work.

112. Ms Payten's evidence was that she is currently 45 years of age. She completed her high school education in Year 10 in 1990. She had no further educational or other qualifications. Whilst she was in high school, she worked at Kmart. She then did some babysitting and worked in fish and chip shops. In 2000, she moved from Wagga Wagga to Adelaide and worked at Charlesworth Nuts doing factory work for about 7.5 years. She was in Adelaide for about 10 years and then moved back to Wagga Wagga and started work with the respondent as a factory worker for about 2.5 years. Ms Payten's next job was with Spot On Cleaning as a cleaner and manager for about four years. As she was about to finish up work for Spot On Cleaning, she was contacted by the respondent and asked to go back to work there in about February 2015 as a part time production worker through an employment agency. In about November 2017, Ms Payten became employed directly by the respondent as a production worker on a full-time basis. Ms Payten's evidence in this regard was unchallenged. Ms Payten's work experience involved shop assistant and babysitter duties in her early working years and process work in more recent years.

[72] ARD at page 60.
[73] ARD at page 60.
[74] ARD at pages 262-263.
[75] Applicant's Application to Admit Late Documents dated 18 December 2019 at pages 244-245.

113. Whilst considering whether Ms Payten's claim was a primary or secondary psychological injury, EML re-referred Ms Payten to Mr Patrick for rehabilitation services for the future.[76] Whilst the Rehab Co clinical records record references to coordinate a return to work plan for the future,[77] no such plan relating to Ms Payten's psychological condition is in evidence.

114. Having regard to Ms Payten's evidence, the medical evidence as to her capacity, age, skills, work experience and the other relevant factors to be considered in accordance with section 32A of the 1987 Act, I am satisfied on the balance of probabilities that she has had no current work capacity from 28 November 2018 to date and continuing and I find accordingly.

115. Ms Payten seeks weekly payments from 28 November 2018 to date and continuing.

116. The pre-injury average weekly earnings were agreed at $934.72. This amount does not exceed the statutory maximum referred to in section 34 of the 1987 Act. The pre-injury average weekly earnings are indexed every six months in accordance with section 82A of the 1987 Act.

117. The parties did not make any submissions in relation to any adjustment to be made in relation to pecuniary benefits (overtime and shift allowance) after 52 weeks in accordance with section 44C(1)(b) of the 1987 Act. There is no evidence before me of any non-pecuniary benefits.

118. Section 36(1) of the 1987 Act provides a formula for the calculation of weekly benefits for an injured worker with no current work capacity during the first entitlement period (being the first 13 weeks of such incapacity). Under section 36(1) of the 1987 Act, Ms Payten's entitlement to weekly compensation during the first entitlement period from 28 November 2018 to 27 February 2019 is as follows:

    PIAWE x 95% minus any deductible amount (pecuniary benefits):

    ($934.72 x 95%) - $0 = $887.98 per week.

119. Section 37(1) of the 1987 Act provides a formula for the calculation of weekly benefits for an injured worker with no current work capacity during the second entitlement period (being weeks 14 to 130 of such incapacity). Under section 37(1) of the 1987 Act, Ms Payten's entitlement to weekly compensation during the second entitlement period from 28 February 2019 to date and continuing, in accordance with the provisions of the 1987 Act, is as follows:

    PIAWE x 80% minus any deductible amount (pecuniary benefits):

    ($934.72 x 80%) - $0 = $747.78 per week.

120. Ms Payten will be entitled to an award in accordance with the above calculations and the respondent should be given credit for any payments made. The respondent will need to make the appropriate adjustments pursuant to sections 82A and 44C(1)(b) of the 1987 Act. I grant the parties liberty to apply within 14 days in relation to the calculation of weekly benefits.

[76] Applicant's Application to Admit Late Documents dated 18 December 2019 at pages 390-391.
[77] Applicant's Application to Admit Late Documents dated 18 December 2019 at page 392.

Are Ms Payten's medical and related treatment expenses reasonably necessary as a result of injury within the meaning of sections 59 and 60 of the 1987 Act?

121. Section 59 of the 1987 Act provides definitions of certain medical and related treatment, services and rehabilitation.

122. Section 60(1) of the 1987 Act relevantly provides that, if as a result of an injury received by a worker, it is reasonably necessary that any medical or related treatment, hospital treatment, ambulance service or workplace rehabilitation service be provided, then a worker's employer is liable to pay the cost of such treatment or service. In addition, the employer is liable to pay the related travel expenses specified in section 60(2) of the 1987 Act.

123. Ms Payten consulted Dr Azer in relation to her work-related psychological symptoms. Dr Azer prescribed antidepressant and sleep medications. She recommended (in the Certificates of Capacity) consultations with a psychologist for cognitive behaviour therapy and structured problem solving. She also recommended consultations with a psychiatrist.

124. Dr Canaris opined that Ms Payten had received appropriate treatment but had not been able to consult a psychologist due to EML's denial of liability and Ms Payten's financial situation.

125. Contrary to the evidence, Dr Bisht took an incorrect history that Ms Payten had undergone a few sessions with a psychologist.[78] He expressed no opinion as to whether the treatment received by Ms Payten was reasonably necessary.

126. On the evidence and having received an award in her favour, Ms Payten is entitled to recover the cost of reasonably necessary medical, hospital and related expenses under section 60 of the 1987 Act and I make a general order in this regard.

CONCLUSION

127. Ms Payten did not suffer a consequential (secondary) psychological injury as a result of the accepted injury to her lumbar spine on 4 May 2018.

128. Ms Payten suffered a primary psychological injury in the course of her employment with the respondent on 28 November 2018 (deemed) within the meaning of section 4(b)(i) of the 1987 Act, to which employment was the main contributing factor.

129. Ms Payten has had no current work capacity within the meaning of section 32A of the 1987 Act from 28 November 2018.

130. The respondent is to pay Ms Payten weekly compensation in respect of the primary psychological injury on 28 November 2018 as follows:

    (a) $887.98 per week from 28 November 2018 to 27 February 2019 under section 36(1) of the 1987 Act.

    (b) $747.78 per week from 28 February 2019 to date under section 37(1) of the 1987 Act.

    (c) Such weekly payments to continue in accordance with the provisions of the 1987 Act.

    (d) The respondent to be given credit for any payments made.

[78] Reply at page 9.

(e) Liberty to apply within 14 days in relation to the calculation of weekly benefits.

131. The respondent is to pay the Ms Payten's reasonably necessary medical and related expenses as a result of her primary psychological injury on 28 November 2018 under sections 60 of the 1987 Act.