

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 3454/20  
**Applicant:** Josephine Cavaleri  
**Respondent:** Woolworths Limited  
**Date of Determination:** 11 September 2020  
**Citation:** [2020] NSWCC 318

The Commission determines:

1. At all material times, the applicant's pre-injury average weekly earnings were \$1,572.59 per week.
2. A finding that the applicant had a current work capacity and was able to return to work in suitable employment between 13 May 2019 and 12 August 2019 and was able to earn \$347.20 per week in such employment during that period.
3. A finding that the applicant had no current work capacity to work in suitable employment between 13 August 2019 and 4 March 2020 and was able to earn \$0 per week during that period.
4. A finding that the applicant has had, and continues to have, a current work capacity and has been able to return to work in suitable employment from 5 March 2020 and has been able to earn \$347.20 per week in such employment during that period and continuing.
5. There is an award for the applicant at the rate of \$1,146.76 per week pursuant to s 36 of the *Workers Compensation Act 1987* (the 1987 act) between 13 May 2019 and 12 August 2019.
6. There is an award for the applicant at the rate of \$1,258.07 per week pursuant to s 37 of the 1987 Act between 13 August 2019 and 4 March 2020.
7. There is an award for the applicant at the rate of \$910.87 per week pursuant to s 37 of the 1987 Act between 5 March 2020 to date and continuing.
8. Liberty to apply in respect of the calculations and periods above.

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

Michael Perry  
**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 MICHAEL PERRY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker  
Sarojini Naiker  
Senior Dispute Services Officer  
**As delegate of the Registrar**



## STATEMENT OF REASONS

### BACKGROUND

1. By Application to Resolve a Dispute (ARD) dated 23 June 2020, Josephine Cavaleri (the applicant) claims weekly payments of compensation under the *Workers Compensation Act 1987* (the 1987 Act) as well as \$307.44 for past medication, counselling and travel expenses pursuant to s 60 of the 1987 act. These claims are made on the basis of allegation of psychological injury as a result of interactions in the workplace involving co-workers, managers and team leaders between August 2016 and 13 May 2019, excessive workloads, lack of adequate support from management and unrealistic expectations with respect to workloads.
2. The ARD alleged the date of injury was 13 May 2019, being a deemed date on the basis of the injury being an aggravation, acceleration or exacerbation or deterioration of a disease.

### PROCEDURE BEFORE THE COMMISSION

3. The parties attended a conciliation and arbitration on 11 August 2020 by telephone, each on a separate line. Ty Hickey of counsel, instructed by Andrew McQuilkin, solicitor appeared for the applicant. Josh Beran of counsel appeared for Woolworths Limited (the respondent). Mr Hickey noted that despite the ARD claiming for weekly compensation from 13 May 2019 until 23 June 2020, the claim was ongoing as the applicant had not returned to work. The claim was then clarified as being pursuant to s 36 of the 1987 Act between 13 May 2019 until 12 August 2019, then under s 37 of the 1987 Act from 13 August 2019 to date and continuing. The pre-injury average weekly earnings (PIAWE) was agreed at \$1,572.59 per week. There was no issue about an amendment to the ARD in that respect.
4. An issue arose during the arbitral phase in relation to two reports of 5 March 2020 by Dr Thomas Oldtree Clark (Dr Clark). He also wrote a third report dated 5 May 2020 which was part of the evidence although neither party addressed it. He reported at the request of the applicant's solicitors. The second of those reports, titled "Impairment Assessment", contained an opinion of the applicant's claim for lump sum compensation under s 66 of the 1987 Act by reference to the Psychiatric Impairment Rating Scale (PIRS) under the guidelines for the evaluation of permanent impairment. Mr Hickey sought to exclude the Impairment Assessment report from the documents to be considered on the bases that there was no lump sum claim and also because PIRS assessments were not absolute or definitive anyway. Mr Beran opposed such course and submitted that if the applicant was not to rely upon that report, the respondent would seek to do so. Mr Hickey ultimately withdrew his objection to the Commission considering the Impairment Assessment report - on the understanding that he was entitled to develop submissions as to how it should be dealt with and what, if any, use should be made of it. I note Dr Clark has also stated in that report that PIRS descriptors are not absolute, nor do all descriptions need to be present in the same category, that they are only a guide to the degree of impairment, and it is a clinical, not a statistically based, scale. It is still the clinical opinion of the assessor that is primarily important (ARD 360).
5. I am satisfied the parties understand the nature of the application and legal implications of any assertion made. I have used my best endeavours to bring them to a settlement acceptable to each of them. I am satisfied they have had sufficient opportunity to explore settlement and have been unable to reach an agreed resolution of the dispute.

### ISSUE FOR DETERMINATION

6. The parties agree the only issue is whether or not the applicant had and has a current work capacity (CWC) under s 37 and s 32A and Schedule 3 of the 1987 Act and if so, to what extent.

## EVIDENCE

### Documentary evidence

7. The documents in evidence before the Commission and taken into account in making this determination are those contained in the ARD, the Reply, and the Application to Admit Late Documents by the applicant dated 10 July 2020.

### *Applicant's Statement 27 January 2020*

8. The applicant is 58 years of age and was born and raised in Sydney. After leaving school at the end of year 10, she attended Meadowbank TAFE where she did a stenographer course for about 10 months. She then found employment with AWA at North Ryde doing secretarial and administrative type work for about 12 months until she was married. After marriage, she stated she moved to Guildford "and found that the travel time was too great and I resigned". She was unemployed for about three months before securing employment with an insurance company in the Sydney CBD as an assistant to the accountant. She remained in that position for about three years until delivering her first child in 1982. Between then and 1990, she had two further children; nevertheless still managed to do "the occasional part-time job ... bookkeeping and typing ... packing at the Target warehouse for a short period ..."
9. In 1990, when her youngest child was six months old, she began working part-time with Woolworths doing night fill at Top Ryde. She gradually progressed to do day shifts as well and ultimately became the second in charge to "the variety manager". Her duties included ordering for the store. In about 1998, she moved to another Woolworths store at Marsfield, not far from Top Ryde. She also started working a second job about this time in a mail house, and suffered a fractured femur in a forklift accident. This put her out of work for about three years. Once recovered, she was re-employed by the respondent full time in 2005, and soon graduated to "the ranging team". She worked with the respondent's head office at Norwest for the majority of this time until "I was made redundant in 2019". This job essentially involved her being in charge of allocating particular new products to particular warehouses and clearing out old products from warehouses to stores.
10. There were  

"often restructures ... staff coming and going ... not always ... replaced quickly ... on occasions I would be left performing ... duties of two or more people for extended periods of ... extremely stressful ... would find myself working on occasions 12 hours per day ... took pride in my work and enjoyed it ... on occasions ... difficult to cope."
11. In 2014, there was a restructure of the ranging team. Three full time and one part time roles changed to two full time roles. In early 2016, she "was having heart palpitations ... my GP... referred me to a cardiologist Dr Martin Brown ... suggested ... stress could be a cause ...". About this time, the respondent was offering Employees Psychological Assistance (EPA) services. The applicant decided to utilise these. She felt "a little resentful" when someone left and she had to replace them and do their extra workload and "wanted to move past these feelings".
12. In about August 2016, another range planner indicated she was leaving the team. Around this time, two more employees were put on, but this process was delayed to some extent during a busy period. The applicant was left to look after that work until the replacements started. The applicant had her own work to do as well. Around this time, the respondent "also added Jenny... to the team ... as an additional resource to support the team, however the capacity in which she was to do so was ambiguous". It was the applicant's job to train Jenny - but she had insufficient time to do so.

13. When the applicant later went to Jenny to advise that she was ready to go “through things with her ... if she also had time to spare ...(Jenny)... snapped at me and said ... she was too busy finishing off the work for her old team”.
14. The applicant “was only able to provide Jenny minimal training as I was off sick for a few days and then ... on annual leave ... from 31/10/16 – 04/11/16”. During this time, a new manager, Julias Angulo, who her immediate manager (Chris) reported to, arrived. After the applicant returned, there was a team meeting to sort out the assignment of the workload. During the meeting, “Jenny constantly attacked anything I suggested and was extremely rude to me in front of the whole team”. During the meeting, Jenny was given preference to which categories (of work) she requested. Following the meeting, Chris asked Jenny and the applicant to stay behind; and during this “Jenny continued to attack me and accused me of not wanting to share my knowledge with the rest of the team...” The applicant was “taken aback given my intention was to train and share ...” She felt “embarrassed, under-valued, attacked and then became defensive”.
15. Despite the applicant raising “Jenny’s attitude towards me” on several occasions, Chris said:
 

“ ...let her do it ...when she sees she can’t cope ... she will understand ... Jenny’s attitude towards me continued and so did my feelings of confusion ... I was becoming increasingly anxious, unsupported and not valued ... mood was becoming lower ... lacking in energy and motivation ... didn’t want to go to work and face Jenny ...”
16. The applicant commenced to see Dr Linda Calabresi, GP, at the North Ryde Family Medical Practice (NRMP). Jenny continued to be difficult in 2017. The applicant stated that “as much as I tried to speak to my team leader and manager, they always sided with her ...”
17. About 28 June 2017, the applicant had a discussion with Chris about working from home one day a week – on the advice of her GP. Chris said that he needed to check with Jenny. This was because Chris was leaving and Jenny was to become Acting Team Leader. This made the applicant anxious.
18. About 19 July 2017, there was an incident involving a disagreement between the applicant and Jenny. The applicant remembers “raising my voice and then leaving”. She felt “very anxious and shaky and my heart rate was very elevated ...” The following week, she asked Julias why there had been no involvement of HR in relation to this incident. Julias told the applicant that Jenny did not want HR involved and that he, Julias, would support Jenny. The applicant did not understand why this would be so. Julias then announced Jenny would continue “to do one-on-one meetings with me”. Thereafter, Jenny told the applicant that she “didn’t need me to do anything”. This was different treatment to another team member, Tracy. With her “Jenny was quite happy for her to take anything off her hands”. The applicant raised this with Julias. His response was that he would not discuss another team member with her and that HR was his business.
19. Jenny was eventually given the position of Team Leader as a permanent role. The applicant felt “it was like they were rewarding her bad behaviour”. About 3 August 2017 she started seeing a psychologist, Theresa Roland, through the EPA. The applicant was “distracted”. About 3 November 2017, the applicant emailed HR representative Melissa Fazzolari. She received no response. The applicant called Ms Fazzolari crying one day, saying she was being bullied. Ms Fazzolari “attacked me, saying something like ... you can’t say that ... you don’t know what you’re talking about ... without listening to anything else I had to say ... told me to discuss my issues with management ...” The applicant felt “hopeless ... not getting anywhere”. About 6 November 2017, she saw Dr Calabresi “due to my heart palpitations”. He referred her to another cardiologist, Dr Kaplan.

20. During the rest of November 2017, Jenny continued to conduct herself towards the applicant in a dismissive way, not giving her work and “always used bad language”.
21. In early 2018, the applicant “decided to take a different approach for my own sanity ... tried to keep to myself and just do my work without challenging any process ...” Things “seemed to settle down a bit”, however Jenny “continued to put me in my place where possible”. The applicant continued to feel anxious about coming to work and seeing Jenny. Around this time, the applicant’s duties changed. She was put into work doing “deletions”. The team “was not treating me well and one member verbally attacked me in front of everyone in our pod”. The applicant felt alone and isolated.
22. On 15 March 2018, a meeting was organised for the team to tell the applicant what they thought of her. The applicant took this as a personal attack and not constructive. Things were said about the applicant’s “behaviour” but the applicant believed that what was said “was not consistent with my actual behaviour, for example, they mentioned ... I had not been taking notes however I had in fact been writing down my own versions of process manuals ...” It was also said she was “communicating in a rude manner”. The applicant stated that she “... was not aware that I had been doing this ... all I can say is that Jenny was a strong influence on the team ...” The applicant felt humiliated during this meeting. The applicant continued to see Dr Calabresi from time to time during 2018.
23. In February 2019, the applicant was requested to attend a meeting with team managers, Jenny and the new manager to discuss her version of events “relating to the kitchenware issue”. The statement does not explain the detail of this. Thereafter, the applicant received a letter which no longer referred to the kitchenware issue or indicated she no longer needed to respond to any allegations in that respect. This “seemed inconsistent” to her. She felt she had to spend “much of my mental capacity trying to work out why this was the case ... ready to defend myself ... never sure of Jenny’s intent”. She “felt defeated and powerless”. She also stated that due to all the stress at work, she started to question her ability to do the work as she had lost confidence to do things correctly. Jenny was “very rarely approachable”.
24. In March 2019, there was another meeting the applicant had with various people, including Edmond, Jenny, Mudit and Louisa. She was provided with a written warning letter and was told she would be going “on a PIP review”. On 25 March 2019, she had a third meeting with various managers and was provided with a copy of the PIP review document and advised that she should sign it. She was reluctant to do so. She was advised such reluctance “showed a lack of goodwill to do any improvement”. The applicant’s daughter was at this meeting and “was told she was not to speak and if she did they would not be responding to her”. The applicant signed the letter and provided it to Jenny.
25. The applicant saw Dr Ellard on 26 March 2019 for irritable bowel syndrome issues. Dr Ellard advised the applicant that she should have some counselling to help with those symptoms. The applicant had six sessions with Emily Wynter and also saw Nicole Rupp from Westleigh Acupuncture & Massage for regular treatments.
26. On 8 April 2019, the applicant had another PIP review meeting. She was advised by a manager that if there was any continuation or decline in her performance such may result in the issuing of a “move on” letter. He clarified he meant “a warning letter”. About the same time, there was a team meeting where management advised the team, including the applicant, that a staff member’s role was being made redundant and that “our range planning team would remain an org structure [sic] of 4 and out of the 5 people ... we would all be interviewed to fill the four remaining positions. One of the team, Rhonda, said that if a redundancy resulted, she would be happy to volunteer for it”. The team leader then said there would be no redundancies and that whoever was not successful in the range planner interviews would be given an opportunity to transfer into another role with the company. The applicant felt the respondent was trying to “performance manage me out of the business”.

27. On 29 April 2019, the applicant interviewed for a range planner position. On 1 May 2019, she was told she was not successful. She was offered redundancy - and told that if she did not find a position by 15 May 2019, she would be leaving Woolworths. She decided it would be too stressful and emotional to return to Woolworths and she would take the redundancy offer.

28. Since leaving work, the applicant's:

“depression has increased ... have had some time to process what happened ... these feelings were magnified when I began applying for new roles in other companies, reading the list of skills required I found my self-dialogue was along the lines of ‘these are things I used to be able to do or could have done’ ... that is when I began unpacking some of the issues, sometimes with the assistance of medical professionals and soon realised that this kind of depression and anxiety was not a result of my redundancy but of the series of events leading up to this point ... even with professional ... support I have struggled to move passed (sic) what ... happened to me and continue to suffer both physical and mental symptoms such as heart palpitations, IBS symptoms, forgetfulness, headaches, inability to express my emotions without breaking down, anxiety over passed (sic) events ...”

***Benestar Group (Theresa Roldan, psychologist)***

29. Benestar is a private employee assistance program (EAP) provider and was engaged by the respondent to provide such assistance to its employees. Ms Roldan essentially provided such assistance for the applicant. This initially occurred over about 15 sessions between August 2017 and May 2018. The Benestar records are consistent with the applicant's statement insofar that it records that she was complaining of distress in relation to her perception of being bullied by her direct manager, and not supported by the overall manager.

30. Ms Roldan reviewed the applicant on or about 7 May 2019 and noted she

“... reported that she was not successful in securing her position and therefore she was given the choice of redundancy or redeployment ... still feeling very anxious ... decided to get redundancy ... she has not told work about her decision ... feeling emotional about having to say goodbye to people after 30 years ... shocked ... angry ... do not know what I am good at anymore ... last time I interviewed was 15 years ago ... do not know if I can find the job I am wanting ... am not ready ... feel exhausted ... anxious ... discussed grief about leaving and finishing the job ... grieving about moving on ... would like to have closure ...”

31. Ms Roldan reviewed the applicant on 30 May 2019 and noted:

“... have been able to sort things ... organising, paperwork and cooking, watching TV and organising Centrelink, insurance and bank ... ruminations ... been offered a job for 9 weeks ... but this is far ... would like to give it a go ... would like to use this job to practice ... discussed wish list for ideal job ...”  
(ARD 60)

32. Then on 6 June 2019, Ms Roldan saw the applicant again and noted

“... the idea of job seeking has been daunting ... went to Centrelink and heard information about the requirements for job seeking ... made her feel very confused and anxious ... is my CV okay? ... how much do I have to travel ... will I find the work that I would like to do ...”

33. Ms Roldan then reviewed the applicant from about 21 June 2019, over about seven sessions, until about 8 August 2019 (ARD15-16). Her summary (ARD 16) is “Jo reported that she struggles ... negative assumptions about interviews and job seeking”. At the 27 June 2019 session, Ms Roldan also noted that the applicant:

“... received phone call for a job interview for a job that is base entry; would like to attend interview but struggles with anxiety ... knows that attending the interview is good for her ... most likely will attend ... been working in Woolworths for over 20 years ... been challenged by interpersonal relationship with new team leader from 2 years ago ... is why she has sought ... counselling 2 ... received redundancy in May ...” (ARD 19)

34. In her session with the applicant on 11 July 2019, Ms Roldan noted the applicant:

“... attended interview with recruitment agency who told her ... she has limited experiences ... discussed rumination ... feels ... she has no skills due to traumatic experience at work ... feels very low and ... confidence is low ...”

35. On 25 July 2019, Ms Roldan again saw the applicant and noted:

“... went to out placement service ... attended workshop ... pressured by information and time ... overwhelmed ... ruminations ... anxiety ... discussed benefits of attending out placement service ...” (ARD 24).

36. On 9 August 2019, Ms Roldan reviewed the applicant and noted “... anxiety ... daily practice on wellbeing ... goes for walk ... reads book ... reduces time for job seeking ... sees her grandson ... may want to volunteer ...” (ARD 26).

### ***Dr Linda Calabresi, GP***

37. Dr Calabresi issued medical certificates, saying the applicant had no CWC, covering most of the period between 4 September 2019 and 10 June 2020. There is no medical certification for the period 13 May 2019 until 3 September 2019. Dr Calabresi also wrote a report on 6 May 2020 (ARD 371), noting she had seen the applicant from early 2017 and:

“... seen her ... regularly since ... when ... first saw ... her ... major issues were related to her GI system ... palpitations and thyroid dysfunction ... clear that many ... symptoms were exacerbated by stress ... at times ... these were very severe ... an acute depressive illness developed in 2019 and she was unable to work ... since this time ... has ceased working ... while her symptoms are much improved ... remains traumatised ... easily overwhelmed, emotionally labile ... no confidence in her abilities ... work stress ... was the major cause of her illness and continues to cause her ongoing health issues ... anxiety and depression continues to limit her ability to secure further employment, although it is my expectation that with time and going psychological therapy ... will be able to work in the future ...”

38. The NRMP notes from May 2019 first refer to a medical certificate on 14 August 2019 (ARD 101-102). That is not in evidence, but the clinical note that day does refer to severe depression and anxiety and “may have a workers compensation claim ... given med certificate for workers comp”. On 10 August 2019, there is also a record of the applicant being “very depressed, crying all the time, stressed”. There is no mention of medical certification or reasons for that.

### **Dr Clark (two reports 5 March 2020)**

39. Dr Clark's March 2020 report, relevantly, diagnosed a major depressive disorder. His solicitor also posed this question for Dr Clark's opinion: "... as to whether the worker is fit, wholly unfit or partially unfit for the work ... performing prior to ... employment ... if they are not wholly unfit, please provide details as to the reasons why and the restrictions you would place upon them ..." Dr Clark responded with this:

"... question is wrongly worded ... refer to work ... was performing prior to ... injury ... now totally unfit for that work ... seek ... advice of a rehabilitation physician for further detail."

40. In answer to a further question posed by the applicant's solicitor asking Dr Clark to "detail any restrictions ... or activities ... the worker may need to avoid". He answered "Again, this is the field of a rehabilitation physician and not my field of expertise". The applicant's solicitor posed this further relevant question to Dr Clark: "... if it is within your expertise ... comment as to whether you feel our client could find other suitable employment". Dr Clark again answered "This is not my field of expertise".

41. The Impairment Assessment report, relevantly, finds a PIRS Class 3 rating with respect to "Employability". Dr Clark set out the different indicators as follows:

"... Class 1 ... no deficit ... or minor deficit attributable to ... normal variation in ... general population ... able to work full time ... duties and performance ... consistent with ... person's education and training ... able to cope with the normal demands of the job ... Class 2 ... mild impairment ... able to work full time in a different environment ... duties require comparable skill and intellect ... can work in the same position but no longer than 20 hours a week e.g. no longer happy to work with specific persons, work in a specific location due to travel required ... Class 3 ... moderate impairment ... cannot work at all in the same position ... can perform less than 20 hours per week in a different position which requires less skill or is qualitatively different, e.g. less stressful ... Class 4... severe impairment ... cannot work more than 1 or 2 days at a time, less than 20 hours per fortnight ... pace ... reduced ... erratic ... Class 5 ... totally impaired ... cannot work at all ..."

### **Submissions for the respondent**

42. This is not a case where the applicant had an injury and then ceased work because of that injury. She was working, displaying a CWC, up until her job becoming redundant. This shows she must have some capacity with the only question being to what extent. At her EAP counselling session (ARD 16) on 1 July 2019, the applicant told Ms Roldan during another such session that "... have been able to sort things ... organising paperwork and cooking; watching TV and organising Centrelink, insurance and bank ... been offered a job for 9 weeks; but this is far; would like to give it a go ...". Ms Roldan added that the next steps were to "reflect on wish list for ideal job and read email on adaptive coping". This shows that the applicant just did not want to attend the interview for a job because of the location being "too far". Such a matter is to be disregarded in the analysis of s 32A of the 1987 Act (s 32A).
43. Limited or no weight should be given to the medical certificates from Dr Calabresi marking the applicant totally incapacitated. They do not provide any reasons for such conclusion. In any event, they should be read in the context of the report of Dr Calabresi's report of 6 May 2020. The conclusion in that report that "the anxiety and depression continues to limit her ability to secure further employment, although ... my expectation that with time and ongoing psychological therapy ... will be able to work in the future" should not be read as



supportive of the case that there is no CWC. The reference to the limitations on the ability of the applicant to *secure* further employment should be contrasted from the real question as to whether there is *capacity* for such employment, having regard to the terms of s 32A. This is relevant given that Ms Roldan noted in July 2019 that the applicant was reluctant to pursue a job opportunity because it was too far away.

44. The opinion from Dr Clark is the only specialist opinion on the issue in the case. His clinical examination (at ARD 353) showed the applicant had “no signs or symptoms of psychosis ... no abnormal signs in manner or posture ... no hallucinations ... no delusionary beliefs and her thought systems are normal”. She is “very anxious going past Woolworths” (ARD 353). At ARD 356, the question and answer number 6 wording shows that Dr Clark believes the applicant is totally unfit for her pre-injury work but that the advice of a rehabilitation doctor should be sought on whether the applicant was “fit, wholly unfit or partially unfit” for the work “prior to her psychiatric injury”. So, he took the question as being confined to the nature of any incapacity for the pre-injury work only – not thereafter.
45. Dr Clark’s impairment assessment report is “medical information” under s 32A even in the context of an impairment assessment. His analysis of “concentration, persistence and pace” is important in the CWC assessment. He found a mild impairment – categorised as “can undertake a basic re-training course ... or a standard course at a slower pace ... can focus on intellectually demanding tasks for periods of up to 30 minutes ... then feels fatigued or develops headache”. In the employability category, he found a moderate impairment, noting the applicant “can perform less than 20 hours per week in a different position, which requires less skill or is qualitatively different, e.g. less stressful”. The Class 4 and 5 descriptors content allows for an inference that Dr Clark believes the applicant does have capacity to work more than one or two days at a time for at least 20 hours per fortnight.
46. While there is little evidence going to rates of pay for work for which the applicant does have capacity, the Commission is entitled to look at the minimum wage for adult employees across Australia, i.e. a rate of \$19.84 per hour. If that were multiplied by 20 hours, it would leave a result of a capacity to earn \$396.

### **Submissions for the applicant**

47. There is no evidence in the respondent’s case on the CWC issue apart from the certificate from Dr Calabresi dated 4 September 2019 – which states that the applicant has no current work capacity during the period between 4 September and 2 October 2019.
48. It is not correct to look at CWC on the basis that the applicant worked up to May 2019 and then left by way of redundancy – meaning there must be some CWC from that time. Her statement should be considered. It shows she was continuing to struggle more and more as time wore on from about 2018 and was having increasing symptoms in the context of ongoing problems at work. As such, the applicant had no CWC from the time she left.
49. There were medical certificates from the GP marking the applicant as having no CWC for essentially all relevant periods. Dr Calabresi is the doctor who knows the applicant best and weight should be given to her opinion on the question of whether or not there is any CWC. Mr Hickey helpfully provided an oral chronology of those certificates in terms of where they appeared in the ARD. These certificates expire by 10 June 2020. Dr Calabresi’s 6 May 2020, report, contrary to the submission for the respondent, does support the applicant’s case. The comment “... anxiety and depression continues to limit her ability to secure further employment ... my expectation that with time and ongoing psychological therapy ... Ms Cavaleri will be able to work in the future...” should be easily construed to mean that the doctor did not believe there was any CWC – although she expected that there would be in the future. This is consistent with the medical certificates referring no CWC.

50. The EAP documents support the applicant's case for no CWC. The respondent has pointed to the EAP documents (ARD 60) recording that the applicant was offered a job for 9 weeks "but this is far ... would like to give it a go". But that should be looked at in the context of the entries when the applicant saw Ms Roldan on 1 July 2019 (ARD 62) - "... the idea of job seeking has been daunting ... went to Centrelink ... heard information about ... requirements for job seeking ... made her feel very confused and anxious".
51. The Impairment Assessment report should not be given any weight. It was sought and obtained for a different purpose, i.e. for a lump sum impairment claim. The PIRS has no relevance to the question of whether or not there is CWC in the present case. The PIRS is not a recipe, the descriptors are only examples, and are not definitive. In the alternative, or in any event, this report of Dr Clark can be seen to be supportive of the applicant's case that there is no CWC. He noted that the applicant's condition is relevant to her continuing incapacity and may result in some incapacity in the future (ARD 356). That should be seen to be referring to total incapacity or no CWC.
52. As to the finding of "moderate impairment" by Dr Clark in the impairment assessment report, the reference to "less than 20 hours per week" is unclear and the applicant's capacity may well be right at the bottom of that range. In the primary report, Dr Clark's comment that "she is now totally unfit for that work" does refer to the pre-injury work, but his comment immediately following that the advice of a rehabilitation physician for further detail clearly shows that he effectively disqualified himself from being able to give an opinion about the question of whether there was CWC otherwise.
53. Regard should be had to the principles set out in *Secretary, Department of Education & Communities v Oparah* [2015] NSWCCPD 67.
54. Contrary to the submission for the respondent, the Commission is not at liberty to use the Australian minimum wage for adult employees

## **FINDINGS AND REASONS**

55. I see the applicant's work experience as significant for the purposes of analysing "suitable employment" for her within the meaning of s 32A. She completed a 10 month stenographic course after leaving school, then worked as a secretary for about 12 months. She has also worked in other administrative and/or clerical roles. Even when she had young children, she managed the occasional part-time job with bookkeeping and typing and packing at a warehouse. She also did part-time night fill work in about 1990 when her youngest child was only six months old. This is relevant to s 32A(a)(ii).
56. From on or about 13 May 2019, until 4 September 2019, there is no express or clear medical certification of CWC. However, it may be inferred from the NRMP notes that Dr Calabresi believed there was at least some incapacity for work – from, say, 12 August 2019. This last date is arrived by taking the halfway mark between 10 and 14 August 2019 (see par 38 above). The applicant did have medical problems between 2017 and May 2019. To the extent that those were not work related psychological problems or injury, Dr Calabresi has stated that many of those symptoms were exacerbated by stress at times.
57. I have summarised the applicant's statement and the Benestar notes in a careful and detailed way given Mr Beran's submission that there must be a capacity to work from 13 May 2019 in circumstances where the applicant continued working until her job became redundant. That detail shows that she was put under a great deal of emotional stress between 2017 and 2019 in the course of her employment, and was not given any, or at least adequate, support by her employer. This is relevant in terms of assessing the question of any CWC from 13 May 2019 – in circumstances where she accepted that her job was redundant at that time, and there is no clear medical certification of any incapacity for work. Still, I believe she did have some incapacity from 13 May up until on or about 12 August 2019.

58. Despite the lack of clear medical information of any incapacity between 13 May 2019 and on or about 12 August 2019, Dr Calabresi did comment (par 37 above) that the applicant's symptoms since 2017 were exacerbated by stress and at times they were very severe, and the acute depressive illness developed in 2019, and she was unable to work since that time. But Dr Calabresi does not make it clear when in 2019 she is referring to. It may be she has referred to from on or about the time she commenced to note medical certification for incapacity, say about 10 August 2019. Although the relevant symptoms existed to some extent well before that time. Dr Clark has also stated he believes the applicant was not fit for the work she was doing up to 13 May 2019 – and that “her symptoms exacerbated at the time a PIP was imposed on her” (ARD 356).
59. There are factors pointing towards it being more likely than not that the applicant had some capacity for suitable employment within the meaning of s 32A between on or about 13 May 2019 and on or about 12 August 2019. The first is her age, education, skills and work experience. She had a relatively wide variety of skills and work experience. A further factor is her statement that since leaving work on 13 May 2019, her depression increased and after having some time to process what happened, “these feelings were magnified when I began applying for new roles in other companies ... that is when I began unpacking some of the issues ...” While I appreciate that she seems to be saying here that her depression was increasing when she began applying for new roles, it's not clear at all that she had no CWC during the period up to about 10 August 2019. But there was incapacity, by that stage, for the pre-injury work. Dr Clark made that clear enough by indicating that her incapacity for the pre-injury employment dated from the time of the PIP.
60. Also, when the applicant saw Ms Roldan on 7 May 2019, she had “decided to get redundancy”, and had not told her employer about the decision. Ms Roldan also noted the applicant to say she did “not know if I can find the job I am wanting ... not ready ... exhausted ... anxious ...” Then on 30 May 2019, Ms Roldan noted the applicant had been “offered a job for 9 weeks ... but this is far ... would like to give it a go ... discussed wish list for ideal job ...”. Ms Roldan does not make any comment suggesting she believed the applicant had an incapacity for work.
61. The applicant saw Dr Calabresi on 15 May 2019. A note is made by this doctor that the applicant was “made redundant at work”, and of her “ongoing dizziness – some headache ...? sinusitis”. On 29 May 2019, the applicant returned to see Dr Calabresi with the “reason for contact ... sinusitis ...” As with the 15 May 2019 entry, the doctor's notes do not refer to a psychological condition, let alone an incapacity for work. On 2 July 2019, the applicant returned to Dr Calabresi. Again, there is no reference to incapacity for work or psychological condition. I appreciate the doctor later reported (6 May 2020) that the applicant's various non-psychological symptoms were exacerbated by stress and at times were very severe. But there is no, at least clear, reference to this in the NRMP notes up to 2 July 2019. The next entry is 10 August 2019 at which stage Dr Calabresi noted “very depressed, crying all the time, stressed ... starting Zolof”.
62. In all the circumstances, I believe the applicant did have a CWC between 13 May 2019 and 12 August 2019. I take into account also the nature of her incapacity and the details provided in the medical information. This includes the opinion of Dr Clark that there was, at least by inference, an incapacity for the employment with the respondent from that time (s 32A(1)(a)). I also take into account the services provided for the applicant by the Benestar Group, principally by Ms Roldan. It is my opinion that those services (summarised above), fall within the definition of “injury management plan” under Chapter 3 of the *Workplace Injury Management and Workers Compensation Act 1998* (see the definition in s 42) and s 32A(1)(a)(iii) of the 1987 Act.

63. On 6 June 2019, Ms Roldan noted that one of the factors the applicant was concerned about in terms of her job seeking was how much she had to travel, and would she “find the work that I would like to do?” I disregard those factors, that appeared to inhibit her job seeking to some extent by virtue of s 32A(1)(b). During the 13 May to 12 August 2019 period, I am of the opinion that there were a number of real jobs that the applicant was able to do, having regard to the matters in subsection (a) of the definition of “suitable employment”, regardless of whether those jobs were available to the applicant or in the employment market generally (*Wollongong Nursing Home Pty Ltd v Dewar* [2014] NSWWCPCPD55 at [63]). These real jobs have been identified in par 55 above.
64. I also take into account the clinical opinion, guided by the PIRS descriptors, expressed by Dr Clark in the impairment assessment report. This is clearly “medical information” within the meaning of s 32A(1)(a)(i). As a specialist psychiatrist, he does have the expertise to proffer the opinion that the applicant is not able to work at all in the position with the respondent, but could perform less than 20 hours per week in a different position requiring less skill, or which was qualitatively different, for example less stressful.
65. There were, between 13 May and 12 August 2019, many real jobs in the employment market where the applicant could have utilised her skills and work experience (see par 55 above) on a part-time basis. At the very least, I am of the opinion that she was able to be suitably employed during the period between 13 May and 12 August 2019 as a clerk at a basic level. I think she could have done so for 17.5 hours per week; about two and a half days per week (*Westpac Banking Corporation v Mani* [2019] NSWWCPCPD 41 at [178 -180]) (*Mani*).
66. From 12 August 2019 until 4 March 2020, I believe the whole of the evidence amounts to it being most likely that the applicant had no CWC. While medical certificates are of little probative value in the absence of a medical report to explain them or to set out the history on which they are based (*Greif Australia Pty Ltd v Ahmed* [2007] NSWWCPCPD229; 6DDCR461) (*Greif*), I also take into account the applicant’s evidence (summarised in par 28 above), and note that there is no contemporaneous medical information to the contrary during that period.
67. The opinion of Dr Clark referred to (in pars 39-41 and 64 above) was made on 5 March 2020 following a consultation he had with the applicant on that same day. In my opinion, Dr Clark did take a reasonably detailed history from the applicant, and his relevant analysis, as noted in par 64 above, makes common sense to me when viewed in the context of all the evidence, in particular the statement of the applicant herself, the notes of Ms Roldan and the material from Dr Calabresi, both in her 6 May 2020 report and the NRMP notes.
68. I also believe that Dr Clark’s opinion is clearer than the opinion from Dr Calabrese in her report of 6 May 2020. She did note that “an acute depressive illness developed in 2019 and she was unable to work”. Again, it is not totally clear what precise time in 2019 is referred to, and I have dealt with that above in the context of my analysis of the period between 13 May and 12 August 2019. Dr Calabresi then states that “since this time... While her symptoms are much improved... She remains traumatised... easily overwhelmed... labile... no confidence in her abilities”. Then the doctor states “... Anxiety and depression continues to limit her ability to secure further employment, although it is my expectation that with time and... therapy that this will be able to work in the future”. I acknowledge the submission for the applicant that this passage should be construed to mean that the doctor was of the view that the applicant had no present CWC. However, at the least, I believe it is insufficiently clear to actually persuade me that the applicant has no CWC.

69. I appreciate that Dr Calabresi issued medical certificates to the effect that the applicant had no CWC up to 10 June 2020. As noted above, medical certificates are of little probative value in the absence of a report explaining them or setting out the history on which they are based. I acknowledge that the 6 May 2020 report goes some way in this regard. I agree with the submission for the respondent to the extent that the expression by Dr Calabresi that the applicant's condition continues to "limit" her ability to secure further employment at least makes it unclear whether the doctor has the view that there is no CWC. It is also unclear whether or not this creates an inconsistency between the medical certification up to 10 June 2020 and the way it is expressed in the report.
70. In any event I prefer the opinion of Dr Clark on the question of whether or not the applicant has any CWC from 5 March 2020 to date and continuing. This is not only because he holds specialised qualifications as a psychiatrist in the context of an issue about CWC for psychological injury. It is also because his opinion is clearer. He did have an option to classify the applicant as Class 5 under the PIRS – which refers to no capacity at all. Even a Class 4 rating would have allowed for some capacity. There is another reason as well: the opinion of Dr Clark in this respect accords with my qualitative and or common sense analysis by reference to the whole of the evidence.
71. In all these circumstances, it is my opinion that the applicant has had, and continues to have, a CWC from 5 March 2020. In addition to the reasons in pars 67-70 above, I take into account the same (but relating to the period from 5 March 2020) principles, factors and evidence that have been identified in support of my conclusion for the applicant having a CWC between 13 May 2019 and 12 August 2019; i.e. those factors referred to in pars 55 and 62-65. It follows that I find that the applicant has been able to be suitably employed from 5 March 2020 as a clerk at a basic level for 17.5 hours per week – about 2½ days per week.
72. I accept the submission for the respondent that, in all the circumstances, the Commission is entitled to look at the minimum wage for adult employees across Australia as a basis for the assessment of the ability to earn in suitable employment. While it has been submitted for the applicant that the Commission is not at liberty to do so, no reasons have been put forward in support of that position, nor was there any other material identified that might have assisted the Commission. In my respectful opinion, the position put for the respondent is fair and proper, given all the circumstances of this case. The decision in *Mani* approves such an approach in circumstances such as these.

## **SUMMARY**

73. I find that the applicant had a CWC to work in suitable employment between 13 May 2019 and 12 August 2019 and was able to earn \$347.20 per week in such employment.
74. I find that the applicant had no CWC to work in suitable employment between 13 August 2019 and 4 March 2020 and was able to earn \$0 per week in such employment.
75. I find that the applicant has had a CWC to work in suitable employment, and has been able to earn \$347.20 per week in such employment from 5 March 2020 to date and continuing.