WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **3160/19**
Applicant: **Shirani Gajaweera**
Respondent: **State of New South Wales**
Date of Direction: **18 October 2019**
Citation: **[2019] NSWWCC 337**

The Commission determines:

Findings

1. The applicant's current work capacity based on an ability to earn in suitable employment during the period from 24 October 2017 to 19 October 2018 was $500 per week.

2. The applicant had no current work capacity as and from 20 October 2018.

3. The no current work capacity as and from 20 October 2018 results from the injury on 8 September 2017.

4. The applicant's entitlement to weekly compensation as and from 20 October 2018 from injury on 8 September 2017 is greater than the entitlement to weekly compensation from the deemed injury occurring on 19 October 2018.

Orders

5. The respondent to pay the applicant weekly compensation in respect of the injury sustained on 8 September 2017 as follows:

    (a) From 24 October 2017 to 22 January 2018 pursuant to section 36(2) of the *Workers Compensation Act 1987* (the 1987 Act) at 95% x $678.90 less $500 totalling $145 per week;

    (b) From 23 January 2018 to 19 October 2018 pursuant to section 37(2) of the 1987 Act at 95% x $678.90 less $500 totalling $145 per week;

    (c) From 20 October 2018 to 22 October 2018 pursuant to section 37(1) of the 1987 Act at 80% x $678.90 totalling $543.12 per week, and

    (d) From 23 October 2018 to date and continuing pursuant to section 37(1) of the 1987 Act at 80% x $589.22 per week (agreed pre-injury average weekly earnings after 52-week period) totalling $471.38 per week.

JOHN HARRIS
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 JOHN HARRIS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Ms Shirani Gajaweera (the applicant) was employed by the State of New South Wales (the respondent) since 2011.

2. This is a claim for weekly compensation pursuant to the provisions of the *Workers Compensation Act 1987* (the 1987 Act) for injuries occurring on 8 September 2017 and 19 October 2018 (deemed).

3. There is no dispute that the applicant suffers from a psychological injury occurring on 8 September 2017 and a further psychological injury deemed to have occurred on 19 October 2018.

THE PROCEEDINGS BEFORE THE COMMISSION

4. This matter was heard on 9 September 2019. Mr Phillip Perry of counsel appeared for the applicant and Mr John Dodd of counsel appeared for the respondent. The matter could not finish due to extensive efforts to resolve the matter by way of conciliation. Accordingly, the following directions were issued containing a series of agreed facts, setting out the issues and providing for the filing of written submissions (the Direction).

    1. Admit the Documents as filed.

    Agreements

    2. The Applicant suffered compensable injuries on 8 September 2017 (Injury 1) and 19 October 2018 - deemed (Injury 2).

    3. The Applicant physically worked at both RNSH and Liverpool Hospital until 23 October 2017 and at Liverpool Hospital only from 24 October 2017 to 19 October 2018.

    4. The Applicant has not physically worked at either Hospital after 19 October 2018.

    5. The Applicant's actual earnings at Liverpool Hospital during the first period of the claim (24 October 2017 – 19 October 2018) are set out at Application, pg 319-320.

    6. The Applicant's PIAWE in respect of Injury 1 for the first 52 weeks is $678.90 and the amount of $589.22 for the period after the first 52 weeks.

    7. The Applicant has not been paid any weekly compensation entitlements in respect of either injury.

    Submission

    8. The Respondent submits that the Applicant's PIAWE for Injury 2 is $442.34.

Issues/Submissions

9. The first issue (Issue 1) is the Applicant's ss 36/37 entitlement for the period from 24 October 2017 to 19 October 2018 based on the dispute concerning the applicant's current work capacity during this period (I may have incorrectly described this date as 23 October 2017 at the hearing although I understand that the Applicant worked at RNSH on 23 October 2017 – parties to advise). It is agreed that the Applicant's actual earnings in this period are as provided by direction 5 above.

10. The second issue (Issue 2) is the Applicant's weekly compensation entitlement from 20 October 2018. The Applicant submits that she is entitled to weekly compensation calculated at 80% x $678.90 from 20 October 2018 to 23 October 2018 (being the period to the cessation of 52 weeks of weekly compensation from 24 October 2017) and then 80% x $589.22 after 23 October 2018 to date and continuing – accepting that the compensation entitlement commenced on 24 October 2017. The Respondent submits that the relevant rates are 95% x $442.34 for 13 weeks and then 80% x $442.34 thereafter to date and continuing, noting that the number of weeks commence from 19 October 2018.

11. Applicant's written submissions to be filed and served by close of business on 20/9/19; Respondent's submissions by close of business on 4/10/19 and Applicant in reply by close of business on 11/10/19.

5. The documentation admitted into evidence was:

(a) Application to Resolve a Dispute (Application);

(b) Reply;

(c) Application to Admit Late Documents filed by the applicant dated 5 July 2019, and

(d) Application to Admit Late Documents filed by the respondent dated 6 August 2019

There was no objection to any document.

6. The parties filed written submissions in accordance with the Direction.

LEGISLATION

7. "Current work capacity" is defined in s 32A of the 1987 Act as "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".

8. "Suitable employment" is defined in s 32A of the 1987 Act as "employment in work for which the worker is currently suited:

(a) having regard to:

(i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and

(ii) the worker's age, education, skills and work experience, and

(iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and

(iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and

(v) such other matters as the Workers Compensation Guidelines may specify, and

(b) regardless of:

(i) whether the work or the employment is available, and

(ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and

(iii) the nature of the worker's pre-injury employment, and

(iv) the worker's place of residence."

9. Section 35 of the 1987 Act provides:

"(1) For the purposes of the provisions of this Subdivision used to determine the rate of weekly payments payable to an injured worker in respect of a week:

'AWE' means the worker's pre-injury average weekly earnings.

'D' (or a
'deductible amount') means the sum of the value of each non-pecuniary benefit (if any) that is provided by the employer to a worker in respect of that week (whether or not received by the worker during the relevant period), being a non-pecuniary benefit provided by the employer for the benefit of the worker or a member of the family of the worker.

'E' means the amount to be taken into account as the worker's earnings after the injury, calculated as whichever of the following is the greater amount:

(a) the amount the worker is able to earn in suitable employment,
(b) the workers current weekly earnings.

'MAX' means the maximum weekly compensation amount.

(2) If the determination of an amount for the purpose of determining the rate of weekly payments payable to an injured worker results in an amount that is less than zero, the amount is to be treated as zero."

10. Section 37 of the 1987 Act applied to weekly compensation in the second entitlement period and provides:

"(1) The weekly payment of compensation to which an injured worker who has no current work capacity is entitled during the second entitlement period is to be at the rate of:

(a) (AWE × 80%) − D, or
(b) MAX − D,
whichever is the lesser.

(2) The weekly payment of compensation to which an injured worker who has current work capacity and has returned to work for not less than 15 hours per week is entitled during the second entitlement period is to be at the rate of:

(a) (AWE × 95%) − (E + D), or
(b) MAX − (E + D),
whichever is the lesser.

(3) The weekly payment of compensation to which an injured worker who has current work capacity and has returned to work for less than 15 hours per week (or who has not returned to work) is entitled during the second entitlement period is to be at the rate of:

(a) (AWE × 80%) − (E + D), or
(b) MAX − (E + D),
whichever is the lesser."

ISSUE 1 – Incapacity from 24 October 2017 to 19 October 2018 (first period)

Submissions

Applicant's submissions

11. The applicant noted that the respondent had not served reports from:

(a) Dr Allan Martin who saw the applicant on 13 November 2018; and
(b) Dr Michael Prior on 30 October 2017 and on a second occasion.

12. The applicant's average earnings over this period was $445 per week, based on total earnings of $22,810.43 over 51.2 weeks. Ninety-five percent of the (pre-injury average weekly earnings (PIAWE)) was $645. Accordingly, the applicant is entitled to an award of $200 per week during the s 36 and s 37 periods.

13. During this period the applicant was working to her maximum capacity. This submission is derived from the following evidence:

(a) The applicant's statement that she ceased work at Royal North Shore Hospital on 14 October "due to my injury".

(b) In 2018 the applicant was struggling to contribute to the family's needs financially and was no longer able to perform blood collection duties at Royal North Shore Hospital.

(c) Dr Gertler said of the applicant on 4 May 2018 that the applicant was "having difficulty coping" with her administrative work.

14. The amount the applicant was able to earn in suitable employment "did not exceed her current weekly earnings for that period".

Respondent's submissions

15. The respondent, after agreeing with a portion of the applicant's submissions, referred to the definition of "E" in s 35 of the 1987 Act.

16. Section 36(2) is differently worked than the previous s 40 and previous principles such as those set out in *Aitken v Goodyear and Rubber*[1] have no application. Another difference is that there is no discretion. Accordingly, the definition of s 35 of "E" is "not to be 'polluted' by out-dated concepts."[2]

17. It is a matter of applying a worker's actual earnings and her ability to earn and applying the greater of these amounts under s 36(2).

18. There is "no evidence that the work [the applicant] continued doing at Liverpool Hospital was the maximum of her working capacity."[3] It is likely that the applicant only worked her normal hours at Liverpool Hospital.

19. The general practitioner changed his certification on 17 January 2018[4] when he certified the applicant fit for eight hours per day, four days per week.

20. Whilst Dr Gertler[5] and Mr Lu[6] certified the applicant as unfit for work as a blood collector, they did not opine that the applicant's ability to work in administrative work was limited. Accordingly, "there is no reason to conclude that the [applicant] could not have been working at least 24 hours per week in administrative work".[7]

Applicant's submissions in reply

21. In reply, the applicant conceded that the doctrine in *Aitken v Goodyear Tyre and Rubber* "no longer has operation in light of sec 35 and 36 of the 1986 Act."[8] The applicant submitted:[9]

> "But the doctrine in *Aitken*, with which doctrine was applied in *Pira Pty Limited v Tucker* [1996] NSWSC 569 ought not be regarded as 'pollution' and 'out dated' as suggested by the respondent at [7]. The Commission is entitled, when considering the amount the worker is able to earn in suitable employment the worker's efforts to obtain an income by the use of his or her labour, and the success of otherwise of those efforts. It is acknowledged that the Commission will be constrained to apply the definition of *suitable employment* provided by sec 32."

22. It is clear that the work performing blood collection was not suitable employment at the relevant time. There was "unchallenged evidence" from Dr Gertler that the "applicant was having difficulty in coping with administrative work"[10].

23. Accordingly, the applicant's actual earnings are an appropriate limit of her capacity to earn in suitable employment.

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[1] [1945] WCR 107
[2] Respondent's submissions, paragraph 7
[3] Respondent's submissions, paragraph 9
[4] Application, p 333
[5] Application, p 24
[6] Application, p 31
[7] Respondent's submissions, paragraph 13
[8] Applicant's submissions in reply, paragraph 2
[9] Applicant's submissions in reply, paragraph 5
[10] Applicant's submissions in reply, paragraph 6

Evidence

24. The applicant provided a number so statements. In her first statement dated 6 December 2017 the applicant noted that she had ceased worked at Royal North Shore Hospital but continued working at Liverpool Hospital "doing reception duties", two days a week for eight hours per day.[11]
25. In the applicant's second statement dated 7 August 2018 she stated:[12]

> "I am currently struggling to contribute to my family's needs financially as a result of my loss of income, as I am no longer able to perform blood collection duties at Royal North Shore Hospital."

26. In the applicant's third statement dated 7 November 2018 she advised that she told Dr Gertler in March 2018 that the job at Liverpool Hospital was part-time, largely administrative and she was "having some difficulty coping with that work."[13] She stated that her condition worsened on 19 October 2018 when she went off work at Liverpool Hospital.

27. Dr Gertler provided a report dated 4 May 2018 in relation to an examination on 19 March 2018[14]. The doctor noted that the applicant was working some two days a week on reception at Liverpool Hospital. He concluded that the applicant had developed an adjustment disorder with both anxious and depressed mood as a result of the incident involving a needle stick injury on 8 September 2018.

28. Dr Gertler opined:[15]

> "Ms Gajaweera is unfit to return to her pre-injury occupation in Blood Collection. She is currently working part-time at the hospital but in a role which is largely administrative in nature. Even so she is having difficulty coping."

29. In his subsequent report dated 18 March 2019 Dr Gertler noted that following the first examination the applicant had a worsening of symptoms after she was asked to handle blood samples.[16] He opined that the initial symptoms were consistent with an acute traumatic reaction with anxiety and depression which progressed to a chronic post traumatic disorder[17] and was not capable of working.[18]

30. In a short report dated 23 May 2018, Ms Wu, Psychologist observed that the applicant was unfit to return to her work duty as a blood collector.[19]

31. In a further report dated 14 July 2018 Ms Wu referred to ongoing difficulties at work and suggested a more supportive working environment that would assist in improving the applicant's condition.[20]

32. Ms Wu consulted the applicant on 20 October 2018 when she observed a highly emotional state as the traumatic event was retriggered due to the ongoing involvement with blood samples and needles. Ms Wu stated that the applicant would benefit from a break from work.[21]

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[11] Application, p 3
[12] Application, p 5
[13] Application, p 6
[14] Application, p 21
[15] Application, p 24
[16] Application, p 26
[17] Application, p 27
[18] Application, p 28
[19] Application, p 31
[20] Application, p 32
[21] Application, p 33

33. The Directions record that the parties accept that the applicant's actual earnings are set out at pages 319-320 of the Application. They show fortnightly earnings ranging from $836.72 to $1,314.95. The significance of these variable earnings was discussed at the arbitration hearing as they were recorded as an agreement in the Directions.

34. The certificates of capacity commence on 25 October 2017 and are completed by Dr Huynh.[22] The doctor initially certified the applicant as fit for employment eight hours per day for two days per week, unable to perform blood collection but "able to perform other alternative duties."

35. The same restrictions and hours were repeated on 28 November 2017.[23]

36. On 17 January 2018 Dr Huynh certified the applicant for eight hours per day, four days per week with restrictions involving an inability to perform blood collection but able to perform alternative duties.[24]

37. On 2 March 2018 Dr Huynh certified the applicant fit for eight hours per day, two days per week with the same restrictions.[25] These certifications and hours continued[26] until Dr Huynh certified the applicant unfit for any work on 23 October 2018.[27]

Reasons

38. The applicant bears the onus of proof on all issues on the balance of probabilities.[28]

39. In *Wollongong Nursing Home Pty Ltd v Dewar*[29] Roche DP stated:

> "However, while the new definition of suitable employment has eliminated the geographical labour market from consideration, it has not eliminated the fact that 'suitable employment' must be determined by reference to what the worker is physically (and psychologically) capable of doing, having regard to the worker's 'inability arising from an injury'. Suitable employment means 'employment in work for which the worker is currently suited' (emphasis added)."

40. The respondent's submissions that the definition of what a worker is able to earn in suitable employment "be polluted by out-dated concepts" is unhelpful. In this respect I agree and adopt the applicant's submission set out at paragraph 21 above.

41. I note that the applicant identified reports not served by the respondent. However, there was no submissions as to how I should deal with the absence of this evidence, particularly in relation to this issue. The relevant principles in relation to the drawing of a *Jones v Dunkel* inference were discussed by Roche DP in *University of New South Wales v Brooks*[30] which adopted the discussion by the Court in Appeal in *MSPR Pty Ltd v Advanced Braking Technology Ltd* (*MSPR*).[31]

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[22] Application, p 326
[23] Application, p 329
[24] Application, p 332
[25] Application, p 335
[26] Application, pp 338-355
[27] Application, p 356
[28] *Nguyen v Cosmopolitan Homes (NSW) Pty Ltd* [2008] NSWCA 246 per McDougall J at [44]- [55], McColl and Bell JJA (as their Honours then were) agreeing; *Chen v State of New South Wales (No 2)* [2016] NSWCA 292 per Leeming JA at [33]-[34]; McColl JA agreeing at [1].
[29] [2014] NSWWCCPD 55
[30] [2014] NSWWCCPD 68
[31] [2013] NSWCA 416.

42. These principles include that an inference permits the Court (or Tribunal) to make a finding unfavourable to the party with greater confidence.[32] However, apart from noting the absence of relevant medical reports, there was no relevant submissions, and accordingly no response form the respondent, as to what I should find or infer because these opinions are not before me. Accordingly, I deal with the issue on the basis of the evidence before me (as addressed by the parties and the agreed facts), and not the reports that are not before me.

43. I accept the uncontradicted evidence that the applicant could not perform the job of blood collection at Royal North Shore Hospital.

44. I accept that the administrative work the applicant was performing at Liverpool Hospital not involving blood collection was suitable employment within the meaning of s 32A. The applicant clearly established a capacity to work at least 16 hours per week in this type of employment during the first period.

45. The issue is whether the applicant was then currently suited to work more than 16 hours per week in this type of suitable employment.

46. The respondent's submission that there was "no evidence" that the applicant was limited to 16 hours per week is incorrect. The certificates of capacity, save as to one, limited the applicant to two days per week at eight hours per day throughout the period. Whilst the certificates are brief and do not provide a basis for the restriction, they are still evidence upon I can conclude the limit of the applicant's capacity for performing work in this type of employment.

47. The applicant referred to the opinion of Dr Gertler. His opinion touches on the issue of capacity in that he opined that the applicant was "having difficulty coping" with her part-time administrative work.

48. The applicant's third statement confirms that she provided this history to Dr Gertler.

49. The applicant's actual pay during the first period is set out in an agreed table of earnings.[33]

50. On four separate occasions during the first period the applicant's fortnightly earnings exceeded $1,000. Two of these periods were during the Christmas/New Year period and Easter and probably included bonus/leave entitlements. In June 2018 the applicant earnt $1,314.95 over a fortnight and in late September/early October 2018 earnt just over $1,000.

51. On another five occasions the applicant's fortnightly earnings exceeded $900, that is, in excess of her average earnings.

52. Noting that the applicant bears the onus of proof, I am not satisfied that the applicant's average earnings over the first period equates with her ability to earn in suitable employment. This is because on nine fortnightly occasions her actual earnings were above the average earnings.

53. In my view the applicant had an ability to earn in suitable employment, established through her actual earnings, an amount greater than the average earnings. Accepting that the general practitioner generally opined that the capacity was limited to 16 hours per week and that Dr Gertler opined that applicant was having difficulty coping, I find that the applicant's ability was in the order of 18 hours per week. Adopting the respondent's calculations of $27.8125 per hour,[34] I assess the applicants' current work capacity during the first period at $500 per week.

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[32] *MSPR* at 60(c)
[33] Application, p 319-320 and recorded as an agreement in the Directions as it was at the arbitration hearing
[34] Respondent's written submissions, paragraph 13

54. To the extent that the onus rests on the applicant, I am satisfied that she was able to work 18 hours per week in the administrative work she was performing at Liverpool Hospital throughout the first period.

55. Accordingly, I do not accept the applicants' submissions that Dr Gertler's evidence was "unchallenged" as the actual earnings, on nine separate occasions, established a capacity greater than the average earnings. It is otherwise unclear whether Dr Gertler was opining that the limit of the applicant's capacity was 16 hours in administrative work. He does not clearly state this.

56. The parties have agreed that the applicant's PIAWE for the first 52 weeks during the first period is $678.90.

57. The weekly compensation entitlement during the first 13 weeks is 95% times $678.90 less $500. The entitlement pursuant to s 37(2) of the 1987 Act is also calculated at the 95% rate as the applicant was working more than 15 hours per week until she ceased work on 19 October 2018.

ISSUE 2 – Entitlement to weekly compensation from 20 October 2018

Submissions

58. The applicant submitted that she has been unable to work by reason of the combined effect of the two injuries. Further, the applicant's lack of work capacity, "is to a significant extent, the result of injury 1."[35]

59. The respondent submitted that it was common ground that the incapacity since 20 October 2018 has resulted from the combined effect of both injuries. Any incapacity after October 2018 is the result of both injuries. The applicant accepted this submission in reply.

60. The worker was employed for at least 52 weeks prior to both injuries. The appropriate PIAWE pursuant to ss 44D and 44E in $678.90 up to 8 September 2017 and $445 up to 20 October 2018.

61. Section 44D provides that the relevant period is the two weeks before the injury. In this case there are two relevant injuries. Pursuant to s 8(b) of the *Interpretation Act 1987*, a word in the singular form includes the word in the plural form.

Reasons

62. In *McCarthy v Department of Corrective Services* (*McCarthy*)[36] Roche DP made observations concerning the appropriate test on causation for establishing an entitlement to weekly compensation. Roche DP stated:[37]

> "It is trite law that a loss can result from more than one cause (*ACQ Pty Ltd v Cook* [2009] HCA 28 at [25] and [27]; [2009] HCA 28; (2009) 83 ALJR 986). The authority of *Calman* is also instructive on this issue. The Court held (at [38], excluding footnotes):

[35] Applicant's written submissions, paragraph 31
[36] [2010] NSWWCCPD 27
[37] at [148]-[149]

> ‘Once the appellant established that his underlying anxiety disorder was an injury within the meaning of the Workers Compensation Act, he was entitled ‘to compensation ... under [that] Act’ upon proof that his total or partial incapacity for work resulted from that injury. The question then for the Tribunal was whether the appellant’s incapacity was causally connected to the underlying anxiety disorder. It has long been settled that incapacity may result from an injury for the purposes of workers’ compensation legislation even though the incapacity is also the product of other - even later - causes. Indeed, death or incapacity may result from a work injury even though the death or incapacity also results from a later, non-employment cause. Thus, in *Conkey & Sons Ltd v Miller*, Barwick CJ, with whose judgment Gibbs, Stephen, Jacobs and Murphy JJ agreed, held that it was open to the Workers’ Compensation Commission to find from the medical evidence in that case ‘that the death by reason of myocardial infarction when it did ultimately occur, ‘resulted’ from the work-caused injury of the first infarction, even if it could not be said that the final infarction was itself caused by work-caused injury.’”

63. Further, in the unanimous decision of the High Court decision in *Calman v Commissioner of Police*[38] referred to and quoted by Roche DP in *McCarthy*, the High Court went further and stated:[39]

> “39. Whether incapacity results from injury is a question of fact. Upon the findings in this case, however, the answer to that question could admit of only one answer. As a matter of law, the Tribunal was bound to find that the incapacity of the appellant resulted from injury within the meaning of s 33 of the Workers Compensation Act. Although the incapacity would not have arisen but for the appellant being told that he was to be transferred, there would have been no incapacity but for the existence of his underlying anxiety disorder. The incident, which was the immediate cause of his incapacity, merely exacerbated the underlying anxiety disorder which continued to exist, notwithstanding that immediately before the incident it manifested no symptoms. In those circumstances, the injury was a contributing cause to the incapacity. As Jordan CJ pointed out in *Salisbury v Australian Iron and Steel Ltd* [20]:
>
> > ‘It is not necessary that the employment injury should be the sole cause of disability. It is sufficient if it is a contributing cause [21]. It may be the catalyst which precipitates disability in a medium of disease. But when the stage is reached at which the employment injury ceases to produce effects and could therefore no longer be a contributing cause to any incapacity which may then exist, the right to compensation ceases.’
>
> 40. In the present case, the underlying anxiety disorder continued and was capable of producing serious effects if exacerbated or aggravated, as the Tribunal's findings showed. That being so, the Tribunal was bound to find as a matter of law [22] that the appellant's incapacity resulted from injury within the meaning of s 33 of the Workers Compensation Act.”

64. The parties agree that the applicant has no capacity after October 2018 due to the combined effect of both injuries.

65. However, the applicant also submitted that the lack of work capacity after the first injury “is, to a significant extent the result of injury 1.”

[38] [1999] HCA 90
[39] at [39]-[40]

66. The respondent's submissions that the absence of capacity results from the combined effects of both injuries does not address the applicant's submission that the absence of work capacity also results from the first injury. A determination of that issue requires analysis in accordance with the principles discussed in *Calman*.

67. I accept, based on the applicant's evidence, the certifications of the general practitioner, the reports of Ms Wu and the first report of Dr Gertler, that the applicant was suffering from a psychological condition as a result of the first injury. That condition restricted her capacity to work during the first period.

68. Following the continual exposure to blood products the applicant was then rendered totally unfit for any work. I accept the uncontradicted opinion of Dr Gertler that:[40]

> "Ms Gajaweera in my opinion, did suffer psychological trauma on the 8 September 2017 when she sustained a finger prick injury. Whilst initially the symptoms were consistent with an acute traumatic reaction with anxiety and depression, they have now in my opinion, progressed to a chronic post-traumatic stress disorder."

69. I observe that it is easier to accept this opinion in the absence of competing evidence and contrary submissions.

70. Consistent with Dr Gertler's opinion, the applicant's lack of capacity from 20 October 2018 resulted from the injury on 8 September 2017. The applicant had a psychological condition caused by the first injury which was aggravated by a subsequent injury rendering her totally unfit. That conclusion, as the High Court discussed in *Calman*, is consistent with the fact that the absence of capacity also resulted from the combined effects of the first and second injury.

71. The respondent otherwise relied on the terms of s 44D of the 1987 Act and s 8(b) of the *Interpretation Act* in support of its submission that the meaning of "injury" refers to both injuries. There are three reasons why this submission cannot be accepted.

72. First, the parties have agreed that the PIAWE in respect of the fist injury was $678.50.[41]

73. Secondly, s 44D relates to the calculation of the PAIWE. The section does not relate to principles of causation. The applicant's entitlement to weekly compensation arises from s 33 of the 1987 Act which provides that a worker is entitled to weekly compensation if total or partial incapacity for work "results from an injury".

74. Thirdly, s 8(b) of the *Interpretation Act* provides that the reference to a word in the singular form includes a reference to the word or expression in the plural from. The provision does not mean that the singular has to include the plural.

75. I do not accept that s 44D impacts on the question of causation of loss of capacity. I otherwise do not accept that the section has to be read in the plural to support the respondent's submission.

76. For the reasons set out earlier, I find that the applicant's total incapacity from 20 October 2018 results from the injury on 8 September 2017.

77. The entitlement to weekly compensation from 20 October 2018 based on the first injury is pursuant to s 37 of the 1987 Act. From 23 October 2018 the applicant is entitled to the agreed PIAWE following the expiry of 52 weeks.

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[40] Application, p 27
[41] Direction, paragraph 6

78. I make a further observation. The applicant undoubtedly has an entitlement to weekly compensation at a lesser rate from injury deemed to have occurred on 19 October 2018. Those rights commenced on 20 October 2018 pursuant to the provisions of s 36 of the 1987 Act. That entitlement is based on a PIAWE of $445 per week.

79. The applicant's weekly entitlements from 20 October 2018 from the first injury are greater than the entitlements from the second injury. Accordingly, she is entitled to the greater amount of weekly compensation. However, the entitlements in respect of the second injury are running concurrently with the first injury as and from 20 October 2018 and do not commence once the entitlements to weekly compensation have expired in respect of the first injury.

CONCLUSIONS

80. The findings and orders are set out in the Certificate of Determination.