

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 785/20
Applicant: Daniella Quiroz
Respondent: Retail Apparel Group Pty Limited
Date of Determination: 20 May 2020
Citation: [2020] NSWCC 165

The Commission determines:

1. The applicant contracted a psychological injury arising out of or in the course of employment and employment was the main contributing factor to the contraction of the injury for the purposes of s 4(b)(i) of the *Workers Compensation Act 1987*.
2. The applicant had no current capacity for employment as a result of the psychological injury from 13 July 2019 to date and continuing.

The Commission orders:

1. The respondent to pay the applicant weekly compensation from 13 July 2019 to date and continuing pursuant to ss 36(1)(a) and 37(1)(a) of the *Workers Compensation Act 1987* as they apply to this case, based on a PIAWE figure of \$1,200.

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

Rachel Homan
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 RACHEL HOMAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Ms Daniella Quiroz (the applicant) was employed as an area manager by Retail Apparel Group Pty Limited (the respondent). The applicant claims that she sustained a psychological injury arising out of or in the course of her employment with the respondent from 1 January 2019 onwards. The applicant claims the injury arose due to unsupportive work practices, aggressiveness, isolation tactics, being dismissed, questioning of her work duties and being challenged when she required time off work to attend medical appointments for her pregnancy.
2. Liability for the injury was declined by the respondent's insurer under a notice issued pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) on 31 October 2019. The decision to decline liability was maintained following an internal review on 4 December 2019.
3. The present proceedings were commenced by an Application to Resolve a Dispute (ARD) lodged in the Commission on 13 February 2020. The applicant sought weekly benefits on an ongoing basis from 1 July 2019.

PROCEDURE BEFORE THE COMMISSION

4. An initial teleconference was held on 13 March 2020 at which directions were made amending the ARD to identify a deemed date of injury of 12 July 2019. The claim for weekly benefits was subsequently amended to commence from 13 July 2019.
5. The parties appeared for conciliation conference by telephone on 5 May 2020. The applicant was represented by Mr Craig Tanner of counsel instructed by Mr Luke Power. The respondent was represented by Ms Lyn Goodman of counsel instructed by Mr Ron Galea.
6. The matter proceeded to an arbitration hearing but was not able to be completed due to technical difficulties and time constraints. The hearing was adjourned and completed on 12 May 2020. At the conclusion of the hearing, a direction was made granting leave to the applicant to file any updated certificates of capacity on or before 14 May 2020.
7. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

ISSUES FOR DETERMINATION

8. The parties agree that the following issues remain in dispute:
 - (a) Whether the applicant has sustained a psychological injury pursuant to s 4 of the *Workers Compensation Act 1987* (the 1987 Act); and
 - (b) the extent and quantification of the applicant's entitlement to weekly benefits.

EVIDENCE

Documentary Evidence

9. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) ARD and attached documents;
 - (b) Reply and attached documents;
 - (c) Documents attached to an Application to Admit Late Documents filed by the applicant on 23 March 2020;
 - (d) Documents attached to an Application to Admit Late Documents filed by the applicant on 17 April 2020;
 - (e) Documents attached to an Application to Admit Late Documents filed by the respondent on 24 April 2020;
 - (f) Documents attached to an Application to Admit Late Documents filed by the applicant on 6 May 2020; and
 - (g) Documents attached to an Application to Admit Late Documents filed by the applicant on 14 May 2020.
10. Neither party applied to adduce oral evidence or cross examine any witness.

Applicant's evidence

11. The applicant's evidence is set out in written statements dated 20 August 2019 and 19 March 2020. A document described as an "informal statement" prepared by the applicant is also in evidence. The document describes examples of how the applicant felt bullied and intimidated at work by her managers since the beginning of 2019. The statement is broadly consistent with the formal written statements described below.
12. The applicant commenced employment with the respondent in 2014 and was responsible for managing retail sales outlets within shopping centres at Hornsby, Bankstown, Eastgardens, Warringah, Warriewood and Chatswood. The applicant's responsibilities included the recruitment of staff, training and development of staff, visual merchandising, ordering stock, meeting sales targets and generating sales.
13. The applicant said that in late January 2019, she notified her immediate manager, Ms Anna Grattan, that she was pregnant. Soon afterwards, the applicant noticed a change in Ms Grattan's approach and attitude towards her. The applicant considered that Ms Grattan adopted a passive aggressive tone in her verbal communication, particularly when the senior operations manager, Mr Daniel Aquilina was involved.
14. The applicant described a series of difficult interactions in the workplace. On 15 February 2019, the applicant had a meeting with Ms Grattan which left the applicant feeling she was being attacked. The applicant said Ms Grattan spoke down to her and over the top of her and was bullying her. The applicant told Ms Grattan that she would not tolerate being bullied and Ms Grattan abruptly ended the meeting. The applicant said that she was extremely upset following this meeting. A colleague comforted the applicant and encouraged her to calm down as it was not healthy for her baby. The applicant drove to her sister's house at Blacktown and felt extremely anxious and stressed. The applicant began to feel strong chest pains and dizziness.
15. The applicant went for a routine scan on 20 February 2019 and was advised that she was having a miscarriage. The applicant expressed the view that the meeting with Ms Grattan the previous week was a major contributor to her losing her child.

16. The applicant took some time off work, returning on 25 February 2019. On 28 February 2019, whilst working, the applicant was bleeding heavily and began to feel lightheaded and dizzy. The applicant contacted Mr Aquilina to advise him that she was leaving work to go to hospital.
17. Upon her return to work at the beginning of March 2019, the applicant felt that Ms Grattan and Mr Aquilina were not happy that the applicant had taken time off work to recover and grieve. The applicant was tasked with cleaning up the back rooms of the stores at Eastgardens and Chatswood. This involved heavy lifting, pushing and pulling of stock. The applicant felt she was being punished by being given this task. The applicant felt unwell and as though she was going to pass out.
18. The applicant continued to feel under attack by Ms Grattan due to her direct communication style and failure to listen to her. The applicant requested a meeting with Mr Aquilina for advice on how to better communicate with Ms Grattan. The meeting took place on 3 March 2019. During the meeting, the applicant explained what was happening and how she felt. The applicant was completely taken aback when Mr Aquilina made a comment which the applicant felt was extremely offensive. Mr Aquilina said, "We are not upset that you took time off, the issue is it was a drop the 'mic' moment." The applicant felt Mr Aquilina was referring to the loss of her child and considered the comment heartless and insensitive. The applicant felt that Mr Aquilina was siding with his "mate", Ms Grattan. The applicant went to the bathroom and sat in a cubicle crying.
19. In mid-March 2019 there was a stocktake at the Hornsby store. The store manager, Lauren Less, told the applicant that after the stocktake, Ms Grattan had come in asking questions about the applicant. Ms Grattan told the applicant that Ms Less had said she was not getting support and was not being developed by the applicant. A week later, Ms Less called the applicant in tears. The applicant went to the store and had a conversation with Ms Less. Ms Less denied stating that she did not feel supported or developed. The applicant felt that Ms Grattan had made a false accusation and used manipulative tactics to collect negative feedback about the applicant's performance.
20. Ms Less later resigned from her role as she wished to relocate due to personal issues with her ex-partner and to begin a career change. The applicant was made to feel as though the resignation was a reflection of her management skills.
21. Around the same time, Ms Grattan made a comment to another of the applicant's colleagues about the applicant working a four-day week. The applicant felt that the comment was inappropriate and felt she was not being supported given her recent loss.
22. On 10 April 2019, there was a meeting between the applicant, Ms Grattan and Mr Aquilina during which the applicant was asked to identify areas she needed to work on. The applicant felt that Ms Grattan and Mr Aquilina were actively listening, agreeing with her action plan and provided support. The applicant felt comfortable and made a conscious effort to work on the areas identified in her action plan. She was happy to go to work. During a social night towards the end of April 2019, Ms Grattan praised the applicant for her hard work and commented on how well she had been performing. On 31 May 2019, the national training manager, Mr Fady Tadros, told the applicant that he had heard good things about her and her performance was above expectations.
23. In early June 2019, the applicant discovered she was pregnant once again. The applicant was hesitant to notify work immediately given the reaction she received previously. The applicant was fearful of another miscarriage. The applicant decided to wait until the 12-week clearance from her doctor.

24. During a meeting with other area managers on 18 June 2019, Mr Aquilina yelled out “Dani Q coming last with KPIs in New South Wales and State”. The applicant felt completely embarrassed. Another area manager quickly yelled out “I’m top in the State, Daniel”. That manager later pulled the applicant aside and told her that she had said this to pull attention away from the applicant as she could see that she was upset and embarrassed. Another manager texted the applicant telling her to ignore the comment and not take it personally. The applicant felt humiliated and considered that Mr Aquilina should have pulled her aside to discuss her KPI performance rather than embarrass her in front of her peers.
25. On 19 June 2019, a colleague told the applicant that in a conversation about a team being put together to set up a new store in Campbelltown the applicant’s name had been brought up. Mr Aquilina had responded, “No she is pregnant and I bet she will be fucking painful.”
26. At a meeting on 20 June 2019, the applicant told Ms Grattan that she had an ultrasound booked for 28 June 2019. When the applicant later reminded her of the appointment, Ms Grattan said, “What again? You never told me that!” The applicant subsequently felt uncomfortable asking for time off. The applicant could not afford to lose her job but felt the health of her unborn child must be a priority given her recent miscarriage.
27. On 26 June 2019, the applicant was asked by Ms Grattan to spend a whole day in an off-site in Bankstown to sort through stock. Ms Grattan had described the off-site as a hazard. The applicant wondered why, if it was such a hazard, she was happy to send a pregnant employee to work amongst the hazard. The applicant felt intimidated and scared to say no. The applicant did not want Ms Grattan to feel as though the applicant was using her pregnancy as an excuse for not performing the task.
28. On 4 July 2019, the assistant manager at the Bankstown store, Ms Ashley Losefo, resigned. Ms Losefo had previously told the applicant that she felt rundown and burnt out following Eid and Ramadan, was dealing with a personal family issue and was not sure if retail was for her. On 5 July 2019, the applicant received emails from Ms Grattan and Mr Aquilina questioning the resignation. The applicant felt that she was being made responsible for the loss of Ms Losefo. The applicant considered the tone of the emails was passive-aggressive and she felt stressed and anxious. Shortly afterwards, the applicant got a migraine and started vomiting.
29. On 6 July 2019, the applicant was admitted to Prince of Wales Hospital with bleeding. The applicant was overwhelmed and crying hysterically as she felt she was on the verge of losing her baby once again due to work-related stress.
30. The applicant returned to work on 11 July 2019. The day before she returned to work, Ms Grattan asked the applicant to work in the Chatswood store’s backroom to get it in order. The applicant again saw this as punishment for being absent. Ms Grattan did not ask the applicant if she was capable of performing such duties nor did Ms Grattan enquire about the applicant’s well-being. The applicant pushed herself all day to complete the task. The applicant sent Ms Grattan photos of the before and after along with a list of tasks she had completed when she was finished. The applicant did not receive a response from Ms Grattan and felt disheartened.
31. Earlier on 11 July 2019, the applicant had a conversation with the store manager, Luke. Luke burst into tears and described being spoken to in a belittling way by Ms Grattan on the previous day. Luke said he felt stupid and incompetent and disrespected by Ms Grattan. The applicant said that Mr Aquilina later made it seem as though Luke was frazzled due to the applicant’s lack of management.

32. On 12 July 2019, the applicant had a meeting with Ms Grattan at Bankstown. Ms Grattan asked the applicant how she was feeling and coping. The applicant broke down and cried. The applicant expressed to Ms Grattan that she felt she was being bullied. Ms Grattan responded that the applicant was having all these medical appointments and not being open about what was happening with her pregnancy. The applicant told Ms Grattan that she felt she was being treated unfairly by her and Mr Aquilina. Ms Grattan commented that maybe the applicant was not suited for the area manager role and should consider another role in the business. The applicant had never been questioned about her capability as an area manager and felt she was being continually devalued by Ms Grattan and Mr Aquilina.
33. As the applicant continued to express how she felt, Ms Grattan began to pack up her things and said she wouldn't continue the conversation. Ms Grattan suggested that the applicant go home as she was not in a state to be at work. Ms Grattan got up and took a phone call. The applicant said,

"At this moment I felt so insignificant, for Anna to believe that the phone call was more of a priority over attending to my emotional needs and providing some sort of comfort and support to her loyal employee who has worked for the business for four years was extremely hurtful, not to mention being left alone crying at a table in public whilst she 'took her call'."
34. The applicant left in an extremely upset and emotional state and sat in her car for about 45 minutes trying to calm down. The applicant called her sister and told her she didn't feel safe to drive as she was shaking and distraught. The applicant's sister left her job to come to the applicant's aid. The applicant went to the bathroom with her sister and noticed a clot of blood. The applicant was very upset and thought that the stress and pressures of work may have caused her to lose her unborn child again.
35. The applicant said she had not returned to work because she felt stressed, scared, threatened and intimidated by Ms Grattan and Mr Aquilina.
36. In her supplementary statement dated 19 March 2020, the applicant denied that she had ever been formally notified of any performance/competency issues. The applicant said her performance had never slipped and she always worked to the best of her ability.
37. The applicant specifically denied struggling in her role since mid-2018, saying she liked working in retail and serving customers. The applicant said she had always received positive feedback from customers. The applicant said that the only people that struggled with respect to her team were Ms Grattan and Mr Aquilina. The applicant said she maintained healthy relationships with all of her other colleagues.
38. The applicant said Ms Grattan had always been dismissive of her leave requests and insinuated that she took too much leave. The applicant said that even when she was off work for medical reasons, Ms Grattan continued to contact her regarding work matters. The applicant said that cleaning out backrooms was not her responsibility and she was already flat out with her own work.
39. The applicant said that from her perspective the decline in her mental health was brought on by the bullying and harassment from Ms Grattan and Mr Aquilina. The applicant did not consider her fear of an adverse pregnancy to be the main contributing factor to her psychological condition.
40. The applicant said she was consulting with her psychologist, Dr Vatiliotis. The applicant had previously been prescribed antidepressant medication but was weaned off this during her pregnancy. The applicant gave birth to a child on 5 January 2020.
41. The applicant said her life had been significantly affected as a result of the psychological injury and she did not feel she was the same person.

Respondent's witnesses

42. Attached to the Reply is a factual investigation report prepared by The Huxley Group dated 6 September 2019. Attached to the report are signed statements of Ms Grattan, HR/payroll manager, Ms Karen Symonds and an unsigned statement from Mr Aquilina.

Ms Grattan's evidence

43. Ms Grattan's statement is dated 26 August 2019.
44. Ms Grattan confirmed that the applicant had reported to her since April 2015. Ms Grattan said the applicant had been struggling in her role since mid-2018. The applicant had failed to maintain a healthy and supportive working relationship with her team. The applicant's team had not received the training and development they needed to be successful in their roles. Retention of staff had been a huge concern. Ms Grattan said the applicant struggled to meet deadlines and forgot to submit stationery orders for her area. In June 2019, the applicant had not adequately prepared the Bankstown store for Ramadan and Eid sales periods. The stores in the applicant's area had a history of delivering below average results. Ms Grattan found herself constantly corresponding with the applicant to enquire how she intended to work with her team to lift their results.
45. Ms Grattan said there was little structure or consistency within the stores in the applicant's area of responsibility. Two area managers had communicated with the applicant to provide ideas and solutions but the applicant did not take advantage of this assistance. Store managers were not being held accountable for meeting basic company expectations.
46. Ms Grattan said that when she was told that the applicant was pregnant in February 2019 she was very happy for her. Ms Grattan noted that the applicant had alleged that she had bullied and belittled her at a meeting on 15 February 2019. Ms Grattan said she was not at work on 15 February 2019 and had taken the day off on annual leave.
47. Ms Grattan denied that she questioned or refused sick leave. Ms Grattan said that whatever time the applicant asked to have off she was completely supportive. In regard to her workload, Ms Grattan said she was willing to step up and take over and expressed this several times through text messages and in person. Ms Grattan said she believed both she and Mr Aquilina were completely supportive of the applicant during this time.
48. Ms Grattan said that when she returned to work, the applicant provided a medical certificate and did not state that she was on restricted duties. The applicant mentioned that she was going back to the gym. Ms Grattan said that cleaning out off-site and backroom stock was very much part of an area manager's duties. Ms Grattan said the applicant was not told that she had to physically clean up the backroom. It was expected that she would support and guide the team at the store in doing this.
49. Ms Grattan said that Mr Aquilina had made a comment about a "drop the mic moment" during an informal meeting at Eastgardens. Ms Grattan said she and Mr Aquilina started the conversation by enquiring into the applicant's health. The applicant assured them she was feeling a lot better. Ms Grattan said Mr Aquilina was not referring to the applicant's health when he made the comment. They were talking about the applicant's work performance. Ms Grattan expressed the belief that the applicant had taken the comment out of context.
50. Ms Grattan said that she thought that the applicant's claim that she had humiliated her by commenting on her working a four-day week was made in reference to a store visit at Hornsby. The store manager told Ms Grattan that they didn't finish stock-take until after 11pm which Ms Grattan was shocked to hear. The store manager was very upset and vented her frustrations that the applicant was not providing enough guidance and clear instruction. Ms Grattan called a meeting between the three of them to get to the bottom of the issue.

Ms Grattan said the applicant and the store manager agreed that they could have better managed the issue and would do so going forward.

51. With regard to the applicant's claim that at a meeting on 18 June 2019, Mr Aquilina embarrassed and humiliated her by referring to her coming last with KPIs, Ms Grattan said the meetings were always open and honest and the content was pretty much the same each week. They always talked about KPI results, sharing wins as well as losses. Ms Grattan said the applicant never mentioned that she felt embarrassed during or after the meeting.
52. Ms Grattan said it was the applicant's job to organise the Bankstown off-site on 26 June 2019 but it was up to the applicant how she went about the task. Ms Grattan said she would never put anyone's safety in jeopardy and she found it disconcerting to hear the applicant's accusation that she intentionally sent a pregnant woman into a hazardous environment.
53. Ms Grattan said the resignation of the Bankstown assistant store manager was a shock as the previous area manager had highly recommended her as a great asset to the brand. They had no idea that she had intended to leave and so questioned the applicant about this.
54. Ms Grattan denied telling the applicant that she was no longer suited for an area manager role and should consider another role during the meeting on 12 July 2019. Ms Grattan said she was trying to get across the point that the applicant needed to focus on her development and revisit her goals and opportunities. The applicant knew that she was struggling in her role and was on a personal development plan.
55. Ms Grattan said she had arranged the meeting on 12 July 2019 to discuss how the applicant was coping with her workload after having five days of sick leave and to speak with her about her overall performance. Ms Grattan said she intended to let the applicant know that her performance would be managed in a more formal environment involving senior management and Human Resources.
56. Ms Grattan said the applicant accused Mr Aquilina and herself of being insensitive, not being supportive, bullying her by sending emails and texts constantly and demotivating her. Ms Grattan said the applicant was visibly very upset.

Mr Aquilina's evidence

57. Mr Aquilina prepared a statement on 20 August 2019 although it is unsigned. Mr Aquilina said he had known the applicant since April 2015 but was not her direct line manager. Ms Grattan reported to Mr Aquilina.
58. Mr Aquilina said he did not believe the applicant had been meeting the requirements of her role for about 18 months. Mr Aquilina was aware that Ms Grattan had been communicating with the applicant through emails and other documentation but the applicant failed to take her advice and guidance. The applicant's area was performing under the company average due to a failure to recruit the right people, lack of store support, inconsistent training and the applicant not taking a proactive approach to the store teams and sales environment.
59. Mr Aquilina said the applicant was not candid about her personal situation. They were left guessing about her personal and professional issues. An understanding of the applicant's personal situation may have enabled them to be more mindful and aware of it during this sensitive time.
60. Mr Aquilina said that on 28 February 2019 when the applicant called and said she was not feeling well, he and Ms Grattan had no idea that she was suffering a miscarriage. Mr Aquilina said he was not aware that the applicant had suffered a miscarriage until sometime in the beginning of March 2019. He had no idea that the applicant was grieving and recovering.

61. Mr Aquilina denied that there was meeting on 3 March 2019 as that was a Sunday, however, he did recall a meeting with the applicant and Ms Grattan regarding the applicant's performance. The applicant felt as though she was being picked on but could not provide examples of how. The applicant's performance and lack of communication regarding her leave were discussed. Mr Aquilina said he did recall that during this conversation he made a comment about the applicant "dropping the mic" but it was in no way made in reference to her miscarriage or health. The comment was made in reference to the applicant's performance as an area manager over the past 12 months.
62. With regard to the applicant's claim that Mr Aquilina had publicly stated that she was coming last with KPIs, Mr Aquilina said that the applicant had been attending meetings to discuss sales and KPIs for the past five years. The structure and content of the meetings had not changed and the applicant had never expressed any concern regarding the structure of the meetings or any comments he had made.
63. Mr Aquilina denied making a comment about the applicant being pregnant and painful. Mr Aquilina said he believed the comment had been completely made up and constituted a personal attack on himself.
64. Mr Aquilina said that overall, the applicant had not been performing in her role for 12 to 18 months. For her to draw a correlation between her pregnancy and the performance management was incorrect. Mr Aquilina said the applicant was a proud individual who could not accept help and guidance from the people around her and had struggled to build relationships with her team and colleagues.

Ms Symonds' evidence

65. Ms Symonds said she was responsible for Human Resources and payroll duties did not know the applicant personally. Ms Symonds said she was aware of performance and competency issues in relation to the applicant which had been brought to her attention by Ms Grattan.
66. In December 2018, Ms Symonds was contacted by an organisation in relation to a garnishee order on the applicant's salary for an outstanding debt. On 28 February 2019, Ms Symonds received notification that the applicant had been declared bankrupt. Ms Symonds said the applicant's performance had slipped markedly since late 2018 and she had been performance managed by her respective managers since that time. Ms Symonds said the applicant was treated no differently to other area managers.
67. Ms Symonds said it had been arranged for the applicant to engage in a meeting with Ms Grattan and Mr Aquilina on 15 July 2019 but she went off work and attended her doctor complaining of being stressed as result of being bullied in the workplace before the meeting took place.

Correspondence and other evidence

68. Attached to both the ARD and Reply are a series of email communications and text messages involving the applicant, Ms Grattan, Mr Aquilina, the applicant's other work colleagues and her sister.
69. Also in evidence are the applicant's Commonwealth Bank and ING Orange Everyday account statements. A schedule of bank records to 26 February 2020, prepared by the respondent's solicitors has also been filed.

Evidence from the applicant's treating practitioners

70. The clinical notes of Bondi Junction 7-day Medical Centre are in evidence. Relevantly, on 14 January 2019, Dr Bhavana Annabattula noted that the applicant had reported feeling anxious, had low mood, financial issues, poor sleep and waking up with panic attacks. Dr Annabattula formed the impression that the applicant had significant depression/anxiety. Dr Annabattula prepared a GP mental health plan and referred the applicant to a psychologist, Dr Veronica Vatiliotis.
71. During the same consultation, the applicant reported that she was late for her periods. A pregnancy test was performed and produced a positive result. The applicant was described as "very emotional. Was not planning for it but quite happy anyway".
72. On 15 January 2019, Dr San Shuen Ku recorded,
- "Pregnancy test positive yesterday
still shocked uncertain what to do.
Financial stress.
Partner is not keen to continue due to financial stress.
She is uncertain.
Tearful ++"
73. On 19 January 2019, Dr Annabattula noted that the applicant reported "poor sleep, still very anxious in general and stressed". The applicant was prescribed temazepam for trial "very occasionally".
74. The handwritten clinical notes of another general practitioner, Dr Christopher Soo are also in evidence. On 8 February 2019, Dr Soo's notes indicate that the applicant was "spotting on + off".
75. In April 2019, Dr Soo noted, "stress at work – small alopecia".
76. In May 2019, Dr Soo noted that the applicant was pregnant with an estimated due date of 17 January 2020.
77. A report to Dr Soo from the Royal Hospital for Women's Early Pregnancy Assessment Service, dated 9 July 2019, reported that the applicant had been reviewed after presenting with "PV bleed in pregnancy".
78. On 12 July 2019, Dr Soo's notes recorded,
- "Woke up ... Blood PV
Randwick Hospital
...
PV Bleed again
work stress
unrealistic goals...
nasty emails, SMS
WC ... 12.7 – 19.7.19"
79. An antenatal referral letter prepared by Dr Soo on 15 July 2019 reported that the applicant's current pregnancy concerns included "PV spotting".

80. The applicant first consulted Dr Vatiliotis on 26 July 2019. Dr Vatiliotis' report on that consultation indicated that the applicant rated herself as having extremely severe levels of depression anxiety and severe stress consistent with Dr Vatiliotis' clinical impression. Dr Vatiliotis said the applicant's symptoms fitted a diagnosis of major depressive disorder. Dr Vatiliotis said the applicant presented in the context of alleged workplace bullying. The applicant reported that she was made to feel incompetent and that her managers were unsupportive following her miscarriage earlier in the year. Dr Vatiliotis' handwritten clinical notes are also in evidence.
81. On 7 August 2019, the insurer wrote to Dr Soo asking him to respond to a series of questions about the applicant's claim. In response, Dr Soo indicated that the applicant was diagnosed with an "adjustment disorder – anxiety depression". Dr Soo was asked to detail the applicant's account of the cause of her injury, noting that the applicant was under performance management and a meeting had been held on 12 July 2019 to discuss coaching and support. Dr Soo responded,
- "Ms D Quiroz fell pregnant in January 2019 and on informing the management of her pregnancy the management went sour on her – unrealistic goals and demands, increased workloads, nasty email/SMS. She miscarried in Feb 2019 and things returned to normal and happy work environment. On finding out she was pregnant again in June 2019, things reverted to bullying."
82. Dr Soo indicated there were no pre-existing psychological problems. Dr Soo was asked what he believed to be the main contributing factor to the applicant's psychological condition and responded, "workplace bullying". Dr Soo provided an estimated timeframe for a full recovery of two to four months.
83. On 9 March 2020, Dr Soo prepared a report for the applicant's solicitors. Dr Soo cited a history and diagnosis consistent with his previous response to the insurer. Dr Soo said the workplace bullying had caused the adjustment disorder and the applicant was certified as unfit for work due to the adjustment disorder as a result of workplace bullying from 12 July 2019.
84. With regard to prognosis, Dr Soo said that since the birth of the applicant's daughter on 5 January 2020 the applicant had slowly improved. The applicant was still undergoing psychotherapy and "may be able to return to work in the near future and with a different company."

Certificates of capacity

85. The applicant has provided WorkCover certificates of capacity issued by Dr Soo dated between 25 July 2019 and 14 May 2020.
86. The certificates provide a diagnosis of "adjustment disorder – workplace stress/bullying". The applicant was first seen for the injury on 12 July 2019. The injury was said to be related to work due to,
- "Workplace stress. Unrealistic goals. Workload issues. Bullying by management. This happened when her employer found out she was pregnant in January 2019 which ended in miscarriage. On finding out that she became pregnant again in June 2019 bullying and pressure restarted."
87. In each certificate, the applicant is certified as having no current capacity for any employment.

Dr Khan

88. The applicant relies on medicolegal reports prepared by consultant psychiatrist, Dr Abdal W Khan, dated 19 November 2019 and 20 March 2020.
89. In his first report, Dr Khan indicated that he had reviewed the applicant's statement and the medicolegal reports prepared by the psychiatrist qualified by the respondent, Dr Bisht, dated 14 and 21 October 2019.
90. The applicant gave a history of experiencing difficulties with her mental health early in 2019. The applicant described the difficulties she had experienced in the workplace in a manner consistent with her written statement. The applicant said that on 12 July 2019 she had attended a medical appointment before work. She then attended a meeting with Ms Grattan in a public place. The applicant raised her concerns about the attitude of Ms Grattan and Mr Aquilina towards her. Ms Grattan prevented the meeting from proceeding and advised the applicant contact Human Resources. After this, the applicant arranged an appointment with her general practitioner due to her significant emotional distress.
91. As a result of these work-related stressors, the applicant had experienced a gradual deterioration in her mental state characterised by symptoms of depression and anxiety. The applicant denied any past psychiatric history. The applicant was taking citalopram.
92. The applicant identified her early miscarriage and recent relationship breakdown as other psychosocial stressors. Despite some initial grief in relation to the miscarriage, the applicant's mental state stabilised and she returned to work in full capacity within three days. The applicant identified her deteriorating mental state secondary to her work-related stressors as the reason for her relationship breakdown. The applicant denied any other significant recent psychosocial stressors.
93. Dr Khan made a diagnosis of major depressive disorder with anxious distress in accordance with DSM – 5 diagnostic criteria.
94. On the issue of causation, Dr Khan stated,

“Ms Quiroz's employment is the main contributing factor to her psychiatric/psychological injury. She suffered numerous work-related stressors during her employment as an area manager with Connor Clothing Pty Ltd, which are described in the 'History of Presentation' section of this report. These numerous work-related stressors caused Ms Quiroz to develop a work-related psychiatric/psychological injury and resulted in her developing the psychiatric condition of major depressive disorder with anxious distress.”
95. With regard to prognosis, Dr Khan said,

“At this stage, Ms Quiroz's prognosis remains guarded. Her mental state appeared to be deteriorating and impacting significantly on her social, occupational and other important areas of functioning. Ms Quiroz's general practitioner recently commenced her on antidepressant medication despite her current pregnant state. A medical practitioner would only prescribe psychotropic medications during pregnancy when there were significant concerns about the mental state of the patient and the benefits of psychotropic medications outweighed any risks.”

96. With regard to the applicant's capacity for work, Dr Khan said,

"Ms Quiroz developed symptoms of depression and anxiety that have resulted in major depressive disorder with anxious distress. She has been unable to return to work since 12 July 2019. She does not currently have capacity for work. Ms Quiroz was motivated to return to employment within her education, training and expertise once her mental state stabilised.

...

Ms Quiroz is not presently able to undertake any occupations as her mental health remains fragile."

97. Dr Khan was asked about the effect of the applicant's miscarriage and stated:

"Despite a previous miscarriage in early 2019, she returned to work in full capacity within three days after her miscarriage. Apart from initial grief in relation to the miscarriage, Ms Quiroz's mental state stabilised and allowed a return to work in full capacity within three days. She did not suffer a psychiatric condition as a result of her previous miscarriage in early 2019..."

98. Dr Khan was asked to comment on the reports of Dr Bisht:

"I do not agree with the opinion of Dr Bisht in the initial report dated 14 October 2019 and supplementary report dated 21 October 2019 that Ms Quiroz's miscarriage was the main contributory factor to her psychiatric/psychological condition. If Ms Quiroz's miscarriage was the main contributory factor to her psychiatric/psychological condition, she would not have been able to return to work in full capacity within three days of her miscarriage. Furthermore, if Ms Quiroz's miscarriage was the main contributory factor to her psychiatric/psychological condition, she would not have been able to sustain work in full capacity until 12 July 2019. It is clear from the history provided by Ms Quiroz that her mental state started to deteriorate due to work-related stressors before her miscarriage and her pervasive mental health difficulties were perpetuated by ongoing work-related stressors."

99. Dr Khan also disagreed with Dr Bisht's diagnosis of an adjustment disorder, stating that anhedonia noted by Dr Bisht was not typical of an adjustment disorder but a core symptom of a major depressive disorder.

100. In the supplementary report of 20 March 2020, Dr Khan reiterated his view that the applicant's injury was caused by the numerous work-related stressors perpetuated by management including, Ms Grattan and Mr Aquilina. These repeated work-related stressors resulted in the applicant's subsequent incapacity to work from 12 July 2019.

101. Asked whether any psychological injury or incapacity flowed from the applicant's failed pregnancy, Dr Khan stated,

"The fact that Ms Quiroz was able to return to work in full capacity indicates that no aspect of her psychiatric/psychological injury or incapacity flowed from her failed pregnancy. If this was the case, Ms Quiroz would not have been able to return to work in full capacity and it is unlikely that she would have been emotionally stable enough to try for another pregnancy, which eventually occurred in May 2019. Ms Quiroz's psychiatric/psychological injury and incapacity to work flowed completely as a result of her workplace psychiatric/psychological injury."

Dr Bisht

102. The respondent relies on medicolegal reports prepared by psychiatrist, Dr Yajuvendra Bisht, dated 14 and 21 October 2019. Dr Bisht noted that he had reviewed the factual investigation report including, evidence from the employer, a report from Dr Soo and Dr Soo's certificates of capacity.
103. Dr Bisht took a detailed history of the applicant's miscarriage. The applicant described this as a "substantially stressful event" for her and said that after the event she had thoughts of grief for the next few months. When she had these thoughts, the applicant would feel sad and teary. The applicant also had flashbacks of the excessive bleeding she experienced. The applicant had difficulty sleeping on some nights. She started to experience decreased interest in previously pleasurable activities and lack of motivation. When the applicant fell pregnant again, she stopped having thoughts of grief but started to have frequent thoughts involving a fear of having another miscarriage.
104. Dr Bisht said the applicant "added that", around the beginning of 2019, she also started to have stress at her workplace. The applicant said that her manager's attitude towards her changed when informed of her pregnancy and the manager asked the applicant to do tasks outside her job description. The tone of communication became harsh and there was excessive criticism of her work. The applicant said the last straw was when she had a meeting with one of the managers and expressed her concerns but was not listen to. The applicant also had noticed some small blood clots on the day of the meeting and was quite stressed about that as she had been fearing that she was having another miscarriage.
105. Dr Bisht made a diagnosis of an adjustment disorder with mixed anxious and depressed mood.
106. Dr Bisht said there were work and non-work related factors leading to the injury. Dr Bisht was asked to compare those factors and express an opinion as to the main contributing factor to the applicant's psychological condition. Dr Bisht said,
- "Considering the timing of onset of the symptoms, the main contributory factor was the miscarriage. She had been having performance related communication with her manager since late 2018, but had not developed psychiatric symptoms then."
107. With regard to capacity for work, Dr Bisht stated,
- "She has the capacity to do part time ie 20 hours a week work, in suitable duties (not involving complex mental tasks or frequent interaction with unfamiliar people), but with a different employer, at this stage. The time frame for return to full capacity would be 6 months."
108. In the supplementary report, Dr Bisht reiterated his view as to the predominant cause of the applicant's condition, stating,
- "The predominant cause of the condition is non work related ie the miscarriage.
- There was minor contribution from performance related communication with the manager, which was perceived as harassment by the worker. The factual investigation didn't find evidence of harassment."

Applicant's submissions

109. Mr Tanner for the applicant submitted that the applicant's injury was caused by a series of work-related stressors. Mr Tanner noted that the applicant suffered a miscarriage on 20 February 2019 and submitted that this was not the main contributing factor to the applicant's psychological injury. It was noted that the applicant continued to work following the miscarriage up until the deemed date of injury. It followed that the miscarriage was not a relevant contributing factor to the injury. Mr Tanner further submitted that there was no factual dispute as to the events on 12 July 2019.
110. Mr Tanner referred me to the applicant's statement and submitted that it was the applicant's perception that there was a change in Ms Grattan's approach to her after she informed Ms Grattan of her pregnancy. The applicant perceived Ms Grattan to become aggressive, speaking down to her and bullying her.
111. Mr Tanner referred me to the applicant's evidence of a meeting which took place on 15 February 2019 at which the applicant told Ms Grattan that she would not tolerate being bullied. The applicant's evidence was that she experienced significant distress as a result of that encounter, feeling chest pains and dizziness. It was the applicant's perception that the meeting with Ms Grattan was a contributor to the loss of her child.
112. Mr Tanner noted that the applicant returned to work five days after her miscarriage on 25 February 2019. Mr Tanner submitted that the miscarriage was not otherwise incapacitating and that the applicant continued working until 12 July 2019.
113. Mr Tanner referred to the applicant's evidence of a meeting on 3 March 2019 during which Mr Aquilina made a comment with regard to a "drop the mic moment". The applicant felt disregarded and not heard and found the comment by Mr Aquilina to be confronting and offensive. It was the applicant's perception that the comment was made with reference to her having suffered a miscarriage. Mr Tanner submitted that it was only necessary to deal with the event at the level of the applicant's perception. Mr Tanner noted that Mr Aquilina's evidence confirmed that the comment was made. The applicant perceived that Mr Aquilina was siding with Ms Grattan.
114. Mr Tanner noted that an incident involving a store manager, Ms Less in March 2019 confirmed the applicant's perception that she had been the subject of adverse enquiry and exposed to prejudicial treatment by Ms Grattan. The applicant perceived that false accusations had been made against her. At a meeting on 29 March 2019, the applicant felt that Ms Grattan had manipulated a conversation to attempt to make the applicant look bad.
115. Mr Tanner noted that the applicant had felt comfortable after a meeting on 10 April 2019 with Ms Grattan and Mr Aquilina. The applicant made a conscious effort to work on the areas agreed upon and was happy to go to work.
116. Mr Tanner noted the applicant's evidence that a national training manager, Mr Tadros had told the applicant that he had heard good things about her. Mr Tanner submitted that this showed a discrepancy between the manner in which Ms Grattan was dealing with the applicant and the feedback she was getting from the respondent's other employees.
117. Mr Tanner noted that at a meeting on 18 June 2019 Mr Aquilina had yelled at the applicant about coming last in the state with her KPIs in the company of other area managers. This was embarrassing to the applicant. On 19 June 2019, another employee told the applicant that Mr Aquilina had indicated that the applicant should not be part of a team to set up a new store because she was pregnant and would be "painful". The applicant found this comment to be disturbing and discriminatory.

118. Mr Tanner noted the applicant's evidence that upon the resignation of an assistant manager, Ms Losefo, she received an email from Ms Grattan on 5 July 2019 questioning the resignation. The applicant felt the email was passive-aggressive in tone and it made her feel stressed and anxious. The following day, the applicant was admitted to hospital and felt at risk of losing her pregnancy again due to work-related stress.
119. Mr Tanner submitted that the applicant's evidence with regard to her interaction with the manager of the Chatswood store on 11 July 2019 indicated that another employee was being subjected to the same disrespectful conduct by Ms Grattan and Mr Aquilina.
120. Mr Tanner said the final stressor was the meeting with Ms Grattan at Bankstown on 12 July 2019. The applicant said she had broken down and cried and told Ms Grattan that she felt she was being bullied. Ms Grattan's response was deflective. Ms Grattan suggested that the applicant may not be suited for the role. Mr Tanner said it was understandable that the applicant regarded this as a cause for concern. Whilst the applicant continued to express how she felt, Ms Grattan packed up and refused to continue the discussion. The applicant was taken aback and was highly emotional. In this context, Ms Grattan took a phone call. Mr Tanner said this was an example of insensitivity and showed an absence of empathy. The fact that the interaction occurred in public caused the applicant to experience embarrassment. Mr Tanner noted that this was the last day on which the applicant worked.
121. Mr Tanner noted that Ms Grattan gave an account of the meeting on 12 July 2019 in her statement. Mr Tanner said Ms Grattan's account confirmed the applicant's perception was that she was being unfairly treated. Ms Grattan also confirmed that the applicant was visibly upset.
122. Mr Tanner noted that Mr Aquilina's evidence also confirmed that the applicant felt she was being picked on although he said she could not provide adequate examples. Although Mr Aquilina gave a different interpretation to his comment regarding the "drop the mic moment", his evidence confirmed that this was a real event.
123. Mr Tanner also referred me to an email from Mr Aquilina on 12 July 2019 which confirmed that the applicant had gone home overwhelmed by a coaching conversation with Ms Grattan earlier that day.
124. Mr Tanner submitted that it was plain that there was discord in the workplace. The visible distress of the applicant during her last encounter in the workplace explained the psychological diagnosis made by the applicant's doctors. Mr Tanner submitted that it was "astonishing" that the respondent was attempting to argue that an event on 20 February 2019, several months prior to the last day at work, was the reason for the applicant's psychological condition.
125. Mr Tanner referred me to the reports of Dr Khan. Mr Tanner noted that the history taken by Dr Khan was consistent with the applicant's evidence. Mr Tanner noted that the applicant reported having stabilised after a period of grief following her miscarriage and that there was no evidence of any absences for psychological treatment in the period following the applicant's return to work after the miscarriage until 12 July 2019. Mr Tanner submitted that Dr Khan found that the numerous work-related stressors were the main contributing factor to the applicant's psychological condition and that she had no current capacity for work.
126. Mr Tanner referred to the report of Dr Bisht dated 14 October 2019. Mr Tanner said Dr Bisht took an incorrect history of symptoms first occurring in February 2019. Mr Tanner said it was plain from the clinical records that the applicant's psychological symptoms started prior to her miscarriage. Mr Tanner said Dr Bisht uncritically adopted the opinions expressed in the factual investigation without considering the applicant's perception of the relevant events.

127. Mr Tanner said Dr Bisht did not explain his opinion that the main contributing factor to the applicant's condition was her miscarriage. Dr Bisht was said to have engaged in no analysis of the work-related stressors identified by the applicant or the evidence of the symptoms she developed in response to what she perceived as harassment from her manager.
128. Mr Tanner noted that in his supplementary report, Dr Khan reiterated his diagnosis and opinions.
129. Mr Tanner said it was clear that the reason for the applicant's decompensation on 12 July 2019 was the way in which she was treated by the respondent. Mr Tanner submitted that the conclusion that the applicant's psychological condition was work-related was inescapable. As a result, Mr Tanner submitted that I would find that the applicant suffered a work-related psychological injury for the purposes of s 4 of the 1987 Act.
130. With regard to capacity, Mr Tanner submitted that the applicant had WorkCover certificates of capacity recording continuing incapacity. Those certificates were issued by Dr Soo, who had regularly seen the applicant. Mr Tanner said there was no reason not to accept those certificates.
131. Mr Tanner submitted that the only evidence from the respondent was the reports from Dr Bisht, who considered the applicant was capable of performing 20 hours per week of suitable duties with a recovery expected within six months. Mr Tanner submitted that Dr Bisht's opinion was not supported by any reasoning.
132. In contrast, Mr Tanner submitted that Dr Soo's clinical notes showed many dates of attendance. Dr Soo was in a position to reliably gain an impression of the applicant's continuing condition. Mr Tanner submitted that Dr Khan's medicolegal opinion was supported by Dr Soo in relation to both causation and incapacity.
133. Mr Tanner concluded that I would award weekly benefits pursuant to ss 36 and 37 of the 1987 Act on the basis of the applicant having no current work capacity and at a pre-injury average weekly earnings (PIAWE) rate of \$1200 from 13 July 2020 continuing to date and beyond.

Respondent's submissions

134. Ms Goodman submitted that it was necessary to consider the context in which the applicant's psychological condition arose. Ms Goodman said the evidence showed the applicant was experiencing difficulties in employment since 2018. The correspondence in evidence showed ongoing coaching of the applicant and dialogue with regard to her performance and that of the stores for which she was responsible. Ms Goodman conceded, however, that a defence pursuant to s 11A(1) of the 1987 Act had not been raised by the respondent.
135. Ms Goodman referred me to the clinical notes of Dr Annabattula, which showed that on 14 January 2019 the applicant complained of psychological symptoms resulting from financial stress, relationship difficulties and pregnancy. There was no indication that work was causing the applicant symptoms at that point.
136. Ms Goodman referred me to the mental health care plan prepared by Dr Annabattula on 14 January 2019. Ms Goodman noted that there was no reference to work in the plan.
137. Ms Goodman noted that a referral had already been made to a psychologist, Dr Vasiliotis in January 2019. Ms Goodman noted that there was little mention of workplace stressors in the documents available from Dr Vasiliotis.
138. On 15 January 2019, Dr Annabattula's notes recorded that the applicant was shocked by her pregnancy. The applicant's partner was said to be "not keen" due to financial stress. On 19 January 2019, the applicant reported poor sleep and being quite stressed.

139. Ms Goodman submitted that at this point in time the applicant had not told her employer anything about her pregnancy. The clinical notes showed that the applicant was already experiencing psychological symptoms due to a number of non-work-related factors. Ms Goodman submitted that Dr Khan was unaware of the setting in which the applicant's symptoms arose when he expressed the opinion that her psychological condition was due to events in the workplace.
140. Ms Goodman submitted that the first reference to work in Dr Soo's clinical notes occurred in April 2019.
141. Ms Goodman noted that the applicant was pregnant again by June 2019. Ms Goodman referred me to the document issued by the Royal Hospital for Women's Early Pregnancy Assessment Service dated 9 July 2019 indicating that the applicant had presented with bleeding in pregnancy.
142. On 12 July 2019, being the same day on which the applicant went off work, Dr Soo's clinical notes referred to the applicant waking up with blood.
143. Ms Goodman also referred me to the antenatal referral letter dated 15 July 2019 which noted the applicant's previous miscarriage and identified that the applicant's current pregnancy concerns included "PV spotting".
144. Ms Goodman took me through the email correspondence in evidence and noted that the applicant had claimed that there was a difference in the respondent's attitude after she had informed it of her pregnancies. Ms Goodman submitted that the alleged change in attitude was not borne out by the email correspondence. Ms Goodman said the tone of the email correspondence was neutral and positive. Ms Goodman said there was a firmly expressed email on 5 July 2019 from Mr Aquilina but the tone of the email was not aggressive.
145. Ms Goodman referred me to each of the witness statements in the Reply. Ms Goodman submitted that the statements and email correspondence gave an indication of how the applicant was performing in her role from 2018 onwards and the steps taken to address the applicant's performance. The applicant's performance did not improve. Ms Goodman submitted that despite these performance issues there was no change in the volume or tone of the emails between the applicant and her supervisors. The contemporaneous evidence suggested an ongoing normal work relationship when the applicant decompensated in July 2019. Ms Goodman submitted that the absence of any change in the respondent's interactions with the applicant indicated that Dr Bisht's opinions on causation would be preferred.
146. Ms Goodman noted that the applicant's grievance against Ms Grattan and Mr Aquilina attached to the Reply indicated that she was fearful of a further miscarriage. Dr Annabattula's clinical records identified stressors outside of work including the reaction of the applicant's partner to her pregnancy. Ms Goodman noted that the evidence indicated that the applicant's relationship with her partner had broken down. Ms Goodman submitted that this evidence all supported the opinion of Dr Bisht that it was the applicant's miscarriage and her fear of a further miscarriage which were the main contributing factors to her adjustment disorder.
147. Ms Goodman referred me to the answers given by Dr Soo in response to a series of questions posed by the insurer on 7 August 2019. Ms Goodman noted that the applicant's first pregnancy and miscarriage in February 2019 and second pregnancy in May/June 2019 were factors which were noted to have had led to the injury. Ms Goodman submitted that Dr Soo only had the applicant's version of events in giving his opinion. Ms Goodman noted that, at that time, Dr Soo considered the applicant would make a full recovery within two to four months.

148. Ms Goodman noted the first report of Dr Khan and submitted that Dr Khan accepted the applicant's history without considering the effects of her miscarriage and pregnancy concerns. Ms Goodman submitted that those matters were properly evaluated by Dr Bisht and his opinion would be preferred. Ms Goodman noted that Dr Khan had provided a supplementary report but submitted that having regard to the totality of the evidence I would not be satisfied that the applicant was undermined, humiliated or bullied as indicated by Dr Khan. Ms Goodman submitted that it was too simplistic to say that because the applicant had returned to work following her miscarriage that it had not affected her or caused continuing psychological symptoms.
149. Ms Goodman referred me to the presidential decision in *AV v AW*¹ and submitted that a determination as to the main contributing factor could be assisted by medical opinion but it was for an arbitrator to identify the various causative factors and come to a conclusion. Ms Goodman said the main contributing factors to the applicant's injury were non-work-related events including, the applicant's miscarriage and her fear of another adverse pregnancy event.
150. Ms Goodman submitted that the applicant's capacity had been formally notified as being in dispute in the insurer's s 78 notice. With regard to the applicant's capacity for work, Ms Goodman referred me to the report of Dr Soo dated 9 March 2020 and noted that Dr Soo had given the opinion on that occasion that the applicant had slowly improved since the birth of her daughter. Dr Soo considered that the applicant could return to work with a different company.
151. Ms Goodman also referred me to the bank records in evidence and submitted that they were inconsistent with the applicant's evidence that she was unable to leave home following her psychological injury. The bank statements, to the contrary, suggested that the applicant was going out just about every day.
152. Ms Goodman noted that the WorkCover certificates in evidence were expressed in identical terms. Ms Goodman submitted that it was apparent that the doctor had not taken time to consider the applicant's real capacity for work and was just reissuing the certificates. The opinions expressed on the certificates did not take into account the respondent's evidence. Ms Goodman submitted that I would not give the certificates weight.
153. Ms Goodman noted that Dr Bisht had expressed the view that the applicant had capacity to do part-time work up to 20 hours per week with a different employer at the time of his report.
154. Ms Goodman conceded that s 32A of the 1987 Act did not contain the discretionary element present in the previous statutory scheme for the purpose of calculating the applicant's entitlement to weekly benefits. Ms Goodman noted that the applicant had provided no evidence as to when she would have gone off work to have her baby. Ms Goodman submitted that the applicant would have been off work from around one month prior to her due date. The applicant had not given evidence as to how she had planned to look after her baby and return to work after the birth. Ms Goodman submitted that the applicant would not be entitled to weekly compensation during the period of her confinement. Ms Goodman did not, however, identify any case law or provision in the applicable statutory framework in support of her submission.

Applicant's submissions in reply

155. Mr Tanner reiterated that no s 11A(1) defence had been raised by the respondent, but said much of Ms Goodman's submissions had related to the applicant's work performance.

¹ [2020] NSWCCPD 9.

156. Mr Tanner noted Ms Goodman's submission that there had been no change in the tone or number of emails exchanged between the applicant's supervisors and that there were ongoing performance issues. Mr Tanner submitted that it was necessary to distinguish between tone expressed in writing and tone in face-to-face interactions.
157. Mr Tanner submitted that the respondent's evidence and submissions demonstrated that issues related to the applicant's work performance were causative of the applicant's psychological condition.
158. Mr Tanner noted Ms Goodman's reference to the clinical notes of Dr Annabattula in January 2019 but said they were irrelevant to the injury which was the subject of the present proceedings. Mr Tanner submitted that the applicant did not rely on any incident in January 2019 as being causative of her condition. Mr Tanner noted that there was no evidence of a pre-existing condition.
159. Mr Tanner submitted that although Dr Bisht considered the applicant's miscarriage in February 2019 was the main contributing factor to her condition, that event was irrelevant given the timing of the injury pleaded in these proceedings.
160. Although there was a mental health plan and referral to a psychologist in January 2019, the applicant did not attend a consultation with Dr Vatiliotis until July 2019. Mr Tanner submitted that this suggested that events in January and February 2019 were not debilitating or causative of an injury within the meaning of the 1987 Act.
161. Mr Tanner submitted that the email from Mr Aquilina, dated 5 July 2019, a week prior to her going off work, singled the applicant out for criticism, causing her to feel she had been treated unfairly.
162. Mr Tanner submitted that it was not necessary for the applicant to establish that bullying and harassment had occurred. The applicant was only required to establish that conduct in the workplace was causative of her psychological condition. It was the applicant's perception that she was bullied and harassed.
163. Mr Tanner submitted that an email from Mr Aquilina dated 11 July 2019 about problems at the Warriewood store was confrontational and caused the applicant to feel threatened. Mr Tanner noted that the email was sent one day prior to the applicant's decompensation and was capable of giving rise to a perception of feeling under attack.
164. With regard to the submission that the WorkCover certificates were identical, Mr Tanner noted that it was the description of injury which did not vary. Mr Tanner submitted that it could not be suggested that the general practitioner had not considered the applicant's actual capacity.
165. Mr Tanner submitted that although there was evidence that the applicant was concerned about experiencing a further miscarriage, the applicant had grounds to be concerned in the context of the stress she was experiencing in her workplace. Mr Tanner submitted that there was no contemporaneous evidence to support a conclusion that the miscarriage in February 2019 caused the applicant's psychological condition.
166. Mr Tanner noted that the clinical record of Dr Soo dated 12 July 2019 made reference to unrealistic goals at work. The attendance on that occasion was due to the meeting with Ms Grattan rather than the bleeding the applicant had experienced in her pregnancy.
167. Mr Tanner described the submission that the evidence of the applicant's partner leaving her lent weight to Dr Bisht's opinion as "extraordinary". Mr Tanner submitted that Dr Bisht's opinion was expressed prior to the applicant's partner leaving and the baby's birth. There was no reference to these events in Dr Bisht's report.

168. Mr Tanner submitted that the email correspondence in evidence supported the applicant's claim. There was an undisputed workplace event on 12 July 2019 causing the applicant to consult her general practitioner the same day. The text messages between the applicant and her sister that day provided a contemporaneous record of the applicant's perception of the meeting with Ms Grattan that day.
169. Mr Tanner submitted that the correspondence between the applicant and her supervisors from June 2018 was irrelevant.
170. With regard to the applicant's incapacity, Mr Tanner submitted that I would prefer the opinions of Dr Soo and Dr Khan in finding that there was continuing incapacity. Mr Tanner submitted that Dr Bisht did not explain the basis for his opinion that the applicant had capacity to work 20 hours per week in suitable employment.
171. Mr Tanner submitted that there was no basis under case law or legislation for accepting Ms Goodman's submission that the applicant was not entitled to weekly compensation during the period of her confinement.

FINDINGS AND REASONS

Psychological injury

172. Section 9 of the 1987 Act provides that a worker who has received an 'injury' shall receive compensation from the worker's employer in accordance with the Act. The term 'injury' is relevantly defined in s 4 as:

"In this Act:

injury:

- (a) means personal injury arising out of or in the course of employment,
- (b) includes a disease injury, which means:
 - (i) 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, and
 - (ii) 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"

173. In the case of a disease injury, s 4(b) requires that employment be the "main contributing factor" to the contraction or aggravation of the disease. In *AV v AW*², Snell DP considered the test, particularly as it applies in s 4(b)(ii), and observed:

"The following may be taken from the above:

- (a) The test of 'main contributing factor' in s 4(b)(ii) is more stringent than that in s 4(b)(ii) in its previous form, which applied in conjunction with the test in s 9A. There will be one 'main contributing factor' to an alleged aggravation injury.

² *AV v AW* [2020] NSWCCPD 9.

- (b) The test of 'main contributing factor' is one of causation. It involves consideration of the evidence overall, it is not purely a medical question. It involves an evaluative process, considering the causal factors to the aggravation, both work and non-work related. Medical evidence to address the ultimate question of whether the test of 'main contributing factor' is satisfied is both relevant and desirable. Its absence is not necessarily fatal, as satisfaction of the test is to be considered on the whole of the evidence.
- (c) In a matter involving s 4(b)(ii) it is necessary that the employment be the main contributing factor to the aggravation, not to the underlying disease process as a whole."

174. "Psychological injury" is further defined in s 11A(3) of the 1987 Act:

- "(3) A psychological injury is an injury (as defined in s 4) that is a psychological or psychiatric disorder. The term extends to include the physiological effect of such a disorder on the nervous system."

175. In *Attorney General's Department v K³ (K) Roche DP* summarised the principles to be applied in determining causation in cases of psychological injury at [52]:

"The following conclusions can be drawn from the above authorities:

- (a) employers take their employees as they find them. There is an 'egg-shell psyche' principle which is the equivalent of the 'egg-shell 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 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
- (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."

176. Further at [54]:

"The critical question is whether the event or events complained of occurred in the workplace. If they did occur in the workplace and the worker perceived them as creating an 'offensive or hostile working environment', and a psychological injury has resulted, it is open to find that causation is established. A worker's reaction to the events will always be subjective and will depend upon his or her personality and circumstances."

³ [2010] NSWCCPD 76.

177. The medical evidence in this case confirms that the applicant suffers from a diagnosable psychological condition although opinion is divided as to the appropriate diagnosis. Dr Bisht and Dr Soo have diagnosed an adjustment disorder whereas Dr Khan and Dr Vatiliotis have expressed the opinion that the correct diagnosis is one of a major depressive disorder. For present purposes it is not necessary to come to a concluded view as to the proper diagnosis. I am satisfied that the applicant has a psychological condition consistent with s 11A(3) of the 1987 Act.
178. The primary dispute relates to the cause of the applicant's psychological condition. The applicant claims that it was a series of workplace stressors over the period from January 2019 to 12 July 2019, which led to her contracting the psychological condition. The applicant's description of the alleged injury is one which is consistent with a disease injury for the purposes of s 4(b) of the 1987 Act. There is no indication that the applicant had a pre-existing psychological condition. I accept therefore that the relevant test is that under s 4(b)(i), namely whether employment was the main concluding factor to the applicant contracting the psychological condition.
179. The respondent disputes that employment was the main contributing factor to the applicant contracting the psychological condition. The respondent relies on the medicolegal reports of Dr Bisht in this regard. Dr Bisht's history focused predominantly on the effects of the applicant's miscarriage in February 2019 and her concerns in relation to the viability of her second pregnancy in June 2019. I am satisfied on the evidence that the applicant did indeed sustain a miscarriage in February 2019. I am also satisfied that the applicant experienced a number of concerning symptoms early on in her second pregnancy.
180. The contemporaneous medical evidence confirms that in the days leading up to the cessation of work, the applicant was experiencing some bleeding. I am satisfied that on 9 July 2019, the applicant was reviewed at the Royal Hospital for Women's Early Pregnancy Assessment Service for this reason. The evidence also indicates that on the applicant's last day of work she woke up with similar bleeding. An antenatal referral letter prepared by Dr Soo on 15 July 2019 confirmed that the applicant's current pregnancy concerns included "PV spotting".
181. The history given to Dr Bisht and the applicant's own evidence confirms that she was concerned by these symptoms and held fears in relation to her second pregnancy as a result of her previous experience. I accept, having regard to the lay and medical evidence, that these fears and concerns were relevant and contributing factors to the applicant's psychological condition. It is, however, necessary to consider all of the factual and medical evidence in forming a view as to "the main contributing factor" to the applicant's psychological condition.
182. Ms Goodman's submissions pointed to a number of other psychosocial stressors that may have contributed to the applicant's condition. These included financial stress, relationship difficulties and stress related to the applicant's first pregnancy being unplanned.
183. The evidence of Ms Symonds and the clinical notes of Dr Annabattula confirm that in the early part of 2019 the applicant was experiencing financial difficulties. Although the applicant has not given direct evidence in relation to this issue, she has not disputed Ms Symonds' evidence that she had been informed that the applicant was declared bankrupt around this time. Whilst I accept, relying on Dr Annabattula's clinical records, that financial issues were causing psychological symptoms in January 2019, there is no evidence of any incapacity for work resulting from those symptoms at the time. The applicant was referred to see Dr Vatiliotis but did not in fact consult with her until late July 2019. I accept Mr Tanner's submission that the applicant continued to work apart from periods of leave for medical reasons related to the applicant's miscarriage in February 2019. Financial issues are not identified as a cause of the applicant's psychological condition in the later medical evidence from Dr Soo, Dr Vatiliotis or the medicolegal experts.

184. There is also reference in the material before me to the applicant's relationship breaking down prior to the birth of her child. There is, however, no evidence that this occurred prior to the cessation of work. Dr Khan has expressed the view that the relationship breakdown was in fact caused by the applicant's psychological condition. I also accept Mr Tanner's submission that Dr Bisht's reports do not identify that relationship difficulties were a contributing factor to the applicant's contraction of a psychological condition. I am not satisfied that relationship difficulties were a contributing factor to the contraction of the applicant's psychological condition.
185. The general practitioner's records tend to confirm that the applicant's first pregnancy was unplanned. The notes of Dr Annabattula and Dr Ku both indicate that the applicant was shocked by the pregnancy, was not planning for it and was uncertain about what to do. Although I accept that this circumstance may have contributed to the applicant's psychological symptoms in January 2019, there is nothing in the later medical evidence to suggest that the unplanned nature of the pregnancy in January 2019 was a contributing factor to the applicant's current psychological condition. There is also no evidence that the applicant's second pregnancy was unplanned.
186. The factual and medical evidence consistently indicates that workplace stressors contributed to the contraction of the applicant's psychological condition.
187. The applicant has described a series of difficult events in the workplace commencing from January 2019, predominantly involving her interactions with Ms Grattan and Mr Aquilina. That these events were real and in fact occurred is, in many instances corroborated contemporaneous email correspondence and text messages. The evidence of Ms Grattan and Mr Aquilina also confirms that many of these events took place although there is a factual dispute as to the occurrence of some events. There is also disagreement as to the nature or characterisation of those events which did occur.
188. It is clear from their statements that Ms Grattan, Mr Aquilina and Ms Symonds held a view of the applicant's performance in the workplace, and the nature and purpose of their interactions with the applicant during the relevant period, that was very different to the applicant's own.
189. It is not necessary for the applicant to establish that her perception of events was the correct one or even that her perception was objectively reasonable. If there were events which actually occurred in the workplace and these were perceived by the applicant 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.
190. Having regard to the totality of the evidence I am satisfied that there were indeed a number of real events in the applicant's workplace, which she perceived as creating an offensive or hostile working environment.
191. I accept that on or around 15 February 2019, the applicant had a meeting with Ms Grattan in which she expressed the view that she was being bullied by Ms Grattan. Although Ms Grattan denies that a meeting could have taken place on 15 February 2019 as she was off work on annual leave that day, Ms Grattan has not denied that a meeting of this nature took place around that time. The applicant has described a work colleague noticing that she was upset following the meeting and encouraging her to calm down. I am satisfied that it was the applicant's perception that the stress she experienced as a result of this meeting and her other recent interactions with Ms Grattan contributed to the loss of her child the following week.

192. I am satisfied that on her return to work, the applicant was asked to complete tasks involving cleaning up backrooms at the Eastgardens and Chatswood stores. I accept that the applicant perceived that she was allocated these tasks as a form of punishment for taking time off although I am not satisfied, having regard to Ms Grattan's and Mr Aquilina's evidence that this was their actual motivation in allocating the work.
193. The evidence from the applicant, Ms Grattan and Mr Aquilina consistently indicates that there was a meeting on or around 3 March 2019 during which Mr Aquilina made a comment about the applicant "dropping the mic". The applicant's evidence was that she interpreted this comment as being made in reference to her recent miscarriage. The applicant said she was shocked and offended by the comment and considered it heartless and insensitive. The applicant said she went to the bathroom and sat in a cubicle crying afterwards. Both Mr Aquilina and Ms Grattan indicate that in their view, the comment referred to the applicant's work performance over the previous 12 months.
194. I accept that there was an interaction involving the manager of the Hornsby store, Ms Less in mid-March 2019. I accept that Ms Grattan indicated to the applicant that Ms Less felt unsupported and underdeveloped by the applicant. I accept that the applicant perceived this to be a false accusation and perceived that Ms Grattan had used manipulative tactics to collect negative feedback about the applicant's performance. Having regard to Ms Grattan's evidence, I am not, however, satisfied that this characterisation of the interaction was objectively accurate.
195. I accept that during a meeting with other area managers on 18 June 2019, Mr Aquilina said that the applicant was coming last with her KPIs in New South Wales and that this caused the applicant to feel upset and embarrassed. I also accept Ms Grattan's and Mr Aquilina's evidence that this type of interaction would have taken place regularly at area manager meetings over a long period of time and was not specifically intended to embarrass the applicant in front of her peers.
196. I accept that on 26 June 2019, the applicant was asked to clean up an off-site in Bankstown. I accept that the applicant considered this to be hazardous in her circumstances but felt intimidated and scared to refuse the task. I also accept that it was Ms Grattan's perception that this task formed part of the applicant's normal duties and she had not intended to place the applicant at risk.
197. I accept that on 4 July 2019, the assistant manager of the Bankstown store, Ms Losefo resigned and that Ms Grattan and Mr Aquilina sent emails to the applicant questioning the resignation and expressing shock at her departure. I do not accept that the tone of the emails was overtly aggressive, unprofessional or otherwise inappropriate. I do accept, however, that the applicant felt stressed and anxious upon receiving the emails and that the next day presented to hospital with pregnancy related bleeding. I accept the applicant's evidence that she felt that she may once again lose her baby due to work-related stress.
198. I accept that the applicant was asked to work in the backroom of the Chatswood store on 11 July 2019 and that there was a difficult interaction involving the store manager, Luke, that day. I accept that Mr Aquilina sent an email to the applicant about it and this contributed to her psychological symptoms.
199. I accept on the evidence of both the applicant and Ms Grattan that there was a meeting at Bankstown on 12 July 2019 during which the applicant became highly emotional and expressed to Ms Grattan that she felt she was being bullied, was not being supported and that Ms Grattan and Mr Aquilina were being insensitive. Ms Grattan's evidence confirms that the applicant expressed these concerns and was visibly very upset during the meeting.

200. Having regard to the totality of the evidence I am not satisfied that the attitude of Ms Grattan and Mr Aquilina toward the applicant actually changed upon being informed of her pregnancies. I do, however, accept that the applicant perceived this from her interactions with them.
201. I am not satisfied that the applicant was performing adequately in her role. The evidence of Ms Grattan, Mr Aquilina and Ms Symonds consistently indicates that from their perspective the applicant was experiencing performance difficulties from around mid-2018. The email correspondence in evidence confirms that Ms Grattan and Mr Aquilina communicated their concerns in relation to the applicant's performance and that of her team over a period of time, albeit in an informal sense. The applicant's own evidence confirms that her performance was addressed in various meetings. The applicant does not contend that Mr Aquilina's observation that the applicant was last in KPIs was inaccurate.
202. Whilst I accept that formal performance management procedures had not been put in place at the time the applicant ceased work, I do accept that Ms Grattan and Mr Aquilina held genuine concerns about the applicant's performance and considered it necessary to raise these with the applicant on a regular basis. I am satisfied that these concerns were raised with the applicant both by email and in person. I am also prepared to accept that, although not intended in this way, the applicant, viewed those discussions as hostile or as bullying and harassment.
203. There are some events described in the applicant's evidence which I do not accept on the evidence before me were "real events". For example, I am not satisfied that Mr Aquilina made a comment about the applicant being "painful".
204. Overall, however, I am satisfied that there were a series of real events and interactions in the workplace between January 2019 and 12 July 2019, which the applicant perceived as adverse or hostile. I am satisfied that these events caused the applicant to experience psychological symptoms and that they were causative of her decompensation on 12 July 2019. In this regard, I am satisfied that the applicant contracted a psychological condition arising out of or in the course of employment.
205. Having made the findings above, it is necessary to evaluate all of the causal factors and make an assessment as to "the main contributing factor" to the applicant's psychological condition for the purposes of s 4(b)(i) of the 1987 Act. In this regard, I accept Ms Goodman's submission that the medical evidence is of assistance but not determinative.
206. Apart from the reports of Dr Bisht, the medical evidence before me consistently indicates that the workplace stressors I have accepted above were the main contributing factor to the applicant's psychological condition. Dr Soo noted the applicant was experiencing stress at work in April 2019. In his certificates of capacity and reports to the insurer and the applicant's solicitors Dr Soo indicated that employment was the main contributing factor to the condition diagnosed by him. Dr Soo was aware of the applicant's previous miscarriage and the symptoms she experienced early in her second pregnancy, when he expressed this opinion.
207. The only insight given by Dr Vatiliotis as to the cause of the condition diagnosed by her is that it occurred in the context of alleged workplace bullying.
208. Dr Khan has expressed the clear opinion that work-related stressors were the main contributing factor to the applicant developing a psychological injury. In giving his opinion, Dr Khan gave express consideration to other psychosocial stressors including the applicant's miscarriage and recent relationship breakdown. Dr Khan gave a cogent explanation for why he did not consider those factors to be the main contributing factor to the applicant's condition. In particular, Dr Khan explained that despite the miscarriage in early 2019, the applicant returned to work in full capacity. Apart from some initial grief, he considered the applicant's mental state had stabilised. As already indicated, Dr Khan expressed the view that the applicant's deteriorating mental state as a result of work-related stress were the reason for her relationship breakdown.

209. Although I accept that Dr Khan did not give express consideration to the physical symptoms the applicant experienced in her second pregnancy or the financial difficulties noted in early 2019, I am not satisfied that these omissions are sufficient to render the opinions of Dr Khan otherwise unreliable, noting that his opinions are consistent with the opinions given by Dr Soo and Dr Vatiliotis.
210. Dr Bisht has given an opinion that employment was not the main contributing factor to the applicant's psychological condition, although he did accept that employment contributed to the applicant's condition. Dr Bisht said that the timing of the onset of symptoms led him to the view that the main contributing factor to the applicant's psychological condition was her miscarriage.
211. Upon review of the contemporaneous medical evidence it is, however, clear that the applicant reported psychological symptoms to Dr Annabattula in January 2019 before she learned of her first pregnancy. There is no contemporaneous evidence of a change or escalation in the applicant's psychological treatment in the period immediately following her miscarriage. Dr Bisht does not explain his opinion in the context of the applicant continuing to work following her miscarriage for a period of almost five months.
212. In my view, Dr Bisht also does not adequately engage with the history given to him of the applicant perceiving her managers' attitude, tone of communication, allocation of tasks and criticism of her work to be hostile. Dr Bisht does not engage with the evidence of the applicant's significant psychological response to those events. The history given to Dr Bisht was that the meeting on 12 July 2019 was "the last straw". Yet the only explanation given by Dr Bisht for not accepting that employment was not the main contributing factor to the applicant's condition was that the applicant had been undergoing performance management since mid-2018.
213. As indicated above, I have accepted that the applicant was receiving regular feedback about her performance since mid- 2018. I accept Ms Goodman's submission that it is difficult to discern a change in the tone or frequency of the email correspondence in evidence since that time. I do not, however, conclude from this that employment did not play a significant role in the contraction of the applicant's psychological condition. The applicant's evidence indicates that it was the accumulation of workplace stressors over this period which led to her decompensation. This account has been accepted by Dr Soo and Dr Khan.
214. I accept that employment was not the only causal factor to the applicant's psychological condition. I accept that the applicant's financial difficulties, unplanned pregnancy, miscarriage and the symptoms she experienced in her second pregnancy were all factors which contributed to the applicant's decompensation on 12 July 2019. I accept that the concerning symptoms the applicant was experiencing in her second pregnancy, in the context of her recent miscarriage, were particularly significant contributing factors, noting that the applicant was experiencing those symptoms in the lead up to and on 12 July 2019 and having regard to Dr Bisht's evidence. I accept, however, that the applicant attributed both her miscarriage and those symptoms to stress at work.
215. Weighing the medical and factual evidence before me, I am satisfied that the workplace stressors I have accepted above were the main contributing factor to the contraction of the applicant's psychological condition.
216. I am satisfied on the balance of probabilities that the applicant contracted a psychological injury arising out of or in the course of employment and that employment was the main contributing factor to the contraction of the injury for the purposes of s 4(b)(i) and s 11A(3) of the 1987 Act.

217. As noted by the parties' respective counsel, many of the workplace events described above related to the applicant's performance in the workplace. The respondent has not, however, claimed that s 11A(1) of the 1987 Act disentitles the applicant to compensation for her injury. I accept, therefore, that the applicant has sustained a compensable psychological injury.

Incapacity

218. 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 to the injured worker shall include a weekly payment during the incapacity.

219. The applicant in this case seeks weekly compensation from 13 July 2019 on an ongoing basis.

220. In order to determine the applicant's entitlement to weekly payments, it is necessary to determine whether she had "no current work capacity" or "current work capacity" as defined in s 32A of the 1987 Act during the period of weekly benefits being claimed.

221. 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

(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."

222. The medical evidence, apart from the reports of Dr Bisht, consistently indicates that since 12 July 2019, the applicant has had no current capacity for work. Although Dr Soo recently reported an improvement in the applicant's condition following the birth of her child in January 2020 and had, in his August 2019 responses to the insurer, indicated an expectation that the applicant would make a full recovery within 2-4 months, he has continued to issue WorkCover certificates indicating total incapacity for work.

223. Ms Goodman's submissions were critical of Dr Soo's certificates in that they were expressed in identical terms. I accept that the description of injury has not changed in the certificates but find that it would necessarily be expected to change. Dr Soo's notes confirm that he has regularly examined the applicant within the relevant period. Dr Soo has also had cause to consider the applicant's condition and capacity in the reports he prepared for the insurer and the applicant's solicitors. I am not satisfied that the repetition in the certificates alone renders them unreliable. To the contrary, I accept in all the circumstances that the certificates are reliable evidence of the applicant's incapacity throughout the period of weekly benefits claimed.
224. Dr Vatiliotis' reports indicate that the applicant continued to consult her after their initial consultation in July 2019. Dr Vatiliotis' reports indicate a need for ongoing treatment and do not give me cause to doubt the correctness of Dr Soo's certifications.
225. Dr Khan has also given the opinion, based on his examination of the applicant in November 2019, that the applicant lacked capacity to engage in any form of employment as a result of her injury.
226. In contrast, Dr Bisht expressed the view in October 2019 that the applicant had capacity for work up to 20 hours per week in suitable employment. Dr Bisht's view as to the applicant's capacity for work must, however, be informed by his opinion as to the nature, onset and cause of the applicant's condition. I have found Dr Bisht's opinion on these matters unpersuasive. Dr Bisht's opinion on capacity also stands apart from all the other medical evidence.
227. I do accept that the applicant's bank statements show she has in more recent times been engaging in activities outside her home on a regular, if not daily, basis. I accept that there has been an improvement in the applicant's condition since the birth of her daughter, that she is no longer being prescribed anti-depressant medication and appears to be consulting Dr Vatiliotis less frequently. An improvement in the applicant's condition does not necessarily equate to a capacity for work. As recently as 14 May 2020, Dr Soo has again certified the applicant as having no current capacity for work. I am not persuaded that that certification should not be accepted.
228. Upon weighing all of the evidence, I am satisfied that the applicant has, since 13 July 2019 to date and continuing had no current capacity for work in any employment as a result of her psychological injury.
229. In considering the applicant's entitlement to weekly compensation, I have taken into account Ms Goodman's submission that the applicant would not be entitled to weekly compensation during the period of her confinement. I accept that in the ordinary course of events, and but for the injury, the applicant would have ceased work for a period of time before and after the birth of her child in January 2020. I further accept that the applicant was not in fact working at those times.
230. Ms Goodman has not, however, pointed to any part of the statutory scheme applicable in the applicant's case which makes provision for this circumstance to be taken into account in making an award for weekly compensation. Section 33 of the 1987 Act provides that if, during the relevant period, the applicant was incapacitated for work as a result of the injury, weekly compensation will be payable. I have found that the applicant's injury, at all times during the relevant period, rendered the applicant unable to return to work, either in the worker's pre-injury employment or in suitable employment. It is irrelevant that the applicant also could not return to work due to her confinement.
231. It follows that the applicant is entitled to weekly compensation pursuant to ss 36(1)(a) and 37(1)(a) of the 1987 Act as they apply to this case, based on a PIawe figure of \$1,200.

SUMMARY

232. The applicant contracted a psychological injury arising out of or in the course of employment and employment was the main contributing factor to the contraction of the injury for the purposes of s 4(b)(i) and s 11A(3) of the 1987 Act.
233. The applicant had no current work capacity as a result of the psychological injury from 13 July 2019 to date and continuing.
234. The applicant is entitled to weekly compensation from 13 July 2019 to date and continuing pursuant to ss 36(1)(a) and 37(1)(a) of the 1987 Act as they apply to this case, based on a PIAWE figure of \$1,200.

