

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 2097/19  
**Applicant:** AV  
**Respondent:** AW  
**Date of Direction:** 30 August 2019

The Commission determines:

### Findings

1. The applicant suffered an exacerbation and aggravation of a pre-existing psychological condition from work incidents in the period from April to 26 July 2018.
2. I am not satisfied that the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the psychological condition.

### Order

3. Award for the respondent.

JOHN HARRIS  
**Arbitrator**

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF JOHN HARRIS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

*A Reynolds*

Antony Reynolds  
Senior Dispute Services Officer  
**As delegate of the Registrar**



## STATEMENT OF REASONS

### BACKGROUND

1. AV (the applicant) was employed by AW (the respondent).
2. This is a claim for weekly compensation and medical expenses pursuant the provisions of the *Workers Compensation Act 1987* (the 1987 Act) for injury pleaded as having deemed to have occurred on 26 July 2018 as a result of the nature and conditions of employment and events which occurred on 26 July 2018.
3. By letter dated 8 February 2019 the respondent served a notice pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) disputing that the applicant suffered a psychological injury within the meaning of s 4 and denying capacity.

### THE PROCEEDINGS BEFORE THE COMMISSION

4. This matter was heard on 26 July and 6 August 2019. Mr Morgan appeared for the applicant and Mr Saul appeared for the respondent.
5. The documentation admitted into evidence was:
  - (a) Application to Resolve a Dispute (Application);
  - (b) Reply;
  - (c) Application to Admit Late Documents filed by the applicant dated 24 May 2019 and 19 July 2019 March 2019, and
  - (d) Exhibit A – Certificate of Capacity dated 16 July 2019.
6. There was no objection to any document. There was no application by either party to adduce oral evidence.
7. On the first day of hearing the Application was amended at Part 5.3 to claim a general order pursuant to s 60 of the 1987 Act.<sup>1</sup>
8. The applicant's pre injury average weekly earnings (PIAWE) were agreed at \$1,300.96. Weekly compensation was paid until 22 February 2019.<sup>2</sup>
9. The applicant asserted injury based on either s 4(a) or s 4(b)(ii) of the 1987 Act. The respondent denied injury and also raised s 9A if the injury was based on s 4(a). Capacity is also in issue.<sup>3</sup>
10. The applicant attended the Commission on the first day in a distressed state and listened to her counsel's submissions. The applicant did not attend the second day of hearing although was available by telephone.<sup>4</sup> On the second day of the hearing I recorded my observations of the applicant's distressed state on the first hearing day.<sup>5</sup>

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<sup>1</sup> Transcript, 26 July 2019 (T1), pg 2

<sup>2</sup> T1, pg 2

<sup>3</sup> T1, pg 2

<sup>4</sup> Transcript, 6 August 2019 (T2), pg 1

<sup>5</sup> T2, pg 64

11. I observe that I am required to provide a “brief statement” of reasons.<sup>6</sup>

## EVIDENCE

### Applicant’s statements

12. The applicant provided a statement dated 29 March 2019.<sup>7</sup> The applicant detailed her work experience and stated that she suffered from no prior work injury or motor vehicle injury that “inhibited my ability to work.” In the past the applicant was away from work “with mental health issues” but always returned to work with no ongoing restrictions.
13. The applicant referred to her mental health issues in March 2018 and that she “broadly agrees with the histories” recorded by Dr 6 in her report dated 8 May 2018 and Dr 1 dated 30 May 2018.
14. The applicant was off work for four weeks in March 2018. She had been working three days per week and continued those hours after March 2018.
15. The applicant referred to the claim form, the file notes of meetings with W1 on 17 and 26 July 2018 and her file note of her discussions with W4 and W5 on 26 July 2018.
16. The applicant stated that she had a prearranged appointment with Dr 1 on 26 July 2018. They discussed “whether I should seek more intensive treatment as in patient” and admission to treatment at the private hospital.<sup>8</sup>
17. The applicant was admitted to hospital on 31 July 2018 for two and a half weeks. She has remained under the care of Dr 6, Ms X and Dr 1.
18. The applicant responded to the various statements of her co-workers.
19. The applicant stated that much of W1’ statement is incorrect and relied on hearsay and an absence of direct knowledge. She stated that there was never mention of her work performance and had always met targets and step increases that had been applied. The applicant had previously won an employee of the year/safety award. It was asserted that the matters raised by W1 should have been the subject of attention and discussion of the HR Department. None of this occurred.
20. The applicant noted W6’s position as a HR business partner and the matters raised “would normally ... have been the subject of intervention by the employer and discussions with the employee”. She stated that this did not occur and “this is demonstrative of an effort on her part to exaggerate the significance, assuming one accepts her descriptions as factual.”<sup>9</sup>
21. The applicant stated that she had little contact with W7 “leading up to the injury I suffered”. She agreed that she had a good relationship with W5. Noting that W7 was a WHS officer, nothing “had been raised with me prior to the incident with respect to my work performance or otherwise.”
22. The applicant agreed she was a good friend with W5 “prior to this episode”. She stated that despite her role as a Performance and Training Officer, nothing was raised by W5 following her return to work in April 2018. The applicant disagreed with W5’s

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<sup>6</sup> Section 294(2) of the 1998 Act

<sup>7</sup> Application, pg 1307

<sup>8</sup> Application, pg 1308

<sup>9</sup> Application, pg 1309

“characterisation of our interaction on that day” although she noted that W5 conceded that she raised her voice.

23. In respect of W8’s statement, the applicant stated “see above”.
24. The applicant noted that W3 did not record any evidence of dysfunction in the workplace on her return to work in April 2019.
25. The applicant stated that W4 was attempting to be as “neutral as possible given her role as a fellow employee”. She disagreed with her characterisation of the manner in which the interactions took place on 26 July 2018.

## **Other Documents**

26. The applicant returned to work on 4 October 2017 following maternity leave. This was initially for three days per week based on a 24-hour working week. Further discussions were to be held with an eventual return to a five day a week role.<sup>10</sup>
27. The applicant returned to work around 4 April 2018 following the miscarriage. There were emails wishing the applicant well on her return such as from W4 and offering help with her duties.<sup>11</sup>
28. The applicant wrote on her return that she “was not in a good way” and “not up to speaking on the phone”.<sup>12</sup> On 4 April 2018 the applicant sent an email to W4 stating that she “can’t stop crying”.<sup>13</sup>
29. By letter dated 26 June 2018, W9, Deputy General Manager, confirmed recent discussions of a change in duties to increase hours to four days per week commencing 18 July 2018.<sup>14</sup> W1 and the applicant signed the variation in the terms of employment on 28 June 2018.<sup>15</sup>
30. The sick leave records show the applicant relevantly off work from 8 March 2018 to 29 March 2018, for one hour on 11 July 2018, on 13 July 2018 and from 31 July 2018.<sup>16</sup>
31. The applicant completed a claim form dated 7 September 2018.<sup>17</sup> The applicant referred to a request to her manager over four weeks to move desks in order to reduce the triggers she was experiencing of her severe PTSD. She stated that on the morning of 26 July she was talking with W4 that her manager would not move her when W5 came into the conversation screaming at her that she needed help. This was said to have caused a panic attack. The applicant’s manager then advised her that he couldn’t have her in the office “in this state”.
32. The applicant prepared a diary note of her meeting with W1 on 17 July 2018.<sup>18</sup> The note related to the applicant’s request to move desks within the office as she was “trapped in a corner with no exit”. The note indicates that W1 initially declined the move. Upon receipt of the “letter” she received a similar response and then said “he would think about it”.
33. The applicant prepared a note of her meeting with W1 on 26 July 2018.<sup>19</sup> The note indicates that W1 said the applicant was sick and needed help and was told to go home. The note

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<sup>10</sup> Reply, pg 39; Application, pg 1216

<sup>11</sup> Reply, pg 57, 60, 77

<sup>12</sup> Reply, pg 58

<sup>13</sup> Reply, pg 59.

<sup>14</sup> Application, pg 950

<sup>15</sup> Application, pg 952

<sup>16</sup> Application, pg 41

<sup>17</sup> Application, pg 3

<sup>18</sup> Application, pg 1192

<sup>19</sup> Application, pg 1193

indicates that there was discussion about moving the applicant and that W1 replied “prob in a week but will not put me in a box or hide me”.

34. The applicant prepared a diary note about her conversation with W4 on 26 July 2018.<sup>20</sup> The applicant referred to “home life and work triggers” and she needed to move due to triggers. W5 came over and “started yelling at me saying enough is enough you are sick you need to go to hospital I have had enough of this”. The yelling caused a panic attack and the applicant “begged W4 to get her away”.

### **Pre-existing psychological condition**

35. Dr 2, Psychiatrist provided a report dated 24 September 2007.<sup>21</sup> The doctor noted features of a major depressive disorder since March which was accompanied by low mood and melancholic features. Past history included a depressive episode at 17 years which lasted about six months.
36. The doctor’s preliminary impression was that the applicant was then suffering a major depressive episode that was moderate in severity accompanied by anxiety symptoms. He recommended an increase in the dose of medication.
37. In September 2007 Dr 3, Consultant Psychologist, noted that the applicant was suffering from anxiety and depression contributed by personal traumatic experience with family, childhood abuse, work stress and relationship issues.<sup>22</sup>
38. In 2012, Dr 4 referred the applicant to Dr 10 for assessment and treatment of an anxiety disorder with recurrent panic attacks and a history of an anxiety disorder since the applicant was 15 years of age. Current problems included anxiety and depression.<sup>23</sup>
39. A referral from Dr 6 to Ms X dated 23 March 2018 for grief counselling referred to a recent miscarriage and the need for treatment for severe anxiety and grief.<sup>24</sup> The doctor noted that the applicant suffered from anxiety and panic disorder generally with the recent event triggering a major escalation in the anxiety. Dr 6 also noted the recent bad experience at hospital.
40. Dr 6 noted that current function included difficulty eating and sleeping and required benzodiazepines.
41. Dr 6 provided a further referral to Dr 1 dated 8 May 2018.<sup>25</sup> The doctor referred to a generalised anxiety disorder managed over the years without medication with recent traumatic experience following the miscarriage and the experience at hospital when treated unkindly by nursing staff at hospital.
42. Dr 6 observed that she was “struggling to help” the applicant through this difficult time with trial of various medications for the acute panic disorders and sleep deprivation. The doctor noted that the applicant was seeing a psychologist weekly. In a further short report dated 8 May 2018, Dr 6 noted current medications.<sup>26</sup>

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<sup>20</sup> Application, pg 1194

<sup>21</sup> Application, pg 204

<sup>22</sup> Application, pg 206

<sup>23</sup> Application, pg 150

<sup>24</sup> Application, pg 121

<sup>25</sup> Application, pg 116

<sup>26</sup> Application, pg 118

43. In March 2018, Dr 6 provided medical certificates for unfitness for work unrelated to any work condition.<sup>27</sup>
44. The clinical notes of Dr 6 during this period recorded difficulty sleeping on her return to work<sup>28</sup>, panic attacks at work<sup>29</sup> and away from work such as hearing a baby cry in the waiting room which triggered panic attack and distress.<sup>30</sup> Dr 6 recorded that the applicant was “extremely easily triggered to panic attacks”<sup>31</sup> and at another time was suffering “fewer panic attacks and anxiety over past week”<sup>32</sup>.
45. On 10 April 2018 Ms X, Psychologist, noted that she had seen the applicant for counselling on two occasions “during this challenging period of returning to work following her miscarriage and the associated trauma with her experience during treatment in hospital.”<sup>33</sup>
46. Dr 1 initially consulted the applicant in May 2018 and prepared a report dated 30 May 2018.<sup>34</sup> The doctor referred to the events in March 2018 and his commentary that the applicant displayed symptoms of PTSD following this event such as hypervigilance, nightmares, intense recall, exaggerated startle response, avoidance of reminders, discomfort in crowds, irritability, discomfort with intimacy, problems with trust and dissociation.
47. The doctor also noted significant symptoms of major depression with depressed mood, low energy levels, poor motivation, regular crying, marked anhedonia, poor concentration, decreased appetite and weight loss and specific suicidal ideation. Dr 1 noted a past history of anxiety disorder at 15 year which progressed to a panic disorder over a few years which had not been present for five years until recently.
48. Dr 1 recommended a trial of alternative depressants given the severity of the symptoms.
49. On 26 June 2018 Dr 1 provided a referral to the private hospital<sup>35</sup> attaching his previous report dated 30 May 2018 and querying whether there was an element of unstable mood. The doctor opined that he thought the applicant “would derive benefit from the inpatient trauma program.”
50. The referral for inpatient admission to the private hospital dated 26 June 2018 was redated 26 July 2018.<sup>36</sup>
51. By letter dated 25 January 2019, Dr 6 expressed concurrence with Dr 9’s assessment that the applicant exhibited personality dysfunction with narcissistic and borderline personality traits and that they were evident prior to the miscarriage.<sup>37</sup>

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<sup>27</sup> Application, pg 124-125

<sup>28</sup> Application, pg 100 (10 April 2018)

<sup>29</sup> Application, pg 100 (17 April 2018)

<sup>30</sup> Application, pg 100 (1 May 2018)

<sup>31</sup> Application, pg 99 (15 May 2018)

<sup>32</sup> Application, pg 99, (23 May 2018)

<sup>33</sup> Application, pg 230

<sup>34</sup> Application, pg 231

<sup>35</sup> Application, pg 19

<sup>36</sup> Application, pg 235

<sup>37</sup> Application, pg 111

## Treating opinions following cessation of work

### **Dr 6**

52. Dr 6 provided a referral to the private hospital on 27 July 2018. The referral noted “severe PTSD post miscarriage in March” which was “frequently triggered at work by pregnant staff”.<sup>38</sup> The clinical note of Dr 6 dated 27 July 2018 records a similar history.<sup>39</sup>
53. On 25 September 2018 Dr 6 opined that the injury was an “exacerbation of pre-existing condition”, that the applicant was totally unfit for work and an expected timeframe for complete recovery was 6- 12 months.<sup>40</sup>
54. The doctor was requested to provide an opinion of Dr 9’s report. In a report dated 25 January 2019 Dr 6 opined that she found it “difficult to comment on the role work has had in exacerbating/aggravating her mental health condition.”<sup>41</sup>
55. Various Certificates of Capacity signed by Dr 6 certified the injury as an “exacerbation of PTSD and Anxiety”.<sup>42</sup>

### **Ms X**

56. Ms X provided a report dated 28 August 2018 noting the applicant’s discharge from the private hospital on 17 August 2018.<sup>43</sup> The applicant reported little benefit from the recent inpatient treatment.
57. The history reported to Ms X included an increase in symptoms after returning to work where the applicant was exposed to routine discussions about pregnancy, maternity leave and due dates. The Psychologist noted that the upcoming admission was timed to coincide with the due date of lost pregnancy. Recent distresses included an estranged brother’s suicide attempt.
58. The applicant reported that she is not returning to work and was discussing lodging a workers’ compensation claim. Various treatment options were described by the Psychologist.
59. The clinical notes of Ms X for 17 October 2018<sup>44</sup> refer to the presenting condition of “PTSD following multiple traumas gynecologically related”<sup>45</sup>. Under the heading “Precipitating” the Psychologist recorded:<sup>46</sup>

“Supervisor/workplace unable to accommodate request for modifications upon return to work w mental health issues (ongoing exposure to PTSD triggers).”

60. Under the heading “Perpetuating” the Psychologist noted:<sup>47</sup>

“Lack of resolution w workplace  
Prior -ve experience of CBT  
Pre-existing anxiety & limited social support”

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<sup>38</sup> Application, pg 7-8

<sup>39</sup> Application, pg 98 (27 July 2018)

<sup>40</sup> Application, pp 255-256

<sup>41</sup> Application, pg 111

<sup>42</sup> See Application pg 245, 269, 300, 303, 342

<sup>43</sup> Application, pg 113

<sup>44</sup> Application, pg 80

<sup>45</sup> Application, pg 81

<sup>46</sup> Application, pg 81

<sup>47</sup> Application, pg 81

## **Dr 1**

61. Dr 1 provided a report dated 2 October 2018.<sup>48</sup> The doctor noted that he wrote to the supervisor on 9 July 2018 requesting a change in the applicant's work station due to exposure to telephone conversations regarding requests by staff for maternity leave and that no action was taken. He opined that the "conditions of employment exacerbated the severity of [the] psychological conditions as listed."
62. Dr 1 noted that the applicant's presentation was "dramatic and severe" and opined that the applicant was unfit for her pre-injury duties.
63. Dr 1 was asked by the insurer to comment on Dr 9's report. In a further report dated 30 January 2019.<sup>49</sup> Dr 1 noted that Dr 9's opinion was based on "one cross-sectional interview". Dr 1 observed that the only test undertaken by Dr 9 with which he was aware was MMPI and he was "unfamiliar" with the other tests.
64. Dr 1 referred to the witness statements. He observed that the quality of these statements were usually tested by cross-examination. Finally, the doctor observed that "personality dysfunction, when present, is a vulnerability factor for both the development of PTSD and perceived mistreatment in the workplace."

## **Treatment at a private Hospital**

65. The applicant was admitted to the private Hospital under the care of Dr 7, Consultant Psychiatrist, for the period from 31 July 2018 to 17 August 2018.<sup>50</sup> During the admission the applicant was assessed for participation in phase 1 of the PTSD program. The doctor noted that the applicant had significant difficulties "given that her trauma occurred in hospital and that the environment at the private hospital would obviously have been very triggering for her."
66. Dr 7 opined that the applicant was utilising exercise and excessive activity "as distraction from the PTSD symptoms". He recommended that the applicant return in September to complete the phase 1 PTSD program.
67. Dr 8, Psychiatrist, provided a discharge summary from the private hospital for the admission for the period from 18 September 2018 to 12 October 2018.<sup>51</sup> The doctor noted that the admission was unsettled at times and exercise levels needed to be curtailed. He noted that the applicant "had several incidents where she felt 'triggered' by seeing children around the hospital."<sup>52</sup>
68. Dr 8 noted high doses of benzodiazepines and sleep issues requiring an increased dose of Seroquel. During the admission the applicant was assessed by the individual focus PTSD program and "found to be suitable".

## **Dr 5**

69. Dr 5 was qualified by the applicant's solicitor and provided a report dated 27 December 2018.<sup>53</sup>
70. Dr 5 obtained a history of exposure in the workplace to triggers setting off episodes of anxiety and panic. Prior psychological history included a period of counselling for up to 12

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<sup>48</sup> Application, pg 16

<sup>49</sup> Application, pg 15

<sup>50</sup> Application, pg 240

<sup>51</sup> Application, pg 354

<sup>52</sup> Application, pg 354

<sup>53</sup> Application, p 346



months in the early 20s and relationship problems some 10 years previously where antidepressant medication was prescribed for 12 to 18 months.

71. The applicant provided Dr 5 with a history of “extra work” following her return in early April 2018 and that the sight of pregnant women coming into the office and references to pregnancy would set off triggers in her with the development of panic and flashbacks.<sup>54</sup>
72. Dr 5 opined that the applicant suffered an intrauterine death in early 2018 and subsequently underwent a D&C associated with a complicated and traumatic experience with a subsequent development of a diagnosed post-traumatic stress disorder. Dr 5 opined:<sup>55</sup>

“She commenced psychological and psychiatric treatment. She did return to work, however describes continued triggers to the PTSD in the workplace. Despite being requested to move her desk to another area she said that this was not undertaken. There was a critical point on 26/7/2018 where she broke down at work.”

73. Asked to comment on whether the work caused, aggravated, or accelerated the condition, Dr 5 stated:<sup>56</sup>

“The post-traumatic stress disorder has its origins in the intrauterine death and subsequent management of this. She developed post-traumatic stress disorder symptoms which would be triggered by events around her. She attempted to work, however, in the workplace describes triggers to the PTSD. Despite recommendations by her treating doctor she states that the workplace was unable to accommodate her wish to have her desk moved to another location and it was in the setting of this and with disturbed interactions at work that she ceased her employment.”

74. Dr 5 opined that the applicant was totally incapacitated for work since 26 July 2018 to date and continuing.

### **Dr 9**

75. Dr 9 provided a report dated 14 December 2018.<sup>57</sup> After obtaining a detailed history, Dr 9 conducted a number of tests that “are protected by copyright”. These tests were described as Medical Symptom Validity Test (MSVT), Structured Inventory of Malingered Symptomatology (SIMS), Miller Forensic Assessment of Symptoms Test (M-FAST) and Minnesota Multiphase Personality Inventory (MMPI-2). The doctor described the MMPI-2 as having passed “cross cultural scrutiny” and a widely used standardized test for the assessment of personality and psychopathology.
76. Dr 9 described the test results as showing the applicant’s profile as invalid due to gross exaggeration, endorsed a compensation seeking response of over reported physical/cognitive symptoms, exaggerated distress and minimization of pre-incident personality problems and a noncredible symptoms response.<sup>58</sup>
77. Dr 9 referred to various witness statements and concluded that they showed self-centredness, lack of empathy and inappropriate behaviour suggesting narcissistic personality traits.<sup>59</sup> This personality predisposed the applicant to dramatically decompensating following the miscarriage.

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<sup>54</sup> Application, pg 349

<sup>55</sup> Application, pg 351

<sup>56</sup> Application, pg 352

<sup>57</sup> Application, pg 313

<sup>58</sup> Application, pg 325

<sup>59</sup> Application, pg 326, 332

78. Dr 9 did not “necessarily agree” that the applicant was suffering from PTSD although he accepted that the reaction to the miscarriage has been dramatic. The doctor opined that the behaviour before the miscarriage is consistent with personality dysfunction and the psychometric testing is inconsistent with genuine reporting.<sup>60</sup>
79. Dr 9 opined that the alleged exposure at work did not contribute to or aggravate the condition. The reasons proffered by the doctor were that the staff had been supportive and that moving the applicant would not have reduced the exposure to pregnancies. He opined that it was more likely that the applicant wished to hide her “questionable behaviour” and this was supported by the “consensus of the reports”.<sup>61</sup>
80. Dr 9 did not identify any non-work or personal problems contributing to the current presentation.<sup>62</sup> The doctor did not accept that the workplace had aggravated, exacerbated or deteriorated the disorder. He opined that both the exposure to motherhood and the stillbirth was a convenient focus to behave in a bizarre attention seeking manner.<sup>63</sup>
81. Dr 9 did not believe that the treatment was inappropriate and may be deleterious. The doctor opined, that the psychometric testing indicated that the applicant was feigning and was capable of some form of work.<sup>64</sup>

## Employee Statements

### **W1<sup>65</sup>**

82. W1 was the applicant’s supervisor from May 2015. He described her work performance was good when she was focused but otherwise “tended to impede others”. He also stated that she was difficult to manage and did not generally accept directions.
83. He stated that following the applicant’s return to work after a miscarriage in March 2018, he allocated her the task of reviewing the return to work procedures but that the applicant never completed this task before ceasing duties. W1 stated:<sup>66</sup>

“The problem I faced after AV had returned to work following her miscarriage was that every time I tried to raise a work-related issue or an aspect of her behaviour, she would break down in tears. I was left wondering, do I coach her, instruct her or take disciplinary action. It was very difficult given her emotional state.”

84. W1 stated that he did not observe any particular change in the applicant’s behaviour following her return to work following the birth of her child in October 2017. The applicant advised everyone around February 2018 that she was pregnant again and she was very happy.
85. W1 stated that upon the applicant’s return to work in early April 2018, there was “a dramatic change in her manner and behaviour”. There were “significant mood swings” and the applicant was “unwilling to deal with people particularly any pregnant woman”. The applicant would regularly break down into tears, sometimes two or three times per day on occasions for no obvious reason.

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<sup>60</sup> Application, pg 333

<sup>61</sup> Application, pg 335

<sup>62</sup> Application, pg 335

<sup>63</sup> Application, pg 338

<sup>64</sup> Application, pp 338-339

<sup>65</sup> Application, pg 1087

<sup>66</sup> Application, pg 1088

86. W1 believed that around May or June 2018 he advised the applicant that she should seek medical assistance. The applicant advised him that she was already seeing a psychiatrist.
87. Around May or June 2018, the applicant informed W1 that seeing a pregnant woman was a trigger for her PTSD. He was aware that when one particular pregnant employee entered the office, the applicant would then leave. He stated there were only about nine employees pregnant in the last 12 months including the applicant.
88. Around June 2018, the applicant informed W1 that she could not talk to Mr Y at StateCover because she knew his wife was pregnant. The applicant also spoke about attending a Curry Festival in Canberra and W1 pointed out that she would likely encounter pregnant woman at the festival. The applicant apparently stated that “she already had her escape plan developed.”<sup>67</sup>
89. W1 described his office as open plan containing a large number of staff. Everyone in the office could hear others conversations. He felt all the staff were very supportive right up until 26 July 2018. Examples included that other staff would take phone calls allowing the applicant free and that she could leave the office whenever she wanted and attend medical appointments without any pressure being applied upon her.
90. W1 stated that despite support and accommodation, the applicant displayed dramatic mood swings and as a result the staff were “walking on eggshells” around the applicant.<sup>68</sup>
91. W1 remembered the applicant asking him during their weekly meeting about changing desks. This was approximately one week prior to presenting him with the first letter from Dr 1. At that time the applicant stated that where she was sitting, she would experience emotional triggers because “she sat near the HR business partners and the staff would approach and might talk about parental leave”. He stated this was not a daily event.<sup>69</sup>
92. W1 did not refuse the request at that time and said that he would need to think about it. The applicant then presented W1 with a second letter from Dr 1 dated 17 July 2018. W1 stated that when the applicant presented the second letter, she was initially demanding but then broke down in tears saying that was a simple move and asked why he would not move her. W1 asserted that he did not decline the request but said that he would think about it.<sup>70</sup>
93. On 25 July 2018, W1 informed the applicant that he had sought independent advice and was still considering his decision and would let her know the following week. He said the applicant responded aggressively and angrily.
94. He noted that on 26 June 2018 the applicant accepted the progressive return to full-time work following her previous maternity leave and was increasing her attendance from three to four days per week from 17 July 2018. He stated the applicant was happy with this change. On the basis that he would continue to be flexible in her arrangements with her husband and their childcare arrangements, he said he was happy to continue the flexibility around children.
95. W1 attended work at 7:10 am on 26 July 2018. This was 10 minutes later than normal. He said that W4 was not happy, W4 was speaking to the applicant who was crying. He said this it was not uncommon to see the applicant crying in the morning. W1 then asked the applicant to come into his office. W1 informed the applicant that she required help and he could not have her in the workplace in this condition. He said the applicant was physically shaking and crying and she apparently said that she could not leave because her car was

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<sup>67</sup> Application, pg 1090

<sup>68</sup> Application, pg 1091

<sup>69</sup> Application, pg 1093

<sup>70</sup> Application, pg 1094

being serviced and she had a doctor's appointment. He said the applicant left work without informing him that she was leaving.

#### **W6<sup>71</sup>**

96. W6 holds the position of HR business partner. She made some general observations about the applicant's demeanour in the workplace and commented about the applicant's first pregnancy.
97. She stated that she guessed that the applicant was pregnant and then had a miscarriage. When the applicant returned to work in April 2018, there was a discussion between W6 and the applicant. The applicant became hysterical and yelled at her that she had had a miscarriage. She stated that the applicant would cry at work approximately two times per week. This had been the pattern since before the applicant went on maternity leave before her first child.
98. W6 was overseas from 18 June 2018 until the end of July 2018. She said that at no time prior to this period did the applicant make any comment to her that she could not cope with employees making comments about parental leave or their pregnancy.
99. She stated that since March 2018 there was one phone enquiry from a male about parental leave and there was one employee who was pregnant based locally who would come into the office very occasionally. She knew of two other employees who went on maternity leave.
100. As at the date of the statement<sup>72</sup> there were two women pregnant and probably one in Customers Service who also went on maternity leave. She stated some of the enquiries are handled on the phone and some of the pregnant employees do not necessarily come into the office. W6 stated that everyone could hear everyone else's discussions.
101. W6 did not believe the request to move desks had anything to do "with pregnancy" and thought the applicant was unhappy sitting outside W1' office. W6 thought the office had been supportive of the applicant since her miscarriage and the manager had been very supportive.

#### **W7<sup>73</sup>**

102. W7 is a WHS Office employed by the Respondent since 2012. She described the applicant as "a fiery person", not unpleasant but very direct prior to going on maternity leave around November 2016 who seemed to get along with the other employees in the office.
103. She said that after the applicant returned from maternity leave in November 2017, she seemed to be struggling with leaving her son and had good days and bad days. She considered this to be a very normal struggle from a mother returning to work.
104. W7 was unaware that the applicant had fallen pregnant again in early 2018 and became aware of the fact when the applicant phoned her and told her that she had suffered a miscarriage. She stated the applicant, from memory, was off work for about a month.
105. W7 noticed the applicant was more teary than usual after her return to work in April. She said there were days when the applicant did not return phone calls and was taking more time off work. The applicant would speak to her and "download". The applicant told W7 that she was struggling with her mental health and had been referred to a new psychiatrist and was going to commence a new program with exposure therapy. It was around this time that the applicant started to leave the office more frequently. She said that sometimes the applicant

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<sup>71</sup> Application, pg 1099

<sup>72</sup> 27 September 2018

<sup>73</sup> Application, pg 1106

was crying when she left the office but on other occasions, the applicant was seen to be holding herself together when she left. Around this time, the applicant mentioned to W7 that she was struggling sitting near the HR business partners who would become involved in conversations with pregnant staff or parental leave.

106. W7 stated:<sup>74</sup>

“I would estimate discussions directly or indirectly associated with pregnancy or maternity leave would occur two or three times per week. It must be remembered we had a couple of staff on maternity leave and we were recruiting to fill vacancies caused by maternity leave and similar.”

She mentioned that a lady named Vicki attended the office on a couple of occasions.<sup>75</sup>

107. W7 said that the team had been supportive of the applicant since her miscarriage and were covering her duties when she was unable to be at work. W7 stated that when the applicant left the office suddenly, people would not know why or where she was going. At times someone would walk outside to see the general direction the applicant was walking to make sure she was alright, but the applicant made it clear that she did not want any of us to follow her. W7 stated:<sup>76</sup>

“It often felt like we are holding our breath when AV left the office because we did not know if she was okay or if she was returning to the office.”

108. W7 stated there was a degree of uncertainty about how or when to speak to the applicant and you would sort of look and try and determine what sort of mood she was in on that day. W7 said she only received second-hand information about what happened on the morning of 26 July 2018.

**W5<sup>77</sup>**

109. W5 commenced working for the respondent in December 2015. She stated that she was “very close [with the applicant] outside of work.”<sup>78</sup> W5 said that the applicant was very happy after the birth of her son but frequently cried following her return to work. She stated the applicant’s demeanour improved over the weeks following her return to work and she became more involved in her work. She stated the applicant put a lot of pressure on herself to be perfect with her work and was doing that work part-time.<sup>79</sup>

110. W5 was aware that the applicant again fell pregnant and then miscarried. She was aware that the applicant underwent a curette at the hospital. The applicant told W5 that new born babies made her upset at the hospital and that she had been left alone at the hospital and bled heavily over the floor and became hysterical. The applicant made a complaint to the hospital regarding her treatment. The applicant was texting W5 during this period.

111. W5 said that the applicant was not the same when she returned to work after the miscarriage. She noted the applicant was on Valium to keep her calm. She said the applicant had “significant mood changes” and at times seemed to be high on medication. She said she begged the applicant to see a psychologist.

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<sup>74</sup> Application, pg 1109

<sup>75</sup> Application, pg 1113

<sup>76</sup> Application, pg 1110

<sup>77</sup> Application, pg 1116

<sup>78</sup> Application, pg 1117

<sup>79</sup> Application, pg 1118

112. W5 said the applicant was doing “strange things at work which was like attention seeking.”<sup>80</sup> The applicant phoned her from up the street, was hysterical and asked to bring her bag to her. When she arrived the applicant’s fingers were curled in a claw fashion and it was like she was going into a full-blown panic attack. The applicant said that she wanted her medication from the bag and took a pill. She stated that “it was bizarre and very difficult to describe.”<sup>81</sup>
113. Around this time, she noticed the applicant was attending the gym regularly and exercising an enormous amount. She said that the applicant told her that she was “having panic attacks at home and there were times when she wants to drive into a tree on the way home.”<sup>82</sup>
114. W5 said that she ran into the applicant’s husband, at a local shop a couple of weeks before the applicant ceased duties. She said he looked thin and was very unwell. W5 said to the applicant’s husband that the applicant needed help to which the applicant’s husband replied that she was getting help and was fine at work. W5 told the applicant’s husband that it reached the point that the applicant had withdrawn from everyone and that she was claiming she was unable to handle any talk about pregnancy and she would leave the office.
115. The applicant’s husband advised W5 that there was an arrangement that if she reached a particular point she should be admitted to hospital, but the applicant kept telling him that she had not reached that point. W5 advised the husband that the applicant was talking about driving into a tree. The applicant’s husband gave her his mobile phone number and asked him to be kept informed about events at work.
116. W5 said that she only was aware of one instance when a pregnant woman came to her office and discussed maternity leave between March 2018 and July 2018.
117. The applicant advised W5 that hearing a pregnant woman speaking to co-workers was an emotional trigger and showed her letters from a doctor about moving desks. When the applicant showed W5 the second letter from the doctor, she stated that “if they do not move me now then I have got them.”<sup>83</sup>
118. W5 spoke to W8 about the move and suggested they move the applicant “because she was not coping in that location.”<sup>84</sup>
119. W5 said that she commenced work around 6:30am on 26 July 2018, at that time the applicant was already at work at her desk crying and talking to W4. She said she sat at her desk and let them talk. She described the applicant as “getting worked up and then calming down.”<sup>85</sup> She said that W4 was trying to calm AV, but W4 was not well herself and she was looking exhausted.
120. W5 stated that the applicant and W4 had talked for about 40 minutes. Apparently, W5 spoke to the applicant and said that she did not know what to do, but she couldn’t just sit at her desk and asked the applicant if she was okay. W5 then advised the applicant that she needed “more help”. W5 said that she raised her voice to get her point across but did not yell at the applicant. She said that she was upset, crying and wanted to help her.<sup>86</sup> She stated that she was basically pleading with the applicant to get help because she was concerned about her.

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<sup>80</sup> Application, pg 1120

<sup>81</sup> Application, pg 1120

<sup>82</sup> Application, pg 1121

<sup>83</sup> Application, pg 1122

<sup>84</sup> Application, pg 1123

<sup>85</sup> Application, pg 1123

<sup>86</sup> Application, pg 1124

121. The applicant then became hysterical, began banging her hands onto her head. W5 then walked away and sent a text message to the applicant's husband at 7:18 am on 26 July 2018. She noted in the text message that a pregnant woman had come into the office the day before and the applicant could not handle it and that the applicant wanted to relocate within the office.
122. W5 stated in the text message that there "are pregnant women everywhere" and that she was so worried about the applicant who was currently unrecognisable and needs help. The applicant's husband responded to this text message soon after the applicant left work.

**W8<sup>87</sup>**

123. W8 was employed with the respondent since 2010. He stated the applicant reported to him until she returned from maternity leave in October 2017. The applicant was then relocated outside of W1' office and reported to him. A number of employees were moved at that time. He stated that his direct contact with the applicant was minimal as he was busy dealing with matters outside of the office.
124. W8 was only aware that the applicant had suffered a miscarriage after he was informed of the situation. He said that after the applicant returned following the miscarriage, she looked gaunt and unwell. The applicant would sit at her desk in a hunched over posture. At times he would approach her, and the applicant would say that she just cannot think, it was all too hard and she cannot deal with it at the moment. He said that when someone asked the applicant if she is okay, the applicant would "just block the people and not respond."<sup>88</sup>
125. He said that he witnessed "possibly two pregnant women come into the office since April 2018"<sup>89</sup> and he saw the applicant walked out of the office in a rather dramatic manner and in tears.
126. W8's knowledge of the applicant's last day at the office is second-hand. He noted that W5 was one person who had been very close to the applicant.
127. W8 said that he saw the medical letters recommending that the applicant move desk. He discussed these with W1 "and we did not consider this was appropriate."<sup>90</sup>

**W3<sup>91</sup>**

128. W3 commenced employment with the Council in October 2014. She described the applicant as very loud, positive and bubbly in a general conversation. She stated the applicant was very happy with the pregnancy of her first child.
129. W3 was unaware that the applicant was pregnant for the second time until she had suffered a miscarriage. She said she found the applicant very different when she returned to work following the miscarriage. The applicant spoke to her about finding it "distressing to find out other women were pregnant and being near them." The applicant spoke about suffering posttraumatic stress and how she was not eating. The applicant spoke to W3 about another family member phoning and telling her they were pregnant. The applicant had to go outside and "gave out a bloodcurdling scream".<sup>92</sup>

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<sup>87</sup> Application, pg 1128

<sup>88</sup> Application, pg 1130

<sup>89</sup> Application, pg 1131

<sup>90</sup> Application, pg 1133

<sup>91</sup> Application, pg 1136

<sup>92</sup> Application, pg 1138

130. W3 stated that she did not notice anything unusual concerning the interaction between the applicant and other staff when she attended the organisational development section. She thought that there was a good arrangement and support from the staff.
131. W3 said she was aware from the applicant's comments that her insomnia was getting pretty bad following her miscarriage and she was struggling to come to work. W3 remembered telling the applicant that if she is sleep deprived, she needed to be careful driving. W3 said that there were a number of policies that have to be reviewed and renewed and the applicant was busy with those matters. Despite the applicant being sleep deprived, W3 opined that the applicant provided "support and advice to me to get through the policy renewal process".<sup>93</sup>
132. In around June or July 2018, the applicant spoke with W3 about the difficulty seeing people pregnant and that another employee was due to give birth around the same time she would have been due. She told W3 that someone else in the family was pregnant and about her insomnia.
133. W3's last discussion with the applicant was when the applicant mentioned she would like to move desks so she was not as exposed to pregnant women coming into the area. She noted there was nowhere to sit in the open plan office to avoid a pregnant woman walking into the office and for that matter, "there are pregnant women walking along the street."<sup>94</sup>

#### **W4<sup>95</sup>**

134. W4 commenced working with the respondent in 2006 and had known the applicant since November 2013. She did not recall when the applicant mentioned being uncomfortable around pregnant women.
135. W4 said that between March 2018 and July 2018 there were at least three pregnant women that would have come into the office. She said it is possible that they were to come into the office in more than one occasion on days that the applicant worked. She stated that in addition, we received phone calls about parental leave time from time to time.<sup>96</sup> The applicant may have been at her desk and overheard the phone calls which would have been of general nature, such as what documentation will be required from the staff member and what notification period would be required.
136. W4 recalls that in the middle of 2018 the applicant spoke to her about having a problem overhearing many conversations about parental leave or having a pregnant member of staff come into the office.
137. W4 stated that she arrived at the office at around 6:40 am on 26 July 2018 and the applicant was already in the office. She observed the applicant in a distressed state, emotional and teary sitting. She pulled up the chair and sat next to her and listened to her colleague. The applicant suggested that she could move from sitting at her desk to the other end of the office where the recruitment officer was sitting to be away from pregnant people and discussions. She said as the applicant was not a staff member or reported to her, she did not provide an opinion on any suggestion to relocate to the other end of the office. The applicant mentioned to her that she had requested to be moved and that her treating psychiatrist had put this request in writing to W1.
138. W4 stated that W5 came in about 10 to 15 minutes later and saw that the applicant was upset. W4 said that the applicant was so emotional that what she was saying "was

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<sup>93</sup> Application, pg 1139

<sup>94</sup> Application, pg 1139

<sup>95</sup> Application, pg 1143

<sup>96</sup> Application, pg 1145



disjointed". She was saying things along the lines "no one understands" and that she did not feel supported.

139. W4 stated that W5 did not scream or yell at AV, although W5 "appeared a little frustrated" for the applicant as she was visibly upset. She stated that W5 was there for between 15 to 20 minutes and they had a discussion.
140. A short time later W1 came in. She said the applicant then left the shift early. She does not recall seeing the applicant pack up and going to see W1 about leaving work.
141. W4 said that she did not initiate any discussion with W1 about the applicant's request to change desk. She stated that W1 informed her that he did not see that moving to the other in end of the office was the solution to the applicant's concerns as she would still have pregnant staff come in and have a conversation near her at that location.

## SUBMISSIONS

142. The applicant submitted:

- (a) The applicant was employed by the respondent for five years with a long history in insurance and human resources.<sup>97</sup>
- (b) There were no issues with respect to her employment at any point prior to going off work in July 2018.<sup>98</sup>
- (c) The applicant's first child was born in December 2016 and she returned to work in October 2017.<sup>99</sup>
- (d) The applicant had a pre-existing condition involving a miscarriage in March 2018. She was off work for four weeks and returned to work for three days per week in April 2018.<sup>100</sup>
- (e) In July 2018 the applicant asked to be moved and provided two doctors reports supporting the move. W1 doesn't dispute the request. There is a concession that the discussion took place<sup>101</sup> and at least two approaches were made and he did not concede the request.<sup>102</sup>
- (f) The respondent paid compensation for nine months having had a factual report prepared.<sup>103</sup>
- (g) The applicant's last day of work was 26 July when there was a further meeting with W1.
- (h) The evidence around that time, such as from W4, establishes that there was a request and that it was either refused or not acted upon.<sup>104</sup>

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<sup>97</sup> T pg 2

<sup>98</sup> T pg 3

<sup>99</sup> T pg 8

<sup>100</sup> T1 pg 9

<sup>101</sup> T1 pg 14

<sup>102</sup> T1 pg 15

<sup>103</sup> T1 pg 17

<sup>104</sup> T1 pg 23

- (i) The critical issue is whether the applicant suffered injury by way of aggravation of a pre-existing condition “that day or in this period”<sup>105</sup> from April 2018 to 26 July 2018.
- (j) The applicant was coping with her employment and the failure to move the applicant “precipitated the time from work and the aggravation of the underlying condition”.<sup>106</sup>
- (k) The applicant had a pre-arranged appointment with Dr 1 on 26 July 2018 and was then sent to hospital shortly thereafter.
- (l) Subsequent treatment was provided by Ms X and Dr 1.
- (m) The opinion expressed by Dr 9 that the applicant suddenly went off work in July 2018 due to the March 2018 trauma is inconsistent with the treating opinion of Dr 1.
- (n) Detailed the various treating reports post 26 July 2018.
- (o) Dr 6 provided a report dated 25 January 2019 and the doctor “properly says ... I don’t feel qualified to help you out with respect to an opinion one way or the other.”<sup>107</sup>
- (p) Dr 6 provided workcover certificates which should be read with the treating opinion.
- (q) The Court of Appeal commented on the validity of the psychometric testing undertaken by Dr 9.<sup>108</sup>
- (r) The statements relied upon by the respondent “traverse matters that are not relevant”.<sup>109</sup>
- (s) The applicant was a vulnerable person citing *Attorney-General v K*.
- (t) No case is advanced by the respondent that the aggravation ceased as they deny the aggravation.<sup>110</sup>
- (u) Dr 6 obtained a history which is consistent with the evidence put forward in the applicants’ case.<sup>111</sup>
- (v) Rely on the workcover certificates and the opinions of Dr 6 and Dr 1 for incapacity.
- (w) Contrary to all treating opinion, Dr 9 opines that the applicant is not suffering from PTSD. He opines that the applicant has an underlying personality disorder.
- (x) Dr 9 supports an aggravation of an underlying psychological condition.<sup>112</sup>

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<sup>105</sup> T1 pg 24

<sup>106</sup> T1, pg 24

<sup>107</sup> T1 pg 37

<sup>108</sup> T1 pg 41

<sup>109</sup> T1 pg 42

<sup>110</sup> T1 pg 44

<sup>111</sup> T1 pg 45

<sup>112</sup> T1 pg 50

- (y) The applicant addresses the comments made by the co-workers and “there has been no response from the respondent with respect to those matters.”<sup>113</sup>
- (z) Ms X asserts that the respondent used the events of March 2018 “as an excuse for behaving poorly and inappropriately in the workplace”.<sup>114</sup>
- (aa) Ms X comments on causation in her clinical notes of 17 October 2018 where she noted ongoing exposures to PTSD triggers where the supervisor was unable to accommodate request for work place modifications and a lack of resolution in the work place perpetuating the condition.<sup>115</sup>

143. The respondent submitted:

- (a) There is no medical opinion on substantial or main contributing factor.<sup>116</sup>
- (b) The applicant has been psychologically disturbed since a young teenager.<sup>117</sup> The loss of the second child was “a life-shattering experience for her”. The lay evidence establishes that there was no further injury and no further exacerbation of any kind that can be pointed to.”<sup>118</sup>
- (c) Disputed that there was any employment connection. If it is a frank injury then s 9A “comes into force” and if it is s 4(b)(ii) then “main contributing factor is a stronger or more severe test”<sup>119</sup>, referring to *Qantas v Ralph*.
- (d) The applicant was only back doing part-time work. If you accept the lay evidence, then the applicant “couldn’t cope with anything from the moment she gets back” to work.<sup>120</sup> The applicant is constantly crying, can’t concentrate and is upset all the time.
- (e) That Dr 5 does not say that the work exacerbated or aggravated the PTSD.<sup>121</sup>
- (f) Triggers of the condition can happen anywhere and it is not confined to the work that the applicant was performing.<sup>122</sup>
- (g) Main contributing factor is “slightly tighter” than substantial. The word “the” as opposed to “a” is also relevant.
- (h) Whatever was the accurate diagnosis of the applicant’s psychological condition, there was no injury let alone that the employment was the main contributing factor to the aggravation.<sup>123</sup>
- (i) The lay evidence contradicts the applicant’s evidence that she was coping at work citing statements from W1, W7, W5, W8, W3, W4 and W6.<sup>124</sup>

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<sup>113</sup> T1 pg 52

<sup>114</sup> T1 pg 53

<sup>115</sup> T2, pg 48

<sup>116</sup> T1 pg 56

<sup>117</sup> T1 pg 56

<sup>118</sup> T1 pg 57

<sup>119</sup> T1 pg 57

<sup>120</sup> T1 pg 59

<sup>121</sup> T1 pg 60

<sup>122</sup> T1 pg 63

<sup>123</sup> T1 pg 65

<sup>124</sup> T2, pg 2-3

- (j) The evidence of the co-workers is in contradiction to the general practitioners record<sup>125</sup> of constant exposure to discussions about pregnancy.<sup>126</sup>
- (k) The evidence, such as from W5, contains assertions from the husband which have not been contradicted by him, that a plan had previously been instituted to admit the applicant into hospital.<sup>127</sup>
- (l) The applicant was reacting in such a bizarre fashion. W1 was simply doing his best to manage her and work out the best course of action.<sup>128</sup> The applicant was not injured as a result of W1 not moving her.<sup>129</sup>
- (m) The applicant was taking “a lot of time off work between April and July, randomly, without any definite notice.”<sup>130</sup> The respondent referred to a series of email and text messages.<sup>131</sup> The leave records showed relevant time off work.
- (n) Referred to previous reports regarding the applicant’s pre-existing condition such as from Dr 2 and Dr 7 in 2007<sup>132</sup> and Dr 4 in 2012<sup>133</sup>.
- (o) I would not give the opinions expressed in the certificates provided by Dr 6 any weight as she wrote a report dated 25 January 2019 stating that it was “difficult to comment” on whether work aggravated the condition.<sup>134</sup>
- (p) Dr 6 expressed agreement with Dr 9 that the applicant had an underlying personality dysfunction with narcissistic and borderline personality traits.<sup>135</sup> In May 2018 Dr 6 diagnosed the applicant with severe anxiety and acute post-traumatic stress disorder. The applicant was then prescribed extensive medications.<sup>136</sup>
- (q) In March 2018 Dr 6 referred the applicant to Ms X, Psychologist, and provided certificates unrelated to any work condition. On 27 July 2018 Dr 6 referred the applicant to a private Hospital.
- (r) Dr 8 at a private Hospital recorded in October 2018 that the symptoms were triggered by seeing children around the hospital. It “did not matter where the trigger occurs it affects the applicant with her symptoms”.<sup>137</sup>
- (s) In his first report dated 30 May 2018 Dr 1 provided a detailed history and referred to a variety of symptom which accords with the evidence of the lay witnesses.<sup>138</sup>
- (t) By letter dated 26 June 2018 Dr 1 provided a referral to a private Hospital. The date of this report accords with W4’s evidence of the conversation with the

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<sup>125</sup> Application, p 244

<sup>126</sup> T2, pg 6

<sup>127</sup> T2, pg 12

<sup>128</sup> T2, pg 15

<sup>129</sup> T2, pg 16

<sup>130</sup> T2, pg 19

<sup>131</sup> T2, pg 20

<sup>132</sup> T2, pg 22-23

<sup>133</sup> T2, pg 34

<sup>134</sup> T2, pg 26

<sup>135</sup> T2, pg 27

<sup>136</sup> T2, pg 30

<sup>137</sup> T2, pg 38

<sup>138</sup> T2, pg 40

applicant's husband.<sup>139</sup> The report was rewritten on 26 July 2018. Apart from Dr 1, there was no other evidence that "comes close to dealing with causation".<sup>140</sup>

- (u) Ms X's clinical notes did not come close to an opinion on causation and a precipitating factor is not causation. The notes were not an opinion and it did not address main contributing factor.<sup>141</sup>
- (v) Referred to the opinion expressed by Dr 7 following the hospitalisation on 31 July 2018 that the initial trauma occurred at hospital and the hospital environment would have been triggering.
- (w) Dr 9 provided a very detailed report and is completely unsupportive of any work involvement. He had the benefit of the factual report. The other medical reports and factual material described the pre-existing difficulties the applicant was exhibiting and expressing at work. They accord with Dr 9's opinion.<sup>142</sup>
- (x) It is difficult to know whether it is a s 9A case or a s 4(b)(ii) as the applicant is running on both.<sup>143</sup>
- (y) In addressing s 9A submitted some of the factor were relevant to s 4(b)(ii). The injury was "already well established", the applicant was not overworked and as merely saying that certain matters were triggers. The duration of employment was irrelevant. The injury or similar injury would have occurred anyway at about the same time. The incidents could have occurred in a shopping centre or on television or somebody talking about children or being at hospital. There is evidence about all of this. The applicant had a serious pre-existing condition.<sup>144</sup>
- (z) The word "trigger" is used by the applicant and the doctors. It is not a word used in the 1987 and 1998 Acts "and it's not there because trigger is not an aggravation, its not acceleration, it's not exacerbation and it's not deterioration."<sup>145</sup> The respondent declined to refer to any authority.
- (aa) There was no exacerbation of the disease because the symptoms were already in situ and "they wax and wane".<sup>146</sup>
- (bb) The applicant requires a medical opinion to establish "main contributing factor to the aggravation".<sup>147</sup>
- (cc) Capacity was "a hard road for me to argue".<sup>148</sup> The behaviour exhibited by the applicant on the first day was consistent with the observations of the lay witnesses. Even if there was some capacity, any trigger would cause the applicant to be incapacitated.<sup>149</sup>

144. The applicant in reply submitted:

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<sup>139</sup> T2, pg 42

<sup>140</sup> T2, pg 45

<sup>141</sup> T2, pg 48

<sup>142</sup> T2, pg 54

<sup>143</sup> T2, pg 56

<sup>144</sup> T2, pg 59

<sup>145</sup> T2, pg 60

<sup>146</sup> T2, pg 61

<sup>147</sup> T2, pg 63

<sup>148</sup> T2, pg 64

<sup>149</sup> T2, pg 64

- (a) The applicant commenced seeing her new general practitioner on 26 July 2019. This was accepted by Mr Saul.<sup>150</sup>
- (b) The applicant addressed the other witness statements and “makes some observations with respect to that, and disputes much of the content of those statements”.<sup>151</sup>
- (c) Dr 9 relied upon psychometric testing which was recently discussed by the Court of Appeal. The doctor’s reliance on this testing infected his opinion. Dr 1 was only aware of one of these tests.<sup>152</sup>
- (d) It could not be legitimately disputed that the applicant had PTSD, anxiety, depression and an underlying personality disorder.<sup>153</sup> An employer takes “a worker as you find them”.
- (e) The applicant had worked for the respondent for a period of time, was rewarded with respect to pay increases and been brought back to work on a graded return to work program.
- (f) The respondent’s case “falls into a heap”, particularly his reliance on six or seven statements from co-workers “all of which are somewhat contradictory”.<sup>154</sup>
- (g) The “elephant in the room” is the letter dated 26 June 2018 from W2, Deputy General Manager of Operations, signed off by W1 on 28 June 2018, where the applicant’s hours are increased from three days to four days.<sup>155</sup> This contradicted the evidence from W1 and his evidence could not be accepted “at any level”.
- (h) The leave records did not support the respondent’s submissions that the applicant was off work “every second day”.
- (i) Various portions of the witness statements are “entirely inconsistent with the employer increasing this worker’s hours”.<sup>156</sup> W1 said he was left wondering what he could do.<sup>157</sup>
- (j) W6 formed a negative view of the applicant prior to her going off on maternity leave and had a problem listening to the applicant’s “language and her outbursts and crying”. She was otherwise overseas between 18 June and the end of July “so her assistance is limited”.<sup>158</sup>
- (k) W7 “contradicts evidence given by others with respect to the frequency with which the applicant may have been confronted with issues associated with pregnancy. She felt it happened two or three times per week.”<sup>159</sup> Others have sought to minimise the frequency with respect to how often the applicant was exposed to discussions about pregnancy and assert it happened “two or three times in three months”.

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<sup>150</sup> T2, pg 65

<sup>151</sup> T2, pg 66

<sup>152</sup> T2, pg 68

<sup>153</sup> T2, pg 69

<sup>154</sup> T2, pg 69

<sup>155</sup> T2, pg 70

<sup>156</sup> T2, pg 72

<sup>157</sup> Application, pg 1088

<sup>158</sup> T2, pg 76

<sup>159</sup> T2, pg 76 referring to Application, pg 1109

- (l) W7 stated that the office was supportive of the applicant and allowed her to leave the office when she wished. This is not borne out by the sick leave records and is not consistent with the employer increasing rather than decreasing her hours.
- (m) W5 stated that she only was only aware of one instance when a pregnant woman came into the office.<sup>160</sup> Such evidence was unacceptable as W7 stated that a particular employee attended on two occasions.<sup>161</sup>
- (n) W5 concedes that she raised her voice on 26 July but didn't yell.
- (o) The flavour of the statements such as from W8 are "quite negative with respect to the applicant".<sup>162</sup> However W3 had a different perspective as she "did not observe anything unusual about the interaction between [the applicant] and other staff".<sup>163</sup> W3 also observed the applicant to be busy with review and renewal of a number of policies.<sup>164</sup>
- (p) W4 contradicted W5 when she stated that "at least three pregnant women have come into the office" between March 2018 and 26 July 2018.<sup>165</sup> W5 was "eager ... to advance her point of view says once and once only in the period".
- (q) W4 stated that W5 did not yell or scream at the applicant but appeared a little frustrated as the applicant was upset. W5 "puts a different context to that conversation".
- (r) The applicant has had significant psychological issues in the past. She managed to become pregnant through IVF and then returned to work and then suffered the personal trauma in early 2018 including "an awful experience in hospital".<sup>166</sup> The applicant then returned to work which "was progressing, albeit with some bumps". The applicant was maintaining employment and her hours had increased at the end of June. Concurrent with the increase in hours the applicant requests a repositioning in the office which was refused on two separate occasions. A confrontation developed which saw the applicant leave work.
- (s) The applicant "suffered an exacerbation of [the psychological] condition that she suffered as a consequence of workplace factors.... The only other alternative that is available to you on the evidence is that the applicant was ... a wildly dysfunctional personality."<sup>167</sup>
- (t) It was accepted that the letters from StateCover to Dr 6 and Dr 1 requesting further reports commenting on Dr 9's opinion were in the evidence.<sup>168</sup> The applicant did not make any further submissions when referred to these letters and accepted that there was no criticism of their context.<sup>169</sup>
- (u) Accepted that the case reads more like a s 4(b)(ii) then a s 4(a) case but was not abandoning the latter.<sup>170</sup>

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<sup>160</sup> T2 pg 80 referring to Application, pg 1122

<sup>161</sup> T2 pg 80 referring to Application, pg 1113

<sup>162</sup> T2 pg 82 referring to Application, pg 1130

<sup>163</sup> T2 pg 82 referring to Application pg 1138

<sup>164</sup> T2 pg 83 referring to Application pg 1139

<sup>165</sup> T2 pg 84 referring to Application pg 1145

<sup>166</sup> T2 pg 86

<sup>167</sup> T2, pg 86-87

<sup>168</sup> Application, pg 32 and pg 1057

<sup>169</sup> T2, pg 90-92

<sup>170</sup> T2, pg 91

## REASONS

145. The applicant must prove her case on the balance of probabilities.<sup>171</sup>

### Legislation

146. Section 4 of the 1987 Act relevantly provides:

"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"

### Factual issues

#### ***Factual dispute – Applicant's conduct following her return to work in early April 2018***

147. There was a factual dispute concerning the applicant's behaviour at work from early April 2018 until ceasing work on 26 July 2018. The applicant initially submitted that she was "coping" at work and the treating psychiatrist opined that she was "capable of working". The respondent took issue with these descriptions and submitted that the applicant was unwell.
148. The evidence of the various co-workers describes the applicant's presentation following her return to work in early April. W7 described the applicant as "more teary than usual"<sup>172</sup> after her return in April and would leave the office frequently.
149. W1 stated that the applicant would regularly break into tears and this might occur "for no reason".<sup>173</sup>
150. W5 noted significant mood changes and hysterical behaviour such that she spoke to the applicant's husband and suggested that the applicant required help. The applicant's husband advised W5 that arrangements had been made to admit the applicant into hospital if she reached a particular point.
151. There was no objection to the hearsay and it was not the subject of rebuttal evidence. The conversation is otherwise confirmed by Dr 1's referral to a private hospital dated 26 June 2018.<sup>174</sup>
152. W8 described the applicant as gaunt and unwell. The applicant advised W8 that she couldn't think and it was all too hard.

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<sup>171</sup> *Nguyen v Cosmopolitan Homes (NSW) Pty Ltd* [2008] NSWCA 246 per McDougall J at [44]- [55], McColl and Bell JJA (as their Honours then were) agreeing; *Chen v State of New South Wales (No 2)* [2016] NSWCA 292 per Leeming JA at [33]-[34]; McColl JA agreeing at [1].

<sup>172</sup> Application, pg 1109

<sup>173</sup> Application, pg 1089

<sup>174</sup> Application, pg 19



153. The respondent relied on the leave records<sup>175</sup> as establishing that the applicant had a lot of time off work. A simple perusal of the leave records did not support the respondent's submission and that particular submission is rejected.
154. W3 described the applicant as "different following the miscarriage"<sup>176</sup> and gave an example of the applicant describing a "blood curdling scream" following being told on the phone by a family member that they were pregnant. W3 also observed that the applicant, despite being sleep deprived, was "busy" with work and provided "support and advice" on the police renewal process.
155. There is no reason not to accept the balanced description provided by W3 that the applicant was suffering and yet still working on that matter described by that witness.
156. Apart from the preponderance of the co-workers' evidence that the applicant was in a quite emotional state following her return to work, various pieces of evidence corroborated the accounts of the co-workers that the applicant was unwell.
157. The emails sent by the applicant on her return to work describe her precarious emotional state.
158. The report of Dr 1 dated 30 May 2018 describe a significant number of symptoms associated with the recent trauma in March 2018. Relevantly Dr 1 noted irritability, problems with basic trust and regular dissociation. All of these symptoms would have adversely impacted on the applicant's ability to undertaken her employment duties.
159. The document provided by Dr 1 in late June 2018 of a proposed admission to hospital corroborates the discussions between W5 and the applicant's husband that steps had been taken, if the need required, to admit the applicant to hospital.<sup>177</sup>
160. The applicant's submission that the various co-workers did not reply to the applicant's denial of their evidence is without merit. There was no requirement for the various co-workers to provide further statements replying to the applicant's short comments which themselves were by way of reply.
161. Contrary evidence to the various descriptions of the applicant's poor work performance, was its decision to increase the applicant's days at work from three to four and the applicant's assertion that no steps were taken on a human resources level if her work performance was as poor as the co-workers suggested. The applicant also referred to supporting evidence from W3 of support and advice through the policy renewal process.
162. However, whilst no active steps were taken by the respondent, W1' evidence was that he he did not know what to do with the applicant. Not only did he not know what to do, he quite surprisingly signed off on increased hours. The decision was made in late June, confirmed by W1 and due to commence on 17 July 2018. I infer that the work hours then increased in accordance with the agreement.
163. Despite the respondent's decision to increase the work hours, bizarre as it seemed given the lay evidence, I accept the consistent evidence from the co-workers that the applicant was struggling throughout this period. I do not accept the applicant's submission, rhetorically described as "the elephant in the room" that the decision to increase the hours is of such moment that it outweighs what I find is consistent evidence from the various co-workers. In this respect, I accept the co-workers' evidence that the applicant was generally struggling at work whilst acknowledging W3's evidence of the applicant's assistance in the policy renewal

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<sup>175</sup> Reply, pg 41

<sup>176</sup> Application, pg 1138

<sup>177</sup> Application, pg 1122

process.

164. I note that, some of the applicant's inability to cope at work is otherwise consistent with her case that there were triggers at work aggravating her psychological condition. I return to this aspect in due course.

***Factual dispute – number of triggers at work***

165. A factual dispute raised in submissions is the number of pregnant people coming into the office. I note that the applicant's case is that she was directly exposed to both pregnant ladies at the workplace and discussions at the workplace in relation to workers making inquiries on maternity leave. The submissions pertaining to this issue sometimes confused the two matters and did not always properly address what the co-workers recorded in their statements.
166. The applicant did not properly address this topic in her statement although Dr 6 states that the applicant provided a history that she was constantly exposed to triggering from these incidents.
167. W1 noted that the respondent "only had about 9 employees pregnant in the last 12 months" including the applicant.<sup>178</sup> That evidence was disputed by the applicant but she did not specify any numbers in her evidence.
168. W7 stated that she would "estimate discussions directly or indirectly associated with pregnancy or maternity leave would occur 2 or 3 times per week". This evidence is not the same as the number of pregnant workers coming into the office.
169. The number of pregnant people coming into the office during this period varied slightly in the evidence but the differences were not as significant as the applicant submitted. I do not accept the applicant's submission that the statements of the various co-workers were inconsistent such that they should be rejected.
170. W5 stated that she was only aware of one instance of a pregnant lady coming into the office.<sup>179</sup> W7 recalled W10 visiting the office on "a couple of times".<sup>180</sup> W4 stated that "at least 3 pregnant women" came into the office and it was possible that they came in "on more than one occasion".<sup>181</sup> W8 witnessed two pregnant women come into the office during that period and the applicant left the office in tears.<sup>182</sup>
171. This evidence is based on recollection. I accept that the witnesses were doing their best to recall the number of actual visits by pregnant ladies during this period. The differences are marginal and reflect differences from honest recollection rather than anything more sinister. There is also no reason to expect that all co-workers and/or the applicant were present in the office when a particular visit occurred. Accepting W4's evidence as the most favourable to the applicant of the three co-workers, the numbers of actual visits by pregnant worker were not significant.
172. The applicant was only working three days per week for most of the period relating to the period pertaining to the allegation of injury. It is likely that some of the attendances at the office occurred when the applicant was not at work.

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<sup>178</sup> Application, pg 1090

<sup>179</sup> Application, pg 1122

<sup>180</sup> Application, pg 1113

<sup>181</sup> Application, pg 1145

<sup>182</sup> Application, pg 1131

173. This evidence confirms that actual visits by pregnant staff were extremely limited. The applicant otherwise did not provide any precise evidence of the number of pregnant people attending the office in her witness statement.
174. The claim form does not specify the number of “triggers” experienced by the applicant in the workplace. The applicant disputed the evidence, including that provided by W7, but provided no specific details in her witness statement.
175. The evidence otherwise clearly satisfies that there were discussions concerning maternity leave during this period.
176. There is nothing inconsistent with W7’s evidence about the number of discussions concerning maternity leave when comparing this evidence with the other co-workers. As I noted, W7 stated that the discussions, two to three times per week, was not in the context of the number of visits by pregnant workers to the office but in respect of discussions on maternity leave.
177. I do not accept the applicant’s evidence provided to the doctors such as Dr 6 that there was “constant exposure” to maternity leave issues. That history is inconsistent with the nature of the workplace and the evidence of the co-worker’s such as W7’s precise evidence on this topic. This was a human’s resources department of the respondent who dealt with a multitude of matters pertaining to employment issues. It makes little sense, given the number of pregnancies as particularised by W1, that there would be a constant exposure to maternity leave matters.
178. I add that I do not accept the applicant’s submission that the various co-workers were required to address the applicant’s denials in her statement. In general, there is an absence of specificity with respect to the applicant’s evidence denying large portions of the co-worker’s evidence. The applicant’s responses to the various co-workers’ statements were by way of reply. The co-workers were not then required to respond to a response as it was clear that there was a conflict in the evidence.

***Whether the applicant would be relocated***

179. The evidence clearly established that the applicant wished to be relocated in the office. Two reports from Dr 1 were provided to W1 supporting the move.
180. W5 did not raise the matter with W1 but she did raise it with W8 when she suggested that the applicant “was not coping in that location.”<sup>183</sup> At that time W8 indicated that that W1 was considering the request.
181. I do not accept that portion of W1 evidence that he had not made a decision whether to move the applicant for a number of reasons.
182. First, W1 discussed the matter with at least two co-workers, W8<sup>184</sup> and W4<sup>185</sup>, and indicated that he did not consider the move “was appropriate”. Secondly, W1 formed a view that moving the applicant would not change matters. That opinion was conveyed by W1 to the applicant on 17 July 2018 as suggested in the diary note for that day.<sup>186</sup>
183. Thirdly, the matter had been raised for sufficient time and W1 was still delaying communication of his ultimate decision.

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<sup>183</sup> Application, pg 1123

<sup>184</sup> Application, pg 1133

<sup>185</sup> Application, pg 1148

<sup>186</sup> See diary note at Application, pg 1192

184. I accept that a source of the applicant's exacerbation of her symptoms was her perception that she would not be allowed to move within the office. The applicant's perception that permission would not be granted was based on at least two requests made over a period and the absence of acceptance of the move. Indeed, whilst it is not essential to my finding, I believe the applicant was probably correct in her perception that she would not be moved.
185. This topic was one of the matters discussed by the applicant with W4 on the morning of 26 July 2018 when the applicant presented in a distressed state.<sup>187</sup>

### ***The Circumstances of Injury***

186. The applicant returned to work in early April 2018 following the miscarriage. She then was working three days per week. It appears the hours increased to four days a week in mid-July 2018.
187. The applicant advised various co-workers that exposure to discussions of maternity leave and seeing pregnant staff triggered her psychological condition. Dr 6 was told about these incidents during the period. Dr 1 was obviously given this history as he provided two reports dated 9 July 2018 and 17 July 2018 requesting that the applicant be relocated in the office. The report dated 17 July 2018 specifically refers to the applicant being with "easy earshot of phone conversations regarding members of staff requesting maternity leave."<sup>188</sup>
188. A number of co-workers were advised by the applicant that she wanted to be moved because of exposure that was triggering her condition including hearing discussions about parental leave.<sup>189</sup> This staff witnessed the applicant becoming upset and leaving the office.
189. There were various meetings between W1 and the applicant regarding relocation of her desk. W1 advised the applicant that he was considering it. I believe the likely position is what he reported to W4, that is "that he did not see that moving her to the other end of the office was a solution as ... she would still have pregnant staff come in and have conversations near her at that location."<sup>190</sup>
190. On 17 July 2018 the applicant and W1 met to discuss the second Dr 1 report recommending that she be moved. I accept that W1 stated, consistent with this diary note that he would think about it and he said words to the effect:<sup>191</sup>

"Doesn't know what to do with me. I'm going to face pregnant people everywhere."

191. By 26 July 2018 the request to move had not been approved. I accept W4's version of what occurred that morning. The applicant was, according to W4, "so emotional that what she was saying was disjointed". W5 came over. W5 did not yell or scream at the applicant but she was a little frustrated.
192. I do not accept the accuracy of the applicant's file note of 26 July 2018 concerning her discussion with W4.<sup>192</sup> The evidence from the co-workers does not establish that the applicant was "triggered all day by pregnancy questions". That evidence is a distortion by the applicant when she was extremely ill and about to be admitted to hospital. It is inconsistent with other evidence, which I accept, that there were discussions about maternity leave about two to three times per week. As I mentioned, that evidence is based on a weekly estimate in circumstances where the applicant was working three days per week.

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<sup>187</sup> Application, pg 1146, paragraph 23

<sup>188</sup> Application, pg 1191

<sup>189</sup> See for example Application, pg 1145, paragraph 16

<sup>190</sup> Application, pg 1148

<sup>191</sup> Application, pg 1192

<sup>192</sup> Application, pg 1194

193. I also do not accept the file note where the applicant asserts that “W5 came over and started yelling at me.” This portion is inconsistent with the evidence of W5 and W4, which I prefer, in circumstances where the applicant thinking was already disjointed.
194. I otherwise observe that the applicant was severely upset before W5 came over and sought to comfort the applicant. In that regard, the evidence establishes that W5 was extremely close to the applicant over an extended period and frequently sought to provide comfort and assistance to the applicant. I do not accept the applicant’s submission that W5 was “eager ... to advance her point of view”. W5 presented as a close personal friend of the applicant who was extremely sincere in her efforts of assistance to the applicant.
195. The applicant then saw W1 and he told her that she cannot be in the office, she was sick and the whole team was “walking on egg shells”.<sup>193</sup> The applicant then left the office.
196. The applicant then immediately consulted Dr 6 and Dr 1 shortly thereafter. Admission to a private hospital occurred on 31 July 2018.

### Diagnosis of Injury

197. The applicant relied on the opinion expressed by Dr 6 in the various WorkCover certificates on injury where she opined that the injury was an “exacerbation of PTSD and Anxiety”.<sup>194</sup> The reports dated 27 July 2018 and 25 September 2018 support work incidents exacerbating the pre-existing condition.
198. The applicant consulted with Dr 6 both before and after the events in June and July 2018. In these circumstances the doctor’s opinion would be extremely relevant to diagnosis.
199. Somewhat inconsistent with these opinions, Dr 6 subsequently opined in a short report dated 25 January 2019 that it was “difficult to comment on the role work has had in exacerbating/aggravating her mental health condition.”<sup>195</sup> In these circumstances it is difficult to give the certificates and other opinions provided by Dr 6 much weight when she subsequently expressed doubt in her latest opinion.
200. A further WorkCover certificate dated 26 July 2019 (Exhibit A) from a subsequent general practitioner is given minimal weight. I was advised by her counsel that this doctor initially consulted the applicant on the day of the certificate,<sup>196</sup> that is some 12 months after the various incidents. The certificate is otherwise unexplained.
201. In *DHL Exel Supply Chain (Australia) Pty Ltd v Hyde*<sup>197</sup> Keating P noted that “the certificates are of little probative value in the absence of a medical report to explain them or to set out the history on which they are based”. The authorities were recently referred to by King ADP in *El-Chami v DME Engineering Services Pty Ltd*.<sup>198</sup>
202. I give particular weight to Dr 1’s opinion that “the conditions of employment exacerbated the severity of [the] psychological conditions as listed.”<sup>199</sup> Dr 1 treated the applicant on a number of occasions including whilst the incidents occurred at work. The doctor provided two reports requesting the respondent to relocate the applicant as the work conditions were upsetting. This opinion is consistent with my earlier findings that various incidents at work were upsetting to the applicant.

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<sup>193</sup> Application, pg 1193

<sup>194</sup> See for example, Application, pg 835

<sup>195</sup> Application, pg 111

<sup>196</sup> T2, pg 65

<sup>197</sup> [2011] NSWCCPD 22 at [93]

<sup>198</sup> [2019] NSWCCPD 35 at [31]

<sup>199</sup> Application, pg 16

203. Ms X did not provide an opinion on causation in her report dated 28 August 2018 when the applicant had been recently discharged from a private hospital. The report notes the history of an increase in the severity of symptoms due to exposure at work to “routine discussions of pregnancy, maternity leave and due dates by the HR staff.”<sup>200</sup> Ms X’s clinical notes, referred to by counsel as supporting a finding of injury, corroborate what is otherwise recorded in that report.
204. Whilst Ms X does not directly articulate an opinion on injury, the history contained in her report and clinical notes of aggravating incidents from work are consistent with Dr 1’s opinion on injury. In this respect I place some weight on Ms X’s history as otherwise supporting my findings of fact and acceptance of Dr 1’s opinion.
205. I accept that Dr 5 expressed an opinion that work place events were “triggers to the PTSD”.<sup>201</sup> The Doctor’s conclusion must be read with the question asked immediately above the passage where he discusses the triggers to the PTSD. The opinion is not particularly detailed but it is otherwise supportive of the applicant’s case that incidents at work were triggers to the PTSD. I reject the respondent’s submission that Dr 5 did not express an opinion on injury, consistent with the opinion of Dr 1, that incidents at work, were “triggers to the PTSD.”
206. Dr 9 provided an opinion entirely unresponsive of the applicant’s case. I reject that part of the doctor’s opinion that opines that work did not aggravate the psychological condition for the following reasons.
207. First, Dr 9 did not accept that the applicant had an underlying psychological condition and her condition was solely a personality disorder. This opinion is contrary to medical views expressed by a number of doctors, including treating psychiatrist, who expressed the view that the applicant had PTSD.
208. Other treating evidence from two specialists at a private hospital concluded that the applicant was suffering from PTSD symptoms. Those conclusions, whilst not of particularly assistance on the injury issue, support the diagnosis made by Dr 1 and are contrary to that portion of the opinion expressed by Dr 9 that the applicant was not suffering from PTSD.
209. Dr 9’s opinion is based on one medical examination. That is a relevant factor when weighting his opinion on diagnosis and causation when other doctors consulted the applicant on multiple occasions, such as Dr 1, or otherwise over an extended period, such as by the doctors at a private hospital.
210. Secondly, whilst Dr 9 examined the effect from the pre-existing incidents, he does not address the actual incidents that the applicant relied upon in determining whether there was an exacerbation of her psychological condition. In rejecting the view that there was any aggravation, Dr 9 relied upon:<sup>202</sup>
- (a) The staff had been supportive;
  - (b) The employer allowed the applicant to work three days per week with time off to express milk and care for her child;’
  - (c) Particular co-workers were supportive;
  - (d) No one complained about the applicant’s “latitude”;

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<sup>200</sup> Application, pg 113

<sup>201</sup> Application, pg 937

<sup>202</sup> Application, pg 55

- (e) Relocating would not have made a difference and it was more likely that the applicant did not want to outside W1' office.

211. Accepting the accuracy of these observations, Dr 9 does not address the particular incidents that were said to have aggravated the applicant's condition. He basically addresses matters that did not aggravate the condition and/or explain why relocating the applicant would not have made a difference to the very exposure that was said to be causative of injury. Accordingly, Dr 9 does not address the relevant incidents that were alleged to be causative of injury when opining that there was no work injury.
212. Thirdly, Dr 9 relied upon questionable testing methods in forming a view that the applicant was malingering, grossly exaggerated her symptoms and was not genuine. Dr 9 stated that "these tests are protected by copyright and are unauthorised for release".<sup>203</sup>
213. The Court of Appeal recently examined the testing undertaken by Dr 9 in *Brighten v Traino (Brighten)*.<sup>204</sup> The Court then referred to the tests undertaken by Dr 9 including SIMS, NVMSVT, MSVT and MMPI 2. Basten JA, with whom Gleeson JA agreed, noted that the Doctor then reached an opinion "on the basis of neuropsychological testing the validity of which was impenetrable and unproven in court"<sup>205</sup>. Some of these tests (MSVT, SIMS) were repeated in this matter.
214. The observations expressed by the Court of Appeal are consistent with Dr 1's comment that he was unfamiliar with the tests referred to by Dr 9 other than MMPI.<sup>206</sup>
215. The applicant referred to the criticism of Dr 9's testing made by the Court of Appeal in *Brighten*. The respondent remained quiet in response to these criticisms.
216. I express concerns that, in light of the decision of the Court of Appeal, evidence based on these tests undertaken by Dr 9 are placed before the Commission on the basis that they supposedly have some probative value as being scientifically valid.
217. For these reasons, I reject Dr 9's opinion save as to where Dr 6 expressed agreement<sup>207</sup> with that part of the opinion that the applicant exhibit personality dysfunction with narcissistic and borderline personality traits.
218. The applicant submitted that the psychological condition was aggravated by a series of events. When requested to elaborate on the basis of injury and whether it was based on either s 4(a) of s 4(b)(ii), it was submitted:<sup>208</sup>

"MR MORGAN: Depends how you characterise the aggravation, whether it's a disease on disease or whether it's a series of frank events giving rise to the aggravation of an underlying disease. I mean, really it's a difficult concept. There's no doubt that she had a pre-existing problem, that was the thrust of Dr 1's report - suggestions.

Now, is the aggravation caused by specific events which has caused that disease of the mind to deteriorate further? Now, is that a 4(b)(i)?

ARBITRATOR: No, it's not a 4(b)(i). It can't be a 4(b)(i) but you seem to be talking about aggravation in terms of 4(b)(ii) right now, that's what I'm observing.

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<sup>203</sup> Application, pg 41

<sup>204</sup> [2019] NSWCA 168.

<sup>205</sup> At [79]

<sup>206</sup> Application, pg 15

<sup>207</sup> Application, pg 111

<sup>208</sup> T1, pg 46-47

MR MORGAN: Yes. I really couldn't commit myself to one or the other.

ARBITRATOR: I understand that. So the 4(b)(ii) is the aggravation of the underlying disease of the mind, that's what I got from you and your 4(a) is the individual events causing an aggravation.

MR MORGAN: Having said that, the applicant's statement is in circumstances of the culmination of a period of time which would tend towards the second limb rather than the first.

ARBITRATOR: 4(b)(ii)?

MR MORGAN: Yes. Without abandoning --"

219. On the second day the following interaction occurred between myself and the applicant's counsel:<sup>209</sup>

"ARBITRATOR: It reads anything like a 4(b)(ii) case more than a 4A. What do you say about that?

MR MORGAN: Oh - - -

ARBITRATOR: Having looked at it all now.

MR MORGAN: - - - I don't abandon - - -

ARBITRATOR: It's your case.

MR MORGAN: - - - I don't abandon it but I'm not going to argue with you."

220. In response to my question as to whether any injury was properly characterised as s 4(a) or s 4(b)(ii), the respondent submitted:<sup>210</sup>

"If it, if it is 4(b)(ii) that's fine for me, because the test of the main contributing factor to aggravation is stronger or a tougher test than substantial."

221. Counsel submissions on this issue are set out above and did not assist on whether any injury was properly characterised as falling within s 4(a) of s 4(b)(ii). In *Federal Broom Co Pty Ltd v Semlitch*<sup>211</sup> (*Semlitch*) Kitto J stated:<sup>212</sup>

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

222. In *Inman v NSW Police Force*<sup>213</sup> (*Inman*) Roche DP cited this passage in concluding that "a recognised psychological condition (such as major depression or PTSD) is a disease." However, this statement does not equate to a statement of principle that a recognised psychological condition cannot be an injury for the purposes of s 4(a) of the 1987 Act.

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<sup>209</sup> T2, pg 91

<sup>210</sup> T2, pg 58

<sup>211</sup> [1964] HCA 34; 110 CLR 626

<sup>212</sup> At 632

<sup>213</sup> [2013] NSWCCPD 11 at [264]



223. In the subsequent decision of *NSW Police Force v Gurnhill (Gurnhill)*,<sup>214</sup> Roche DP stated that whether “a psychological condition is classified as an injury or a disease depends on the evidence in each case”. In respect of a personal injury under s 4(a) the worker must establish that the event has a “physiological effect” on the worker.<sup>215</sup>
224. The applicant suffers an injury within the meaning of s 4(a) of the 1987 Act if there is a physiological change that might be dramatic or ascertainable.<sup>216</sup> There is no medical evidence that the applicant suffered from a physiological change from the work events alleged to be causative of injury. The applicant’s submissions did not articulate one. Accordingly, I am not satisfied that the applicant suffered an injury within the meaning of s 4(a) of the 1987 Act.
225. For these Reasons, the provisions of s 9A of the 1987 Act are irrelevant and not considered.
226. Accordingly, the applicant is required to establish injury within the meaning of s 4(b)(ii). As Mr Morgan accepted, the applicant suffered from a pre-existing psychological condition. I accept the opinions Dr 6 and Dr 1 that the applicant suffered from pre-existing depression, anxiety and PTSD symptomatology. There was also, as Dr 6 accepted, a pre-existing personality dysfunction with narcissistic and borderline personality traits. In that respect I agree with Dr 6’s opinion and accept that portion of Dr 9’s opinion, that there was an underlying narcissistic personality complex.
227. The applicant submitted that the principles in *Attorney-General’s Department v K (A-G v K)*<sup>217</sup> applied to the facts in this case. In *A-G v K* Deputy President Roche relevantly concluded:<sup>218</sup>

“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

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<sup>214</sup> [2014] NSWCCPD 12

<sup>215</sup> at [72]

<sup>216</sup> *Military Rehabilitation and Compensation Commission v May* [2016] HCA 19 at [47], [75]; *Kennedy Cleaning v Petkoska* [2000] HCA 45 at [39]; *Ky v Blue Leaf Food Group Pty Ltd* [2016] NSWCCPD 55 (Ky) at [50]-[64].

<sup>217</sup> [2010] NSWCCPD 76

<sup>218</sup> at [52]

- (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."

228. I agree that the principles are relevant to the facts in this case. The applicant, appeared to be referring to paragraph (a) above when counsel agreed with the proposition that "eggshell skull principles" applied.<sup>219</sup>
229. The respondent's submitted that the word "trigger", when used by either the applicant or doctors, does not satisfy the meaning of s 4(b)(ii). This submission does not address the relevant issue.
230. The word "trigger" is used in the evidence to describe the event or incident that resulted in the further symptoms. The further symptoms, such as the nature of the distress suffered by the applicant when faced by a particular incident, is the relevant exacerbation which establishes that part of the meaning of injury in s 4(b)(ii). The "trigger" is the relevant incident that exacerbated the applicant's psychological condition.
231. I accept that the applicant's personality and extremely traumatic prior personal circumstances meant that these principles are relevant and that it is more likely that the incidents at work exacerbated the applicant's condition.
232. I am satisfied that the work incidents at least exacerbated the applicant's pre-existing psychological condition. As Kitto J noted in *Semlitch*, the meaning of exacerbation in the previous definition of injury in the New South Wales legislation meant that "it is properly used to refer to effects which the disease produces in the victim rather than to the advance of the disease itself to a more serious stage of its development."
233. The terms used in s 4(b)(ii), that is "aggravation, acceleration, deterioration or exacerbation" are not mutually exclusive and an injury may establish more than one of the descriptors. However, given the medical evidence generally discusses "exacerbation", I have limited the finding to that part of s 4(b)(ii) and probably "aggravation".
234. I am satisfied on the balance of probabilities, that the applicant's psychological condition was exacerbated and aggravated by the incidents in the workplace, specifically when she saw a small number of pregnant workers, heard discussions about maternity leave and her request to be relocated in the office was not accepted.

### **Main contributing factor**

235. The respondent submitted that the applicant had to satisfy the test of main contributing factor to the "aggravation, acceleration, deterioration or exacerbation as required by s 4(b)(ii) of the 1987 Act.
236. In *Mitic v Rail Corporation NSW* (unreported, 8 April 2014) (*Mitic*), I stated:

"During submissions I referred counsel to the decision of *Murray v Shillingsworth* [2006] NSWCA 367 in relation to the concept of s 4(b)(ii) in its previous form and s 9A of the 1987 Act. In that case, Einstein J (at paragraph 63 - 64) stated:

- '63. These submissions are misconceived. They fail to recognise that in the circumstances concerning an integer dealt with by s 4(b)(ii) [such as an aggravation of a disease], the only compensation is to the effect of the aggravation and not to the effects of the original non-aggravated disease.

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<sup>219</sup> T1, pg 43

64. His Honour approached the question of construction or upon the basis that the case was put as an acceleration or aggravation or deterioration of a pre-existing atherosclerotic condition in which the substantial contributing factor had to relate to the acceleration or aggravation, and not to the underlying condition. There was no error in this approach. The fact that the work caused dehydration was sufficient to 'tip the balance' and was on the evidence, found to satisfy the requirement that it be shown that the employment concerned was a substantial contributing factor to the injury.'

During submissions I referred counsel to a decision of Judge Neilsen which I thought was *Smith's* case. However I was unable to locate the decision during the short adjournment. I did manage to locate a decision of Judge Bourke of the Compensation Court reported as *Reed v Commissioner of Police* 22 NSWCCR, at 385 where his Honour expressed similar views as to the effect of s 9A in respect of s 4(b)(ii) injuries.

In that case, Judge Burke said:

'As suggested in *Cant v Catholic Schools Office* [2000] New South Wales Compensation Court Reports 88, the provision requires that the relevant employment be a substantial contributing factor to the injury. That injury, the injury is the assumed minimal aggravation, acceleration, exacerbation or deterioration of the emphysema. So that injury ex hypothesis, the only contributing factor is the employment exposure. If that be the only factor it is necessarily substantial in that context.'

Those decisions, of course, relate to the interaction between s 4(b)(ii), as it was, and s 9A. An assumed view by many was that the employment concerned had to be a substantial contributing factor to the overall pathology as opposed to the injury. What Judge Burke made clear in *Reed* and as discussed by the Court of Appeal in *Murray v Shillingsworth* is that one had to look at the injury concerned in determining the s 9A issue, that is, whether the employment concerned was a substantial contributing factor to the injury as alleged, *and* not to the overall pathology.

Unfortunately, this mistake of examining the link between the work incident and the overall pathology and the s 9A issue continues to be made by many doctors in reports provided to the Commission.

The Court of Appeal in *Murray v Shillingsworth* have clearly set out that a determination of the s 9A issue must relate to the aggravation, acceleration and so forth as opposed to the overall pathological condition if the injury falls within s 4(b)(ii).

The opening words of the amended s 4(b)(ii) relate to the aggravation, acceleration, exacerbation or deterioration 'in the course of employment of any disease'. In my view, those opening words therefore direct attention to the work related component of the 'aggravation, acceleration, exacerbation or deterioration'. The following words of clause (ii) then state 'but if only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease'. The concluding words of clause (ii) requires an examination of whether the employment was the main contributing factor 'to the aggravation, acceleration, exacerbation or deterioration of that disease' and not to the overall pathology or the overall disease process.

If one was looking at whether the employment had to be the main contributing factor to the overall pathology then the concluding words of s 4(b)(ii) would be to the overall pathology and or the disease and not to the aggravation, acceleration, exacerbation or deterioration of the disease.

In my view, the amendment to s 4(b)(ii) does not require the applicant to establish that the employment must be the main contributing factor to the overall disease process or pathology within his left knee but simply that the employment must be the main contributing factor to the injury, that is, to the aggravation, acceleration, exacerbation or deterioration of such disease. I reject the respondent's submission that the employment incident relied upon must be the main contributing factor to the overall disease process in the left knee.

If Parliament had intended the meaning as was submitted by Mr Grant then the words 'aggravation, acceleration, exacerbation or deterioration' where they appear at the end of s 4(b)(ii) are unnecessary.

The meaning the Courts have given to the interaction of s 4(b)(ii) and s 9A of the 1987 Act is consistent with my interpretation that one must focus on the nature of the injury and what an applicant must show to be either a 'a substantial contributing factor to' (s 9A) or 'the main contributing factor' (s 4(b)(ii))."

237. I repeat these comments.

238. Section 4(b)(ii) of the 1987 Act proscribes that the employment must be "the" main contributing factor to either the contracting, or the aggravation, acceleration, exacerbation or deterioration of the disease. The use of the word "the" contrasts with the requirement under s 9A where the employment concerned must be "a" substantial contributing factor. The Court of Appeal has commented on numerous occasions of the use of the indefinite article in s 9A: see for example *Kelly v Secretary Department of Family and Community Services* [2014] NSWCA 102 at [46]. The use of the word "the" before "main" imports a clear intention by Parliament that the applicant must establish a tougher test than that proscribed under s 9A of the 1987 Act. However, the test under s 4(b)(ii), unlike s 4(b)(i), is directed to the causes of the "aggravation, acceleration, exacerbation or deterioration" rather than the cause of the disease.

239. *Mitic* has been applied by various Arbitrators including in *Mylonas v The Star Pty Ltd* [2014] NSWCC 174 at [161] and in *Egan v Woolworths Ltd* [2014] NSWCC 281 at [60]. The reasoning in *Mitic* was repeated in *Harrison v Central Coast Local Health District* [2015] NSWCC 86 at [91].

240. There are now at least three Presidential decisions discussing the meaning of the amended s 4(b)(ii) which are to the same effect: see *State Transit Authority v El-Achi* [2015] NSWCCPD 71 at [92], [108]; *Mannie v Bauer Media Pty Ltd* [2016] NSWCCPD 47 at [80] – [83] and *Lilyvale Hotel Pty Ltd v Bradley* [2016] NSWCCPD 62 at [33]. All of these decisions consistently hold that, in respect of injury as defined in s 4(b)(ii), the employment must be the main contributing factor to the "aggravation, acceleration, exacerbation or deterioration of the disease".

241. I observe that if I was only required to examine the work causes of any aggravation etc to the disease then the applicant would always be successful as that would not only satisfy the meaning of "the main" but would satisfy the only contribution to the aggravation etc of the disease process. If that was the correct process then the words "the main contributing factor" would be otiose and the sub-section operate no differently from its pre-amendment interpretation.

242. It is my view that in a disease case such as the present extending over a period of time, I am required to analyse whether the work causes of the aggravation etc to the disease establish that they were “the main contributing factor” when there are concurrent non-work causes which also aggravated etc the disease process.
243. Pursuant to s 16(1)(a)(i) of the 1987 Act, any s 4(b)(ii) injury would be deemed to have occurred on 26 July 2018 when the applicant became incapacitated. I therefore conclude that, in examining whether the employment was “the main contributing factor” to the aggravation etc of the disease, I examine the relevant causes of the aggravation only up until 26 July 2018. I observe that this conclusion is consistent with the case as pleaded and as argued by the applicant during submissions.<sup>220</sup>
244. There were no submissions from the applicant on whether the main contributing factor to the aggravation etc was established in the present case. The submission appeared to be that the work was the only cause of the applicant’s aggravation within s 4(b)(ii) and/or that the lay evidence was irrelevant or wrong. There were no submissions directed to other causes of the aggravation/exacerbation although it appeared implicit in the applicant’s submissions that there were none and/or that I would not accept the lay evidence that suggested other causes.
245. For the reasons provided, I do not accept the applicant’s submissions that the evidence from the co-worker’s was irrelevant. The co-workers describe various occasions when the applicant commented that she suffered aggravations and exacerbations of her psychological condition from non-work causes.
246. In *E-Dr Younan Pty Ltd v Ker*<sup>221</sup> Keating P collected various authorities where inferences could be drawn based on matters described as “common knowledge”, “ordinary human experience” and “ordinary powers of human reason in light of human experience”.
247. It is a matter of common human experience that pregnant ladies and babies are seen throughout interaction with society such as simply walking in the streets. The applicant has a very young child. There is every reason to believe that interaction through her young child would expose her to similar triggers.
248. The applicant complains, and I accept, that her psychological condition was triggered by exposure to pregnant ladies at work and discussions about maternity leave. I agree with the respondent’s submissions that there is every reason to conclude that similar triggers to the applicant’s psychological condition occurred outside the workplace.
249. My view of common human experience is supported by portions of the evidence in this matter. Dr 6 referred to such a trigger at the doctor’s surgery. The applicant advised W1 that she was prepared for exposure to pregnant woman when she attended a curry festival in Canberra. The applicant was advised by a family member over the phone that they were having a baby and she then went outside and gave “a blood curdling scream.”<sup>222</sup>
250. Dr 7 noted that triggering occurred at hospital during August 2018 as the trauma occurred in hospital. I do not take this event into account in assessing the aggravation causes of the injury as they are limited to the period until 26 July 2018. However, the report mentions another potential non-work cause of triggers to PTSD which is otherwise consistent with my ultimate conclusion that triggers would occur outside the work place.

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<sup>220</sup> T1, pg 24

<sup>221</sup> [2017] NSWCCPD 26 at [126]-[130]

<sup>222</sup> Application, pg 1138

251. The applicant's diary note for the meeting with W1 on 17 July 2018 is in accordance with my experience. W1 stated:<sup>223</sup>
- “Doesn't know what to do with me. I'm going to face pregnant people everywhere.”
252. Ms X clinical notes were referred by the applicant on the issue of injury. Under the heading “Precipitating”, Ms X recorded:<sup>224</sup>
- “Supervisor/workplace unable to accommodate request for modifications upon return to work w mental health issues. (ongoing exposure to PTSD triggers)”
253. I agree that the clinical note suggests that the unwillingness to move the applicant was an incident that exacerbated the applicant's psychological condition. It is however unclear from the note that is meant by “ongoing exposure to PTSD triggers” and whether these were work or non-work causes.
254. The applicant's diary note of 26 July 2018 refers to discussions with W4 about “home life and work triggers”. Whilst the diary note is unclear whether the home life was also a trigger, the statement by W4 adds clarity to this discussion. W4 stated that she saw the applicant “emotional and teary” and she pulled up a chair and sat down next to the applicant.
255. The applicant then discussed personal issues with W4 concerning her relationship with her husband and “was not coping with personal circumstances”.<sup>225</sup> W4 stated that they were initially not discussing work issues but then moved to that topic when the applicant discussed moving her desk to the other end of the office so she could be away from pregnant people and discussions”.<sup>226</sup>
256. The account given by W4 is detailed and consistent with the diary note made by the applicant. The applicant stated that she disagreed with the characterisation of the manner in which the interactions took place on that morning. It is unclear what that means.
257. For the reasons given previously, I accept W4's version of the events where it differs from the applicant's denial. In my view this evidence supports another distinct area exacerbating the applicant's psychological condition, that is distress from the applicant's personal relationship.
258. I accept that the applicant's distressful psychological condition is exacerbated when she is exposed to pregnancy, babies and related discussions. I find that the applicant's psychological condition is also exacerbated when she is exposed to similar factors outside the workplace. There is no logical reason why, for example, the applicant's condition would only be exacerbated if she heard discussions about pregnancy or witnessed a pregnancy in the workplace and not exacerbated when she was outside the workplace.
259. This conclusion is consistent with W5's evidence, which I accept, that the applicant was also having panic attacks at home.<sup>227</sup>
260. Section 4(b)(ii) requires that the employment be “the main contributing factor” to the exacerbation. There were no relevant submissions by the applicant comparing the nature of the exacerbation by work and non-work triggers.

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<sup>223</sup> Application, pg 1192

<sup>224</sup> Application, pg 81

<sup>225</sup> Application, pg 1146, paragraph 20

<sup>226</sup> Application, pg 1146, paragraph 23

<sup>227</sup> Application, pg 1121

261. As the respondent correctly submitted, there was no relevant medical opinion establishing that the employment satisfied the test of “the main contributing factor” to the aggravation or exacerbation.
262. Mr Saul submitted that the applicant required a medical opinion to establish “main contributing factor”. No direct authority was cited in support of this submission although it was noted that the respondent required such an opinion if it sought to prove a defence based on s 11A of the 1987 Act when establishing that the psychiatric injury was “wholly or predominantly caused” by reasonable action by the employer. In that respect, the respondent referred to the decision of Snell DP in *Hamad v Q Catering Ltd*.<sup>228</sup>
263. I do not accept the respondent’s submission that there must be medical evidence on the specific test provided by s 4(b)(ii) although I agree that explained medical opinion directed to this issue would have assisted.
264. However, there is no logical reason why the inference could be drawn, on the facts, that a worker had established the relevant test under s 4(b)(ii). For example, that inference could be drawn when the relevant causes of any aggravation etc, when compared and properly analysed with no-work causes, establish that the work causes were “the main contributing factor” to the relevant aggravation etc.
265. One example where the inference could be drawn in the absence of medical evidence is where the evidence establishes that the employment is the only contributing factor to the aggravation etc of the disease as there is an absence of non-work causes aggravating the disease. Another example is where the work causes of aggravation such as from heavy repetitive lifting, outweighed the non-work causes.
266. In the present case I am left to analyse the effect of the work and non-work causes in the absence of submissions from the applicant on this issue despite my observations during the hearing.<sup>229</sup>
267. The respondent submitted that “these triggers can happen anywhere”, were not confined to the workplace and “the evidence shows that the applicant was having these triggers outside the workplace.”<sup>230</sup> I agree with this submission.
268. I am satisfied, in accordance with W4’s evidence, that there would be indirect and direct exposure at work to the type of matters that triggered the applicant’s psychological condition between two and three times per working week when the Applicant was working, for most of the period, for three days per week. I do not accept that there was a constant triggering as the applicant purportedly stated to Dr 6.
269. I also accept that the applicant psychological condition was exacerbated by the refusal in moving her to another desk within the office. This latter finding is consistent with the severe distress the applicant exhibited on the morning of 26 July 2018 when she discussed this matter with W4. It is also consistent with Dr 6’s clinical note of 24 July 2018.<sup>231</sup>
270. I find that it is probable that the applicant would be and was exposed to similar triggering events outside the workplace during the period when work was also exacerbating the applicant’s condition. That evidence is generally set out in conversations where the applicant advised co-workers about non-work triggers and otherwise comments by co-workers about ordinary human experience.

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<sup>228</sup> [2017] NSWCCPD 6 at [88]

<sup>229</sup> T2, pg 56

<sup>230</sup> T1, pg 67. See also T2, pg 38

<sup>231</sup> Application, pg 98

271. If the work exposure exacerbated the psychological condition then there is no reason not to find, and I do, that non-work exposure also caused exacerbation in the applicant's psychological condition. The history given to Dr 6 on 1 May 2018 is one such piece of evidence where exposure outside work triggered and exacerbated the applicant's psychological condition.<sup>232</sup>
272. I agree with W1 statement, as recorded in the applicant's diary note, that the applicant would have been exposed to issues of pregnancies and babies outside the workplace. The extent of such exposure is unclear but consistent with ordinary human experience.
273. For these reasons I am not satisfied on the balance of probabilities that the employment was the "main contributing factor" to the aggravation and exacerbation of the psychological condition.
274. The applicant raised, as an admission, that she had been paid compensation for nine months including after the period when the respondent obtained a factual report. I don't give this admission particular weight having analysed the evidence including the medical opinions before me: see *Department of Education and Training v Sinclair*<sup>233</sup>. Any slight admission that might be inferred from such payment would not alter my ultimate conclusion that the applicant has not satisfied the onus of proof in relation to the issue of main contributing factor.

## CAPACITY

275. Given my findings on injury it is unnecessary to decide the other issue concerning the extent of the applicant's work capacity. Despite my finding on injury I provide some brief reasons on capacity. I also note that the respondent did not argue that the effects of any work injury had ceased.
276. The suggestion that the applicant had some capacity was faintly pursued by the respondent's counsel in submissions.
277. I recorded my observations of the applicant's demeanour as she appeared on the first hearing day<sup>234</sup>. Mr Saul did not disagree with my description.
278. I also agree with Mr Saul's concession that the applicant's mental state meant that she was probably unfit for any work as her condition could be triggered by something rendering her incapable of working.<sup>235</sup>
279. The applicant presents to the doctors, other than Dr 9, as being severely incapacitated by reason of her psychological condition. I agree with the consistent views, expressed by the doctors such as Dr 5 and Dr 1, together with the various certificates, that the applicant had no current work capacity. For the reasons previously given, I do not accept Dr 9's opinion, partially based on questionable testing, that the applicant was malingering and otherwise fit for work.
280. I accept that the worker has no current work capacity within the meaning of s 32A of the 1987 Act. If the applicant had established injury, then I accept that she is entitled to weekly compensation based on no current work capacity.

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<sup>232</sup> Application, pg 100

<sup>233</sup> [2005] NSWCA [90]-[93], [99] and [100]

<sup>234</sup> T2, pg 64

<sup>235</sup> T2, pg 64



## FINDINGS and ORDERS

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

