

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 5776/20
Applicant: Kirsty Maree Sheehan
Respondent: Australian Red Cross Blood Service
Date of Determination: 22 February 2021
Citation No: [2021] NSWCC 55

The Commission determines:

1. The applicant sustained a primary psychiatric/psychological injury arising out of and in the course of her employment with the respondent on 7 July 2015.
2. The permanent impairment dispute is remitted to the Registrar for referral to an Approved Medical Specialist for assessment of whole person impairment resulting from the injury on 7 July 2015.
3. The documents to be sent to the Approved Medical Specialist are the Application to Resolve a Dispute and the Reply.

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

Deborah Moore
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 DEBORAH MOORE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Disputes Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. The applicant, Kirsty Maree Sheehan, was employed by the respondent, Australian Red Cross Blood Service, initially as a receptionist then subsequently as an acting donor centre manager at Port Macquarie.
2. She claimed that she sustained a psychological injury in the following circumstances:

“Disease injury sustained whilst undertaking... employment with the employer from 2009 until October 2015, and in particular whilst employed as the Donor Centre Manager from 2014 to October 2015. The applicant's condition developed as a result of a subordinate's poor work ethic, inadequate regard for training and procedure, breaches of various workplace guidelines, together with managements' ineffectual actions taken to remedy the situation. The applicant's current impairment is also at least partly influenced by a further event in which the applicant saw the previous employee in 2016 whilst working for a different employer, although this is not an injury pursuant to ss 4 and 9A of the 1987 Act, but in fact part of the original injury and/or consequential thereto. The date of the injury is the date of the lump sum claim.”
3. The date of injury was nominated as 7 July 2015, and the date of the claim for lump sum compensation in respect of a 22% whole person impairment (WPI) was 28 May 2020.
4. In the Application to Resolve a Dispute (the Application) the insurers were identified as follows:
 - (a) AAI Limited t/as GIO (GIO) from 7 July 2015 to 31 December 2017;
 - (b) icare Workers Insurance (icare) from 1 January 2018 to 6 October 2020.
5. Liability for the injury had been accepted by the respondent. Various documents to which I will refer shortly indicated a date of injury of 7 July 2015. Weekly benefits of compensation were paid up until 4 March 2020. They ceased on the basis of s 39 of the *Workers Compensation Act 1987* (the 1987 Act) on 21 November 2019, in view of an assessment by Dr Wilmot (for the insurer) of 17% WPI.
6. In short, the respondent accepted that the applicant had sustained a primary psychological injury but maintained that the date of injury was 7 July 2015 as pleaded, not 28 May 2020, for the purposes of a referral to an Approved Medical Specialist (AMS) for assessment.
7. The parties attended a telephone conference on 1 December 2020.
8. They requested the opportunity to present written submissions on this issue in dispute.
9. These have now been received.
10. The applicant filed submissions on 21 December 2020 and the respondent on 21 January 2021. The applicant then filed submissions in reply on 27 January 2021.

ISSUES FOR DETERMINATION

11. The parties agree that the principal issue in dispute is the correct date of injury for the purposes of referral to an AMS. Other issues include:
 - (a) Whether the injury is by way of a 'disease' within the meaning of s 15 of the 1987 Act,
 - (b) Procedural issues raised by the applicant with respect to s 289A of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).

PROCEDURE BEFORE THE COMMISSION

12. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.
13. The parties have agreed to the determination of the matter without a conference or formal hearing.

EVIDENCE

Documentary Evidence

14. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) The Application and attached documents;
 - (b) Reply and attached documents;
 - (c) Submissions from both parties referred to above.

FINDINGS AND REASONS

The s 289A Issue

15. The applicant submits that the respondent effectively only raised the issue of the correct date of injury for the purposes of a referral in its Reply filed on 23 October 2020 on behalf of GIO.
16. The applicant added:
 - a. "The Reply stated: 'The date of injury is 7 July 2015;
 - b. The injury is not a disease;
 - c. If it is a disease, the employer is not the last relevant employer pursuant to s 15/16.'In these circumstances, it is submitted that the above was not raised in any correspondence prior to the proceedings (other than the date of injury), despite previous proceedings being commenced and discontinued."

17. I note the applicant “accepts that GIO...as opposed to icare responds to the claim.”
18. In these circumstances, “the applicant submits these issues should not be permitted to be raised.”
19. Several authorities are then referred to in respect of the various powers of the Commission.
20. The applicant submits: “In the absence of a successful s 289A application, the issues raised by the respondent in the Reply cannot be ventilated.”
21. The applicant continued:

“The employer has failed to provide any explanation as to: a. Why the disputes were not raised when the claim was made; b. Why there was no s 289A application made at the teleconference.
The issues substantially prejudice the applicant. The applicant could have served additional evidence, at least in relation to the issues based on s 15/16 issue (of both a lay and expert nature). As such, leave should be refused.”
22. In response, the respondent submits that these submissions are misconceived because the issues had been made clear from the outset, and further that this matter was not raised at the teleconference. In other words, the applicant’s submissions suggest that “the very issue upon which submissions have been directed is denied to the respondent due to its pre-litigation conduct.”
23. There was considerable discussion at the teleconference about the nature of the dispute.
24. Neither party took issue with the terms of my Direction.
25. My Direction stated:

“The principal issue in dispute is the correct date of injury for the purposes of referral to an AMS for assessment, namely either the date of injury (7 July 2015) or the date of the claim for lump sum benefits (28 May 2020).
The parties have now requested the opportunity to present written submissions.”
26. There was no suggestion that any s 289A application needed to be made.
27. If it had, then it would have formed either part of my Direction or been properly ventilated at the teleconference.
28. It was not.
29. For these reasons, I do not accept that the respondent was required to make any s 289A application. For reasons that will be dealt with more fully below, the ‘date of injury’ dispute has been clear from the outset.
30. Moreover, the applicant has accepted that GIO “responds to the claim” and from the period of risk identified, it is clear that it reflected the respondent’s position as regards the date of injury, namely 7 July 2015.
31. Accordingly, this submission by the applicant fails.

The nature of the injury

32. I do not propose to set out in detail the medical and other evidence as to the applicant's diagnosis and condition. As I said, the respondent accepts that she sustained a psychological injury.
33. My observations and findings thus relate to the issue in dispute, namely whether her condition is most properly characterised as a frank injury or a disease.
34. In her statement dated 22 July 2015 the applicant said:

"I first started experiencing symptoms of my injury just before I went on holidays~ I went on holidays from 4-26 April 2015.

I had a staff member who is difficult to manage, Karen Goodland, who had just returned from unpaid leave....Karen is someone you walk on eggshells around. She is extremely moody and you do not know how she will present from day to day. Karen also complains about everything... but there are also times when you can connect with her and laugh and have fun...

Karen also has a big issue with younger people being in charge of her and giving her direction...

I pretty much have had sleeping difficulties since November 2014. I am a perfectionist and I give everything to a role. I ended up having to put a piece of paper and a pen by the bed so if I woke at midnight, I could write an issue down...

The team loved the previous manager Jama... I indicated to the team that Jama would come back in 12 months and we should work as a team...

So on my return from Paris I noticed there was a real change of atmosphere in the staff. They were not happy. The Session Leader, Amy Munday had stepped into [my] role... Staff came to me .and complained about how the centre was run by Amy in my absence...

On 19 May 2015 there was an issue in the centre...[regarding Amy and Petra]...

The investigation process went on for about 6 weeks...

I was not sleeping and anxious. I did not know how to fix things...

I did not believe Petra was competent... I did not trust Petra and was freaking out that something would seep through the system...

At this stage I was not eating, losing weight (I lost 4 kilos) and not sleeping. I had nausea going to work. Mv. heart rate would increase. I felt terrible. I could not focus on what I was doing...

On 1 July 2015 I went to work. I was not feeling great. I am normally happy go lucky and laughing...

I then told Penny I was going to the doctors because I was not feeling very well.

I then collapsed... I was shaking and shivering. I understand they then called an ambulance...

I got to the hospital and was taken to the ED department... The following day I did not go to work. I stayed at home all day...

On Friday I was not feeling any better but I went to work...

On the Monday I went to work and basically sat in my office all day...

On the Tuesday (7 July) I went in to work again. I felt grey again...I called Sue and told her I was going to the doctor...

On Friday 10 July 2015...I decided to go in [to work]... When I got to the back door, I felt my heart racing again. I felt clammy and nauseous ...I left [work]...

I went back to the doctor on 14 July 2015...

On that evening my partner, Ward took the workers compensation paperwork in to the workplace on my behalf...

On Sunday 19 July 2015 I had a major panic attack. Nothing happened in the workplace to spark it off, I do not know whether it was because I had been near work that day...

I went back to the doctor's on Tuesday 21 July 2015. I discussed with him the major panic attack...
I am not feeling any better. I think about work all the time..."

35. The applicant appears to have remained off work thereafter for a period of time before commencing employment later in 2015 as a concierge at Port Central Shopping Centre.

36. In a subsequent statement dated 27 April 2020 she said:

"Within the first month of taking on my new role as Donor Centre Manager at the Blood Service, I was contacted by the Quality Department in Sydney regarding staff member Petra... and errors on her paperwork that was submitted with a blood donation..."

On around 19th May 2015, Petra falsified documentation relating to a donor's questionnaire form to determine whether they were eligible to donate blood....

I then spoke to Petra while Amy was present...

Australian Blood Service then commenced an investigation and that took a few weeks. During that time, I contacted the EAP as I felt I could use extra assistance for support and my mental health during the investigation as I was unsure of how many times this had occurred...

We had a couple of meetings during this time...

At one performance meeting in June 2015... (unable to remember the exact date) she attended with a support person and pleaded her case for continuing employment. The outcome was that she was able to continue with employment...

I struggled with this decision and started to feel extremely stressed about the situation... I was suffering extreme stress, I was unable to eat, sleep, began feeling tightness in my chest and anxious about going to work. I started having panic attacks at least 3 or 4 times a week...

I had an incident occur on 1st July 2015... while in my office upstairs, where I was feeling stressed, panicked and light-headed...

On 7 July 2015 I remember walking in the door of the Blood Donor Centre and tried to begin my day and an overwhelming feeling of stress, anxiety and panic set in and I was unable to stay and went straight to the doctor's and was given another medical certificate and applied for Work Cover...

I was initially given the ok by my doctor to commence work as a concierge at a local shopping centre for 25 hours a week. I attempted to, but during this time, I still suffered panic attacks at least 3 - 5 times a week. I became overwhelmed with everything and was unable to continue with this role and ceased employment after 10 months.

During this time Petra came into my workplace (the shopping centre) and when I saw her, I panicked and sat on the floor and hid from her.

I was unable to drive past the Blood Service without feeling anxious or stressed, and we decided to relocate away from the area to reduce the stress and anxiety to Tweed Heads in 2016..."

37. In a final statement dated 31 August 2020 she said:

"I resigned from my position with the Australian Red Cross Blood Service on 28 October 2015. I resigned solely because of my injury.

I found work as a concierge at Port Central Shopping Centre (Port) in about November 2015, not long after I had left the Blood Service. I was employed to work 4 days per week, 30 hours per week. My role involved working on the floor of the Centre at a kiosk, giving directions and fliers to shoppers in the Centre, and selling merchandise.

Initially I was happy to be away from the Blood Service. By the end of my time there I was so panic stricken that I could not even go near the building or interact with any of the staff..."

I was numb most of the time and needed to work to provide a roof over my children's heads and food on the table. Even though I was not in a good condition

I felt like I had no other option than to work.

I quickly found however that the change of work environment did not make my anxiety and panic attacks stop. I continued to have panic attacks almost every single day which drained me emotionally and made me scared to go outside because I did not know what would trigger one to happen...

I would struggle to manage my hours, and put on a brave face and forced myself to interact with customers and my colleagues, but by the time I got home at the end of the day I was just exhausted. Keeping up the façade of being "okay" during the day was draining me. Even though I was exhausted, I could not sleep, and that made my exhaustion even worse. I had nothing left to give once I had been to work and would need to spend the rest of the week recovering.

In December 2015, I saw Petra at the shopping centre. I immediately suffered a panic attack...

While working at the shopping centre I would see from time to time, people who had been donors at the service, as well as other staff of the service. Seeing these people always put me on edge, but I didn't have a reaction like I did when I saw Petra...

The panic attacks continued...

In March 2016, my employer asked me to take on more administrative duties at the Centre, because other employees had left. At one point I was managing the visual merchandising for the centre for a period of one month. I found it very stressful to be in that position because I didn't feel that I could handle it due to my injury. I was still continuing to have panic attacks.

In about July 2016, I was asked by my employer to assist with the Whale Trust, which meant an increased workload and more tasks. I agreed to it but by this stage I was starting to think that I wasn't going to be able to maintain this job.

I want to be clear that the stress that I was under at my job at the shopping centre was entirely different to the panic attacks and anxiety that I felt when I even thought about the Donor Centre and what had happened there. I was stressed by the job at the shopping centre because when I got the job I was already suffering from a psychological injury, and that injury never went away. Almost every morning before I left the house, I suffered a panic attack, and I had been having those panic attacks since my injury at the Donor Centre.

I was having psychological treatment during this period, but it was not helping...

I resigned my position at the shopping centre on 30 September 2016 and we moved to Tweed Heads not long after."

38. The applicant submitted as follows:

"Psychological injuries are ordinarily classified as "disease" injuries (*Federal Broom Co Pty Ltd v Semlitch* [1964] NSW 551) (*Semlitch*), although it is accepted that in some cases a "frank" injury can also occur (for instance in PTSD cases): *NSW Police Force v Gurnhill* [2014] NSWCCPD 12.

However, in this case, the evidence is overwhelming. The lay and expert evidence points solely to the conclusion that the applicant's condition developed over a period of time, resulting from a number of different incidents.

However, in this case, the evidence is overwhelming. The lay and expert evidence points solely to the conclusion that the applicant's condition developed over a period of time, resulting from a number of different incidents..."

39. In support of this submission, the applicant refers to her statements and other evidence as follows.
40. Dr Hadikusumo from The Shrink Company wrote a report on 27 April 2020 stating the cause of her injury as:

“Workplace related stress in her role as middle management. She was put in an untenable position with a staff member who was being investigated for fraudulent activity, but had to keep the staff on despite protest by other team members. The pressure from led to the emergence of her symptoms and ultimately the above diagnoses...”

41. Pamela Costatini (Clinical Psychologist) saw the applicant at the request of QBE on 25 November 2016. In a report dated 5 December 2016 she said:

“Based on the information gathered from Ms Price during the interview and from the documentation reviewed, it is my opinion that she has been suffering from a Major Depressive Disorder...I am of the opinion that this disorder was caused by the reported workplace stressors which occurred in 2015...”

Ms Price [Sheehan] described an exacerbation of her symptoms in December 2015 when she was employed at a different workplace and she saw the staff member who was directly involved in the stressors at her previous workplace. She also described an ongoing exacerbation of her symptoms and an increase in her stress level due to an increase in her workload and allocation of more tasks at her new workplace in March 2016 and July 2016.

It is my opinion that even though Ms Price reported ongoing symptoms and an exacerbation, her condition is progressing into remission. The fact that she continued to work as a Concierge until she resigned on 30 September 2016 supports this opinion as well as the fact she has not engaged in continual psychological or psychiatric treatment. It appears her psychological treatment ceased in early 2016 and it is also noted that she takes Valium now and then rather than medication on an ongoing daily basis. It is also important to note that Ms Price chose to resign due to her move to Tweed Heads and I believe that her current self-reported symptoms of high anxiety and stress on the DASS-21 are due to her adjustment process to this move.”

42. The applicant saw Associate Professor Michael Robertson at the request of her solicitor on 20 May 2020. In a report dated 21 May 2020 he said:

“The situation presents as a work-related unmasking of an underlying diathesis to panic disorder. Panic disorder is often considered a “constitutional condition” with a complex genetic and life experience basis...”

It appears based on the history available that in the course of her employment with the Blood Bank at Port Macquarie, Ms Sheehan experienced the unmasking of panic disorder, which has become a substantive debilitating and seemingly treatment refractory condition.

On the question of a pre-existing condition, I believe Dr Wilmot has overemphasised the significance of the presumed psychodynamic factors. While these may have some explanatory power to Ms Sheehan’s vulnerability to mental illness, they do not represent a pre-existing condition. Ms Sheehan’s pre-morbid perfectionism equally is best considered a vulnerability rather than pre-existing condition.

In recent psychiatric discourse, the relationship between stressful events and the onset of conditions hitherto considered constitutional is explained by the field of epigenetics which posits the elaboration of certain underlying genetic vulnerabilities that had been previously unexpressed in the context of psychosocial stress. Put simply, the epigenetic hypothesis holds that certain genetic vulnerabilities to conditions – such as anxiety - are ‘switched on’ by traumatic difficulties...”

Ms Sheehan presents with panic disorder with agoraphobia. There have been periods of major depression...
In essence, her panic disorder was unmasked in the course of her employment with Australian Red Cross Blood Service...”

43. The applicant saw Dr Wilmot at the request of GIO on 21 November 2019. In a report dated 25 November 2019, when asked the question: “Please advise whether employment, specifically the injury of 7 July 2015, was a main contributing factor to the claimant’s injury?” he said:

“She restated her original injury as being occurring in 2015... Kirsty became anxious and distressed... and she collapsed at work in July 2015...
In my opinion the main contributing factors of the claimant’s injury was the injury of 7 July 2015. The reason for this is that the patient appears to be anxious and worried about things going wrong. Although there is evidence of this in her earlier life history, they have not resulted in the degree of mental unwellness that this particular incident has caused. The reason for this is that Kirsty’s experience of failure in this area of safety may result in a future death.”

44. Dr Wilmot commented on other medical opinions as follows:

“Ms Pamela Costatini, Clinical Psychologist.
According to the patient’s narrative which appears to have support from her doctors indicates that since the original injury there has been a significant change in personality features evident in the patient. I therefore opine that the changes in mental state now observable in Ms Price stem from whatever it was that has broken her personality structure back in the original injury in 2015. In my opinion the trigger for Ms Price was not the fact of moving. The original injury still remains unresolved.
Dr Lee Ingram comments on pg 8 of his report dated 30 July 2015 in relation to her past: ‘She reported some anxiety at school. She reported that she used to lose sleep and also had anxiety around taking exams. She reported that this was isolated to the events and denied any significant emotional or psychological symptoms since then.’ On pg 11 he further recounts: ‘She has also reported problems with self -esteem and some performance anxiety and perfectionism.’”

45. The respondent accepts the principles enunciated in *Semlitch* that the term ‘disease’ includes mental illness such that “it can readily be accepted that the applicant’s work-related mental illness can be characterised as a disease within the meaning of s4(b)(i).”
46. However, the respondent submits that the injury is not a disease within the ambit of s 15 for reasons that follow.
47. The respondent submits that the most detailed analysis of the applicant’s condition is that provided by A/P Robertson in his reports dated 27 May 2020 and 2 September 2020.
48. The respondent adds:

“He responds in detail to the suggestion made (faintly) by Dr Wilmot that some portion of the impairment was due to a pre-existing injury or condition.
Clearly, he is of the view that the applicant’s condition, which he diagnosed as ‘panic disorder and agoraphobia’ did *not* result from the aggravation of a disease (despite the passing suggestion at paragraph 9 of the applicant’s submissions). He also considered the question of causation in the face of concern regarding the apparent deterioration of the applicant’s condition during her ten months employment with Port Central Shopping Centre...She eventually found increased work-load and more tasks beyond her in July 2016 and resigned (as per her statement).

His conclusions are not consistent with a finding of injury consisting of a ‘disease which is of such a nature as to be contracted by a gradual process.’

He describes ‘a catastrophic panic attack in July 2015’ and concludes ‘a work-related unmasking of an underlying diathesis to panic disorder’ which is often considered a ‘constitutional condition.’

He expands on this assessment...observing that: ‘It appears on the history available that in the course of her employment with [the respondent] Ms Sheehan experienced the unmasking of panic disorder...’

He also cites with apparent approval academic reference to epigenetics and the hypothesis that ‘certain genetic vulnerabilities to conditions -such as anxiety- are “switched on by traumatic difficulties.”’

Taken at face value, A/P Robertson is suggesting that the applicant had a genetic predisposition (the diathesis) to panic disorder, something that existed independently of her work experience with the respondent, and that this diathesis was *unmasked* by the stressful events of July 2015. This theory may seem difficult to reconcile with the absence of a contribution from any pre-existing condition or abnormality however, that is ultimately a matter for an AMS.

The important consideration is that the medical thesis does not suggest a disease contracted by a gradual process. It is of a catastrophic panic attack, the consequences of which have been refractory to treatment, *unmasked or switched on by traumatic difficulties* in the workplace in July 2015.”

The Legal Framework

49. The applicant rejects the respondent’s assertion that her injury is a ‘frank’ one rather than a disease, and submits:

“Firstly, there is no dispute in relation to this (either by way of s 78 or s 289A). Secondly, the respondent did not agitate such a submission at the hearing. The writer seems to recall the respondent ‘accepting’ that there was a disease injury.”

50. I reject this submission.

51. It was clear at the teleconference that there were several issues pertaining to the correct date of injury for the purposes of a referral to an AMS, including whether the injury was one occurring on a particular date, namely 7 July 2015, or was a ‘disease’ injury with alternate deemed dates depending on consideration of both the medical and other evidence.

52. There was also discussion as to whether the respondent was the last relevant employer if a disease injury was established.

53. The applicant added: “the respondent concedes... that there is an injury by way of s4(b)(i)” but that is not correct. The respondent submitted that “it can readily be accepted that the applicant’s work-related mental illness *can be characterised* (my emphasis) as a disease within the meaning of s4(b)(i)” but submitted that it was not.

54. The applicant added:

“The employer’s argument that the date of injury is 7 July 2015, given the applicant presumably received weekly compensation from that date, ignores that there can be different dates of injury for different claims/entitlements: *Stone v Stannard Bros Launch Services Pty Ltd* [2004] NSWCA 277 (*Stone*).

The applicant submits that the date of injury, in accordance with binding case law, is 28 May 2020, the date of the lump sum claim. That is because the only claim made is one concerning lump sum compensation.”

55. A number of other authorities were also noted.

56. In response, the respondent submits:

“The applicant points to cases in support of the proposition that different dates of injury can apply depending on the compensation claimed. Each can be distinguished. As Handley JA observed in *Stone*... which involved an allegation of aggravation of a disease, there was and could be no claim for weekly compensation. This case is distinct on the facts. The respondent accepted that incapacity commenced from 7 July 2015 and liability was accepted.

In *Stone* the Court referred to its earlier decision in *Alto Ford v Antaw* [1999] NSWCA 234 (*Antaw*) in which it had been established that more than one date of injury could exist for different claims.

However, *Antaw* also turned on its own facts. In particular, the workers claim, which resulted from a frank injury to his eye in 1976 was deemed to be a disease contracted by a gradual process by dint of s15(3) of the 1987 Act. In confirming the trial judge’s application of s15(4) to the effects (gradual loss of vision) to the consequences of a frank injury sustained prior to the commencement of the 1987 Act [the Court] considered as relevant the fact that the most recent incapacity had arisen in 1992, that is, after the commencement of the 1987 Act, and the fact that the worker’s condition was deemed to be a disease of gradual onset pursuant to s15(3).

Ms Sheehan’s condition of panic disorder and agoraphobia is not as a matter of medical fact, nor as a result of any deeming provision a disease of gradual onset. The only relevant date of incapacity and thus date of injury is 7 July 2015.”

57. I accept the respondent’s submissions on this point for reasons more fully set out below.

The Last Relevant Employer Issue

58. The respondent submits that if I were to determine that by application of s 15 the applicant can successfully assert a date of injury of 28 May 2020, then there should be an award in favour of the respondent.

59. The submissions continue:

“S15(1)(b) provides that ‘compensation is payable by the employer who last employed the worker in employment to the nature of which the disease was due.’

Guidance as to the application of this part of the section is found in *Antaw*. Contrary to what the applicant seems to assume...the resolution of this issue requires no finding of actual injury arising out of or in the course of her employment at Port. The only question to be considered is whether it was employment to which the nature of the disease was due.

Her employment with the respondent was of an administrative nature...her job at Port...changed in March 2016 when she took on more management responsibilities increasing in July 2016 with greater workload and more tasks (as per her statement) until her resignation on 30 September 2016.

This was employment ‘of such a kind as to involve a risk to the employee of contracting the gradual disease process which is disabling him’ (*Tame v Commonwealth Collieries Pty Ltd* (1947) 47 SR NSW), the risk being that her underlying panic disorder would be unmasked by work-related stress.

If this proposition is established, it is apparent that the applicant has not joined the last relevant employer and the claim fails.”

60. In response, the applicant submits:

“Once again, the respondent submits that the applicant’s injury is not a s 4(b)(i) injury.

It has, once again, ignored s 4(b)(ii) and otherwise made submissions as to injury without a valid dispute.

For the reasons set out above, the submissions should not be permitted to be made.

It must be recalled that the primary reason for written submissions, as opposed to an oral hearing, was that the respondent argued (at the teleconference), that the deemed date of injury was the first date of incapacity, as opposed to the date of the claim.

The respondent has now sought to entirely change the nature of its defence, which has still not been formally pleaded or set out.

The submissions...are specious and opportunistic. It is precisely the type of matter that should have been put into a dispute notice and/or leave sought.

Moreover, it is entirely inconsistent with the evidence in the case, as set out in... the primary submissions.”

61. Again, the applicant seems to take issue with the nature of the discussions at the teleconference, in circumstances where, as I said previously, all evidence in relation to the correct date of injury for the purposes of a referral to an AMS was, as it were, on the table.

62. It was clear that the applicant had undertaken subsequent employment. In her statement she confirmed that:

“I continued to have panic attacks almost every single day... I had nothing left to give once I had been to work and would need to spend the rest of the week recovering...”

In December 2015, I saw Petra at the shopping centre. I immediately suffered a panic attack...”

63. It was clear that there was certainly evidence to support the proposition that the subsequent employment at Port could be regarded as being “of such a kind as to involve a risk” to the applicant of impacting her psychological condition.

64. At the teleconference, the applicant was keen for the matter to be dealt with by way of written submissions rather than any formal conference or hearing presumably in order to speed up resolution of the dispute.

65. For these reasons, I am not persuaded that the respondent’s submissions are either “specious [or] opportunistic”, nor that the submissions should not be permitted to be made.

66. As the respondent pointed out, it made an offer of settlement of the dispute in June 2020 based on the assessment of Dr Wilmot such that the dispute as to the level of impairment was well known to the applicant.

67. The issue in dispute was as I said the date of the claim for the purposes of a referral to an AMS and the associated issues to which I have referred.

CONCLUSION

68. I have carefully considered the submissions by both parties.

69. I have been guided largely by the medical evidence, particularly the opinion of A/P Robertson. His report is both thorough and well considered, and is not entirely at odds with the opinion of Dr Wilmot.
70. It seems clear to me that the applicant did indeed sustain “a work-related unmasking of an underlying diathesis to panic disorder...” which I am not persuaded can be classified as a ‘disease’ within the meaning of the 1987 Act, and that such a condition was one that “existed independently of her work experience with the respondent”.
71. Weighing the whole of the evidence, I am of the view that the applicant sustained a frank injury within the meaning of s 4(a) of the 1987 Act.
72. The referral to the AMS will reflect this conclusion.