WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **3716/19**
Applicant: **Michael John Ward**
Respondent: **St Mary's Sand & Soil Supplies Pty Ltd**
Date of Determination: **25 November 2019**
Citation: **[2019] NSWWCC 376**

The Commission determines:

1. The applicant suffered injury to his right wrist and both lower limbs arising out of and in the course of his employment on 6 May 2001.

2. As a result of that injury the applicant has been unable to return to his preinjury employment.

3. Since 11 October 2018, the applicant has a current work capacity as that phrase is defined in section 32A of the *Workers Compensation Act 1987*.

4. The parties agree that at all material times the applicant's PIAWE was $889.52.

5. Find that in suitable employment to the applicant could earn the sum of $360 per week.

6. Award for the applicant pursuant to section 37 (3) in the sum of $351 per week from 11 October 2018 to date and continuing until same is suspended or terminated in accordance with the provisions of the *Workers Compensation Act 1987*.

7. Subject to the *Workers Compensation Act 1987* award for the applicant pursuant to section 60.

8. Liberty to apply in respect of the calculations made in respect of the award for weekly payments and on any issue arising out of the award pursuant to section 60.

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

Paul Sweeney
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 Paul Sweeney, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

INTRODUCTION

1. Michael John Ward (the applicant) is 48 years of age. He suffered serious injury to his right wrist and lower limbs on 6 May 2001, when the tip truck that he was driving collided with the rear of a stationary vehicle. By reason of his injuries, he was unable to return to his pre-injury work. He returned to work as a truck driver approximately two years after the accident.

2. The applicant was employed intermittently as a driver between 2003 and 2014. He has not worked since. He alleges that he has been incapacitated for work since 11 October 2018 as a result of his injuries.

3. By these proceedings the applicant claims weekly compensation from 11 October 2018. He also seeks an order in respect of his medical and hospital expenses pursuant to s 60 of the *Workers Compensation Act 1987* (the 1987 Act).

PROCEDURE BEFORE THE COMMISSION

4. When the matter came on for conciliation and arbitration at Penrith on 10 October 2019, Mr Epstein, of counsel, appeared for the applicant and Mr Hanrahan, of counsel, appeared for St Mary's Sand & Soil Suppliers Pty Ltd (the respondent). I was informed by counsel that they were unable to resolve the threshold issues of whether the applicant was incapacitated for work from 11 October 2018 and, if he was, the quantum of compensation to which he was entitled.

5. The parties did agree, however, that the applicant had been paid compensation for 45 weeks and that the jurisdiction of the Commission to award weekly payments in accordance with s 37 of the 1987 Act extended for a further 85 weeks. If was also accepted that the applicant's pre-injury average weekly earnings (PIAWE) were $889.52 and that, if he was entitled to compensation in the second entitlement period, the relevant starting point was 80% of that figure or $711.

6. I am satisfied that the parties, who were represented by experienced counsel, had ample opportunity to resolve the dispute but were unable to reach a mutually acceptable resolution.

DOCUMENTS

7. The documents before the Commission are as follows:

    (a) The Application to Resolve a Dispute (the Application) and the documents attached;
    (b) The Reply and the documents attached.

8. There was no objection to the material contained in the above documents. At the arbitration hearing, however, Mr Hanrahan indicated that he wished to cross-examine the applicant on the records of Dr Karanjai, which had been produced to the Commission pursuant to an order made by me at the telephone conference in the matter. These documents had not been attached to an Application to Admit Late Documents by reason of their late inspection by the respondent.

9. After hearing from the parties, I ruled that the notes of Dr Karanjai should be forwarded to the Commission under the cover of an Application to Admit Late Documents of 21 October 2019 and that the applicant should have the opportunity make a written submission in respect of the clinical notes by 1 November 2019. I also ruled that the respondent should have leave to cross-examine the applicant briefly on entries in the clinical notes. There was no strenuous opposition to such a course of action.

10. My understanding of the entries in the notes, on which Mr Hanrahan wished to cross-examine, left me in little doubt that the respondent should have the opportunity to test and the applicant the opportunity to explain the matters recorded by the doctor.

SUBMISSIONS

11. The submissions of the parties are recorded, and I do not intend to reiterate them in these short reasons. In essence, Mr Hanrahan submitted that the evidence in the applicant's case supported a finding that the applicant has a current earning capacity after 11 October 2018. Further, it supported a finding that the applicant was capable of performing suitable work and earning not less than 80% of his PIAWE.

12. Mr Epstein submitted that an analysis of the applicant's earnings since his return to work following the injury was consistent with a long-standing impairment of earning capacity. He submitted that the Commission would accept the certification of the applicant's current general practitioner, Dr Tabasuarez, that the applicant was totally unfit for work. In the alternative, he submitted that the applicant was only fit for part-time menial work.

13. Prior to addressing the issues in dispute, I will briefly canvass the evidence of the applicant and the reports and clinical notes which constitute the contemporaneous medical record.

14. In neither case do I propose to comprehensively survey the evidence. Rather, I set out the salient points, so the arguments of the parties and the way in which the Commission has resolved the dispute can be understood.

THE EVIDENCE OF THE APPLICANT

15. The applicant's evidence consists of a primary statement dated 29 August 2018 and a short supplementary statement bearing date 22 August 2019. By his initial statement, the applicant says that he left school in Year 10 and commenced an apprenticeship in carpentry but did not complete it.

16. He describes the motor vehicle accident of 16 May 2001 and then injuries he suffered as a result of it. He says:

> "I was diagnosed as having a fracture to the right wrist, right ankle and left knee. Dr Sorial was my surgeon and he performed two operations. One was a bone graft to fix the fracture in the left femur. Then one week later I had an operation on my right ankle. There was also a cast put on my right wrist."

17. The applicant recalls that following a period of rehabilitation he recommenced work in early 2002 on a work trial in a warehouse. He then obtained a job with Fast Lift operating mini trains and performing his customary activity of truck driving. He says that up until four years ago, he was working "most of the time driving trucks including tip trucks".

18. The applicant says that his "ankle has been a problem and is continually aching and I can't stand for more than a few seconds. My left knee goes into spasm my left knee drops out and in constant pain [sic]."

19. The applicant then recounts that he was made redundant about four years ago as the company for which he was working had "run out of work". He continues:

> "However, I was about to stop work due to the pain as I was continually falling over."

20. The applicant was also referred to Dr Simon Coffey, another orthopaedic surgeon, who examined his knees but did not recommend surgery.

21. The applicant recounts that he was then referred to Dr Olschewski, an orthopaedic surgeon, who performed an arthroscopy on his left knee at the Nepean District Hospital on 5 June 2018. The applicant says he obtained little benefit from the surgery.

22. The applicant says that his right knee is now symptomatic, although he has not had any medical investigations of the cause of these symptoms. He says that his right ankle is "gradually getting worse".

23. By his supplementary statement, the applicant says that before his retrenchment from Regal Excavators in 2014 he was "only working 1 or 2 days per week". He says that the reduced hours were due to a combination of "lack of work and difficulty in handling the work."

24. He recounts that sitting in the truck made his knee worse; he found that climbing the steps of the truck difficult and operating the clutch hurt his knee. he says:

> "By the time I ceased work, I was finding that it would take me ages to get down from the cabin and walk to the back of the truck."

25. He says that he did not relate to Dr Bodel that he was still driving trucks. He has not worked since 2014. He has not received medical treatment in the last year.

26. At the arbitration hearing, the applicant was cross-examined briefly on his fitness for work. He was cross-examined on a note of Dr Karanjai of 5 January 2017 where, in the context of completing a certificate of fitness to drive a vehicle, the doctor recorded the following:

> "H/O injury – left knee and right ankle about 13 years back. Operated.
> Says has been driving trucks since. Denies any difficulty driving automatic/manual vehicles".

27. Mr Hanrahan put to the applicant that he had told Dr Karanjai he had "no difficulty driving automatic/manual vehicles." The applicant could not recollect making that statement. Mr Hanrahan pressed the applicant on whether he was able to drive automatic/manual vehicles and whether he could perform work driving light vehicles. He was reluctant to concede this. He said it depended on the type of vehicle and the time he was required to drive. He said it might depend on whether he could have breaks during periods of driving. Ultimately, he conceded that he may be able to perform light driving work "if he could find something, he was capable of doing".

28. The applicant stated that he retained a license to drive heavy combination vehicles. It was not renewable until 2021. He was cross-examined to suggest that he was waiting for the outcome of this case before looking for suitable work. He denied that was the case.

CONTEMPORANEOUS MEDICAL RECORD

Dr Sorial

29. There are a series of short reports from Dr Sorial, the orthopaedic surgeon, who treated the applicant in the period following his injuries. By a report of 2 July 2001, he recorded that the applicant suffered:

> "A fracture of his right wrist, a fracture of the lateral process of the talus on the right side with comminution into the subtalar joint and a depressed fracture of the tibial plateau on the left side."

30. As a result of these injuries, Dr Sorial performed an open reduction and internal fixation with bone grafting to the left tibia; an open reduction and screw fixation of the talus with debridement of the joint; and a reconstruction of subluxating peroneal tendons due to an injury to the peroneal sheath.

31. By the report of 2 July 2001, the doctor noted that the applicant had remained in a wheelchair post-injury, non-weight bearing "with a hinged brace on the left side and a plaster short leg cast on the right side." The doctor suggested he commence rehabilitation and that he would benefit from physiotherapy and hydrotherapy.

32. When Dr Sorial saw the applicant on 26 September 2001, he was still using a walking stick. The doctor noted that the x-rays showed complete union of the tibial plateau fracture and of the sub-talar fracture. He thought the applicant required continued intensive physio and hydrotherapies. He thought the applicant remained unfit for work.

33. On 17 December 2001, Dr Sorial records that the applicant was about to commence rehabilitation with view to return to light duties. The applicant complained of some persisting symptoms, including a residual stiffness in his left ankle.

34. On 13 May 2001, Dr Sorial reported that the applicant still had continuing discomfort in his right ankle and left knee. He was walking with an antalgic gait on the right side. He needed to be retrained for "a different occupation that has a limited capacity of lifting kgs".

35. By a short report of 29 January 2015, Dr Coffey stated that the applicant's:

> "Ongoing issues relating to lower limb pain and associated dysfunction are related to his initial accident which apparently occurred on 16 May 2001".

Dr Olschewski

36. Dr Olschewski saw the applicant at the request of Dr Karanjai on 25 July 2017, and noted that the applicant had increasing pain in his left knee for the last few years. He recorded that the applicant had been "unable to work as truck driver for the last two years." He required a cane to ambulate and had a walking tolerance of two blocks.

37. Dr Olschewski expressed the opinion that the applicant had "post traumatic degenerative changes in his left knee". There was also a possibility of a meniscus tear. He suggested arthroscopy to investigate the state of the knee including the menisci and to remove the hardware inserted at the time of the applicant's initial surgical treatment by Dr Sorial. The applicant accepted this advice.

38. When the applicant saw Dr Olschewski on 20 June 2018, he reported that his knee did "not feel very different than it did prior to his surgery". He was still experiencing discomfort in the knee.

39. Dr Olschewski reported that, he assured the applicant that there was "no further mechanical problem in the knee". he said that he would be happy to review him again if there was difficulty.

DISCUSSION

40. Undoubtedly, the applicant has significant restrictions on his capacity to work as a consequence of the injury in 2001. At his last review of the applicant, Dr Sorial contemplated that the applicant would not return to his pre-injury work as that involved lifting heavy weights. He recommended that the applicant be retrained in a lighter occupation. Obviously, the inability to lift heavy weights restricts the employment opportunities available to a worker who left school in Year 10 and who performed carpentry and truck driving duties thereafter. The nature and extent of the incapacity is not as obvious.

41. As is often the case, it is necessary to consider the reliability of the applicant's evidence. There are some odd aspects of the applicant's presentation and his evidence. Dr Olschewski refers to spasms of his lower extremity which occurred frequently during his appointments. They also occurred during the arbitration hearing. They are not clearly explained by the medical evidence. There is also the history recorded by Dr Bodel that the applicant was “still doing some truck driving work” at the time of the consultation on 26 May 2019. By large, however, I accept the applicant's evidence.

42. No sustained attack was made on his credit during cross-examination, although I accept that it is implicit in Mr Hanrahan’s cross-examination that the applicant’s evidence of capacity is inconsistent with what he told Dr Karanjai in 2017. On reflection, I formed the view that the contents of the note of January 2017 are not inconsistent with the applicant’s evidence on the capacity issue. Being capable of driving a truck safely does not necessarily equate with an ability to drive it on a full-time basis and carry out all the physical tasks associated with a truck driving job. More importantly, the note relates to a period before the present claim and one should not assume that the applicant’s condition now is as it was then.

43. In respect of the history recorded by Dr Bodel, the applicant denied in writing and on oath that he had worked driving vehicles recently. Having observed his evidence, I believe he was telling the truth. It is more likely, in my opinion, that Dr Bodel’s history on this point is mistaken.

44. Given the severity and the sites of the applicant’s injuries, it is acceptable that he has experienced increasingly severe symptoms in his lower limbs over the years. Certainly, Dr Bodel, the only medicolegal opinion (and the only recent medical opinion) before the Commission accepts that these symptoms are not inconsistent with the pathology.

45. The finding in relation to credibility does not necessarily make an assessment of the applicant's capacity to earn or a quantification of his entitlement to compensation easier. While Dr Tabasuarez has certified the applicant unfit for work over the period of the claim, Dr Bodel is of the opinion that the applicant is fit for driving work. Admittedly, his history was wrong. However, he expressed the opinion that as long as the applicant “is careful and able to avoid the strenuous activities associated with this (*driving*) work, he would cope reasonably well”.

46. Forensically, it is difficult to put aside the opinion of Dr Bodel, the only specialist medical practitioner who considers the issue of the applicant's earning capacity during the period for which compensation is claimed. Nonetheless, even discounting some of the applicant's complaints, it is difficult to imagine the applicant being regularly employed in full-time work as a truck driver.

47. If the matter was to be determined under the previous weekly payment's regime, I suspect that the applicant's earning capacity would be assessed at little more than nominal. However, the approach of the courts and the Commission to those provisions, epitomised by *Lawarra Nominees Pty v Wilson* (1996) 25 NSWCCR 206, is no longer applicable. The initial question for determination is whether the applicant has a current work capacity. That is defined by s 32A of the 1987 Act as follows:

> "A present inability arising from an injury such that the worker is not able to return to his or her pre-injury work but is able to return to work in suitable employment."

48. The phrase "suitable employment" is also defined. The meaning of the phrase was discussed by the Presidential Unit of the Commission in *Wollongong Nursing Home Pty Ltd v Dewar* [2014] NSWWCCPD 55 (2 September 2014) (*Dewar*). In that case, Roche DP said this:

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

49. Doing the best I can with the medical evidence and giving due weight to the applicant's evidence at the arbitration hearing on the issue, I have concluded that it is probable that the applicant does have a current earning capacity during the period claimed. Accepting the evidence of Dr Bodel, the applicant would have to avoid "strenuous" activities associated with driving. Obviously, that formulation would exclude a job that required him to load trucks or carry weights. As I understand the applicant's evidence, he is also found it difficult to get in and out of trucks. Further, he is unable to drive for long periods.

50. It follows that the applicant could perform courier work driving a light vehicle on a part-time basis. While there is no evidence about the availability of such work in Western Sydney, I have no doubt that such employment exists and that it constitutes a "real" job. I have concluded that the applicant could work half time performing such work. I have also concluded that it is unlikely that such menial work would attract more than the minimum wage. The applicable minimum wage at the commencement of the year period claimed is $719.20 per week. Accordingly, I find that the applicant was capable of earning in suitable employment from 11 October 2018 the sum of $360 per week.

51. The parties have agreed that 80% of the applicant's PIAWE is the sum of $711 per week. I make an award for the applicant pursuant to s 37 (3) of the 1987 act in the sum of $351 per week from 11 October 2018 to date and continuing.

52. A claim is also made pursuant to s 60 for past medical and hospital expenses. There was a cursory discussion of the interaction between ss 59A and 60 of the 1987 Act during the conciliation conference. But it was not addressed during the arbitration hearing. I propose to make an award pursuant to s 60 in respect of the applicants' medical expenses. As s 60 must be read in the context of the Act, it is plausible that the applicant's entitlement to medical expenses ceased following the initial cessation of compensation and will not revive until 11 October 2018 in accordance with the reasoning in *Flying Solo Properties Pty Ltd v Collett* [2105] NSWCCPD 14.

53. I propose to grant liberty to apply in respect of the calculation of the award of weekly payments and in respect of any specific issue that might arise from the general award pursuant to s 60.