WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **3790/19**
Applicant: **KAREN CLARKE**
Respondent: **SECRETARY, DEPARTMENT OF COMMUNITIES AND JUSTICE**
Date of Determination: **12 DECEMBER 2019**
Citation: **[2019] NSWWCC 399**

The Commission determines:

1. Award in favour of the applicant against the respondent in the sum of $423.08 per week for the period 8 May 2018 to 4 December 2018.

2. General order in favour of the applicant against the respondent in respect of section 60 expenses.

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

PHILIP YOUNG
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 PHILIP YOUNG, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Karen Clarke (the applicant) is a 64-year-old lady who was employed by Secretary, Department of Communities and Justice (the respondent) as a psychologist. It is common ground that she suffered injury namely psychological injury including depression, anxiety disorder and post-traumatic stress disorder in the course of her employment with a deemed date of injury of 15 July 2013.

2. The present claim involves the Commission considering section 38 of the *Workers Compensation Act 1987* (the 1987 Act) in terms of a work capacity assessment. The respondent paid all relevant weekly payments to the applicant up until 7 May 2018. The claim is made by the applicant from 8 May 2018 to 4 December 2018, a period of 30 weeks.

3. It is also common ground that the respondent's making weekly payments of compensation to the applicant up until 7 May 2018 would appear to be about 100 weeks beyond the applicant's section 37 entitlement in circumstances where the applicant did not request a work capacity assessment under section 38 of the 1987 Act, nor did the insurer make one. The insurer stopped weekly payments following a review by Dr J Bertucen in March 2018.

ISSUES FOR DETERMINATION

4. The following issues are for determination in this matter:

    (a) Does section 38 apply so that the Commission is able to make a work capacity decision for reasons identified in that section?

    (b) Does the applicant present with work capacity as required by section 38?

    (c) If so, what is the applicant's capacity to earn during the relevant period?

    (d) Is a general order for section 60 expenses appropriate?

PROCEDURE BEFORE THE COMMISSION

5. The matter originally came for conciliation and arbitration in Newcastle on 21 October 2019. On that occasion Mr P Davies of Counsel instructed by Ms C Roughley appeared for and with the applicant. Mr J Beran of Counsel appeared for the respondent.

6. On 21 October 2019 the respondent raised section 38 for the first time. The insurer had not written any letter prior to the expiry of the section 37 second entitlement period advising the applicant of her potential rights under section 38. The insurer simply kept paying the applicant for a further 100 weeks and the respondent took issue with the Commissions' power to determine the matter on that day because of the absence of any request by the applicant for a work capacity assessment.

7. In the circumstances it was necessary on 21 October 2019 to adjourn the matter for a further conciliation and arbitration, so as to afford the parties procedural fairness.

8. The matter then came for conciliation and arbitration hearing in Newcastle on 25 November 2019. Appearances were as before. The applicant had complied with the Commission's direction earlier made that the applicant was to apply for a work capacity assessment. The insurer had not performed that assessment.

9. In those circumstances, the respondent conceded that the Commission was entitled to determine the matter and the following matters were not in dispute:

    (a) injury;

    (b) the Commission's entitlement to determine the dispute;

    (c) the applicant received all relevant payments up until 7 May 2018;

    (d) the claim for weekly payments from 8 May 2018 to 4 December 2018 is pursuant to section 38, together with section 60 medical expenses;

    (e) the relevant pre-injury average weekly earning figure is $1,653.85. Eighty per cent of this figure is $1,323.08 per week, and

    (f) the applicant was working for various times between 8 May 2018 and 4 December 2018. The maximum amount the applicant earned in any week was $1,288.21 per week (October 2018) and her average weekly earnings during the 30-week period were $754.76 per week.

10. I am satisfied that the parties to the dispute understand the matters in issue in these proceedings and have had sufficient opportunity to explore their differences. I am satisfied that the parties were unable to reach agreement and it was appropriate for the matter to proceed to an arbitration hearing.

EVIDENCE

Documentary evidence

11. The following documents were in evidence before the Commission and taken into account in making this determination:

    (a) Application to Resolve a Dispute dated 30 July 2019 and attachments (Application);

    (b) Reply registered 21 August 2019 and attachments (Reply), and

    (c) Application to Admit Late Documents lodged by the applicant on 6 September 2019 and attachments (AALD).

Oral evidence

12. No oral evidence was given.

THE APPLICANT'S SUBMISSIONS

13. In relation to the question of capacity, Mr Davies submitted that in the case of psychological injury, Dr Bertucen's opinions in October 2015 and March 2018 are almost identical, however, these assessments ignore the fact that the applicant suffered psychological injury, as a result of which her capacity can fluctuate from time to time. The report of Associate Professor Robertson dated 19 October 2018 accurately sets out the diagnosis as chronic anxiety and frequent panic attacks, fear and phobic avoidant behaviours and panic disorder with agoraphobia. Dr Robertson regarded the applicant as capable to only work 10 to 15 hours per week. The applicant continued to be incapacitated throughout the relevant period.

14. In terms of the appropriate approach to section 38, the Commission should determine the applicant's capacity for work by reference to her actual earnings during the relevant period, namely by averaging these earnings.

THE RESPONDENT'S SUBMISSIONS

15. Mr Beran submitted that the approach to section 38 was to look at the applicant's capacity to earn and this may well be a figure higher than her average weekly earnings. The determination has to be that the applicant was able to work more than 15 hours per week, otherwise there is no entitlement to any weekly payments. If reliance is placed upon Dr Robertson, it is clear that the applicant's capacity has to be indefinite and the applicant's condition has not stabilised.

16. A further issue arises from the applicant's second statement dated 21 March 2019 in that she refers to the fact that in November 2016 she was able to work three and a half days per week, but her condition was aggravated by alleged bullying by the QBE case worker in June 2017. This is also noted in Dr Bertucen's second report. Harassment by an insurance company, if it occurred, caused a reduction in the applicant's capacity and "injury" does not include bullying by an insurance company.

17. In Dr Bertucen's report of 2018, the doctor explains that the applicant's capacity was related more to her difficulty in adjusting to working in the private sector and the insurer's actions. Dr Molsey, treating psychiatrist, notes the applicant's depression developed in February 2018 but there is no indication of the cause. Dr Robertson's assertion of 10 to 15 hours per week capacity is simply derived from the applicant's history, without any analysis. The applicant has demonstrated capacity to work three and a half days per week. In May 2018, the applicant was earning $989.19 per week. In October 2018, in one week, the applicant earned $1,288.21 per week which is almost exactly the same time that Dr Robertson says the applicant could only work 10 to 15 hours per week.

18. In terms of the medical certificates, they do no offer any rational basis because the applicant did in fact work more than the periods certified. The applicant received regular earnings throughout the relevant period of more than $1,000 per week.

APPLICANT'S SUBMISSIONS IN REPLY

19. Mr Davies made the point that section 38 does not refer to maximum earnings, it simply requires an assessment of capacity. The nature of a psychiatric injury is that a person has good days and bad days and it is not appropriate to simply examine the good days. Dr Robertson confirms that the applicant suffered aggravation of psychological injury to the point that chronic anxiety disorder had developed and this diagnosis is consistent with the applicant's account of what she had suffered. By making 100 weeks of payments to the applicant beyond the section 37 second entitlement period, the insurer has waived the benefit of conducting a work capacity assessment and denied the applicant payments for the balance of the 30 weeks.

FINDINGS AND REASONS

20. The respondent does not take issue with the application of section 38 in terms of the Commissions' power to make the work capacity decision. This concession is properly made and consistent with the authorities[1].

21. A consideration of section 38(3) reveals that, on the majority of medical opinion the applicant had current work capacity during the relevant period. Indeed, the applicant's ability to perform work is reflected in the fact that she actually earned income during that period.

[1] *Inghams Enterprises Pty Ltd v Sok* [2014] NSWCA 217; *Lee v Bunnings Group Ltd* [2013] NSWWCCPD 54; *Sabanayagam v St George Bank Limited* [2016] NSWCA 145.

22. The respondent does not seek to rely on section 38(3)(a) because it is acknowledged that the applicant has made application to the insurer in writing. In terms of section 38(3)(b), the applicant has returned to work during the relevant period and the question becomes whether she did so for not less than 15 hours per week. Given that the applicant's pre-injury average weekly earnings were $1,653.85 for a three-and-a-half-day week, then this amount was earnt by her at a rate of $61.25 per hour. The first limb of section 38(3)(b) is that the applicant must have returned to work "for a period of not less than 15 hours per week". This expression as a matter of interpretation does not, in my view, equate to "a period of not less than 15 hours *every* week" (emphasis added). When regard is had to the applicant's hourly rate of $61.25 per hour, it follows from her tax invoices that in several weeks during the relevant period, the applicant earned more than 15 x $61.25 per hour, namely the applicant earnt more than $918.75 per week.

23. Similarly, the expression in section 38(3)(b) does not in my view require analysis of whether during the period the applicant worked an average of 15 hours per week. Had the legislature so required, it would have said so. It follows in my view, the fact that in some weeks during a period the applicant worked less than 15 hours per week does not detract from the proposition that the applicant during the period worked more than 15 hours per week.

24. The second limb of section 38(3)(b) requires that the applicant's current weekly earnings for the relevant period were at least $185 per week. It is clear from the applicant's tax invoices that the applicant earnt more than this amount per week and this is reinforced by the fact that her average weekly earnings for the 30-week period was in the sum of $754.76 per week.

25. In terms of section 38(3)(c) it is important in my view, to first consider the time at which the question should be asked whether the applicant is "likely to continue indefinitely to be incapable of undertaking further additional employment or work that would increase the worker's current weekly earnings". Because the enquiry as to the workers "current" work capacity relates to a specific past period, it would be inconsistent and illogical in my view to assess the applicant's capacity as at now. The enquiry should be approached as at 8 May 2018, being the commencement date of the relevant period. In terms of the various enquiries, it may seem inconsistent that in a matter such as this the enquiries under sections 38(3)(a) and 38(3)(b) look to the past whereas the enquiry under section 38(3)(c) looks to the future as at the time of the work capacity assessment. This is explained when one examines section 38(4) which requires an insurer (use of the word "must") to conduct the assessment during the last 52 weeks of the second entitlement period. In this matter the insurer has not complied with that obligation, meaning that the potential operation of section 38(3) has been defeated, hence requiring the Commission to now perform the insurer's statutory function.

26. Mr Beran made the submission, based upon the medical opinion of Dr Bertucen that it was non-work factors which were the cause of the applicant's incapacity after 2017, namely the applicant's difficulty adjusting to the transfer to the private sector and her reaction to the insurers' approach to handling her claim.

27. In terms of the insurers' reaction, because injury is not in issue, I take it to mean that Mr Beran's submission refines to one under section 33 of the 1987 Act, namely that her incapacity does not result from injury. But to point to this external influence in the context of common-sense causation concepts overlooks some important matters. First, "injury" is not disputed. Second, the submission in part must be a challenge as to whether this incident arose out of or in the course of the applicant's employment, namely (in the former case) whether the applicant's discussions with the claims officer were incidental to her employment. Clearly, they were. Third, once it is accepted that they were, consideration of the "results from" concept in section 33 is established because on the respondent's own submission, part of the incapacity was caused or materially contributed to by this incident.

28. I accept Mr Beran's submission that the medical certificates do not align with the applicant's actual ability to work during the relevant period. I accept Mr Davies' submission that psychological injury by its nature as a matter of common-sense renders a person subject to good days and bad days. I am of the view to some extent this has affected the applicant's actual earnings during the relevant period because although availability of work can be a factor, in my view the applicant's condition had a material bearing upon her ability to work at various times during the period.

29. For the period in question, I assess the applicant as able to earn $60 per hour, 15 hours per week. This means that I regard her capacity to earn as $900 per week, which is somewhat more than her average actual weekly earnings of $754.76 per week. The 80 per cent figure for the purposes of section 38(7)(a) is, accordingly, $1,323.08. In my view the applicant is entitled to an award pursuant to section 38 in the sum of $423.08 per week in respect of the period 8 May 2018 to 4 December 2018.

30. There were no serious submissions concerning the applicant's need for medical and associated expenses. I make a general order in favour of the applicant against the respondent for section 60 expenses.

ORDERS

31. Award in favour of the applicant against the respondent in the sum of $423.08 per week for the period 8 May 2018 to 4 December 2018.

32. General order in favour of the applicant against the respondent in respect of section 60 expenses.