

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 6746/19
Applicant: Kerry Elizabeth Felix
Respondent: Australian Associated Motor Insurers Pty Ltd
Date of Determination: 15 June 2020
Citation: [2020] NSWCC 198

The Commission find:

1. The limit of the applicant's entitlement to medical expenses pursuant to section 60 of *the Workers Compensation Act 1987* (the 1987 Act) is to be determined by section 59A of the 1987 Act.
2. The applicant's entitlement to medical expenses is not limited to 12 months following the date when weekly payments of compensation ceased to be paid or were payable.

The Commission orders:

3. The respondent is to pay the applicant's medical expenses pursuant to section 60 of the 1987 Act of accounts, receipts and/or HIC Notice of Charge for a period of five years commencing on 30 June 2015 in accordance with section 59A of the 1987 Act.

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

Nicholas Read
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 NICHOLAS READ, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Kerry Elizabeth Felix sustained an injury to her right ankle whilst employed by the Australian Associated Motor Insurers Pty Ltd (the respondent) on 28 March 2008.
2. On 3 April 2008, Ms Felix made a claim for compensation.
3. Weekly benefits compensation was paid to Ms Felix for the period 28 March 2008 to 12 May 2011.
4. In or around May 2011, Ms Felix ceased receiving weekly benefits compensation.
5. On 20 December 2019, Ms Felix lodged an Application to Resolve a Dispute (ARD) the Commission claiming weekly benefits compensation for the period 10 April 2011 to 30 June 2015, permanent impairment compensation and medical expenses.
6. In her statement attached to the ARD, Ms Felix set out the circumstances surrounding the cessation of weekly benefits compensation as follows:

“In May 2011, my mother fell terminally ill. She was diagnosed with cancer. The doctors estimated that she had only three (3) months to live. I decided to become her official carer. I applied for the carer's pension. Before lodging my application, I informed my case manager about my decision. The case manager whose name I cannot recall, advised me to get a letter from my doctor and to forward it to him in an email. I was informed that my weekly payments would be postponed until my mother's death. I was advised to call the case manager when that had happened” (ARD, page 4).
7. On 31 January 2020, the proceedings were listed for a telephone conciliation. The following orders were made by consent:
 - (a) the matter was remitted to the Registrar to appoint an Approved Medical Specialist (AMS) to assess whole person impairment of Mr Felix's left and right lower extremities;
 - (b) the respondent pay the applicant weekly benefits compensation for the period 13 May 2011 to 30 June 2015 at a rate of \$200 per week, agreed to total \$43,000, and
 - (c) the applicant's claim for medical expenses is deferred pending receipt of the Medical Assessment Certificate.
8. On 3 March 2020, the AMS issued a Medical Assessment Certificate (MAC) certifying Ms Felix as suffering from 12% whole person impairment.
9. The matter was subsequently relisted to determine the outstanding issue of Ms Felix's claim for medical expenses.
10. Ms Felix claimed she had an entitlement to five years of medical expenses in accordance with the terms of section 59A of the *Workers Compensation Act 1987* (the 1987 Act) The respondent submitted Ms Felix had an entitlement to only one year of medical expenses from the last date weekly compensation was payable, relying upon the translational provisions.

PROCEDURE BEFORE THE COMMISSION

11. The parties attended a telephone conference on 8 May 2020. At the telephone conciliation I made directions for the parties to lodge and serve written submissions.
12. The parties lodged written submissions in accordance with my direction.
13. Having reviewed the parties' submissions, I am satisfied that the material before me is sufficient to determine the matters in dispute.

ISSUES FOR DETERMINATION

14. The issue for determination is the extent of Ms Felix's entitlement to compensation for medical expenses having regard to section 59A and the transitional provisions in clause 11, Part 19I of Schedule 6 of the 1987 Act.

EVIDENCE

15. The following documents were in evidence before the Commission and have been taken into account in making this determination:
 - (a) ARD and attachments;
 - (b) Reply, and attachments;
 - (c) Ms Felix's written submissions, undated, and
 - (d) the respondent's written submissions dated 20 May 2020.

REASONS

The statutory framework

16. Section 59A was amended by the *Workers Compensation Legislation Amendment Act 2015* (the 2015 amending Act). Section 59A relevantly provides:
 - "(1) Compensation is not payable to an injured worker under this Division in respect of any treatment, service or assistance given or provided after the expiry of the compensation period in respect of the injured worker.
 - (2) The compensation period in respect of an injured worker is -
 - (a) if the injury has resulted in a degree of permanent impairment assessed as provided by section 65 to be 10% or less, or the degree of permanent impairment has not been assessed as provided by that section, the period of 2 years commencing on -
 - (i) the day on which the claim for compensation in respect of the injury was first made (if weekly payments of compensation are not or have not been paid or payable to the worker), or
 - (ii) the day on which weekly payments of compensation cease to be payable to the worker (if weekly payments of compensation are or have been paid or payable to the worker), or
 - (b) if the injury has resulted in a degree of permanent impairment assessed as provided by section 65 to be more than 10% but not more than 20%, the period of 5 years commencing on -

- (i) the day on which the claim for compensation in respect of the injury was first made (if weekly payments of compensation are not or have not been paid or payable to the worker), or
 - (ii) the day on which weekly payments of compensation cease to be payable to the worker (if weekly payments of compensation are or have been paid or payable to the worker).”
17. The 2015 amendments extended the period during which compensation for medical and treatment expenses for workers who have been assessed as suffering from a degree of whole person impairment of more than 10% but not more than 20% to a period of five years from the date of cessation of weekly payments (section 59(2)(b)(ii)).
18. The transitional provisions pertaining to the amendments made to section 59A by the 2015 amending Act are contained in clause 11 of Part 19I to Schedule 6 of the 1987 Act, which provide:
- “(1) The amendments made by Schedule 3 [1] – [3] to the 2015 amending Act to section 59A of the 1987 Act are for the removal of doubt and, accordingly, that section is taken to have been so amended from its own commencement.
 - (2) However, those amendments do not affect any decision of the Commission or a court, or any compromise or settlement, made before the commencement of the amendments.
 - (3) Section 59A of the 1987 Act (as inserted by an amendment made by the 2015 amending Act) extends to the compensation payable to an injured worker who –
 - (a) first made a claim for weekly payments of compensation in respect of the injury before the commencement of the amendment, but not before 1 October 2012, or
 - (b) was an existing recipient of weekly payments in respect of the injury.”
19. Schedule 6, Part 19I, clause 1 of the 1987 Act defines “existing recipient” as an injured worker who was in receipt of weekly payments of compensation in respect of the injury immediately before 17 September 2012.

Discussion

20. The respondent submitted that Ms Felix was excluded from having a benefit of an extended entitlement to medical expenses under section 59A because she did not meet the criteria in subclause 11(3) of the transitional provisions. The respondent submitted that subclause 11(3) operates to deny Ms Felix the benefit of an entitlement to medical expenses because she is not a worker to which clause 11(3) extends the benefits of the 2015 amendments to section 59A.
21. Ms Felix’s written submissions do not directly address the above issue. Ms Felix submitted the respondent is estopped from raising the issue of the application of the transitional provisions because it was not raised in the dispute notice, or alternatively the respondent waived its right to raise the issue by “agreeing” for the issue of medical expenses to be wholly determined by the MAC. Ms Felix also submitted she should be treated as an “existing recipient of weekly payments” because the respondent’s denial of liability was “subsequently acknowledged to have been incorrect” by way of the consent orders made on 31 January 2020.

22. Contrary to Ms Felix's submission the dispute notices issued by the respondent raised the extent of Ms Felix's entitlement to medical expenses and referred to section 59A of the 1987 Act (see ARD pages 63, 68, 73). Further, as the application of section 59A and the transitional provisions are a matter of law, this would not necessarily be an issue for which leave would be required. The Commission may only make orders which are incidental and necessary to the exercise of its statutory jurisdiction (see *Raniere Nominees Pty Limited trading as Horizon Motor Lodge v Daley and Another* [2006] NSWCA 235 at [66]). The Commission does not have any express power permitting it to make an order for the payment of medical expenses that is inconsistent with the terms of section 59A. If leave is required to raise the issue, which I doubt, I grant the respondent leave to raise the issue under section 289A(4) of the *Workers Compensation and Work Injury Management Act 1998*. The issue is one of law and is relevant to the power of the Commission to make the orders sought by Ms Felix.
23. I reject Ms Felix's submission that by entering into the consent order, the respondent implicitly agreed that the issue of the extent of Ms Felix's entitlement to medical expenses would be wholly determined by the AMS's assessment of the degree of her whole person impairment. The consent order was for the claim for medical expenses to be deferred pending receipt of the MAC. It does not follow that the respondent conceded to limiting (or "merging and narrowing") the issues before the Commission to be ultimately determined by the medical assessment process. I also do not accept that the respondent is estopped from raising the issue of the extent of Ms Felix's entitlement to medical expenses under the transitional provisions or waived its right to rely upon this issue.
24. However, the respondent's submissions that Ms Felix is excluded from the benefit of the amendment to section 59A of the 1987 Act and her entitlement is to be determined by the pre-amended section 59A cannot be accepted because:
- (a) Section 59A(2) commenced on 4 December 2015. Section 59A(2) applies to all workers from the date it commenced (other than exempt workers). Subclause 11(1) of the transitional provision provides that section 59A is taken to have been so amended from the date of its own commencement;
 - (b) Section 59A(2) determines the limit of Ms Felix's entitlement to medical and related expenses. On the face of section 59A(2)(b) Ms Felix has an entitlement to medical expenses for a period of five years commencing on the day on which weekly compensation ceased to be payable to her because her injury has resulted in a degree of permanent impairment assessed to be more than 10% but not more than 20%;
 - (c) Whilst subclause 11(3) provides that the amended section 59A "extends to" compensation payable to workers that meet the requirements of subclause 11(3)(a) and (b), it does not provide that workers who fall outside of provisions are excluded from the application of section 59A (or as submitted by the respondent "denied benefits"). The words "extends to" are not words of limitation;
 - (d) There is no reason why Ms Felix's right to medical expenses would be determined by section 59A in its pre-amended form, thereby limiting Ms Felix's entitlement to a period of 12 months after she ceased to be entitled to weekly payments of compensation. From 4 December 2015, the extent of Ms Felix's entitlement to medical expenses was to be determined in accordance with section 59A, as amended by the 2015 amending Act. The 2015 amendment Act replaced the pre-amendment section 59A. It is illogical that the extent of Ms Felix's entitlement would be determined by reference to a statutory provision that has been effectively repealed;

(e) Finally, I accept Ms Felix's submission that the legislation should not be interpreted in a way that results in the respondent being advantaged in this instance by its denial of liability for weekly compensation payments. If the respondent's position is correct, Ms Felix would not have been an "existing recipient" immediately before 17 September 2012 because liability was disputed for weekly compensation. On 20 December 2019 consent orders were entered into providing an entitlement to Ms Felix to weekly compensation for the period 13 May 2011 to 30 June 2015. I accept that Ms Felix cannot retrospectively be classed as an existing recipient (see *Jaffarie v Quality Castings Pty Ltd* [2018] NSWCA 88 (27 April 2018) at [35]-[37]). However, section 59A and the transitional provisions should not be interpreted in a way that enables a respondent to take advantage of a denial of liability to avoid payment of an entitlement to medical expenses.

25. For the above reasons, I find that Ms Felix's entitlement to medical expenses is to be determined by section 59A of the 1987 Act. I am not satisfied that the transitional provisions have the effect of limiting Ms Felix's entitlement to one year from the last date weekly compensation was payable.
26. There is no dispute that the last date weekly compensation was payable was 30 June 2015, in accordance with the consent orders. Therefore, Ms Felix has an entitlement to medical and treatment expenses for a period of five years commencing on 30 June 2015 (until 30 June 2020). Ms Felix's entitlement is also subject to the other provisions in section 59A, such as subsections 59A(3) and (6).