WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **5512-18**
Applicant: **Matthew Thomas Kennedy**
First Respondent: **Icare workers insurance**
Second Respondent: **Larissa Giddens**
Date of Determination: **14 August 2019**
Citation: **[2019] NSWWCC 274**

The Commission determines and orders:

1. Pursuant to section 145 of the *Workers Compensation Act 1987* Matthew Thomas Kennedy is to pay to the Nominal Insurer the sum of $32,340.83.

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

Josephine Bamber
Senior 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 JOSEPHINE BAMBER, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Jackson

Ann Jackson
Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. On 8 May 2019 in this matter, the Commission issued my Certificate of Determination and Statement of Reasons[1] in which I found that the second respondent, Larissa Giddens, sustained injury to her left knee on 1 March 2018 in the course of her employment with the applicant, Matthew Thomas Kennedy.

2. At all relevant times Mr Kennedy operated a business known as Matts Bakery Café and he did not have a policy of workers compensation insurance.

3. During the Arbitration Hearing on 1 April 2019, Mr Kennedy's solicitor, Mr Paul Macken, sought to make submissions regarding the extent of the payments made by the first respondent to Ms Giddens for weekly compensation. Because this had not been previously articulated as a dispute, I advised the parties that while I would allow this to be raised as an issue, it could be dealt with after there had been a determination of the injury issue. Accordingly, after the above-mentioned Certificate of Determination and Statement of Reasons was issued, I held a telephone conference on 23 May 2019 with the parties and their legal representatives. As no agreement could be reached at that time regarding this remaining issue, directions for written submissions were made in consultation with the parties and thereafter a written copy of the directions were forwarded to all parties. The directions were as follows:

    "1. On or before 30 May 2019, the first respondent is to file and serve an application to admit late documents attaching any relevant documents upon which it seeks to rely confined to the issue of incapacity in the period 7 May 2018 to 26 July 2018.

    2. On or before 11 June 2019, the second respondent is to provide an application to admit late documents attaching her further statement, if required, relating to the above-mentioned issue.

    3. On or before 18 June 2019, the applicant is to file and serve his submissions in relation to the above-mentioned issue.

    4. On or before 25 June 2019, the first respondent is to file and serve its submissions in relation to the above-mentioned issue.

    5. On or before 2 July 2019, the second respondent is to file and serve her submissions in relation to the above-mentioned issue.

    6. On or before 9 July 2019, the applicant is to file and serve his submissions in response."

4. On 23 May 2019 at 1.27 pm, the first respondent filed an Application to Admit Late Documents attaching a medical report from Dr Wisam Ihsheish dated 1 June 2018.

5. On 12 June 2019, the second respondent filed and served an Application to Admit Documents dated 12 June 2019 attaching a statement of Larissa Giddens dated 11 June 2019.

[1] [2019] NSWWCC 161

6. On 18 June 2019, the applicant's solicitor filed and served his written submissions. In paragraph 1 of those submissions Mr Macken states that the second respondent had not filed her further statement. As this was not correct, I requested that a member of the Commission's staff send an email to Mr Macken, and forward a copy to both respondent's solicitors, stating the following:

> "Dear Mr Macken
> Attached is the application to admit late documents filed on behalf of Ms Giddens dated 12 June 2019 attaching a supplementary statement from Ms Giddens.
>
> If you wish to file further submissions to address this statement, Senior Arbitrator Bamber directs that you file and serve the same by close of business on 24 June 2019."

7. I am informed that an email in these terms was sent by Ms Sarojini Naiker on 21 June 2019 to Mr Macken, as well as both respondents' solicitors. I am also informed by Ms Naiker that no response was received.

8. On 25 June 2019, the first respondent filed its submissions.

9. As no further submissions were filed by any party, I requested Ms Naiker to enquire of the parties if any other submissions were filed. I am informed that on 10 July 2019 at 12.39 pm Ms Naiker sent an email to all parties' solicitors stating:

> **"From:** Naiker, Sarojini [mailto:Sarojini.Naiker@wcc.nsw.gov.au]
> **Sent:** Wednesday, 10 July 2019 12:39 PM
> **To:** Paul Macken; Joanna Turnbull - Hall & Wilcox (Representative); Les Heinrich - RMB Galland Elder (Representative)
> **Subject:** WCC Matter No 5512/18 Matts Bakery Cafe v Icare Workers Insurance & others - Direction For Submissions
>
> Dear Parties,
>
> I refer to the attached sealed Direction For Submissions of the Commission as given by Arbitrator Josephine Bamber (copy attached).
>
> Could the parties please advise if any submissions were filed in particular by second respondent and the applicant in accordance with order no. 5 and 6 of the Direction dated 31 May 2019.
>
> Kind regards
>
> Sarojini"

10. I am advised that Mr Macken responded on 10 July 2019 at 1.34 pm "The applicant has. Not the 2nd respondent. Will forward again. Regards Paul H Macken". Thereafter, apparently Mr Macken forwarded another copy of his submissions dated 18 June 2019.

11. The second respondent's solicitor advised that Ms Giddens was not making submissions.

EVIDENCE

Documentary evidence

12. The documents that were in evidence before the Commission at the time of the Arbitration Hearing are set out in paragraphs 8 and 9 of my Statement of Reasons dated 8 May 2019. They have been taken into account in making this further determination, together with the additional evidence and submissions referred to above.

13. The parties have agreed to the determination of this remaining issue without a further conference or formal hearing.

FINDINGS AND REASONS

14. In paragraph 86 of my previous Statement of Reasons I summarised the applicant's position regarding this issue as follows:

> "Mr Kennedy's solicitor accepted that the payments made by icare for periods where Ms Giddens was certified as having no current work capacity were appropriate. He outlined that he wished to submit that in other periods, where Ms Giddens was certified as having a capacity for some employment for four hours per day, four days per week, payments at the full rate were not appropriate. This is confined to approximately a two-month period from 7 May 2018 to 26 July 2018, however he accepted that the surgery took place on 11 July 2018, which may affect the argument. Mr Kennedy's solicitor confirmed that no other payments were being disputed."

15. Mr Kennedy now submits:

- On the basis of the certificates filed with the Reply Ms Giddens has a capacity for employment in the period from 7 May 2018 to 26 July 2018 (Reply pages 16-24);

- That throughout that period Ms Giddens is certified as having capacity to work four hours per day four days per week, without any other restriction;

- Ms Giddens' gross earnings in the period from 30 June 2017 to 1 March 2018 (immediately prior to the alleged injury) totalled $30,266.94 being an average of $864.74 gross per week, which Mr Kennedy submits is the appropriate pre-injury average weekly earnings;

- Ms Giddens had lengthy and broad experience in the hospitality industry including in her profession as a Barista (First Respondent's reply page 61) and which such qualifications she would comfortably be able to earn not less than $35 per hour, which translates to an earning capacity of not less than $560 per week based on the certificates, and

- Therefore, the appropriate rate at which Ms Giddens should have been paid weekly compensation in the relevant period is approximately $300 per week.

16. The first respondent submits:

- That Mr Kennedy has not provided any evidence in support of the submission that the appropriate weekly benefits rates should have been $300 per week, nor is there evidence to support the hourly rate of $35 or $560 per week. It is submitted without evidence Mr Kennedy's submissions should not be accepted.

- The operation of the legislation did not permit the first respondent to reduce Ms Giddens weekly benefits for the relevant period. The first respondent explains the operation of the legislation as follows:

"4.1 The Second Respondent's weekly benefits entitlement for the relevant period is determined pursuant to sections 36 and 37 of the *Workers Compensation Act* 1987 as follows:

- 7 May to 4 June 2018 - section 36 (weekly benefits commenced on 5 March 2018)

- 5 June 2018 to 26 July 2018- section 37

4.2. In order for the First Respondent to have reduced the Second Respondent's weekly benefits for the relevant period based on earning capacity it would have had to have made a Work Capacity Decision.

4.3. The Second Respondent was first certified to have a capacity for work from 7 May 2018 however the Certificate of Capacity giving this certification was issued on 9 May 2018 and received by the First Respondent on 10 May 2018. Therefore, aA [sic] Work Capacity Decision to reduce the Second Respondent's weekly benefits based on earning capacity could not have been made prior to 10 May 2018.

4.4. The Work Capacity Decision notice periods applicable for the relevant period were as follows (section 80 *Workplace Injury Management and Workers Compensation Act 1998*):

- Work Capacity Decision made between 10 May to 28 May 2018 – 3 weeks' notice (2 weeks' Fair Notice plus 1 week postage delivery as less than 12 weeks' weekly benefits paid)

- Work Capacity Decision made between 29 May to 26 July 2018 – 3 months plus 4 weeks' notice (2 weeks' Fair Notice plus 1 week postage delivery and 3 months' Work Capacity Decision notice plus 1 week postage delivery)

5. Having regard to the number of weeks of weekly benefits paid to the Second Respondent, the date on which the First Respondent received evidence of a work capacity and the requisite notice periods, the only way the Second Respondent's weekly benefits could have been reduced for any part of the relevant period would have been if the First Respondent had

made a Work Capacity Decision between 10 May and 28 May 2018 (a period of only 18 days).

6. Any work capacity decision made by the First Respondent on or after 29 May 2018 could not have reduced the Second Respondent's weekly benefits for the relevant period due to the required notice period.

7. The First Respondent did not have evidence to enable a Work Capacity Decision to have been made between 10 and 28 May 2018.

8. Further, the period of 18 days from 10 to 28 May 2018 was not sufficient for the First Respondent to have obtained the evidence necessary to make a Work Capacity Decision - it was simply insufficient time to have had the necessary assessment/s conducted and obtained reports required to make a Work Capacity Decision.

9. The Applicant has not identified any evidence in the possession of the First Respondent that would have enabled a Work Capacity Decision to have been made during the period 10 to 28 May 2018.

10. Further, the Second Respondent was waiting to undergo surgery during the relevant period and therefore even if a Work Capacity Decision could have been made (which is not agreed) it is questionable whether it would have been appropriate given the impending surgery and the incapacity for work that accompanied the surgery.

11. Finally, even if the First Respondent had sufficient evidence to make a Work Capacity Decision on 10 May 2018 (which it did not), the earliest date the Second Respondent's weekly benefits could have been reduced is 1 June 2018, being 3 weeks from the date the First Respondent received the Certificate of Capacity and the earliest time a Work Capacity Decision could have been made."

17. The applicant and the first respondent have not referred to the additional evidence filed being the statement of Ms Giddens dated 11 June 2019 and the report of Dr Ihsheish dated 1 June 2018. So, while I have read that material I do not propose to make my decision based on the same.

18. On 8 March 2018, Dr Jassani issued a Centrelink certificate stating that Ms Giddens was not fit to do her usual work until 6 April 2018. The diagnosis was "meniscal and lig injury to the left knee". The condition was noted to be "exacerbation of existing condition" and the symptoms were pain and clicking[2] . The clinical note for that date noted Ms Giddens still had pain and clicking.

19. On 23 March 2018, Dr Maria Alvarez from the same practice as Dr Jassani issued a Centrelink Certificate certifying Ms Giddens as unfit for her usual work until 23 April 2018, noting she was awaiting the left knee surgery and physiotherapy.

20. On 28 March 2018, Dr Jassani provided a WorkCover NSW- certificate of capacity in relation to the left knee injury of 1 March 2018, and certified that she had no current capacity for any employment from 5 March 2018 to 5 April 2018. In the clinical note for that date it is noted that she was on the surgery waiting list for early 2019.

[2] Late Documents 28/3/19 p18

21. On 4 April 2018, Dr Jassani provided a further certificate also certifying she had no capacity for any employment until 6 May 2018.

22. The applicant does not challenge the payments made to Ms Giddens in the above periods, which were made on the basis that she had no capacity for any employment.

23. On 9 May 2018, Dr Jassani certified that Ms Giddens had capacity for some type of employment from 7 May 2018 to 7 June 2018, for four hours per day for four days per week.[3] The clinical note for 9 May 2018 states "recommended back to work gradually. Due for surgery 25 June. Improving. Still in mild pain. Mild swelling.[4]"

24. This level of certification continued throughout June and July 2018. It was noted in the management plan that she was "awaiting surgery, awaiting approval for payment". The clinical note for 7 June 2018 noted continue physio, analgesia and that she was awaiting surgery on 25 June with Dr Wisam[5]. On 27 June 2018 Dr Jassani records in his clinical notes that Ms Giddens still had pain, feels tight and she was doing physiotherapy once a week.

25. However, the certificate dated 26 July 2018 certified that Ms Giddens had no current work capacity for any employment until 28 August 2018. It was noted in the management plan that she was "awaiting surgery, awaiting approval for payment. Surgery done on 11 July".[6] In the clinical note for 26 July 2018 Dr Jassani records that Ms Giddens was to be non-weight bearing for six weeks[7].

26. Mr Kennedy has disputed the payments in the period 7 May 2018 to 26 July 2018 on the basis that her doctor had certified her having some capacity in this period. However, given that Ms Giddens in fact had the surgery to her left knee on 11 July 2018 and thereafter could not weight bear, I find the period from 11 July 2018 to 26 July 2018 was correctly and appropriately paid as the evidence supports a finding of no capacity for employment in this period.

27. In the matter of *Ballantyne v WorkCover Authority of NSW*[8] the Court of Appeal considered the relevant considerations to be taken into account by the Commission when making an order under section 145 of the *Workers Compensation Act 1987* (the 1987 Act). At [83] Justice Basten referred to the decision in *Raniere Nominees Pty Ltd v Daley* (*Raniere Nominees (No. 1)*)[9] wherein Tobias JA (with whom Hodgson JA and Stein AJA agreed) stated:

> "45. In my opinion, these provisions make clear that an employer upon whom a notice is served is entitled to apply to the Compensation Court for a determination as to its liability in respect of any payment made by the Authority to an injured worker under the Scheme. It must follow that that liability relates to that of the employer to pay compensation to the injured worker under the Act. ... That liability, if not otherwise conceded by the employer, is to be determined by the Compensation Court pursuant to s 145(4).
>
> 46. That the employer's liability to reimburse the Fund in respect of the amount of any payment made to the injured worker under the Scheme is a reference to its liability to pay the injured worker compensation under the Act is, in my opinion, confirmed by the terms of s 145(5)."

[3] Icare reply p16
[4] Late Documents 28/3/19 p6/7
[5] Late documents 28/3/19 p7
[6] Icare reply p27
[7] Late Documents 28/3/19 p6
[8] [2007] NSWCA 239
[9] [2005] NSWCA 121; (2005) 66NSWLR 594

28. At [106] Basten JA added,

> "As already discussed, the person's 'liability' will depend, in broad terms, on the following factors:
>
> (a) was the person properly served with a notice under sub-s (1);
>
> (b) did the notice require payment of an amount not exceeding the payment made by the Authority;
>
> (c) was the person served the employer or an insurer of the employer of the injured worker;
>
> (d) was the payment made by the Authority a payment of 'compensation in accordance with this Act'."

29. The issue in dispute to be presently determined involves the last of the above points, was the payment made by the Nominal Insurer a payment of compensation in accordance with the Act. The Nominal Insurer has explained why having received the certificate of capacity issued on 9 May 2018 (certifying that Ms Giddens had some capacity for employment) it could not have immediately reduced her weekly compensation payments, because it had to comply with the provisions in the legislation. Section 80 of the 1998 Act provides that an insurer *must not* reduce the amount of weekly compensation to a worker unless the required period of notice has been given to the worker.

30. In order to determine if particular payments made to a worker were payments of compensation in accordance with the Act, I find that not only must I consider the medical evidence and the applications of sections 36, 37 and 32A, but also the procedural sections, such as section 80.

31. However, section 80(2) of the 1987 Act states that the section applies to a worker *only* if the worker has received weekly payments for a continuous period of at least 12 weeks.

32. According to the first respondent's submissions Ms Giddens payments of weekly compensation commenced on 5 March 2018 and so she would not have received 12 weeks of weekly compensation on 10 May 2018 when the Nominal Insurer received the certificate of capacity. The 12 weeks would not have been reached until 28 May 2018. So that means as at the relevant date section 80 did not apply and there would have been no notice provision to be complied with in order to reduce the weekly payments.

33. The Nominal Insurer has also argued that it did not have evidence to enable a work capacity decision to have been made between 10 and 28 May 2018. However, section 44B of the 1987 Act sets out the requirements for a certificate of capacity. The certificate of capacity issued by Dr Jassani on 9 May 2018 complies with those requirements. The doctor certifies Ms Giddens as having capacity for some type of employment for four hours per day, four days per week from 7 May 2018 until 7 June 2018 and he does not certify any restrictions. He maintains this level of certification in his next certificate even though he notes she is awaiting surgery on 26 June. On 27 June 2018, he again provides such a certification. The only finding I can make based on this medical evidence is that Ms Giddens did have capacity for some work from 7 May 2018 to 10 July 2018.

34. She underwent surgery on 11 July 2018 and the evidence in the clinical note of 26 July 2018 records she was non-weight bearing. I consider the totality of the evidence from 11 July to 26 July 2018 supports a finding on the balance of probabilities that she had no current capacity for employment in this period.

35. However, I find that from 10 May to 10 July 2018 the medical evidence supports finding that Ms Giddens had a capacity to work 16 hours per week. The definition of suitable employment in section 32A does not permit me to take into account whether employment is available, the nature of her pre-injury employment or her place of residence. I am to have regard to the nature of her incapacity. Given the injury was to her left knee and while there are some comments by Dr Jassani of improvement, he also refers to ongoing pain and swelling and that she was being treated with analgesia, physiotherapy and required surgery. Taking such matters into account I find that the nature of her incapacity would preclude work involving standing or of a physical nature that would place stress on her knee. However, sedentary work would be a type of work that would fall within the nature of her incapacity.

36. I am also to take into account her age, education, skills and work experience. She was 26 and she says in her first statement she had been doing the type of work she had been doing for Mr Kennedy for at least 10 years. There she served, supervised the running of the shop, did the banking and some cleaning. Mr Kennedy stated she had good barista skills and had previously worked at various hotels. She also has skills with horses.

37. Mr Kennedy's submissions are that she would have been able to earn not less than $35 per hour. The first respondent submits there is no evidence for this submission. I accept this submission. Also, Mr Kennedy in his statement says she was paid $25.11 per hour so this is well under $35 suggested in the submission.

38. I also consider it would be unsound to value her capacity to earn at anything but the minimum wage, particularly as her performance of any sedentary duties could be affected by her experiencing pain. Therefore, I consider the first respondent had the evidence and was not precluded by the legislation from reducing Ms Gidden's weekly payments in the period 10 May to 10 July 2018. They paid Ms Giddens in this time on the basis of her having no current capacity for any employment. I find weekly compensation in this period using the 2018 minimum wage of $23.66 per hour for a casual worker, multiplied by 16 hours represents an ability to earn in suitable employment of $378.56 per week. Therefore for 8.5 weeks from 10 May to 10 July 2018 the weekly payments need to be reduced by $378.56 x 8.5 equals $3,217.76.

39. The notice served by the Nominal Insurer on Mr Kennedy was for $35,558.59 from which I deduct $3,217.76 leaving an amount payable of $32,340.83. I find the sum of $32,340.83 was the payment made by the Nominal Insurer, being compensation in accordance with the 1987 Act.

SUMMARY

40. The Commission orders that Matthew Kennedy is to pay to the Nominal Insurer the sum of $32,340.83