

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 3219/20
Applicant: LYNDALL WHEAR
Respondents: COLES SUPERMARKETS AUSTRALIA PTY LTD
Date of Determination: 29 JULY 2020
Citation: [2020] NSWCC 261

The Commission determines:

1. Award in favour of the applicant against the respondent pursuant to section 38 of the *Workers Compensation Act (NSW) 1987* (1987 Act) in the sum of \$334.31 per week from 11 June 2020 to date and continuing.

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 MacLeod

Ann MacLeod
Acting Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Lyndall Whear (the applicant) is a 58 year old lady who was employed by Coles Supermarkets Australia Pty Ltd (the respondent). On 24 October 2016 in the course of her employment, the applicant was moving cartons of alcohol at a Coles Liquor Store and injured her lumbar spine.
2. The applicant pleads her case as an aggravation, acceleration, exacerbation or deterioration of lumbar spine disease pursuant to section 4(b)(ii) of the 1987 Act.
3. The applicant claims weekly payments of compensation from 9 June 2020 and continuing. It is apparent, however, that the applicant was paid up until 10 June 2020 and therefore the claim is from 11 June 2020 and continuing.
4. The applicant up until 10 June 2020 had received 154 weeks of weekly payments. Her entitlement beyond 10 June 2020 must therefore be supported by section 38 of the 1987 Act, being weekly payments beyond the first 130 weeks of incapacity.
5. On 3 March 2020 ,the insurer issued a Work Capacity Decision which in reliance upon certain labour market and vocational evidence asserted that the applicant was fit for suitable employment and therefore payments were terminated effective10 June 2020.
6. The applicant submits that she has no capacity for work from 11 June 2020 and continuing. The respondent says that the applicant has capacity for work and because of section 38(3) of the 1987 Act the applicant is not entitled to any further weekly payments.
7. The respondent has identified the applicant's pre-injury average weekly earnings at \$417.89. 80% of that figure is \$334.31 per week.

ISSUES FOR DETERMINATION

8. The issues are:
 - (a) Does the applicant have current work capacity for the period claimed?
 - (b) If not, what if any is the applicant's entitlement to weekly payments during the period claimed?

PROCEDURE BEFORE THE COMMISSION

9. This matter came for teleconference on 25 June 2020, when Ms E Campbell, Solicitor, appeared for and with the applicant and Ms M Browne, Solicitor, appeared for the respondent. Ms A Springfield of iCare was also present.
10. The parties engaged in discussions through a conciliation process but those discussions were not successful. I am satisfied that I have used my best endeavours to achieve resolution of the matter but settlement could not be achieved.
11. The matter involved a challenge to an insurer's work capacity decision and in the circumstances it was appropriate that a Direction for submissions by the parties should occur.

12. That Direction was issued on 26 June 2020 and submissions were received by the Commission as follows:
- (a) applicant's submissions under hand of Mr J Beran of counsel dated 3 July 2020;
 - (b) respondent's submissions under hand of Ms N Compton of counsel dated 17 July 2020, and
 - (c) applicant's submissions in Reply under hand of Mr J Beran of counsel dated 23 July 2020.

EVIDENCE

Documentary evidence

13. The following documents were before the Commission and were taken into account in making this determination:
- (a) Application to Resolve a Dispute (Application) dated 10 June 2020 and attachments;
 - (b) Reply dated 22 June 2020 and attachments;
 - (c) Application to Admit Late Documents by the applicant dated 2 July 2020 and attached further report of Dr A G Hopcroft dated 30 June 2020 (AALD1);
 - (d) Application to Admit Late Documents by the respondent dated 16 July 2020 and attached copy letter from the applicant's solicitors to Dr Hopcroft (AALD2), and
 - (e) the submissions mentioned above.

Oral evidence

14. No oral evidence was given.

SUBMISSIONS

15. It is unnecessary to summarise in detail the submissions provided in this matter as both parties prepared written submissions.

PRELIMINARY CONSIDERATIONS

16. After the teleconference on 26 June 2020, the applicant's solicitors wrote to Dr Hopcroft on 29 June 2020 seeking a supplementary opinion.
17. That request followed the Commission raising an issue at the teleconference concerning the extent to which the qualified medical opinion (in particular Dr Hopcroft) had given consideration to the radiological investigations.
18. The applicant's solicitors have proceeded by AALD1 to seek to introduce into evidence a further report of Dr Hopcroft dated 30 June 2020. AALD2 seeks to introduce into evidence the applicant's solicitors of request to Dr Hopcroft dated 29 June 2020.

19. The respondent has objected to the admission of Dr Hopcroft's report of 30 June 2020 into evidence because of the applicant's late approach to clarify the issues and the inability for the insurer to obtain any evidence in response to Dr Hopcroft's opinion. The respondent says that in the circumstances it is prejudiced if Dr Hopcroft's report of 30 June 2020 were admitted into evidence.
20. Having reviewed Dr Hopcroft's report of 30 June 2020, I am concerned that the opinions expressed therein go beyond the parameters of what was raised at the teleconference as live issues. In particular there are expressions of opinion concerning the central issue of capacity which the respondent has had no opportunity to meet. For that reason, I reject the admission of Dr Hopcroft's report of 30 June 2020 and the applicant's solicitors letter of 29 June 2020 into evidence.

DISCUSSION, FINDINGS AND REASONS

21. There is no dispute that the applicant suffered injury to her lumbar spine arising out of or in the course of her employment with the respondent on 24 October 2016.
22. Both parties refer to the applicant's need to establish that she has no current work capacity during the period in question in order to qualify for an award for weekly payments pursuant to section 38 of the 1987 Act.
23. Whether the applicant has a capacity for work depends upon whether she is fit for suitable employment within the definition contained in section 32A(1) of the 1987 Act. "Current work capacity" is defined by reference to whether a worker has "a present inability arising from an injury such that the worker is not able to return to work, either in the workers pre-injury employment or in suitable employment".
24. The definition of "suitable employment" requires regard to be had to a number of matters. Relevantly, the nature of the worker's incapacity, any medical certificate of capacity, the worker's age, education, skills and work experience. No regard is to be had to matters such as the availability of employment whether in the employment market or otherwise, nor the worker's place of residence.
25. Dr Doig has provided a report dated 28 May 2019. He regarded the applicant as having a chronic pain condition with a poor prognosis. He thought her able to return to office or administrative work at that time.
26. Dr Hopcroft in his report of 11 May 2020 noted the significant list of medication which the applicant was taking (including opioids). He took a history of the applicant having a fall in November 2019 which the applicant ascribes to a back spasm and her leg giving way. After the fall the applicant began to experience pain radiating to her right buttock and thigh and pain in her left knee.
27. The severity of this pain is detailed in the applicant's statement. The applicant says that she has developed depression, experiences constant back ache and spasms, can't bend and is unable to walk or stand for long periods.
28. The Work Capacity Decision issued by the respondent's insurer on 3 March 2020 relies heavily upon documents which were commissioned between about October 2019 and January 2020. These include a labour market assessment taking into consideration the applicant's capacities and tolerances at that time. This assessment identified the applicant as suitable for roles such as receptionist, customer support officer or administration assistant.

29. At paragraph 15 of its submissions the respondent points to the absence of evidence of certificates of capacity beyond 30 December 2019 and says that there is no evidence whatsoever of medical certification other than that the applicant had capacity for some employment.
30. The applicant's general practitioner is Dr Fu Wen Chong. Included in the electronic file from pages 168 and following are a series of Workcover medical certificates. The first relevant certificate is 16 March 2020 and then there are certificates through until 8 June 2020 certifying no capacity for work. In each of these latter certificates Dr Chong adds recommendations for physiotherapy and remedial massage, chiropractor and hydrotherapy. He adds the following comment under "capacity":
- "Has capacity for job seeking. Not fit for work in the next month due to recent stress of being terminated from work despite being compliant with manager and work. Stress due to uncertain future with her back condition. Lower back has gradually gotten worse as there has not been treatment organise [sic] as recommended despite being regular home exercises".
31. The respondent's submission regrettably did not have the benefit of these medical certificates, however, the certificates do form part of the electronic file and are of central relevance to the question concerning the applicant's capacity for work during the period claimed. It is of course the case that the certificates conclude on 8 June 2020, before the period during which weekly payments are claimed. I do not apprehend, however, that to be destructive of the applicant's entitlement because the question of suitable employment is "not limited to, any certificate of capacity"¹.
32. It is of course clear that Dr Hopcroft on 21 May 2020 thought the applicant was capable of performing some work, but I accept the applicant's submission that Dr Hopcroft also observed the significant "gamut" of medication the applicant was taking, the guarded prognosis and the need for the applicant to receive further treatment.
33. It seems clear from the medical certificate of Dr Chong that the applicant did undergo a deterioration in her condition from about the middle of March 2020. That was of course after the work capacity decision. The respondent places considerable reliance upon the 28 May 2019 report of Dr Doig and the various labour market assessment reports. I prefer the more recent evidence, namely the opinion of the applicant's general practitioner Dr Chong, the evidence of the applicant in accordance with her statement and the history and conclusions given by Dr Hopcroft in his report of 11 May 2020 concerning the November 2019 fall.
34. The applicant's chronic pain has compelled her to be prescribed significant medication, including opioids. The nature of her incapacity is significant. She is now aged 58 and has been unable for some time at least to obtain remedial treatment because the insurer denied liability for it. I anticipate that the denial for this treatment occurred at or about the time of the work capacity decision. I accept Dr Chong's opinion that the absence of the treatment has made the applicant's lower back condition to worsen. This worsening of symptoms, level of medication and the chronic pain described by the applicant lead me to the view that in a practical sense the applicant has had no capacity for work from 11 June 2020 and continuing.

¹ Section 32A(1)(a)(i) 1987 Act.

AWARDS

35. The award is as follows:

- (a) Award in favour of the applicant against the respondent pursuant to section 38 of the 1987 Act in the sum of \$334.31 per week from 11 June 2020 to date and continuing.

POST SCRIPT

Since preparation of these Reasons the respondent has withdrawn certain submissions based on the applicant's submissions in reply. The Commission is grateful for the candour shown by the respondent insurer and representatives.