

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2763/20
Applicant: Andrew Morcos
Respondent: Deosa Enterprises Pty Limited
Date of Determination: 10 February 2021
Citation No: [2021] NSWCC 44

The Commission orders:

1. The respondent is to pay weekly payments of compensation to the applicant at the rate of \$2,000 per week from 12 January 2020 to date and continuing pursuant to section 38 (2) of the *Workers Compensation Act 1987*.

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

John Isaksen
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 JOHN ISAKSEN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. On 5 August 2020, I made a determination that the applicant had failed to establish that he has had no current work capacity from 12 January 2020.
2. The applicant filed an appeal against that decision. On 17 December 2020 Acting Deputy President Parker in *Morcos v Deosa Enterprises Pty Limited* [2020] NSWCCPD 73, revoked the determination I had made. ADP Parker said at [60]:

“On the basis of all of the evidence, both physical and psychiatric, the Arbitrator should have reached the conclusion that the appellant did not have any ability to return to work either in the pre-injury employment of electrician or in suitable employment. It follows that the Arbitrator should have found that as 12 January 2020 the appellant had ‘no current work capacity’.”

3. Acting Deputy President Parker remitted the applicant’s claim for weekly payments of compensation back to myself to determine whether the applicant is likely to continue indefinitely to have no current work capacity, being a requirement of section 38 (2) of the *Workers Compensation Act 1987* (the 1987 Act).

ISSUES FOR DETERMINATION

4. The parties agree that the following issue remains in dispute:
 - (a) Whether the applicant is likely to continue indefinitely to have no current work capacity and thereby be entitled to weekly payments of compensation pursuant to section 38 (2) of the 1987 Act.

PROCEDURE BEFORE THE COMMISSION

5. A telephone conference was conducted on 18 January 2021 following the outcome of the appeal decision. Directions were made for both parties to file and serve written submissions on the effect and application of the words “likely to continue indefinitely to have no current work capacity” in section 38 (2) of the 1987 Act, as it applies to this dispute, by 1 February 2021.
6. The applicant’s submissions were not filed until 8 February 2021. Mr Morgan of counsel, who made the submissions for the applicant, stated that both himself and his instructing solicitor were on holidays until early February, which made the preparation of the submissions in a timely fashion problematic.
7. I have accepted the applicant’s submissions as failure to do so would amount to a substantial prejudice to the applicant on a critical issue as to whether the applicant is entitled to weekly payments of compensation.

EVIDENCE

Documentary evidence

8. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute and attached documents;
 - (b) Reply and attached documents;

- (c) Application to Admit Late Documents filed by the applicant on 22 July 2020, and
- (d) Application to Admit Late Documents filed by the respondent on 28 July 2020.

FINDINGS AND REASONS

The applicant's submissions

- 9. Mr Morgan of counsel provided written submissions on behalf of the applicant.
- 10. Mr Morgan was not able to identify any decision where the phrase "likely to continue indefinitely" has been the subject of judicial determination in New South Wales.
- 11. Mr Morgan had the benefit of reading the respondent's submissions, which were filed on 1 February 2021, and agreed that the ordinary dictionary meaning of 'indefinite' should be adopted, being 'without fixed or specified limit' or 'into the foreseeable future.'
- 12. Mr Morgan submits that there is no evidence to suggest that the applicant's physical and psychiatric conditions will improve in the foreseeable future, or that the applicant will not otherwise have no current work capacity for an indefinite period of time.
- 13. Mr Morgan submits that the applicant's physical and psychiatric conditions have existed for more than two years and absent evidence or reasons as to why that present state of affairs is likely to change, then a presumption of continuance should be applied.

The respondent's submissions

- 14. Mr Beran of counsel provided written submissions on behalf of the respondent.
- 15. Mr Beran submits that the phrase "likely to continue indefinitely" has not been the subject of judicial interpretation in New South Wales. He submits that the exact same language is used in section 93C (1)(a) of the *Accident Compensation Act 1985* (Vic) and section 163 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic), but the word "indefinitely" has not specifically been the subject of judicial interpretation in Victoria. However, in *Dourley v Australian Urethane & Styrene Pty Ltd* [2020] VMC 26, Magistrate Hoare, in determining whether a worker was likely to continue indefinitely to have no current work capacity pursuant to section 163 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic), said at [9]:

"In my opinion, for the reasons which follow, Mr Dourley should have the relief which he seeks on the basis that he has no current work capacity which is likely to continue for the foreseeable future."
- 16. Mr Beran submits that Medical Panels in Victoria have used the test of "whether the condition is unlikely to change in the foreseeable future" (see *Combined Enterprises Pty Ltd v Brister* [2016] VSC 807 at [15]) or "unlikely to improve in the foreseeable future" (see *Steel Smith Engineering Pty Ltd v McPhee & Ors* [2020] VSC 571 at [43]).
- 17. Mr Beran refers to the ordinary dictionary meaning of 'indefinite' in the Macquarie Dictionary to be 'without fixed or specified limit.' He submits that 'without fixed or specified limit' or, alternatively, persisting into the foreseeable future and unlikely to improve as per the Victorian jurisprudence, should be adopted by the Commission in the application of section 38 (2) of the 1987 Act.

18. Mr Beran submits that neither of those interpretations have been met by the applicant on the available evidence.
19. Mr Beran notes that the applicant states he began seeing Dr Khan, psychiatrist, in October 2019, and over time the applicant began to see improvements in his mental state. Mr Beran refers to Dr Khan's opinion in January 2020 that there was a possibility that the applicant would return to work after one year.
20. Mr Beran submits that it was the opinion of Dr Poplawski, who examined the applicant at the request of his solicitors in October 2019, that the applicant was fit for some light duties in respect of his physical injuries. Dr Kirychenko, who provided an opinion to the respondent in the speciality of occupational medicine, opined in January 2020 that once the applicant's psychiatric condition had improved then the applicant would attain some capacity in the future in respect of his physical injuries.
21. Mr Beran submits that the evidence is that with further treatment there is to be an expected improvement in the applicant's condition in the foreseeable future. Mr Beran submits that the evidence does not support the applicant's status of having no current work capacity of an indefinite nature, but rather that the applicant's work capacity is subject to change. Accordingly, the terms of section 38 (2) of the 1987 Act cannot be satisfied.

Determination

22. Section 38 (2) of the 1987 Act provides:

“A worker who is assessed by the insurer as having no current work capacity and likely to continue indefinitely to have no current work capacity is entitled to compensation after the second entitlement period.”

23. Neither counsel for applicant or respondent were able to refer to any Presidential or appellate decision in New South Wales that could assist with the application of the term “likely to continue indefinitely” in section 38 (2) of the 1987 Act. Recently, Arbitrator Harris considered the same term as it applies to section 38 (3)(c) of the 1987 Act in *Roberts v University of Sydney* [2020] NSWCC 25, and said at [99-100]:

“I agree with the applicant's submission that the meaning of “indefinitely” is akin to an unknown or non-specific period.

I also agree with part of the respondent's submission that the meaning relates to the “foreseeable future”, although the meaning is probably more restrictive than that because the satisfaction of the concept requires incapacity of an indefinite nature rather than just in the foreseeable period.”

24. In *NSW Trustee and Guardian on behalf of Robert Birch v Olympic Aluminium Pty Ltd* [2016] NSWCCPD 54, President Keating P, when considering the definition of “dispute” in the now repealed section 43 (3) of the 1987 Act, said at [51]:

“The unhelpfulness of relying on dictionary definitions for statutory meaning has been reiterated recently in the Court of Appeal (*State of New South Wales v Chapman-Davis* [2016] NSWCA 237 at [62] citing *2 Elizabeth Bay Road Pty Ltd v The Owners – Strata Plan No 73943* [2014] NSWCA 409 at [81] (Leeming JA); *TAL Life Ltd v Shuetrim*; *MetLife Insurance Ltd v Shuetrim* [2016] NSWCA 68 at [80] (Leeming JA, Beazley P and Emmett AJA agreeing)).”

25. However, there would seem no reason why the application of the words 'likely to continue indefinitely' in section 38 (2) of the 1987 Act should not be given their ordinary meaning. In my view, those words require the applicant to establish that he is likely to continue to have no current work capacity for an unknown or indeterminate period into the future.
26. The opinion of Dr Khan, which was critical to the applicant's success on appeal, supports a finding that the applicant is likely to continue indefinitely to have no current work capacity. In his report dated 30 January 2020, Dr Khan opines:

"...it is his psychiatric/psychological conditions that have been the predominant barrier to his recovery. It is unlikely that Mr Morcos will be able to return to work within the next one year. Should he return to work in the future, it is unlikely that he will be able to manage with full-time work, which would result in a reduction in his earning capacity."
27. Dr Khan was not able or prepared to offer a time when the applicant would be able to return to some form of work. Dr Teoh only postulates that in the event that the applicant is able to return to work, it is unlikely that the applicant would be able to manage to do that full time.
28. The opinion of Dr Khan is now 12 months old. The only medical opinion provided since then is from Dr Teoh, who sees the applicant in March 2020. However, there is an ambiguity in the opinion provided by Dr Teoh, which was recognised by ADP Parker in the appeal decision, wherein Dr Teoh considers the applicant as being fit for suitable duties as part of his assessment of permanent impairment, but also opines that the applicant is not able to work at all as a result of his physical and mental condition, without providing any explanation for this.
29. On the current available evidence, I prefer the opinion of Dr Khan because of his role as the applicant's treating psychiatrist and because his opinion was integral to the applicant's success on appeal. In my view, Dr Khan's opinion supports a finding that the applicant has no current work capacity for an unknown or indeterminate period into the future.
30. It might well be that the applicant's conditions, especially his psychiatric condition, will change for the better in the future, and this will mean that the applicant can return to some suitable employment. That is consistent with the applicant's own optimism as a result of the treatment provided by Dr Khan between October 2019 and May 2020. However, the opinion of Dr Khan, which I have accepted, is that the applicant has no work capacity for an unknown or indeterminate period into the future.
31. I do not agree with the submission made by the respondent that the applicant cannot get the benefit of weekly payments pursuant to section 38 (2) if the applicant's condition or conditions can be subject to change. It is only necessary for the applicant to establish that for an unknown or indeterminate time into the future he will have no current work capacity. This is supported by the opinion of Dr Khan.
32. At the arbitration hearing conducted on 30 July 2020, the parties agreed that the applicant's pre-injury average weekly earnings (PIAWE) was \$2,500. Eighty per cent of PIAWE is \$2,000.
33. Acting Deputy President Parker found on appeal that I should have found that as at 12 January 2020, the applicant had no current work capacity.
34. I have provided my reasons as to why the applicant is likely to continue indefinitely to have no current work capacity. There will therefore be an order that the respondent is to pay weekly payments of compensation to the applicant at the rate of \$2,000 per week from 12 January 2020 to date and continuing pursuant to section 38 (2) of the 1987 Act.