

# WORKERS COMPENSATION COMMISSION

## INTERIM PAYMENT DIRECTION

This direction is issued pursuant to the *Workplace Injury Management and Workers Compensation Act 1998*

**Matter No:** 1480/20  
**Applicant:** Kazi Hoque  
**Respondent:** State of New South Wales  
**Date of direction:** 6 April 2020  
**Citation:** [2020] NSWCCCR 1

### The Registrar directs:

1. That the respondent pays the applicant weekly compensation at \$ 832 per week from 26 March 2020 to date and continuing pursuant to s 37 of the *Workers Compensation Act 1987* (the 1987 Act).
2. The respondent is to have credit for payments made after 26 March 2020.

### Background

1. Mr Kazi Hoque (the applicant) was employed by an entity described as “HSNSW-FPLUS” but is probably correctly identified as the State of New South Wales (the respondent) and suffered an accepted compensable injury to the cervical and lumbar spines on 26 June 2018.
2. This is a claim for weekly compensation pursuant to s 37 of the 1987 Act.
3. The applicant has been paid weekly payments of compensation. On 17 December 2019 the respondent issued a notice pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).
4. The s 78 notice relevantly provided that the applicant’s pre-injury average weekly earnings (PIAWE) were \$1,040. It also stated that the applicant was capable of earning the amount of \$961.50.
5. This matter was listed for telephone conference on 27 March 2020. The parties were legally represented. Mr Garling appeared for the applicant and Mr Franco appeared for the respondent.
6. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied.
7. The documentation admitted into evidence was:
  - (a) Application to Resolve a Dispute (Application), and
  - (b) Reply.

### Legislation

8. Part 5 of the 1998 Act is headed “Expedited Assessment”. Pursuant to s 295 of the 1998 Act the Part applies to a dispute referred to the Commission that concerns “weekly payments of compensation”.

9. The functions under Part 5 are exercised by the Registrar (s 296 of the 1998 Act). A dispute about a decision by an insurer to discontinue or reduce weekly payments is not to be done by way of interim payments direction (s 297(1A) of the 1998 Act). Accordingly, the standard presumptions in favour of making an interim payment direction pursuant to s 297(3) do not apply with respect to determining this dispute.
10. These functions were delegated to me under the Registrar's powers.
11. Work capacity decisions are defined in s 43 of the 1987 Act to include "a decision about a worker's current work capacity" and a decision about the worker's PIAWE.
12. "Current work capacity" is defined in s 32A of the 1987 Act as "a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment".
13. "Suitable employment" is defined in s 32A of the 1987 Act as "employment in work for which the worker is currently suited:
  - (a) having regard to:
    - (i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and
    - (ii) the worker's age, education, skills and work experience, and
    - (iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and
    - (iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and
    - (v) such other matters as the Workers Compensation Guidelines may specify, and
  - (b) regardless of:
    - (i) whether the work or the employment is available, and
    - (ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and
    - (iii) the nature of the worker's pre-injury employment, and
    - (iv) the worker's place of residence."
14. The amendments to PIAWE and related provisions made by the *Workers Compensation Legislation Amendment Act 2018* do not apply to injuries received before 21 October 2019.<sup>1</sup>

## Agreements

15. The following matters were agreed by the parties:
  - (a) the applicant's PIAWE was \$1,040;
  - (b) the work capacity decision is dated 17 December 2019 and the applicant's claim is from 26 March 2020 when the notice period expired;
  - (c) the applicant had a present inability arising from the injury to return to his pre-injury employment, and

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<sup>1</sup> 1987 Act, Sch 6, Pt 21, cl 7.

- (d) the applicant's current physical restrictions from injury were set out in the WorkCover NSW – certificate of capacity dated 18 February 2020.<sup>2</sup>

16. The issues as presented at the telephone conference were narrowed to whether the applicant had current work capacity and, if so, the quantification of the applicant's "current work capacity" in respect of his ability to work in "suitable employment".

## Submissions

17. The applicant submitted:

- (a) The respondent's concession as to his current physical restrictions meant that this relevantly addressed the nature of the worker's incapacity (see(a)(i)) in the definition of suitable employment.
- (b) His "age, education, skills and work experience" are detailed in the histories recorded by various health practitioners. The absence of a statement by the applicant did not matter as what he told the various health professionals was consistent and should be accepted. The applicant had worked in Australia for approximately 14 years as a cook/chef with no other experience in any industry either in Australia or overseas.<sup>3</sup>
- (c) He had basic computer skills and limited English skills especially in relation to literacy.
- (d) He did not have the capacity to undertake the duties identified by the respondent.
- (e) He was unfit to work as a pathology courier as identified in the labour market assessment<sup>4</sup> as a he was not physically fit to sit for extended periods and did not meet the lifting requirements. The report relied upon by the insurer noted this.<sup>5</sup>
- (f) The respondent also submitted that the applicant could work as a sales assistant/representative in respect of cooking equipment. The requirements for the job were articulated at page 10 of the report<sup>6</sup>. The applicant did not meet that criteria. The other example given indicated that sales experience was required or otherwise persons who were "strong communicators".<sup>7</sup> Other criteria included that the applicant had "RSA & RCG qualifications"<sup>8</sup> which he did not have.
- (g) The applicant had been provided with "no retraining" and this meant that he was not qualified for vocational options.<sup>9</sup> The occupational rehabilitation service organised by the respondent had not found the applicant any work.
- (h) He had no current work capacity give the matters that are required to be examined in the definition of suitable employment.

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<sup>2</sup> Reply, pp 16-18.

<sup>3</sup> Application, p 71.

<sup>4</sup> Application, p 51.

<sup>5</sup> Application, p 52.

<sup>6</sup> Application, p 59.

<sup>7</sup> Application, p 61.

<sup>8</sup> Application, p 62.

<sup>9</sup> Application, p 88.

18. The respondent submitted:

- (a) The applicant had been provided with forms of retraining assistance which were set out in the Workers Health Centre report dated 15 December 2019.<sup>10</sup>
- (b) Accepted that the Commission had judicial knowledge of wage rates.
- (c) There was no statement from the applicant which was “unsatisfactory” and a “significant omission” in his case. By way of example, there is no direct evidence from the applicant that he cannot perform the nominated jobs.
- (d) The earlier WorkCover certificates, such as that dated 11 October 2019,<sup>11</sup> showed a capacity to work as a pathology courier or customer service /receptionist. There was no medical evidence to show why the general practitioner had changed or retracted his opinion. The deleterious change was inconsistent with the opinion expressed by Associate Professor Sheridan that there would be an improvement in the applicant’s condition over time<sup>12</sup>.
- (e) The vocational assessment undertaken on behalf of the applicant was undertaken over the telephone and diminished the weight that should be given to the report. There was no reason why the report was undertaken in this way.
- (f) The rehabilitation consultant qualified by the applicant noted there were no pathology jobs advertised in the Sydney Metropolitan Area. This was an irrelevant consideration for the purposes of determining suitable employment.<sup>13</sup>
- (g) There was no direct medical evidence that the applicant could not do the jobs that were suggested by the respondent. The restrictions in the medical certificates did not tie in with a conclusion that the applicant did not have the relevant loss of capacity.
- (h) The job seeking logs completed by the applicant<sup>14</sup> were an admission that he thought he could do those jobs.

19. The applicant in reply submitted:

- (a) The applicant did not need to put on a statement as his evidence is recorded in the various histories. The applicant’s evidence that he could not undertake a particular job would be of no assistance and the Commission would be guided by the expert evidence.
- (b) The limitations expressed in the previous workcover certificates were outdated and overtaken by the recent workcover certificate which showed greater restrictions such as reduced sitting. The respondent expressly accepted the latest WorkCover certificate as establishing the applicant’s physical limitations and had not withdrawn that concession.

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<sup>10</sup> Application, p 39.

<sup>11</sup> Reply, p 2.

<sup>12</sup> Reply, p 19.

<sup>13</sup> Application, p 68.

<sup>14</sup> Application, pp 41-44.

## Evidence

20. The latest certificate of capacity which contained the agreed physical restrictions provided:<sup>15</sup>
- (a) capacity for some type of employment six hours a day, five days a week;
  - (b) lifting/carrying – not more than 5 kg floor to waist rarely and 3.5 kg floor to waist occasionally;
  - (c) sitting tolerance – 40 minutes;
  - (d) standing tolerance – 25 minutes;
  - (e) pushing/pulling ability – not more than 15 kg;
  - (f) bending/twisting/squatting – avoid, and
  - (g) driving ability - able to drive.
21. Earlier certificates of capacity showed less restrictions. Indeed, in October 2019 the general practitioner opined<sup>16</sup> that the applicant was physically capable of being a pathology courier and/or involved in customer service. The deterioration in the applicant's condition in late 2019 was inconsistent with Associate Professor Sheridan's opinion in early 2019 that there would be an improvement over time.<sup>17</sup>
22. The applicant is approximately 45 years of age. Despite the absence of a statement, the evidence indicates that the applicant has been in Australia for 14 years and only worked as a cook chef. He has no other experience in any other industry either in Australia or overseas.<sup>18</sup>
23. The applicant has applied for a number of jobs which have been unsuccessful.<sup>19</sup> These jobs included customer service and pathology courier work.
24. A rehabilitation consultant reported that the applicant does not have the English literacy skills to adequately complete application letters to a higher standard with poor grammar and spelling and difficulty completing scenario-based applications. However, the applicant otherwise demonstrated the ability to engage in speaking, listening and comprehension skills throughout a vocational assessment interview.<sup>20</sup>
25. The applicant was reported to have basic computer skills such as the ability to use the internet but has never used a computer in a work environment. An example of this was lack of knowledge of Microsoft Office.<sup>21</sup>
26. After discussing the applicant's limited computer skills, Mr George Lazaridis, Rehabilitation Consultant, stated:<sup>22</sup>
- “Mr Hoque has gained the above skills throughout his career as a Cook/Chef, however, they are not readily transferable to new vocations as having general work skills and specific knowledge relevant to a particular industry does not mean that he has the required experience or qualifications required to be considered a realistic candidate in a new and unrelated industry/vocation.”

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<sup>15</sup> Reply, p 17.

<sup>16</sup> Reply, p 2.

<sup>17</sup> Reply, p 19.

<sup>18</sup> Application, p 71.

<sup>19</sup> Application, pp 41-42, 73.

<sup>20</sup> Application, p 74.

<sup>21</sup> Application, p 74.

<sup>22</sup> Application, p 76.

27. The applicant was quoted as saying that he could not secure work in customer service or as a pathology courier as he had no relevant experience.<sup>23</sup> Mr Lazaridis concluded:<sup>24</sup>
- “At the time that this report was written it is considered that there are no suitable vocational options for Mr Hoque without appropriate retraining. Should he participate in retraining that equips him with qualifications that enable him to be considered a realistic candidate in a specific vocation, the suitability of vocational options can be reviewed again at that time.”
28. The respondent referred to the assistance that the applicant has been provided in obtaining work. That assistance included developing a resume, registering with job search agencies and the like, writing application letters and interview skills.
29. A labour market analysis report obtained by the respondent identified that the applicant was fit to work as a pathology courier driver and/or as a sales assistant/representative in respect of cooking equipment.<sup>25</sup>
30. The conclusion that the applicant could perform work as a courier driver was based on an assumption that he could “drive as required”<sup>26</sup> or that there would be driving “for long periods of time”.<sup>27</sup>
31. The capacity to undertake work as a sales assistant/representative in cooking equipment required either at least three sales experience or a strong confident engaging personality with polish conversation skills.<sup>28</sup> Another relevant descriptor was RSA & RCG qualifications with relevant hospitality or customer service experience.<sup>29</sup>

## Reasons

32. The parties’ submissions were limited to whether the applicant’s ability and capacity to undertake suitable employment was limited to the roles as a pathology courier or a sales representative for cooking equipment.
33. In *Wollongong Nursing Home Pty Ltd v Dewar*<sup>30</sup> Roche DP stated:
- “However, while the new definition of suitable employment has eliminated the geographical labour market from consideration, it has not eliminated the fact that ‘suitable employment’ must be determined by reference to what the worker is physically (and psychologically) capable of doing, having regard to the worker’s ‘inability arising from an injury’. Suitable employment means ‘*employment in work* for which the worker is currently suited’ (emphasis added).”
34. I accept there was merit in the respondent’s submission that the deterioration in the worker’s capacity as evidenced in the recent certificates were inconsistent with the views of Associate Professor Sheridan that there would be an improvement in the condition. It is also suspicious that the certification by the general practitioner of a decrease in physical capacity was coincidental with the respondent serving the work capacity decision. The deterioration is otherwise unexplained.

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<sup>23</sup> Application, p 73.

<sup>24</sup> Application, p 88.

<sup>25</sup> Application, p 63.

<sup>26</sup> Application, p 52.

<sup>27</sup> Application, p 54.

<sup>28</sup> Application, p 59.

<sup>29</sup> Application, p 62.

<sup>30</sup> [2014] NSWCCPD 55.

35. I accept that the respondent's submission was logical and one that I would have accepted except that the respondent otherwise conceded that the applicant's current physical restrictions were as recorded in the most recent certificate of capacity. This is particularly in circumstances where there is no direct evidence from the applicant stating that there had been a deterioration in his physical condition. But for that concession, I believe that the applicant was capable of undertaking courier work. I also agree with the respondent's submission that this was the appropriate finding even though there were no opportunities presently available.
36. Given the respondent's concession, the extent of the applicant's ability to engage in suitable employment must be examined in the context of the accepted restrictions.
37. The applicant's submission that he had been provided with "no retraining" was inaccurate. However, I would describe what the respondent has provided was more akin to "assistance" rather than "retraining". The respondent has assisted the applicant in trying to find work with his existing skill set but has not provided training that would add to this skill set. An example of this is the suggestion by the rehabilitation consultant qualified by the respondent that the applicant would require certificates in RSA & RCG. These certificates have not been attained.
38. In *Broadspectrum Pty Ltd v Skiadis*<sup>31</sup> Keating P accepted that it was relevant that "occupational rehabilitation services" had not been provided by the respondent in the assessment of the worker's ability to undertake suitable employment. Whilst I accept that there has been some assistance provided by the respondent to the applicant, there has been no retraining to assist the applicant in becoming qualified in a field where he had no previous experience.
39. The respondent relied on the applicant applying for work<sup>32</sup> as evidence that he admitted that he could do this work. I reject that submission. These applications must be examined in the context of the medical evidence and the fact that the applicant is required to apply for work. The applicant reported that he had been unsuccessful in obtaining this work.<sup>33</sup> The failure to obtain any work may also indicate that the applicant did not have the capacity or the experience to undertake the work.
40. Given the sitting restrictions currently certified and accepted by the parties, the applicant does not appear to be physically fit to undertake the work as a courier driver.
41. The alternative proposition was that the applicant was suitably qualified in a customer service role. There is no dispute that the applicant has no practical experience in this type of position. The rehabilitation evidence suggests that he could do the role based on his practical experience if he possessed sufficient communication skills described as a "strong confident engaging personality"<sup>34</sup> or a "strong communicator". There is also the evidence that the applicant requires some minor formal qualifications that he does not have.<sup>35</sup>
42. I am satisfied that the applicant, based on his background and experience, does not possess a skill set as a strong communicator.
43. With some reservations, I am satisfied on the requisite onus that that the applicant has established, on the basis of how the case was argued, that he presently has no current work capacity.

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<sup>31</sup> [2016] NSWCCPD 34 at [61]-[63].

<sup>32</sup> Application pp 41-42

<sup>33</sup> Application, p 73.

<sup>34</sup> Application, p 59.

<sup>35</sup> Application, p 62.

44. I observe that the respondent limited itself to the two jobs identified in the rehabilitation report and did not otherwise suggest that there was other suitable employment, or that the applicant was suitable for these jobs for lesser hours.
45. I note that the applicant did not put on a statement in the present case. I agree with the respondent's submission that this omission was unsatisfactory. As I mentioned, absent the respondent's concession as to the current physical restrictions being in accordance with the recent certificate, the failure to adduce a statement would have been part of my reasons supporting the conclusion that the applicant was fit and suitably qualified to undertake courier work.

## DIRECTION

46. The respondent pays the applicant weekly compensation at \$832 per week from 26 March 2020 to date and continuing pursuant to s 37 of the 1987 Act.
47. The respondent is to have credit for payments made after 26 March 2020.

NOTE: A person who fails to comply with an interim payment direction is guilty of an offence in accordance with section 300 of the *Workplace Injury Management and Workers Compensation Act 1998*.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE INTERIM PAYMENT DIRECTION ISSUED BY JOHN HARRIS, REGISTRAR'S DELEGATE, WORKERS COMPENSATION COMMISSION.

*A Sufian*

**Abu Sufian**  
**Senior Dispute Services Officer**  
As delegate of the Registrar

