

WORKERS COMPENSATION COMMISSION

AMENDED CERTIFICATE OF DETERMINATION

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

Matter Number: 691/20
Applicant: Reza Nikfarman
Respondent: Bestwood Commercial Interiors Pty Ltd
Date of Determination: 13 August 2020
Date of Amendment: 14 August 2020
Citation: [2020] NSWCC 274

The Commission determines:

1. The applicant suffered injury in the course of his employment with the respondent on 14 September 2016.
2. As a result of the injury referred to in (1) above, the applicant has suffered incapacity for employment from 12 November 2017 to 10 May 2020.
3. The applicant's pre-injury average weekly earnings was \$1,102.87 per week.
4. The respondent is to pay the applicant weekly compensation as follows:
 - (a) from 26 November 2017 to 10 February 2018 pursuant to s 36 of the *Workers Compensation Act 1987* (the 1987 Act) at the rate of \$1,047.73;
 - (b) from 11 February 2018 to 1 March 2018 pursuant to s 37 of the 1987 Act at the rate of \$882.30 per week;
 - (c) from 27 February 2020 to 10 May 2020 at the rate of \$482.30.
5. The respondent is to pay the applicant's reasonably necessary medical and treatment expenses except for the costs of and incidental to the lumbar discectomy surgery carried out in Iran in February 2019.
6. Award for the respondent on the claim for medical and treatment expenses associated with the lumbar surgery carried out in Iran in February 2019.

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

Cameron Burge
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 CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Reza Nikfarman (the applicant) brought proceedings for permanent impairment compensation, weekly benefits and payment of medical expenses allegedly arising from an injury to his lower back suffered in the course of his employment with Bestwood Commercial Interiors Pty Ltd (the respondent).
2. On 14 September 2016, the applicant was working as a shop fitter. He was lifting a large, heavy frame with a co-worker. As he bent over to lift the frame, he felt an “excruciating sharp pain in my lower back. I also heard a crack come from my back.”
3. The applicant continued working until 12 November 2017, when he resigned owing to pain in his back and left leg. He states he was first paid weekly compensation on 5 March 2018. In February 2019, the applicant returned to Iran and underwent a L4-5 discectomy. He returned to Australia in approximately April 2019 when he gained employment in the real estate industry, working in accordance with the restrictions placed upon him of light duties for 20 hours per week at the rate of \$20 per hour.
4. On 8 January 2020, the respondent issued a s 78 notice alleging the effects of any injury had passed, and accordingly the applicant was not entitled to compensation of any kind.
5. On 11 March 2020, the applicant's claim for permanent impairment compensation was referred for determination by an Approved Medical Specialist (AMS). At a telephone conference on 2 June 2020, that claim was settled. Notwithstanding the resolution of the applicant's permanent impairment claim by way of payment of an award to him, his entitlement to weekly benefits and to the payment of medical and treatment expenses remained in issue.

ISSUES FOR DETERMINATION

6. The parties agree that the following issues remain for determination:
 - (a) the applicant's capacity for employment and entitlement to weekly benefits, and
 - (b) the applicant's entitlement to medical expenses, in particular the cost of the surgery undertaken in Iran.

PROCEDURE BEFORE THE COMMISSION

7. The matter was listed for hearing before me on 16 July 2020. The parties were unable to resolve their differences, so the matter proceeded. Mr D Baran of counsel instructed by Mr S Walker appeared for the applicant and Mr R Stanton instructed by Mr D Veasey appeared for the respondent.

EVIDENCE

Documentary evidence

8. The following documents were placed before the Commission and taken into consideration in reaching this determination:
 - (a) Application to Resolve a Dispute (the Application) and attachments;
 - (b) Reply and attachments;

- (c) no fewer than five Applications to Admit Late Documents (AALDs) filed by the applicant on 17 April 2020, 3 June 2020, 24 June 2020, 1 July 2020 and 17 July 2020, and
- (d) the respondent's AALDs dated 25 May 2020 and 17 July 2020.

9. Each of the respondent's second AALD and applicant's fifth AALD were filed post-hearing in response to a direction that the parties file respective wages schedules.

Oral evidence

10. There was no oral evidence called at the hearing.

FINDINGS AND REASONS

Capacity for employment

11. The applicant maintains a claim in his latest wages schedule for weekly compensation from 9 November 2016. However, the applicant's own statement indicates he ceased employment "towards the end of 2017." That statement is consistent with the first certificate of incapacity, written by general practitioner Dr Ebrahimi on 12 November 2017. Moreover, in the Application weekly benefits are claimed from the same date in November 2017.
12. On balance, I accept the commencement date of the applicant's claim for weekly benefits should rightly be 12 November 2017. That date reflects the applicant's own evidence found at page 2 of the Application, where he states:
- "The pain began to radiate down my left leg. I reported this to my GP in November 2017. There was numbness and a burning sensation.
- Towards the end of 2017 I could no longer work due to the pain. I had to resign. The pain in my left leg and lower back was too extreme."
13. There is no evidence the applicant was incapacitated in and from November 2016, as is alleged in his wages schedule. The evidence, namely both the applicant's own statement, the first certificate of incapacity and the respondent's list of payments supports a finding the first date of incapacity is 12 November 2017, and I so find.
14. The applicant's pre-injury average weekly earning (PIAWE) is agreed at \$1,102.87 (see both wages schedules).
15. The respondent noted the applicant was in receipt of continuous weekly payments from 12 November 2017 to 27 February 2020, however, its own records establish no payments were made between 26 November 2017 and 1 March 2018, a period of 14 weeks. It is unclear why no payments were made for this period, however, I accept at this time the applicant was totally incapacitated for employment, as supported by his unchallenged statement evidence and the certificates issued by his treating general practitioner.
16. Those 14 weeks aside, I find in accordance with the list of payments provided by the respondent that the applicant was continuously paid weekly benefits from 12 November 2017 to 27 February 2020. Such a finding is consistent not only with the evidence by way of list of payments, but also with the respondent having issued a s 78 notice in early 2020, at which time it advised the applicant of the cessation of his payments.

17. The respondent submitted that, given the applicant had been paid from 12 November 2017, his entitlement to weekly benefits pursuant to s 37 of the *Workers Compensation Act 1987* (the 1987 Act) would expire on 10 May 2020. By contrast, the applicant claims an entitlement to ongoing weekly payments, despite his own wages schedule alleging an earlier date of incapacity, and there being no suggestion put forward in the proceedings that the applicant's degree of whole person impairment is such as to entitle him to receive weekly benefits beyond the second entitlement period under section 37.
18. There is no issue the applicant commenced employment on restricted duties in the real estate industry on 29 October 2018. In that role, he has earned \$20 per hour and worked 20 hours per week in accordance with the restrictions placed upon him by his treating general practitioner. The payment schedule discloses he received compensation at a rate of \$482 per week from that time, being 80% of his PIAWE less the amount he was earning in suitable employment.
19. Likewise, there is no issue that in February 2019, the applicant returned to Iran and underwent surgery by way of discectomy. Upon his return to Australia, he continued to be certified to work only 20 hours per week and on restricted duties.
20. Since the respondent ceased weekly payments, the applicant has continued to be certified fit only for four hours per day, five days per week on restricted duties. The respondent submitted that from as early as September 2019, the applicant has been fit to work longer hours, and relied upon the report of Dr Endrey-Walder, the applicant's independent medical examiner (IME) dated 5 September 2019. In that report, Dr Endrey-Walder expressed an opinion to the effect the applicant should be fit to work full-time hours in the real estate industry. It was further submitted that if this was the case, the applicant's capacity to earn would be in the vicinity of \$800 per week and he had therefore been overpaid from that time until February 2020 when payments ceased. The respondent submitted if this was the case, it should be given credit for any payments made during that period.
21. The respondent submitted the view of the applicant's IME surgeon should be preferred in relation to capacity to that of his treating general practitioner, however, I reject that submission noting the applicant's general practitioner has the benefit of consulting with and treating him over an extended period of time compared with a medicolegal examination carried out by an IME.
22. In support of its submission that the applicant's capacity for employment was greater than 20 hours per week and that those hours did not accurately reflect his capacity, the respondent relied upon the report of Dr Nicholson, IME who noted in his report dated 13 April 2018 that the applicant could return to full-time hours on light duties over a period of two months from that date. The problem with that submission, however, is that in the meantime the applicant has undergone the discectomy surgery, so it is apparent Dr Nicholson's view on that aspect is outdated.
23. The respondent's submission also relied upon the views of Dr Lloyd-Hughes, who indicated in his report of December 2019 the applicant could return to full-time, pre-injury duties and "certainly full-time" duties in real estate. However, Dr Lloyd-Hughes was also of the view that any ongoing issues which the applicant experienced were not related to the work injury and instead were caused by degenerative changes in his lumbar spine. He opined that the effects of any aggravation to those underlying problems had passed.

24. Importantly, the respondent resiled from that position in resolving the applicant's permanent impairment claim. In doing so, it implicitly accepted the proposition the applicant has suffered permanent impairment as a result of the injury. Although considerations relating to permanent impairment and incapacity are different, the foundation of Dr Lloyd-Hughes opinion in relation to both permanent impairment and weekly benefits claims is the applicant's ongoing problems were caused by non-work-related factors. Given the acceptance by the respondent of the ongoing effects of injury in resolving the permanent impairment claim, I reject Dr Lloyd-Hughes' opinion regarding the causation of the applicant's ongoing problems, which is contrary to the preponderance of the medical evidence.
25. In terms of capacity, I am satisfied having regard to the treating medical and IME evidence that the applicant's capacity is limited to that for which he has been certified and the work he has undertaken in the real estate industry, namely four hours per day and five days per week on restricted duties. In accepting this is the case, I find the applicant's capacity for employment is limited to the \$400 per week which he has been earning in the real estate industry since he commenced post-injury employment.
26. I also accept that for the period between 26 November 2017 and 1 March 2018, the applicant was totally incapacitated for employment as a result of his workplace injury and accordingly should be paid weekly compensation for that period at the appropriate rates pursuant to sections 36 and 37 of the 1987 Act. Those rates are set out on page one of this Certificate of Determination.
27. Given my findings in relation to incapacity, and noting there is no evidence to suggest the applicant's degree of whole person impairment is such as to entitle him to weekly benefits beyond the second entitlement period, I find in accordance with the respondent's submissions that the applicant's entitlement to compensation expired on 10 May 2020. Accordingly, for the period 27 February 2020 to 10 May 2020, the respondent will be ordered to pay the applicant weekly compensation at the rate of \$482.30, being 80% of his PIAWE (\$882.30) less his capacity for employment (\$400 per week).

ENTITLEMENT TO SECTION 60 EXPENSES

28. At the hearing, the applicant sought a general order in respect of past medical and treatment expenses, including the surgery carried out in Iran. For its part, the respondent submitted a general order for medical expenses would be appropriate, however, the surgery ought to be excluded.
29. In support of that contention, the respondent advanced a number of arguments, including that the costs associated with the surgery should not be paid as it was undertaken overseas, and the travel expenses should not be met particularly in circumstances where the surgery is regularly available in Australia.
30. I reject that aspect of the respondent's submissions, as I do not believe there is any impediment to an injured worker seeking treatment overseas where that is appropriate. Nonetheless, for the following reasons I do not believe the surgery carried out in Iran was reasonably necessary.
31. The applicant had sought treatment and opinion from a number of surgeons in this matter. They include Dr Ghahreman, who noted the presence of L4 radiculopathy but advocated conservative treatment. In his report of 30 April 2018, Dr Ghahreman noted the applicant's pain was consistent with an L5/S1 distribution and his L4/5 herniation had experienced some improvement. He again recommended conservative treatment.

32. Dr Singh, treating neurosurgeon provided a report at page 132 of the Application, dated 28 November 2018. In that report, Dr Singh noted:

“I had a long discussion today with Mr Nikfarman regarding the radiographic findings and also the clinical findings. In the first instance, Mr Nikfarman would like to persist with chiropractic treatment and physiotherapy and I am happy for him to do this.”

33. In the same report, Dr Singh noted the applicant could trial a left L4 perineural injection, after which he would review the applicant after two months. On 26 March 2019, Dr Singh noted “he is hopeful that I can recommend surgery from his insurer however at this point he has not demonstrated that the L4/5 disc herniation is the source of his symptoms.” Curiously, that report seems to post-date the surgery in Iran, however, in April 2019, Dr Singh remained of the view that the applicant had not yet exhausted his options of conservative treatment and he required further assessment and imaging before surgery is considered. This is despite the applicant having apparently undergone his discectomy in February 2019 (as confirmed by the operation report sheet found in the applicant's third AALD).

34. It is unclear why the applicant would have been asking Dr Singh for surgery in March 2019 in circumstances where he had had the operation in February of the same year.

35. On balance, I find the medical evidence concerning the reasonable necessity or otherwise of the applicant's proposed surgery does not support a finding that it was reasonably necessary.

36. The applicant has two treating specialists, each of whom state the surgery was not indicated. As noted by the respondent, the fact that someone wishes to undertake a surgical procedure does not make it reasonably necessary. Moreover, taking into account the matters to be considered as set out by Deputy President Roche in *Diab v NRMA Ltd* [2014] NSWCCPD 72, the applicant has not in my view demonstrated that the preponderance of expert opinion supports the reasonable need for the surgery which was carried out. I also note the applicant's IME Dr Endrey-Walder goes no further than saying the applicant appeared to have difficulty convincing his treating doctors of his ongoing issues, and notes Dr Singh was apparently unaware the applicant had undergone surgery. In my view, Dr Endrey-Walder does not provide a sufficiently persuasive opinion that the discectomy was reasonably necessary to overcome the views of the treating doctors, who indicate conservative treatment should have been pursued before surgery was contemplated.

37. In my view, the applicant has not satisfied the onus of proof in establishing that the discectomy surgery carried out in Iran was reasonably necessary, and accordingly there will be an award for the respondent on this aspect of the claim.

SUMMARY

38. For the above reasons, the Commission will make the orders set out on page 1 of this Certificate of Determination.

