WORKERS COMPENSATION COMMISSION

INTERIM PAYMENT DIRECTION

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

Matter No: **4780/19**
Applicant: **David Hassett**
Respondent: **Secretary, Department of Communities and Justice**
Date of direction: **22 October 2019**
Citation: **[2019] NSWWCCR 5**

The Registrar directs:

1. The respondent to pay the applicant weekly compensation in accordance with the *Workers Compensation Act 1987* as follows:

    (a) $561.10 per week from 14 September 2019 to 15 September 2019 pursuant to section 37(3)(a);

    (b) $561.10 per week from 16 September 2019 to 22 September 2019 pursuant to section 37(1)(a), and

    (c) $561.10 per week as adjusted from 23 September 2019 to date and continuing pursuant to section 37(3)(a).

2. The respondent is to have credit for payments made after 14 September 2019.

BACKGROUND

3. David Hassett (the applicant) filed an Application for Expedited Assessment, where a work capacity decision is in dispute (the Application), which was registered in the Workers Compensation Commission (the Commission) on 13 September 2019.

4. There is no dispute that the applicant injured his left wrist when he struck a work colleague on the back on 2 October 2017 in the employ of Secretary, Department of Communities and Justice (the respondent). Liability was accepted by QBE Workers Compensation (NSW) Ltd (the insurer) and payments of weekly compensation have been paid to date.

5. On 15 May 2019, the insurer advised the applicant that it was assessing his work capacity. It indicated that based on the information available, the assessment was likely to result in a decision that he had current work capacity for suitable employment and that his weekly payments would be reduced.

6. The insurer invited the applicant to send any information that would assist in the assessment of his current work capacity by 5 June 2019. It advised that the information that it had in its possession suggested that he had current work capacity for four hours per day, five days per week. The vocational options were Disability Service Officer and Retail Assistant, and his ability to earn was $607.20 per week in suitable employment.

7. The insurer attached to the correspondence a copy of a Vocational Assessment report, a Labour Market Analysis, the treating doctor's approval of the suitable employment options, Rehabilitation Progress reports and a detailed reference guide explaining the legislation.

8. On 7 June 2019, the insurer issued a document described as a Work Capacity Decision (WCD) in accordance with s 43 of the *Workers Compensation Act 1987* (the 1987 Act). It advised that it had determined that the applicant was able to work for four hours per day/ five days per week earning $607.20 per week in suitable employment as a Disability Services Officer or Retail Assistant. His payments were reduced to $393.90 as from 14 September 2019.

9. The applicant claims weekly compensation from 14 September 2019 to date and continuing pursuant to s 37 of the 1987 Act due to injury sustained to his left wrist on 2 October 2017.

PROCEDURE BEFORE THE COMMISSION

10. 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. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

11. At the telephone conference on 27 September 2019, the applicant's counsel. Mr Goodridge, indicated that the applicant disputed that the insurer had issued a notice pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act) and he disputed that the letter dated 7 June 2019 was a valid WCD. The respondent was not in a position to make submissions regarding this previously unnotified issue.

12. Accordingly, I directed that written submissions be filed. Written submissions were filed by the applicant on 3 October 2019 and 14 October 2019, and by the respondent on 11 October 2019 and 16 October 2019.

ISSUES FOR DETERMINATION

13. The issues to be determined in this dispute are:

    (a) whether the insurer issued a valid Section 78 Notice;

    (b) whether the insurer issued a valid WCD on 7 June 2019, and

    (c) extent and quantification of the applicant's capacity.

EVIDENCE

14. The following documents were in evidence before the Commission and taken into account in making this determination:

    (a) The Application and attached documents;
    (b) Reply and attached documents, and
    (c) Application to Admit Late Documents received on 26 September 2019.

REVIEW OF EVIDENCE

Reports and certificates of Dr Glover

15. Dr Glover reported on 9 September 2018. He noted that the applicant's rehabilitation was complicated by the development of CRPS, but following specialist treatment, he had made steady progress as was currently certified as fit for suitable work for four hours per day/ five days per week, with a lifting restriction of 5kg in his left hand and a 15kg bilateral lifting restriction, avoidance of repetitive pulling and pushing of weights up to 15 kg, and use of only an automatic vehicle. The doctor stated that the applicant had a normal grip strength in his left hand and he expected that the applicant would be fit for unrestricted duties within two to three months. He noted that the applicant was motivated to return to work and was enthusiastic about the possibility of a job with Corrective Services.

16. In his report dated 17 August 2019, Dr Glover described the circumstances of the applicant's injury, his symptoms and treatment. He confirmed that the applicant was fit for suitable work for four hours per day/ five days per week and the doctor recommended that he participate in a suitable work trial, even in any area where he had little experience, or in a voluntary capacity.

17. Dr Glover noted that the applicant had unsuccessfully tried to secure a fulltime job with the Corrective Services Department, but he considered that until there was substantial improvement in his symptoms, a fulltime position was unlikely.

18. According to WorkCover certificates issued by the doctor, the applicant was the capacity to perform some work for four hours per day/ five days per week, with a lifting restriction of 5kg in his left hand and a 15kg bilateral lifting restriction, avoidance of repetitive pulling and pushing of weights up to 15 kg, and use of only an automatic vehicle from 29 August 2018 to 3 July 2019.

19. The doctor noted in some of the certificates that IPAR was working on job trial options, but there was a change of provider in May 2019. The doctor advised that he had told the applicant to look for volunteer work while trying to arrange for a work trial.

20. In his final certificate dated 25 September 2019, Dr Glover recorded that was to be admitted to the Lingard Hospital for Ketamine infusions from 16 September 2019 to 20 September 2019. The doctor certified that the applicant had no current work capacity from 16 September 2019 to 22 September 2019, and was fit for some restricted work from 25 September 2019 to 23 October 2019.

Reports of Dr Diebold. Dr McClelland and Dr Mason

21. The medical reports of Dr Diebold confirm the applicant's early treatment that included internal fixation of his fractured left scaphoid on 4 November 2017 and again on 4 December 2017. In his last report dated 18 January 2018, the doctor recorded that the applicant only had mild aching and a reasonable range of movement.

22. Dr McClelland reported on 10 May 2018, 5 June 2018 and 10 July 2018. He advised that the applicant had multiple site issues in his left upper limb consistent with a regional pain syndrome. The applicant was attending Dr Prickett for pain management treatment and he was seeing a pain psychologist and a hand therapist. The doctor considered that it was important for the applicant to return to the work force on restricted duties.

23. Dr McClelland reported that there was a flare up in the applicant's symptoms in October 2018 and he recommended that the applicant continue his treatment regime.

24. Dr Christie Mason, clinical psychologist, reported on 18 June 2018. She advised that the applicant had on-going issues with CRPS in his dominant left hand and arm and he was suffering from depression and anxiety. She recommended further counselling sessions.

Reports of Dr Prickett

25. Dr Prickett reported on 22 May 2018 and 29 October 2018. He confirmed that the applicant had Complex Regional Pain Syndrome (CRPS) following his left scaphoid fracture and surgery. He recommended that the applicant take medication, continue with pain desensitisation exercises and have some counselling by the pain psychologist. The doctor indicated that the applicant would have to accept that he would continue to experience symptoms and he recommended that the applicant be encouraged to participate in rehabilitation with a view to returning to work.

26. In his report dated 17 June 2019, Dr Prickett recorded that the applicant's medications had been virtually eliminated and there had been a definite improvement in his mental state. The applicant stated that he experienced spasming in his hands and he continued to wear a brace on his left hand.

27. Dr Prickett indicated that aside from his pain, the applicant had difficulty in returning to the work environment due to a lack of transferable skills and few job opportunities in his local area. The doctor organised a cranial MRI to exclude any undetected pathology that might explain the applicant's on-going symptoms.

28. Finally, in his report dated 10 September 2019, Dr Prickett advised that the applicant was motivated to return to some form pf work, but the limitations in his living arrangements and his limited transferrable skills were significant impediments. He agreed that the applicant's disabilities would impact on his ability to return to work.

29. Dr Prickett stated that the role of Disability Support Officer would be inappropriate for the applicant, unless it was very much a sedentary role, but he conceded that the applicant might be capable of work as a retail assistant, provided that there were no heavy load requirements. He believed that the applicant's options would be limited within an open market due to competition.

Vocational Assessment

30. Shannon Reid, a psychologist and rehabilitation consultant with IPAR NSW, provided a vocational assessment report on 18 June 2018.

31. The assessor stated that the applicant had a number of transferrable skills and noted his past experience included working as a Disability Support Worker, Carer, building labourer and bar manager. She identified suitable positions of Disability Services Officer/ Disability Employment Consultant, Youth Mentor and Social Worker. These rates for these positions ranged from $24.90 to $34.88 per hour. She advised that his job prospects as a Social Worker would be enhanced with further training qualifications.

32. A case conference was convened with Dr Glover and the applicant on 7 June 2018 and the doctor agreed that a graded return to work for four hours per day/ three days per week should be implemented.

33. IPAR NSW provided the applicant with job seeking assistance, canvased potential employers and attended case conferences until 15 April 2019 when it closed its file. In the closure report, the assessor recorded that a work trial had been organised with a hardware store in Armidale, but the applicant contacted the prospective employer and advised that he would not be undertake the trial because of the work environment and the cold temperature.

Labour Market Research report

34. IPAR NSW provided a Labour Market Research report on 8 February 2019. The vocational rehabilitation consultant, Emma Erntell, made enquiries of six potential employers and they advised that the applicant would be suitable for the roles of Disability Services Officer ($25.30/ $26/ $30.36 per hour for 20 hours per week) and Retail Assistant ($22/ $23/ $27 per hour for 20 hours per week). A third option of employment as a Youth Worker at three prospective employers was considered appropriate once the applicant had obtained relevant qualifications.

35. Ms Erntell contacted Dr Glover and requested him to review job options that had been identified as being suitable for the applicant' skills and work experience and to consider whether they were suitable for his current work capacity. The duties and physical demands of the options, Disability Services Officer, Retail Assistant and Youth Worker, were described in some detail.

36. In a report dated 13 February 2019, Dr Glover provided a response to a number of questions. Unfortunately, the handwriting is difficult to read, however, it is apparent that the doctor was hopeful that the applicant would be able to return to fulltime work, although this was likely to be in the longer term.

37. Dr Glover recommended that the applicant initially undertake duties in accordance with his current assessed work capacity in a work trial and he thought it likely that the applicant would make improvements in his work capacity over a period of time. He recommended physiotherapy and the use of a TENS machine at home and during physiotherapy.

38. Dr Glover agreed that the three options were appropriate by ticking a box. He did not add any further comment other than confirming that the applicant would be restricted to four hours per day/ five days per week.

Work Capacity Decision

39. On 7 June 2019, the insurer issued a document described as a WCD. On page one of the document, the insurer advised that a work capacity assessment had been completed and had confirmed that he currently had work capacity in suitable employment.

40. The insurer advised that as a result of this assessment, a decision had been made to reduce his weekly compensation payments from 14 September 2019.

41. On page two of the notice, the insurer provided a summary of and the reasons for the decision. It confirmed that it had made a WCD pursuant to s 43 of the 1987 Act and determined that he was able to work for four hours per day/ five days per week in suitable employment, as Disability Services Officer or Retail Assistant, in accordance with s 32A of the 1987 Act. The insurer advised that it believed that he could earn $607.20 per week in suitable employment.

42. The insurer advised that the effect of the decision meant that his weekly payments would be reduced to $393.90, to take effect as from 14 September 2019, which included a notice period of three months plus a further seven working days by post in accordance with s 80 of the 1998 Act and s 76 of the Interpretation Act 1987. The applicant was advised that his entitlement to medical or related treatment expenses would not be affected.

43. The insurer gave details of its calculations that were based on a PIAWE of $1,251.38 and resulted in a weekly payment amount of $393.30.

44. The insurer informed the applicant that he could seek an internal review or commence proceedings in the Commission with the assistance of a lawyer and the Workers Compensation Independent Review Office (WIRO). Contact details were provided for the WIRO and the registry of the Commission.

45. The insurer advised that if a dispute was lodged in the Commission before the decision took effect, there would be no change to his weekly compensation until the Commission made a decision.

46. The documents that were previously identified by the insurer in the work capacity assessment, namely, the Vocational Assessment, Labour Market Analysis and rehabilitation reports of IPAR NSW and the approval of Dr Glover dated 13 February 2019, were again particularised and various certificates of Dr Glover that had not been previously provided were attached to the notice. A form “Review form application for review by the insurer” was also attached and the applicant was invited to complete the document in the event that he intended to request an internal review.

Applicant’s statements

47. In his statement dated 24 June 2019, the applicant gave details of his past work history, the circumstances of his injury and his subsequent treatment. He stated that he had been to a number of job interviews for the position of Disability Support Worker, but he had been unsuccessful due to his injury and the restrictions in his left hand and wrist. This position involved considerable lifting beyond his 5kg lifting restriction and he would not be able to carry trays of food or lift patients.

48. The applicant stated that he was unable to use his dominant left hand to its full capacity and he had significant restrictions on the open labour market. He advised that he had no received any training in a sedentary job such as office based duties or computer work, but this would be difficult because of the limited use of his left hand.

49. The applicant stated that he had no experience or training as a Disability Services Officer. This position includes liaising with clients, their families and stakeholders, attending meetings, completing documents and reporting. He stated that he was interested in the position but felt that he needed retraining in order to be able to compete with able bodied and experienced job applicants. The insurer had not provided him with any retraining or work trials.

50. The applicant indicated that he had no work experience as a Retail Assistant. Given the restrictions in his left hand, the administrative tasks required of this position would be difficult to work on a computer or operate a cash register. He was also at a disadvantage on the open labour market dude to his lack of experience and training in the role. The insurer had not provided him with any retraining or work trials.

51. Finally, the applicant stated that he had no experience or qualifications to work as Youth Worker. He required proficient computer skills and exceptional report writing skills for this position. Operating a computer would be difficult. The insurer had not provided him with any retraining or work trials. He confirmed that he continued to experience pain, stiffness and restriction in his left hand and wrist, right hand pain and chronic pain in his legs, and secondary depression and anxiety. This impacted on his ability to perform daily tasks.

Report of Dr Patrick

52. Dr Patrick reported on 1 July 2019. He advised that he examined the applicant on 30 November 2018. I was subsequently informed by the applicant's solicitor on 9 October 2019 that the doctor did not provide a report at the time of his initial consultation. Further, the doctor had a further telephone consultation with the applicant, without an examination, on 1 July 2019.

53. Dr Patrick recorded a detailed history and noted that the applicant had on-going pain in his left hand, pain in his right hand, numbness in his hands, and sensations in his legs, knees and thighs. He was not taking any medication.

54. Dr Patrick indicated that the applicant did not satisfy the criteria for CRPS, but he had spreading neuropathic syndrome affecting his upper and lower extremities. The doctor stated that based on the applicant's education, training and experience, he did not believe that the applicant had any realistic prospects of returning to regular employment. He was essentially unemployable due to the severe physical restrictions and disabilities and there was a likelihood of aggravations or flare-ups if he performed even light work for a couple of hours each day.

Legislation

Workers Compensation Act 1987

55. Section 32A of the 1987 Act provides:

> "**current work capacity**, in relation to a worker, means 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.
>
> **no current work capacity**, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to work, either in the worker's pre-injury employment or in suitable employment.
>
> **suitable employment**, in relation to a worker, means 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 WorkCover 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."

56. Section 43 deals with WCDs. It provides:

"**43 Work capacity decisions by insurers**

(1) The following decisions of an insurer are ***work capacity decisions***:

(a) a decision about a worker's current work capacity,
(b) a decision about what constitutes suitable employment for a worker,
(c) a decision about the amount an injured worker is able to earn in suitable employment,
(d) a decision about the amount of an injured worker's pre-injury average weekly earnings or current weekly earnings,
(e) a decision about whether a worker is, as a result of injury, unable without substantial risk of further injury to engage in employment of a certain kind because of the nature of that employment,
(f) any other decision of an insurer that affects a worker's entitlement to weekly payments of compensation, including a decision to suspend, discontinue or reduce the amount of the weekly payments of compensation payable to a worker on the basis of any decision referred to in paragraphs (a)–(e).

(2) The following decisions are not work capacity decisions:

(a) a decision to dispute liability for weekly payments of compensation,
(b) a decision that can be the subject of a medical dispute under Part 7 of Chapter 7 of the 1998 Act.

(3) (Repealed)."

57. What constitutes a work capacity assessment is set out in s 44A of the 1987 Act. It provides:

"44A Work capacity assessment

(1) An insurer is to conduct a work capacity assessment of an injured worker when required to do so by this Act or the Workers Compensation Guidelines and may conduct a work capacity assessment at any other time.

(2) A ***work capacity assessment*** is an assessment of an injured worker's current work capacity, conducted in accordance with the Workers Compensation Guidelines.

(3) A work capacity assessment is not necessary for the making of a work capacity decision by an insurer.

(4) An insurer is not to conduct a work capacity assessment of a worker with highest needs unless the insurer thinks it appropriate to do so and the worker requests it.

(5) An insurer may in accordance with the Workers Compensation Guidelines require a worker to attend for and participate in any assessment that is reasonably necessary for the purposes of the conduct of a work capacity assessment. Such an assessment can include an examination by a medical practitioner or other health care professional.

(6) If a worker refuses to attend an assessment under this section or the assessment does not take place because of the worker's failure to properly participate in it, the worker's right to weekly payments is suspended until the assessment has taken place."

Workplace Injury Management and Workers Compensation Act 1998

58. Sections 78 to 80 of the 1998 Act deal with the obligations imposed on insurers to give notice of their decisions. They provide:

"**78 Insurer to give notice of decisions**

(1) An insurer must give notice in accordance with this Division of any decision of the insurer:

(a) to dispute liability in respect of a claim or any aspect of a claim, or
(b) to discontinue payment to a worker of weekly payments of compensation, or reduce the amount of the compensation.

(2) Notice of a decision of an insurer involving both a liability dispute and a discontinuation or reduction of weekly compensation may be combined into a single notice (subject to any provision of the Workers Compensation Guidelines requiring separate notices to be given).

(3) The requirement to give notice of a decision to discontinue payment to a worker of weekly payments of compensation does not affect any limitation on weekly payments of compensation under Division 2 of Part 3 of the 1987 Act.

79 How notice of decision is given

(1) A notice required by this Division must be given:

(a) to the claimant or worker concerned, and
(b) in the case of a notice of a decision to dispute liability—to the worker's employer, if required by the regulations.

(2) The notice must contain a concise and readily understandable statement of the reason for the insurer's decision and of the issues relevant to the decision.

(3) In addition, notice of a decision to dispute liability for a claim for compensation must identify any provision of the workers compensation legislation on which the insurer relies to dispute liability.

(4) The regulations may make provision for:

(a) the manner in which a notice under this Division is to be given, and
(b) the form of and other information to be included in or to accompany the notice.

80 Required period of notice

(1) An insurer must not discontinue payment to a worker of weekly payments of compensation, or reduce the amount of the compensation, unless the required period of notice (commencing when the notice of discontinuation or reduction is given in accordance with this Division) has expired.

(2) This section applies to a worker only if the worker has received weekly payments for a continuous period of at least 12 weeks.

(3) The ***required period of notice*** for a decision made on the basis of any reassessment by the insurer of the entitlement to weekly payments of compensation resulting from a work capacity decision of the insurer is 3 months.

Note.
See sections 81–83 for the effect of an internal review or determination of a dispute by the Workers Compensation Commission on the required period of notice…."

59. The relevant sections in respect of interim payment applications are contained in Part 5 of Chapter 7 of the 1998 Act as follows:

"**295 Disputes to which Part applies**

(1) This Part applies to a dispute referred to the Commission that concerns:

(a) weekly payments of compensation or medical expenses compensation…"

"297 Directions for interim payment of weekly payments or medical expenses compensation

(1) When a dispute to which this Part applies concerns weekly payments of compensation or medical expenses compensation, the Registrar can direct the person on whom the claim is made to pay the compensation concerned. Such a direction is referred to in this Part as an ***interim payment direction***.

(1A) Section 298 does not apply to a dispute concerning a decision by the insurer to discontinue or reduce weekly payments of compensation on the basis of a work capacity decision under Division 2 of Part 3 of the 1987 Act.

(2) An interim payment direction for payment of medical expenses compensation cannot be for an amount of more than $7,500 or such other amount as may be prescribed by the regulations.

Note. The amount of $7,500 is subject to adjustment under Division 6 of Part 3 of the 1987 Act.

(3) The Registrar is to presume that an interim payment direction for weekly payments of compensation is warranted unless it appears to the Registrar that:

(a) the claim concerned has minimal prospects of success, or

(b) the worker has returned to work, or

(c) the injury was not reported by the worker as required by section 44 (Early notification of workplace injury), or

(d) insufficient medical evidence is available concerning the period of incapacity of the worker, or

(e) circumstances exist that are prescribed by the regulations as circumstances in which it is not to be presumed that such a direction is warranted…"

"**298 Period for which interim payment of weekly payments can be directed**

(1) An interim payment direction (or further interim payment direction) can direct the person on whom the claim is made to pay weekly payments of compensation for a period that does not exceed 12 weeks.

Note. The 12-week limit applies to each direction or further direction.

(2) An interim payment direction can direct payment of weekly payments during

a period that is before the direction is given, but that period must not exceed 10 weeks."

Workers Compensation Regulation 2016

60. Clauses 38 and 41 of the *Workers Compensation Regulation 2016* (the 2016 Regulation) set out the requirements of notices issued by insurers. They provide:

"**38 Notice of insurer decisions**

(1) A notice under section 78 of the 1998 Act of an insurer's decision to dispute liability in respect of a claim or any aspect of a claim (except in connection with a work injury damages matter), or to discontinue or reduce the amount of weekly payments of compensation, is to contain the following information:

(a) a statement identifying all the reports and documents submitted by the worker in making the claim for compensation, and by the employer in connection with the claim,
(b) a statement identifying all the reports of the type to which clause 41 applies that are relevant to the decision, whether or not the reports support the reasons for the decision,
(c) a statement advising that a copy of a report required to be provided by the insurer under clause 41 (3) (except as provided by clause 41 (5) or (6)) accompanies the notice,

(d) details of the procedure for requesting a review of the decision,
(e) a statement to the effect that the worker can seek advice or assistance from the worker's trade union organisation, from an Australian legal practitioner, from the Independent Review Officer or from any other relevant service established by the Authority,
(f) the contact details for the Independent Review Officer,
(g) the street address and the email address of the Registrar of the Commission,
(h) a summary, in the approved form, of the effect of the decision, the worker's rights of review, the procedure for requesting a review and the legal and other services that may be available to the worker to provide advice or assistance in relation to the dispute.

(2) If the notice relates to a decision to discontinue weekly payments of compensation, the insurer must give a copy of the summary referred to in subclause (1) (h) to any current employer of the worker who is liable to pay the compensation (except in circumstances where the compensation is paid by the insurer)."

And

"**41 Access to certain medical reports and other reports obtained by Insurer**

(1) This clause applies to the following types of reports that an employer or insurer has in the employer's or insurer's possession:

(a) medical reports, including medical reports provided pursuant to section 119 (Medical examination of workers at direction of employer) of the 1998 Act,
(b) certificates of capacity,
(c) clinical notes,
(d) investigators' reports,
(e) workplace rehabilitation providers' reports,
(f) health service providers' reports,
(g) reports obtained by or provided to an employer or insurer that contain information relevant to the claim on which a decision to dispute liability is made.

(2) This clause applies to the following decisions of an employer or insurer relating to an injured worker:

(a) a decision to dispute liability in respect of a claim, or any aspect of a claim (in circumstances requiring the insurer to give the worker a notice under Division 3 of Part 2 of Chapter 4 of the 1998 Act),
(b) a decision to discontinue payment, or to reduce the amount of weekly benefits (in circumstances requiring the insurer to give the worker a notice under Division 3 of Part 2 of Chapter 4 of the 1998 Act),
(c) a decision on the review under section 287A of the 1998 Act of a decision described in paragraph (a) or (b) that confirms the original decision.

(3) For the purposes of sections 73 (1) and 126 (2) of the 1998 Act, if an employer or insurer makes a decision to which this clause applies, the employer or insurer must provide a copy of any relevant report to which this clause applies to the worker, as an attachment to a notice under Division 3 of Part 2 of Chapter 4 of the 1998 Act or section 287A of the 1998 Act, as the case may be, except where the report has already been supplied to the worker and that report is identified in a statement under clause 38 (1) (d).

(4) The obligation in this clause to provide a copy of a report applies to any report
that is relevant to the claim or any aspect of the claim to which the decision relates, whether or not the report supports the reasons for the decision.

(5) If the employer or insurer is of the opinion that supplying a worker with a copy of a report would pose a serious threat to the life or health of the worker or any other person, the employer or insurer may instead supply the report:

(a) in the case of a medical report, certificate of capacity or clinical notes—to a medical practitioner nominated by the worker for that purpose, or
(b) in any other case—to a law practice representing the worker.

(6) If, on the application of an employer or insurer, the Authority is satisfied that supplying the worker with a copy of the report would pose a serious threat to the life or health of the worker or any other person and that supplying the report as provided by this clause would not be appropriate, the Authority may:

(a) direct that the report be supplied to such other persons as the Authority considers appropriate, or
(b) make such other directions as the Authority thinks fit."

61. Clause 42 of the 2016 Regulation is relevant in cases involving Interim Payment Directions. It provides:

"**42 Interim payment direction not presumed to be warranted**

For the purposes of section 297(3)(e) of the 1998 Act, it is not to be presumed that an interim payment direction for weekly payments of compensation is warranted in circumstances where the insurer has given the worker notice under section 78 of the 1998 Act (Insurer to give notice of decisions)."

SIRA workers compensation guidelines

62. The *SIRA workers compensation guidelines* (the Guidelines) were issued by the State Insurance Regulatory Authority (SIRA) pursuant to s 376(1)(c) of the 1998 Act. They came into effect on 1 January 2019 and replace the *Guidelines for claiming workers compensation*, the *Guidelines for injury management consultants* and the *Guidelines for independent medical examinations and reports.*

63. Part 5 of the Guidelines set out the requirements for an insurer when it conducts work capacity assessments, having regard to the provisions of s 44A of the 1987 Act. These are largely procedural in nature. Unlike the previous guidelines, there are no guidelines in respect of work capacity decisions in the current version of the Guidelines or in the new guidelines that come into effect on 21 October 2019.

APPLICANT'S SUBMISSIONS

64. The written submissions of the applicant's counsel, Mr Goodridge, are extensive and deal with various scenarios that are not relevant to the present dispute. The submissions have been uploaded on the Commission's system and I have reviewed them in their entirety, but will focus my summary on those that concern the issues in dispute in this matter.

65. Mr Goodridge submits that it is mandatory for an insurer to issue a notice pursuant to s 78 of the 1998 Act. Where there is no Section 78 Notice, there is no dispute and leave cannot be granted to the insurer pursuant to s 289 of the1998 Act. He makes a number of submissions regarding s 289A of the 1998 Act. I will deal with these, if necessary, once I have determined the first issue in dispute.

66. Mr Goodridge submits that there was no Section 78 Notice served by the insurer and there has been no application to rely on any such notice. There have been no grounds suggested as to why it is in the interests of justice to allow the insurer to proceed where possibly important and critical documents and reports have not been disclosed to the applicant, notwithstanding a statutory obligation to do so, and any circumstances of default can be assigned solely to the insurer. The unfairness to the applicant is disproportionate to any prejudice suffered by the insurer and there is no reason why the applicant should suffer any denial of due process.

67. Mr Goodridge submits that s 297(3) of the1998 Act provides a presumption that an interim payment direction is warranted, but this is subject to cl 42 of the 2016 Regulation which provides that it is not to be presumed that an interim payment direction for weekly payments of compensation is warranted in circumstances where the insurer has given the worker notice under s 78 of the 1998 Act.

68. Mr Goodridge submits that a valid Section 78 Notice ought to identify itself by title and must comply with cl 38 and cl 41 of the 2016 Regulation. He submits that the notice issued by the insurer on 15 May 2019 set out its likely decision and it did not give notice of a decision as required in accordance with s 78 of the 1998 Act.

69. Mr Goodridge that the insurer invited the applicant to send information, but the request was passive. There was no requirement nor any funding for him to gather evidence. The applicant's rights could not and should not depend upon what evidence was in his possession at the time of the insurer's letter. On the assumption that the mail would take seven days from posting to receipt, the applicant would have received the letter on or before 23 May 2019 and he would have had to respond on or before 27 May 2019 to comply with the insurer's timeframe.

70. Mr Goodridge submits that the Work Capacity Decision issued on 7 June 2019 did not by its title or by its substance constitute a Section 78 Notice. Clauses 38(1)(a) and 38(1)(b) of the 2016 Regulation provide that as part of its Section 78 Notice, the insurer must provide effectively the whole of the applicant's file in respect of his claim for compensation and it must identify all the reports of the type to which cl 41 of the 2016 Regulation applies that are relevant to the decision, whether or not the reports support the reasons for the decision.

71. Mr Goodridge submits that the insurer failed to provide all of these documents and the extent of the insurer's non-compliance is only within its knowledge. The insurer attached various certificates of Dr Glover, but it did not attach the other documents that were identified in the notice.

72. Mr Goodridge submits that the notice referred to cl 41(3) of the 2016 Regulation which is a regulation made for the purposes of ss 73 (1) and 126 (2) of the 1998 Act, but those sections are narrower that s 78 of the 1998 Act. Section 73(1) of the 1998 Act provides that the regulations may make provisions for providing a worker "with a copy of a specified report or a report of a specified kind", but this section is merely facilitative and does not cut down the provisions of s 78 of the 1998 Act or cl 31 of the 2016 Regulation. He submits that satisfying cl 41(3) would only partly satisfy cl 38 of the 2016 Regulation.

73. Mr Goodridge submits that s 126(2) of the 1998 Act is merely a permissive power to make regulations in respect of a report if a worker's claim is disputed. The language is narrower than the identifying of all the reports and documents required by cl 31 of the 2016 Regulation and it is not language which is easily apt to a WCD where a worker's claim is not disputed but concerns the insurer's subsequent decision about a worker's current capacity for work.

74. Mr Goodridge submits that it can be inferred that Dr Glover's certificate at page 264 of the Application was not the initial certificate and this certificate refers to a considerable treatment history and a case conference with IPAR on 7 June 2018. Further, the Vocational Assessment report dated 18 June 2018 identified in the WCD may or may not be the same as the Vocational Plan dated 18 June 2018.

75. Mr Goodridge submits that according to page 4 of the Vocational Plan, Dr Glover advised that the key area of treatment was psychological counselling that had been organised by Dr Prickett, but the WCD only referred to the applicant's injury as "physical".

76. Mr Goodridge submits that according to the Vocational Plan, IPAR provided Dr Glover with a document that described duties and requirements of the vocational options and the doctor provided approval for the roles of Disability Services/Employment Officer, Youth Mentor and Social Worker.

77. Mr Goodridge submits that the applicant was not provided with this document and he had no opportunity to investigate whether the duties were fairly described or what educational and other barriers might apply to such options. This document should have been included in the WCD in accordance with cl 38(1)(a) of the 2016 Regulation. There was no basis for the assessment of whether such work was suitable in terms of s 32A of the 1987 Act.

78. Mr Goodridge submits that according to the Vocational Plan, a formal qualification in disability or social services was an advantage to gaining employment as a Disability Employment Consultant/ Disability Services Officer, but there was no quantification of the "advantage to gaining employment". The matters identified in s 32A of the 1987 Act needed to be considered.

79. Mr Goodridge submits that the position of Youth Worker and Social Worker required further qualifications and could not be considered as suitable employment.

80. Mr Goodridge submits that according to the WCD, the insurer's decision was said to be made pursuant to s 43(1)(a) of the 1987 Act. This section concerns current capacity and discussions that may have occurred a year earlier were largely irrelevant or of very little weight.

81. Mr Goodridge submits that the applicant has a physical and psychological condition which is progressing with time. This was confirmed by Dr Patrick in his report dated 1 July 2019. The WCD was based solely on the physical injury and documents provided by the psychologist to IPAR or the insurer were not disclosed or not considered.

82. Mr Goodridge submits that the WCD was contemporaneous with Dr Patrick's second examination as to the applicant's current capacity and should prevail over an opinion contained in an assessment report one year earlier.

83. Mr Goodridge submits that the insurer provided approval for IPAR to assist the applicant with active job seeking and it would complete the task by 30 August 2018. It can be inferred from the documentation that no suitable employment was able to be identified and no appointments were made.

84. Mr Goodridge submits that the Labour Market Analysis report dated 8 February 2019 referred to what was said to be the applicant's current capacity as certified by Dr Glover, however, Dr Glover was only prepared to approve a work trial, meaning that he was not prepared to certify that the applicant had that capacity to work, but there was a possibility that he had the capacity to work on a trial basis.

85. Mr Goodridge submits that the Labour Market Research report could not be considered a plan or document prepared as part of a return to work planning process referred to in s 32A of the 1998 Act and cannot be relevant to any decision as to suitable employment, unlike the Vocational Plan, which was prepared as part of the return to work planning process.

86. Mr Goodridge submits that the handwriting in the response of Dr Glover is difficult to read. He submits that providing illegible documents without a statement as to what the insurer has made of the document is a breach of the notice requirements as well as being a requirement of due process and natural justice.

87. Mr Goodridge submits that in the IPAR report dated 26 February 2019, the rehabilitation consultant indicated that the plan to achieve a return to work goal was for the applicant to continue to see his psychologist to address his symptoms, however, there are no documents of reports regarding the applicant's psychological condition, the opinion of the psychologist(s), the monitoring of treatment, the progression of the return to work plan or the review of the applicant's work capacity.

88. Mr Goodridge submits that an insurer can issue a further Section 78 Notice where no valid notice was originally issued, but a worker has no second chance. The legislature and natural justice require that the totality of the prescribed material be provided as part of the Section 78 Notice. The legislature did not intend that a worker's rights would be determined on such material as the insurer choosed to disclose. The process requires an open book consistent with the Model Litigant Policy.

89. Mr Goodridge submits that it was clear that the legislature considered that insurers were not to be relied upon to fairly apply the legislation and guideline and it has empowered the Commission to review WCDs. The respondent should be directed to pay $1,008.38 per week from 14 September 2019 and continuing.

90. In reply, Mr Goodridge repeats many of his primary submissions. He submits that insurer must provide extensive material in accordance with the legislation. Part 5 of the 1998 Act provides workers with very limited protection against what is substantially an unbalanced relationship.

91. Mr Goodridge submits that an insurer can make decisions affecting a worker, but a worker can only have one opportunity to challenge a WCD. Further, the worker is only entitled to a brief statement of reasons in accordance with the *Workers Compensation Rules 2011*.

92. Mr Goodridge submits that Part 5 of the 1998 Act is predicated on an expedited process. Insurers may be selective with the provision of material, thus disadvantaging a worker and the Registrar's delegate of critical evidence. In the absence of a valid Section 78 Notice, an interim payment direction must be made in a worker's favour. The unfairness to a worker is wholly disproportionate to any prejudice suffered by the insurer, and there is no reason why a worker should suffer any denial of due process.

93. Mr Goodridge submits that the extent of non-compliance with cl 38 of the 2016 Regulation is not within a worker's knowledge. The process of determining a worker's rights at a telephone conference is significantly inferior compared with a traditional arbitration hearing.

RESPONDENT'S SUBMISSIONS

94. The respondent's counsel, Mr Adhikary, submits that s 78 of the 1998 Act makes it mandatory for an insurer to give a worker notice of any decision in relation to liability and in relation to a decision to discontinue or reduce weekly payments.

95. Mr Adhikary submits that the obligations on an insurer with respect to dispute notices issued pursuant to the former s 74 of the 1998 Act were discussed by Roche DP in *Mateus v Zodune Pty Ltd t/as Tempo Cleaning Services*[1] and *Irvin v LA Logistics Pty Ltd*[2].These principles equally apply to ss 78 and 79(2) of the 1998 Act.

96. Mr Adhikary submits that in *P & N Beverages Australia Pty Ltd v Hammoud*[3], Roche DP observed that the "Guidelines were important, but they are merely a non-binding indication of policy"[4].

97. Mr Adhikary submits that once an issue has been squarely raised in proceedings, there is no obligation to refer to all of the evidence or submissions because this would be unworkable.[5] Therefore, there is no requirement for an insurer to provide a worker's claim file or that it must identify all of the reports submitted by the worker and the employer.

98. Mr Adhikary submits that the respondent provided a notice about its decision to reduce the applicant's weekly payments in accordance with s 78(1) of the 1998 Act. The respondent made it clear to the applicant that the extent of his capacity was in dispute. The applicant was aware that his capacity was being assessed.

99. Mr Adhikary submits that having regard to the principles of statutory interpretation, it is clear that the insurer gave the applicant notice in accordance with s 78 of the 1998 Act.

[1] [2007] NSWWCCPD 227; 6 DDCR 488 (*Mateus*).
[2] [2010] NSWWCCPD 40 (*Irvin*).
[3] [2008] NSWWCCPD 102 (*Hammoud*).
[4] *Hammoud*, [49].
[5] *Bonica v Placentini & Son Pty Ltd* [2019] NSWWCCPD 4, (*Bonica*), [59].

100. Mr Adhikary submits that the notice was in plain language, provided concise and readily understandable reasons for the decision, did not place the onus on the applicant to try to understand what the decision was and the reasons for same and it set out what the decision would mean for his claim. A reference guide was attached. The notice did not refer to all of the evidence which may become relevant or all of the submissions that might be made, as this was not required by s 78 of the 1998 Act.

101. Mr Adhikary submits that at all times, the applicant has been aware that the respondent was making a decision about his capacity. He was aware that a work capacity assessment was being undertaken and that a WCD would be made. By relying on the WCD dated 7 June 2019, the respondent has acted coherently and has not sought to ventilate issues beyond those matters identified in the notice.

102. Mr Adhikary submits that in accordance with cl 42 of the 2016 Regulation, it is not to be presumed that an interim payment direction for weekly payments of compensation is warranted, and therefore the Registrar should not exercise his discretion to direct the respondent to make interim payments in accordance with s 297(3)(e) of the 1998 Act. Section 84 of the 1998 has no role to play because a Section 78 Notice has been issued.

103. In the event that there is a determination that a valid Section 78 Notice has been issued, the respondent seeks leave to rely on a dispute relating to previously unnotified matters pursuant to s 289A of the 1998 Act in the interests of justice. I will deal with this issue, if necessary, once I determine the first matter in dispute.

104. In the alternative, Mr Adhikary submits that what constitutes suitable employment is described in s 32A of the 1998 Act, and whether that employment is available is irrelevant. A worker's subjective view of his or her capacity is not determinative but is a factor that is to be weighed against the other evidence.[6] In the circumstances, the applicant's evidence cannot be regarded as determinative and it must be weighed against the other evidence.

105. Mr Adhikary concedes that the applicant has some restrictions in his earning capacity and Dr Glover has certified that he had the capacity to work for four hours per day/ five days per week, with restrictions from 29 June 2018 to 3 July 2019. Further, Dr Glover approved the vocational options identified by IPAR as being within these restrictions, whether the applicant had the experience or worked in a voluntary capacity. Dr Prickett also indicated that the applicant should be strongly encouraged to return to work. Therefore, the applicant has the capacity to engage in suitable employment.

106. Mr Adhikary submits that Dr Patrick has not provided sufficient reasons as to why he had formed the view that the applicant was essentially unemployable. The doctor did not identify what severe physical restrictions and disabilities rendered the Applicant "essentially unemployable", what he meant by "very light duty work of a couple of hours per day" and "regular days", and why he thought that the applicant could not participate in a work trial. Therefore, little weight could be given to his report on the basis of the principles in *Hancock v East Coast Timber Products Pty Ltd* [7].

[6] *Boral Recycling Pty Ltd v Figueira* [2014] NSWWCCPD 41, [44].
[7] [2011] NSWCA 11, (*Hancock*), [83].

107. Mr Adhikary submits that the opinions expressed by Dr Glover and in the reports of IPAR should carry greater weight as they confirm that the applicant has had the capacity to undertake suitable employment for a prolonged period. The options identified by IPAR were deemed suitable on the basis of the medical evidence and the discussions with Dr Glover, and were part of a return to work plan.

108. Mr Adhikary submits that Dr Patrick was aware of the applicant's history that was consistent with an ability to engage in suitable employment and he did not undertake any assessment of the applicant's earning capacity or provide any comment why and how his symptoms affected this.

109. Mr Adhikary submits that although Dr Prickett raised concerns about the applicant's lack of transferable skills and job opportunities in the local area, this was addressed by IPAR, whilst the availability of work is irrelevant.

110. Mr Adhikary submits that the lack of experience or training in the job options is not fatal. It was noted that a formal qualification in Disability or Social Services was an advantage, but not essential. No formal qualifications were required for a position as a Retail Assistant. Therefore, the applicant has the capacity to work in suitable employment as a Disability Services Officer and/or a Retail Assistant and has the ability to earn $607.20 per week, or if not, he has the capacity to work in a different form of suitable employment.

REASONS

Section 78 Notice and Work Capacity Decision

111. In order to understand the meaning of the legislation, one must interpret the ordinary and grammatical meaning of the text, language and structure of the legislation, the legal and historical context, and the purpose of the statute in order to come to a reasonable conclusion as to its meaning and application[8]. In my view, the language used in ss 78 and 79 of the 1998 is clear and unambiguous.

112. Section 78 of the 1998 Act makes it mandatory for an insurer to give notice to a worker if it intends to dispute liability in respect of a claim or any aspect of a claim, to discontinue payment to a worker of weekly payments of compensation, or, as in the present case, to reduce the amount of compensation. The notice of the decision involving liability and a reduction in payments can be combined into a single notice, subject to the guidelines.

113. Section 79 prescribes how the notice is to be given to a worker, and it must contain a concise and readily understandable statement of the reason for the insurer's decision and of the issues relevant to the decision, with reference to the legislative provision relied upon by the insurer. The section also acknowledges that the regulations may make provision for the manner in which a notice is to be given, the form of the notice and other information to be included.

[8] *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355, [69] – [71] (per McHugh, Gummow, Kirby and Hayne JJ); *Hesami v Hong Australia Corporation Pty Ltd* [2011] NSWWCCPD 14, [43] – [44] (per Roche DP) and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* [2009] HCA 41; 239 CLR 27, [47] (per Hayne, Heydon, Crennan and Kiefel JJ).

114. Section 80 of the 1998 Act makes it mandatory for the insurer to provide a worker with a required period of notice, and in the circumstances of a WCD, the period of notice is three months.

115. There is no provision in the 1998 Act that specifies that a WCD issued by an insurer must specify that it is a notice issued pursuant to s 78 of the 1998 Act, or that it is to be described as a "Section 78 Notice". Further, there is no provision that makes it mandatory for an insurer to issue a Section 78 Notice and a separate WCD.

116. The notice that was issued by the insurer on 7 June 2019 was described as a WCD on page one. It concerned a decision to reduce weekly payments and was addressed to the applicant. The insurer provided details of the reasons and the relevant issues in concise and understandable terms and it confirmed that the decision had been made in accordance with s 43 of the 1987 Act. The required notice of three months was provided.

117. Therefore, for the purposes of ss 78, 79 and 80 of the 1998 Act, the insurer complied with the legislation. However, these sections are subject to the provisions in 2016 Regulation and the Guidelines.

118. The current Guidelines contain no provisions regarding an insurer's obligations with respect to WCDs, so they are of no assistance. The provisions in the previous guidelines described the content of WCDs and directed the insurer to ss 32A, 43, 44A and 54 of the 1987 Act.

119. In *Mateus*, Deputy President Roche discussed the requirements of dispute notices issued pursuant to s 74 of the 1998 Act. That repealed section was more detailed than the equivalent provisions in ss 78 and 79 of the 1998 Act.

120. The Deputy President stated:

> "… Attaching a document to the section 74 notice and leaving it to the worker to work out exactly which issues are disputed does not satisfy those obligations. A section 74 notice must state in plain language, in the body of the document, the reason the insurer disputes liability and the issues relevant to that decision. An obscure reference to a document attached to the notice, but dealing with a different issue to that identified in the notice, is not sufficient. The Arbitrator was therefore correct in determining that the issue of injury was a 'previously unnotified' matter and that leave was required before it could be disputed."[9]

121. President Keating in *Irvin* also confirmed that the mere reference to the sections of the legislation without clearly articulating the issues in dispute was not proper compliance with the former s 74 of the 1998 Act.[10] I agree with Mr Adhikary that the same principles apply to ss 78 and 79 of the 1998 Act.

122. The next matter to consider are the provisions in the 2016 Regulation.

123. Mr Goodridge submits that the insurer failed to comply with cl 38(1)(a), cl 38(1)(b) and cl 41 of the 2016 Regulation because it did not serve all of the documents in the applicant's file, whether relevant or otherwise.

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[9] *Mateus*, [45].
[10] *Irvin*, [50] – [52].

124. Mr Adhikary submits that there is no obligation to refer to all of the evidence or submissions because this would be unworkable.

125. The principles of statutory interpretation are again relevant and assistance can be found in the case law.

126. In *Macrae v St Margaret's Hospital* [11], the Court of Appeal considered whether compliance or substantial compliance by a worker when serving a notice of claim for lump sum compensation on the post office box of the employer satisfied the requirements of the former ss 92A and 106E of the 1987 Act.

127. In *Macrae*, a claim for lump sum compensation was sent to the employer's post office box and a copy was sent to Catholic Church Insurances. Proceedings commenced in the Compensation Court and the respondent argued that service on a post office box did not come within s 92A of the 1987 Act, which provided for personal service or service by post on the residence or business premises.

128. O'Toole CCJ dismissed the worker's claim because Mr Macrae had not complied with s 106E of the 1987 Act, which provided that a worker could not commence court proceedings for lump compensation for 12 weeks after the claim was duly made, not because the claim had been served on the post office box.

129. On appeal, Davies AJA acknowledged that is some circumstances, substantial compliance with the legislation was sufficient. He stated:

> ''Provisions of the type with which we are concerned may fall into one of three categories. Some provisions must be strictly complied with. Usually, such provisions provide for matters of substance or for matters in respect of which only strict compliance is possible. An example of the latter may be seen in *Hunter Resources Limited v Melville* [1988] HCA 5; (1988) 164 CLR 234, where Dawson J said at p 249:
>
> > *'*[T]*his is a case, in my view, in which substantial compliance with the relevant statutory requirement was not possible. Either there was compliance or there was not.".*
>
> The twelve weeks requirement in s 106E(1)(a) is such a requirement: see *Baker v Rothmans of Pall Mall (Australia) Ltd* [1999] NSWCA 245. Either the proceedings in the Court are brought twelve weeks after a claim for compensation has been made, or they are not. The period must be complied with.
>
> With other provisions, substantial compliance is sufficient. In *Victoria v The Commonwealth* [1975] HCA 39;(1975) 134 CLR 81, Stephen J said at p 179:
>
> > *'A directory construction will not assist in securing validity unless, despite the non-compliance which is the occasion for invoking that construction, there may nevertheless be seen to be substantial compliance with the general object at which the statutory provision aims. ...*

[11] [1999] NSWCA 381 (*Macrae*)

> *... A directory construction may ... be given to such a stipulation if it is of a kind capable of degrees of non-compliance and if some degree of non-compliance can be seen as not necessarily prejudicing the substantial carrying into effect of the general object. If in such a case a directory construction be adopted, the extent of non-compliance in the particular case must then be examined to determine whether what has in fact occurred nevertheless gives effect to the general object of the statute.*'

Many of the requirements in ss 92 and 92A of the Act and regs 39 and 40 of the *Workers Compensation (General) Regulation 1995* fall into this category. As Stephen J pointed out, in provisions of this type, the crucial question is whether what was done achieved the intent and object of the provision.

Lastly, there are stipulations, the total non-compliance of which will not result in the invalidity of the act done. Stephen J said, with respect to such provisions, in *Victoria v The Commonwealth* at p 179:

> '*Sometimes the stipulation which has not been complied with is, in its context, so relatively unimportant to the attainment of that general object that, although there has been total non-compliance, a directory construction may be appropriate. In such cases it may not matter that the non-compliance is complete, not partial. Indeed the stipulation in question may be of a kind which is incapable of partial compliance; to give to such a stipulation a directory interpretation recognises that it may be wholly disregarded without prejudice to validity because of its relative unimportance in the attainment of the general statutory object and also, perhaps, because of the far-reaching and undesirable consequences of treating its non-observance as invalidatory.*'

An example of such a provision may be seen in *Woods v Bate* (1987) 7 NSWLR 560. The provision with which we are concerned in this present case is not of that type.

The category into which any particular requirement may fall depends upon the terms used, the context in which the provision appears and the scope and object of the statute. Thus, in *Tasker v Fullwood* (1978) 1 NSWLR 20, Hope, Glass and Samuels JJA, after referring to a number of authorities including *Victoria v The Commonwealth*, said, inter alia, at pp 23-4:

> *'From these sources we take the following propositions: (1) The problem is to be solved in the process of construing the relevant statute. Little, if any, assistance, will be derived from the terms of other statutes or any supposed judicial classification of them by reference to subject matter. (2) The task of construction is to determine whether the legislature intended that a failure to comply with the stipulated requirement would invalidate the act done, or whether the validity of the act would be preserved notwithstanding non-compliance: the Franklins Stores Pty Ltd case (1977) 2 NSWLR 955 at pp 963 et seq. (3) The only true guide to the statutory intention is to be found in the language of the relevant provision and the scope and object of the whole statute: Hatton v Beaumont (1977) 2 NSWLR 211 at p 220. (4) The intention being sought is the effect upon the validity of the act in question, having regard to the nature of the precondition, its place in the legislative scheme and the extent of the failure to observe its requirement: Victoria v The Commonwealth at pp 179, 180.*'[12]

[12] *Macrae*, [14] – [17].

130. Therefore, in this matter, one has to determine whether the insurer's actions achieved the intent and object of the 1998 Act and the 2016 Regulation, whether non-compliance affects the validity of the insurer's WCD, and whether strict compliance was "relatively unimportant" in the context of the present dispute. It must be borne in mind that the current dispute only concerns the applicant's capacity since 14 September 2019.

131. It is true that the insurer did not identify each and every document on the applicant's claim file. It did not attach copies of the material submitted by the applicant when making his claim for compensation, or the material obtained by the respondent.

132. However, in my view, the legislature would not have intended that the failure by the insurer to strictly comply with cl 38 of the 2016 Regulation and attach all of the documents in the applicant's claim file would invalidate the WCD that concerned a dispute as to his capacity two years after his accepted injury.

133. This would make the whole dispute process overly complicated and unworkable. It would draw the focus away from the nature of the dispute and the fact that cl 41 of the 2016 Regulation efers to the provision of "any relevant report" seems to acknowledge this.

134. Clauses 41(2)(b), 41(3) and 41(4) of the 2016 Regulation makes it mandatory for an insurer to provide a copy of any relevant report, which includes the applicant's medical reports, clinical notes, health service providers' reports and certificates, as well as the respondent's medical reports in respect of a decision to reduce the amount of weekly benefits as in the present case. The clause refers to "any relevant report", whether it supports the decision or otherwise. It does not refer to irrelevant reports relating to the decision.

135. In *Bonica*, Deputy President Snell stated:

> "The respondent, in its Amended Reply (which was not objected to) relied on the dispute notices, including that dated 16 February 2017. The causation issue was squarely raised in the proceedings. There is not an obligation to refer to all of the evidence which may become relevant, or all of the submissions that may ultimately be made. Such an obligation would be unworkable, and is not required by s 74. Section 289A(1) of the 1998 Act prevents referral of a dispute for determination by the Commission unless it concerns only matters previously notified as disputed. Section 289A(2) provides relevantly that a matter is previously notified as disputed if it was notified in a notice of dispute. The reference to a "matter" is a reference to what was required in the notice of dispute (the s 74 notice), being notice of the dispute about liability."[13]

136. Although the Deputy President did not discuss whether all documents, either relevant or not, should be attached to a dispute notice or a WCD, his comments regarding the unworkable nature of referring to all evidence in a dispute notice could easily apply to the present case.

137. The applicant sustained injury on 2 October 2017. Injury and the extent of his capacity prior to 14 September 2019 when the WCD came into effect are not in issue in the present dispute. Presumably the applicant supplied medical certificates and medical accounts to the insurer to ensure that his weekly payments of compensation and

[13] *Bonica,* [59].

medical expenses were paid. Therefore, one could infer that he would have copies in his possession.

138. The current claim relates to the extent and quantification of the applicant's capacity since the applicant's weekly payments were reduced as from 14 September 2019. Therefore, the material on the applicant's claim file that came into existence in 2017 and 2018 would be of minimal probative value and would be of no relevance to the insurer's recent WCD.

139. In the letters dated 15 May 2019 and 5 June 2019, the insurer identified the relevant material, namely, various certificates of Dr Glover, the Vocational Assessment report of IPAR dated 18 June 2018, the Labour Market Analysis report of IPAR dated 8 February 2019, the approval of Dr Glover dated 13 February 2019 and various rehabilitation reports of IPAR.

140. It would have been preferable for the certificates and rehabilitation reports to be identified with more precision, but the documents were attached to the letter dated 15 May 2019 and those that were not previously provided were attached to the WCD dated 5 June 2019.

141. The applicant has not suggested that the identified evidence was not served on him and it seems that he did not take the opportunity to provide the insurer with further information after it invited him to do so on 15 May 2019.

142. Further, the certificates were most likely given to him by Dr Glover, so they would have been in his possession at some stage. He had ample time to obtain further material and whether he had access to funding is irrelevant. He also had access to a number of reports from his treating doctors that have been attached to the Application. His solicitor also obtained reports from Drs Glover, Prickett and Patrick.

143. The applicant was given notice that a work capacity assessment was being undertaken on 15 May 2019. The Application was filed by the applicant's solicitor on 13 September 2019, the day before the WCD came into effect. The applicant had three months to seek legal advice, obtain relevant evidence and confer face to face with counsel.

144. If the applicant had concerns about the contents of his claim file, he could have made a request pursuant to s 126 of the 1998 Act for copies and his solicitor could have served a Notice to Produce on the respondent and the insurer when he served the Application. There was ample opportunity to address any perceived prejudice or unfairness to the applicant.

145. Mr Goodridge has expressed his dissatisfaction with the process that is employed by the Commission with respect to Interim Payment Directions. The object of such proceedings is to ensure an expeditious determination of a dispute between a worker and the employer.

146. The Application was filed by the applicant's solicitor on 13 September 2019. This matter could well have been finalised at the telephone conference on 27 September 2019 or shortly afterwards, but on that occasion, Mr Goodridge raised for the first time the issue regarding the Section 78 Notice and the validity of the WCD. These previously unnotified matters took me and the respondent's solicitor by surprise. On the grounds of procedural fairness, I ordered that written submissions be filed.

147. The applicant's submissions comprised a total of almost 35 pages and identified further issues of complexity. This has contributed to an unnecessary delay in the determination of the dispute.

148. What was essentially a simple matter became unnecessarily complicated. Nevertheless, both parties were provided with the opportunity to provide detailed written submissions, which often happens in contested arbitration hearings, and I have provided detailed reasons in this Direction. Hopefully this will allay Mr Goodridge concerns about the interim payment direction process employed in the Commission.

Conclusion

149. On 15 May 2019, the insurer advised that a work capacity assessment was being undertaken in accordance with s 44A of the 1987 Act. The insurer invited the applicant to submit any information that would assist in the assessment of his current work capacity by 5 June 2019. It would seem that no information was provided by the applicant.

150. A WCD was made on 7 June 2019. A summary was provided on page one of the notice, consistent with the Guidelines. The notice was concise and easily understandable. It was a decision about the applicant's current work capacity, what constituted suitable employment, and what the applicant was able to earn in suitable employment in terms of s 43 of the 1987 Act.

151. The insurer advised the applicant that it had made a decision in accordance with ss 32A, 43(1)(a), 43(1)(b) and 43(1)(c) of the 1987 Act. The insurer provided a summary of the decision, the reasons for the decision and the effect that it would have on the applicant's weekly payments and medical expenses. It provided details of its calculations.

152. The insurer advised the applicant that the decision would take effect as from 14 September 2019. This represents the requisite notice to be given to a worker following a WCD and is consistent with ss 78, 79 and 80 of the 1998 Act.

153. The insurer informed the applicant that he could seek an internal review or commence proceedings in the Commission with the assistance of a lawyer and the WIRO. Contact details were provided. The applicant was also advised that the decision would be stayed if an application was lodged in the Commission during the notice period.

154. Copies of the documents that were previously identified by the insurer in the work capacity assessment, namely the Vocational Assessment, Labour Market Analysis and rehabilitation reports of IPAR NSW, the approval of Dr Glover dated 13 February 2019 and various certificates of Dr Glover were attached to the notice. A form "Review form application for review by the insurer" was also attached and the applicant was invited to complete the document in the event that he intended to request an internal review.

155. Whilst it is true that the insurer did not provide the applicant with copies of all of the reports and documents submitted by the applicant in making the claim for compensation, and by the employer in connection with the claim, the claim that was being considered was the extent and quantification of the applicant's capacity as at June 2019. To include every report, certificate or other document that was contained on an insurer's file since the date of the applicant's injury would result in unnecessarily complicated and confusing notices. This would be inconsistent with the intent of the legislation.

156. Therefore, I do not accept that there has been any failure by the insurer to comply with the provisions of ss 78 and 79 of the 1998 Act and cl 38 and cl 41 of the 2016 Regulation.

157. In the circumstances, I am satisfied that the insurer issued a valid WCD in accordance with the procedural requirements in the 1998 Act and the 2016 Regulation. Further, it does not require leave to pursuant to s 289A(4) of the 1998 Act to rely upon a dispute with respect to unnotified matters.

Application for Expedited Assessment

158. The present Application concerns a dispute regarding a WCD and concerns weekly payments consistent with s 295(1)(a) of the 1998 Act.

159. Sections 297(1) and 303 of the 1998 Act give me, as the delegate of the Registrar, the power to direct to the insurer to pay the compensation pursuant to an interim payment direction.

160. The applicant has been paid approximately 105 weeks compensation. The applicant claims weekly compensation from 14 September 2019 to date and continuing pursuant to s 37 of the 1987 Act.

161. There is no dispute that the applicant is unfit for his pre-injury duties and Dr Glover has certified that he has the capacity to undertake some work for four hours per day/ five days per week, with a lifting restriction of 5 kg in his left hand, 15 kg bilateral lifting restriction, avoiding repetitive pulling, avoiding pushing of weights up to 15 kg, and use of only an automatic vehicle. These restrictions have been in place since 29 August 2018.

162. In the Vocational Assessment report dated 18 June 2018, Ms Reid recorded that applicant had past experience as a bar attendant, labourer, trolley collector, hospital wardsman, tomato picker and disability and aged care worker. The majority of his experience has been in disability and aged care.

163. Ms Reid identified a number of work options including a Disability Services Officer/ Disability Employment Consultant, Youth Mentor and Social Worker, although the latter required further qualifications. IPAR closed its rehabilitation file in April 2019 after a work trail was organised with a hardware store in Armidale, but regrettably, the applicant elected not to give the trial a go.

164. According to the Labour Market Research report compiled by IPAR on 8 February 2019, enquiries were made of six potential employers for positions of a Disability Services Officer and Retail Assistant. It was confirmed by three prospective employers that applicant needed further qualifications before he could work as a Youth Worker.

165. IPAR then provided Dr Glover with a detailed description of the duties and physical demands of the proposed job options. On13 February 2019, Dr Glover advised that the applicant initially undertake a work trial for 20 hours per week as a Disability Services Officer, Retail Assistant or Youth Worker.

166. The insurer conducted the work capacity assessment and made a work capacity decision based on this evidence. It quite rightly disregarded the role of Youth Worker, but determined that the applicant was able to work for four hours per day/ five days per week in suitable employment, as Disability Services Officer or Retail Assistant, in accordance with s 32A of the 1987 Act, based on a rate of $30.36 per hour.

167. In his statement, the applicant advised that he had tried to obtain employment as a Disability Support Worker, but he had been unsuccessful due to his injury and the associated restrictions. He indicated that he would not be able to do the job in any event because of the lifting involved with the position.

168. The applicant indicated that he had no experience as a Disability Services Officer because this involved client liaison and he would need training. Similarly, he had no Retail Assistant experience and his injury would restrict his capacity to work on a computer or use a cash register. His lack of experience disadvantaged him on the open labour market. The applicant indicated that he could not work as a Youth Worker, but that option was not considered by the insurer in its WCD, so it is not relevant.

169. The reports of Drs Diebold, McClelland and Mason are dated and they are of no assistance to the current claim. This is consistent with my comments about the relevance of dated evidence that was not attached to the WCD.

170. Dr Prickett provided a recent report in June 2019 in which he advised that the applicant had almost ceased taking medication and that his mental state had improved. He expressed the view that the applicant would have difficulty resuming work because he lacked transferable skills and there were few job opportunities in his local area. He provided a similar opinion on 10 September 2019.

171. Dr Prickett discounted role of Disability Support Officer, unless it was sedentary in nature. He agreed that the applicant might be capable of work as a retail assistant avoiding heavy lifting, but his chances of obtaining work on the open market would be difficult due to competition. Unfortunately, the availability of suitable jobs and a person's prospects of obtaining same in competition with able bodied applicants is not a relevant consideration under s 32A of the 1987 Act.

172. In his report dated 17 August 2019, Dr Glover noted that the applicant had unsuccessfully tried to secure a fulltime job with the Corrective Services Department, and he was keen for the applicant to get back to work, even in a voluntary capacity.

173. Although the applicant has the support of Dr Patrick, I have concerns about the weight that can be given to his report. He examined the applicant in November 2018, but for reasons unknown, he never completed a contemporaneous report. His recent report was based on his examination finessing in November 2018 and the history obtained from the applicant in November 2018 and in July 2019.

174. Dr Patrick advised that the applicant did not have any realistic prospects of returning to regular employment and he was essentially unemployable because of his injury, restrictions and the potential for aggravations. How he came to that conclusion is not entirely clear. Further the doctor did not address the vocational options identified by IPAR.

175. The applicant's entitlements are calculated based on a consideration of the provisions in s 32A of the 1987 Act and in accordance with the formulae set out in s 37(3)(a) of the 1987 Act and s 32A of the 1987 Act.

176. The insurer relied on the Vocational Assessment report dated 18 June 2018 and the Labour Market Analysis report dated 8 February 2019 when it determined that the applicant had the capacity to work as a Disability Services Officer or Sales Assistant, and had the ability to earn $607.20 per week. The insurer chose to use the highest rate, namely $30.36 per hour as a Disability Services Officer, rather than an average of the six suitable options.

177. Mr Goodridge submits that the insurer relied upon discussions that were undertaken a year or so ago, so these could relate to the applicant's current capacity. That might well be the case regarding the Vocational Assessment report, but there is no evidence to suggest that the applicant has worked or gained further qualifications and experience that might impact on the assessment conducted by IPAR. Dr Glover has continued to certify the applicant fit for suitable duties for 20 hours per week since August 2018, so there has been no change in the applicant's capacity.

178. The Vocational Assessment and Labour Market Analysis reports were concerned with vocational options based on the applicant's capacity. The Vocational Assessment was described as a Vocational Plan and it was noted that the applicant had been referred to IPAR to identify a vocational goal and develop strategies for overcoming barriers to a successful return to work. Therefore, it formed part of a return to work plan for rehabilitation purposes.

179. Given the job description for a Disability Services Officer, and despite his past experience in disability care, the applicant might struggle to perform the duties without appropriate training. Given his lack of experience, one could only expect that the applicant would secure a postilion at an entry level.

180. The applicant has past experience as a bar manager and has been involved in managing staff ordering stock, customer service and drink sales. The skills that he utilised in this position would equally apply to the skills required in retail sales, even that though the applicant has not worked in that capacity since 2009.

181. Dr Glover has indicated that the applicant has the functional capacity to undertake this work and I accept that he would be in the best position to assess the applicant. He was provided with a detailed description of the duties and he was aware of physical requirements. He did not indicate in his certificates that the applicant had any psychological incapacity arising from his work injury that would impact on his ability to undertake suitable work. He has also been keen to get the applicant back to work to assist in his recovery.

182. The clinicians at IPAR who compiled the Vocational Assessment and Labour Market Analysis reports have qualifications in rehabilitation so their views carry some weight.

183. Having regard the relevant factors identified in s 32A of the 1987 Act, I consider that the applicant could only expect to commence any form of suitable work at the entry level, which would pay at a lower hourly rate.

184. According to the Labour Market Analysis report, the lowest rate for a Disability Services Officer was $25.30 per hour for 20 hours per week and for a Retail Assistant was $22 per hour. In my view, the position of Sales Assistant is more suitable than a Disability Support Officer.

185. I would expect that an entry level employee working for 20 hours per week at the rate of $22 per hour would earn $440 per week. Therefore, I am satisfied that the applicant has the ability to earn $440 per week in suitable employment.

186. The applicant will be entitled to weekly compensation calculated in accordance with s 37(3)(a) of the 1987 Act. However, as he was an inpatient at the Lingard Hospital and was certified by Dr Glover as having no current work capacity from 16 September 2019 to 22 September 2019, the applicant's entitlements during this period will be calculated in accordance with s 37(1)(a) of the 1987 Act.

187. Accordingly, the applicant's entitlements in accordance with 1987 Act are as follows:

(a) 14 September 2019 to 15 September 2019:

(AWE X 80%) – E + D =
($1,251.38 x 80%) – $440 =
$1,001.10 – $440 = $561.10 per week pursuant to 37(3)(a).

(b) 16 September 2019 to 22 September 2019:

(AWE X 80%) – E + D =
($1,251.38 x 80%) – $440 =
$1,001.10 – $440 = $561.10 per week pursuant to 37(1)(a).

(c) 23 September 2019 to date and continuing:

(AWE X 80%) – E + D =
($1,251.38 x 80%) – $440 =
$1,001.10 – $440 = $561.10 per week as adjusted.

DIRECTION

188. The respondent to pay the applicant weekly compensation as follows:

(a) $561.10 per week from 14 September 2019 to 15 September 2019 pursuant to s 37(3)(a) of the 1987 Act;

(b) $561.10 per week from 16 September 2019 to 22 September 2019 pursuant to s 37(1)(a) of the 1987 Act, and

(c) $561.10 per week as adjusted from 23 September 2019 to date and continuing pursuant to s 37(3)(a) of the 1987 Act.

189. The respondent is to have credit for payments made after 14 September 2019.

NOTE: A person who fails to comply with an interim payment direction is guilty of an offence in accordance with section 300.

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

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar