WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **6622/19**
Applicant: **Robert Parsons**
Respondent: **Toll Holdings Ltd**
Date of Determination: **8 July 2020**
Citation: **[2020] NSWWCC 228**

The Commission determines:

1. The applicant suffered an injury to his lumbar spine in the course of his employment on 16 November 2014.

2. As a result of the injury referred to (1) above, the applicant has suffered total incapacity for employment.

3. The respondent continued to pay the applicant weekly benefits after the expiry of the second entitlement period under section 37 of the *Workers Compensation Act 1987*.

4. In determining to extend payments beyond the second entitlement period pursuant to section 38 of the *Workers Compensation Act 1987*, the respondent made work capacity assessments in relation to the applicant and continued making weekly compensation payments to him.

5. As a result of those assessments, up to 7 September 2019 the applicant was paid weekly benefits in accordance with total incapacity.

6. The applicant was, between 8 September 2019 to 22 February 2020 wholly incapacitated for employment.

7. The respondent is to pay the applicant weekly compensation for the period 8 September 2019 to 22 February 2020 at the rate of $2,040 per week.

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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Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Robert Parsons (the applicant) was working for Toll Holding Ltd (the respondent) at the construction site of the new Parkes Hospital on 16 November 2014 when he suffered a serious injury to his lumbar spine. Liability for that injury was accepted.

2. On 15 June 2016, the applicant underwent a double discectomy and laminectomy. The applicant was paid weekly compensation benefits until 1 September 2019. The circumstances of the cessation of those benefits are contentious.

3. In mid-2109, the applicant was arrested and incarcerated in China, where he remains. Given the matters at issue in these proceedings, it is necessary to set out a brief timeline of certain events and of correspondence between the parties.

4. The applicant was paid weekly compensation from 23 February 2015 pursuant to section 36 of the *Workers Compensation Act 1987* (the 1987 Act). From 25 May 2015, the applicant was paid pursuant to section 37 of the 1987 Act.

5. On 31 August 2016, the respondent's then insurer wrote to the applicant advising an assessment would be undertaken as to whether he qualified for benefits after the second entitlement period, pursuant to section 38 of the 1987 Act. That letter enclosed a form for the applicant to complete and return. The letter noted that as at 17 May 2016, the applicant had been in receipt of weekly benefits for 78 weeks.

6. A simple mathematical exercise reveals the 130-week entitlement period under section 37 would therefore come to an end on 17 May 2017.

7. The applicant completed the Continuation of Weekly Payments After 130 Weeks – Application form and returned it to the respondent. On 6 April 2017, the respondent wrote to the applicant indicating the process of making a work capacity decision had commenced on 7 February 2017 and would be decided on or about 28 April 2017.

8. There is no direct evidence of the respondent's work capacity decision to extend weekly payments, however, on 24 September 2018 (well after the expiry of the second entitlement period pursuant to section 37), the respondent wrote to the applicant advising of an indexation of his ongoing weekly benefits.

9. It is not disputed that as late as 7 September 2019, the applicant was in receipt of weekly benefits, and had been since the expiry of the second entitlement period. Those benefits are referred to in the respondent's list of payments which formed part of the applicant's Application to Admit Late Documents (AALD) as payments "post second entitlement period – no work capacity."

10. On 22 July 2019, the Australian Embassy in Manila wrote to the applicant's wife confirming he had been arrested and detained in China whilst on a holiday there.

11. On 18 September 2019, the applicant's solicitors wrote to the respondent requesting a reason as to why the applicant's weekly benefits had ceased. No reply to that email appears to have been received, though documents in evidence confirm the respondent was aware by that time that the applicant had been detained in China.

12. On 14 November 2019, the respondent wrote to the applicant in the following terms:

> "We have attempted to contact you however had been unsuccessful. We understand that you no longer require medical treatment related to your injury and therefore your claim will be closed on 14 November 2019."

13. No section 78 notice in respect of the cessation of the applicant's benefits was ever issued.

14. After his solicitors received no reply to their query as to why the applicant's payments had ceased, they lodged an Application to Resolve a Dispute (the Application) on 17 December 2019 seeking weekly benefits from 8 September 2019 to date. At the hearing, the claim was amended to run for the period 8 September 2019 to 22 February 2020, being the expiration of 260 weeks of weekly benefits.

15. On 22 January 2020, the respondent filed a Reply. In the Reply, the respondent disputed the applicant's claim and purported to deny liability on the following bases:

    (a) the applicant has not complied with the requirements of the 1987 Act as he has not provided certificates of capacity for the period claimed pursuant to section 44B of the 1987 Act;

    (b) that any incapacity suffered by the applicant is not a result of any injury arising out or in the course of employment with respondent in respect of the period claimed, as the worker is incapacitated as a result of his detention overseas;

    (c) that the applicant is not entitled to weekly payments compensation pursuant to section 53 of the 1987 Act;

    (d) the Commission has no jurisdiction to determine a claim for weekly benefits after 130 weeks, and

    (e) the claim is subject to section 39 of the 1987 Act.

16. As noted, the applicant limited his claim to the expiration of 260 weeks, and therefore section 39 does not apply.

ISSUES FOR DETERMINATION

17. The following matters remain in dispute:

    (a) did the respondent's insurer make work capacity decisions in relation to the applicant's entitlement to weekly benefits after the expiry of the second entitlement period, pursuant to section 38 of the 1987 Act;

    (b) whether there is a dispute between the parties and whether the Commission has jurisdiction to hear that dispute;

    (c) is the respondent entitled to raise the matters in its Reply given it did not issue a section 78 notice, and

    (d) whether the applicant is disentitled to weekly compensation payments owing to the operation of section 53 of the 1987 Act.

EVIDENCE

Documentary evidence

18. The following documents were in evidence before the Commission:

    (a) Application and attachments;
    (b) Reply and attachments;
    (c) applicant's AALD dated 28 January 2020;
    (d) applicant's AALD date 11 March 2020, and
    (e) Report of Associate Professor Papantoniou dated 17 February 2020, admitted into evidence and marked exhibit A.

Oral evidence

19. No oral evidence called at the hearing.

PROCEDURE BEFORE THE COMMISSION

20. Despite my best endeavours, the parties were unable to resolve their differences during the conciliation process. Accordingly, the matter proceeded to hearing before me on 27 February 2019. At the hearing, Mr C Tanner of counsel appeared for the applicant and Mr A Parker of counsel for the respondent.

21. At the conclusion of the matter, the Commission made order for the provision of written supplementary submissions. On 6 April 2020, the applicant's further submissions were received. The respondent's further submissions were received on 15 April 2020 and the applicant's submissions in reply on 24 April 2020.

22. Additionally, on 24 April 2020, the applicant's solicitors emailed to the Commission the entirety of the documents produced by the respondent's insurer in answer to a Notice for Production. Correspondence with the Commission made clear that those documents were only provided to overcome a submission made by the respondent that the applicant had otherwise been selective in the matters which it had extracted from the documents produced by the respondent. Neither party specifically sought to rely on any of the documentation filed by email by the applicant's solicitors on 24 April 2020.

FINDINGS AND REASONS

Preliminary finding of fact – did the respondent make work capacity assessments of the applicant pursuant to section 38 of the 1987 Act?

23. There is no question the Commission lacks jurisdiction to make an award beyond the expiration of the 130-week entitlement period which is contrary to any work capacity assessment made by an insurer.

24. The wording of section 38 of the 1987 Act makes it clear the only basis on which an injured worker can receive weekly benefits after 130 weeks is in accordance with that section. The section provides ongoing benefits can only be paid in accordance with assessments of a worker's entitlements made by the relevant insurer. Relevant to this matter, section 38(4) provides that:

> "An insurer must, for the purpose of assessing an injured worker's entitlement to weekly payments of compensation after the expiry of the second entitlement period, ensure that my work capacity assessment of the worker is conducted:

(a) During the last 52 weeks of the second entitlement period, and

(b) Thereafter at least once every two years…"

25. There is no work capacity assessment before the Commission. This being so, the issue arises as to whether an inference can be drawn that a work capacity assessment or assessments of the applicant were made from time to time between the expiration of the second entitlement period in May 2017 until his benefits were terminated in September 2019.
26. Counsel for the respondent submits there is insufficient evidence to draw any inference, and the evidence equally discloses several inferences which are available as to why payments continued in the section 38 period. The respondent submitted these include the claims officer forgetting to undertake the assessment; the claims officer changing; the insurer changing (which in fact happened), or the insurers failed to comply with their obligations.

27. The circumstances in which inferences may be drawn have been the subject of a long line of authority. As Gleeson CJ noted in *Swain v Waverley Municipal Council* (2005) 220 CLR 517 at [17] (*Swain*):

> "More than 200 years ago, Lord Mansfield said [in *Blatch v Archer* (1774) 98 ER 969 at 970] that 'all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.'"

28. In his dissenting judgment in the same matter, McHugh J said at [36]:

> "If an inference upon which the plaintiff relies is 'equally consistent' with an inference or inferences upon which the defendant relies, the jury cannot reasonably act on the inference upon which the plaintiff relies. But the cases in which a court can say that two inferences are 'equally consistent' are rare… As Isaacs J pointed out in *Cofield v Waterloo Case Co Ltd* in the context of discussing whether causation was established:
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> > 'A Court has always the function of saying whether a given result is 'consistent' with two or more suggested causes. But whether it is "equally consistent" is dependent on complex considerations of human life and experience, and in all but the clearest cases - that is, where the Court can see that no jury applying their knowledge and experience as citizens reasonably could think otherwise - the question must be one for the determination of the jury.'
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> 37. Statements can also be found in the cases, for example, by Jordan CJ in *De Gioia*, to the effect that in determining whether, as a matter of law, there is evidence of negligence, the court may take into account that 'some of the facts essential to the plaintiff's case are peculiarly within the knowledge of the defendant'. In *Hampton Court Ltd*, Dixon CJ held that there was no evidence of negligence, but his judgment also appears implicitly to have endorsed this approach. His Honour said:
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> > 'But a plaintiff is not relieved of the necessity of offering some evidence of negligence by the fact that the material circumstances are peculiarly within the knowledge of the defendant; all that it means is that slight evidence may be enough unless explained away by the defendant and that the evidence should be weighed according to the power of the party to produce it'.

38. With great respect to these great jurists, however, it is not legitimate to take into account on a 'no evidence' submission that some of the facts essential to the plaintiff's case are peculiarly within the knowledge of the defendant. Either the facts relied upon by the plaintiff give rise to a reasonable inference of negligence or they do not. If the evidence tendered by the plaintiff cannot reasonably support an inference of negligence, it does not matter that the defendant has knowledge of facts that may have assisted the plaintiff's case."

29. Although *Swain* dealt with inferences which could reasonably be drawn by a jury in a case involving a finding of negligence, in my view the principles apply to the drawing of inferences generally, including in relation to whether a work capacity assessment has been undertaken.

30. In *Strong v Woolworths Ltd* [2012] HCA 5 (7 March 2012), Heydon J dealt with similar arguments surrounding the drawing of inferences. At [65] his Honour noted that the cases dealing with the absence of evidence leading to the drawing of an inference specifically relate to matters where facts essential to one party's case are peculiarly within the knowledge of another. It is therefore important to examine the facts of this matter to determine firstly whether there is some evidence offered by the applicant suggestive of work capacity assessments having been made; and whether direct evidence of the existence or otherwise of the assessments is peculiarly within the respondent's knowledge.

31. At this point, it is helpful to set out what constitutes a work capacity assessment. The term is defined in section 44A of the 1987 Act as follows:

"(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.

32. In the context of inferring the existence of a work capacity assessment, the respondent referred the Commission to a number of decisions, including *Lee v Bunnings Group Limited* [2013] NSW WCCPD 54 (*Lee*); *Paterson v Paterson Panel Workz Pty Limited* [2018] NSW WCCPD 27 (*Paterson*); *NSW Trustee & Guardian on behalf of Robert Birch v Olympic Aluminium Pty Limited* [2006] NSW WCCPD 54 (*Birch*); *Sabanayagam v St George Bank Limited* [2016] NSWCA 145 (*Sabanayagam*); and *D'Er v Glemby International (Aust) Pty Limited* [2016] NSW WCCPD 42 (*D'Er*).

33. In *Lee*, President Keating dealt with the jurisdiction of the Commission to determine entitlements under section 38 and determined a decision pursuant to that section regarding a worker's capacity must be made by an insurer. In the present matter, that is not controversial. Rather, the applicant asserts the respondent made such decisions and asks the Commission to make a determination in accordance with them.

34. There was no question in *Lee* that a work capacity assessment had not been undertaken. That is an important distinction between that case and the present matter, where the existence or otherwise of an assessment is very much in issue. As President Keating noted at [57] "It is clear from the unambiguous terms of section 38 that an entitlement to compensation under that section must be assessed by the insurer, not by the Commission." Thus, if no work capacity assessment has been made, the authority in *Lee* would preclude me from making an award for the period in issue.

35. Likewise, the decision in *Birch* dealt with circumstances where an arbitrator made a decision relating to a worker's capacity for employment inconsistent with a decision of the insurer. It does not assist in determining whether the existence of such a decision should or should not be inferred.

36. In *Sabanayagam* Sackville AJA found (at [119] (Beazley P agreeing), citing *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-356 (Mason CJ, Brennan and Deane JJ agreeing); *Bruce v Cole* (1998) 45 NSWLR 163 at 187-188 (Spigelman CJ, Mason P, Sheller and Powell JJA agreeing)): "The making of findings and the drawing of inferences in the absence of any evidence to support them is an error of law." Although that matter dealt with circumstances where an insurer issued a section 74 notice denying liability and not considerations regarding work capacity decisions, his Honour's comments are plainly relevant to the preliminary finding of fact at issue in this matter, and the availability of inferences to a tribunal of fact.

37. The decision in *D'er* affirms the principles set out in *Sabanayagam*, however, that matter also relates to cessation of payments absent a work capacity decision to support that cessation.

38. President Keating DCJ also dealt with principles relevant to the drawing of an inference in *Namoi Cotton Co-operative Ltd v Stephen Easterman (as administrator of the estate of Zara Lee Easterman)* [2015] NSWWCCPD 29 (*Easterman*). His Honour said:

> "93. The drawing of an inference is 'an exercise of the ordinary powers of human reason in the light of human experience' (*G v H* [1994] HCA 48; 181 CLR 387 at 390). An inference may be drawn because of common knowledge and ordinary human experience (*Nicolia v Commissioner for Railways (NSW)* (1970) 45 ALJR 465).
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> 94. Moreover, in evaluating questions of causation, the Commission is entitled to rely upon common sense (*Adelaide Stevedoring Co Ltd v Forst* [1940] HCA 45; 64 CLR 538 at 563–4, 569; *Tubemakers of Australia Ltd v Fernandez* (1976) 50 ALJR 720 per Mason J at 725). Nevertheless, as Ipp JA pointed out in *Flounders v Millar* [2007] NSWCA 238 at [35], a claimant who relies on circumstantial evidence to prove causation must show 'that the circumstances raise the more probable inference in favour of what is alleged'.
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> 95. More recently Beazley P (Macfarlan and Emmett JJA agreeing) made the following observations about the drawing of inferences in *Marshall v Prescott* [2015] NSWCA 110. Her Honour said (at [83]–[84]);

‘83. However, an inference cannot be drawn in the absence of evidence. In *Luxton v Vines* [1952] HCA 19; 85 CLR 352, the plurality, Dixon, Fullagar and Kitto JJ, at 358, approved the explanation of the principle of the High Court in the then unreported decision of *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 as follows:

"... where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture ... But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise." (emphasis added) (citations omitted)

84. *In Holloway v McFeeters* [1956] HCA 25; 94 CLR 470, the plurality, Williams, Webb and Taylor JJ, observed, at 480, that:

Inferences from actual facts that are proved are just as much part of the evidence as those facts themselves. In a civil cause "you need only circumstances raising a more probable inference in favour of what is alleged ... where direct proof is not available it is enough if the circumstances appearing in evidence give rise to a reasonable and definiteinference ..." (emphasis added by President Keating DCJ)

Their Honours, referring to *Bradshaw v McEwans Pty Ltd*, emphasised that an inference could be drawn 'from **the circumstances that sufficiently appear by evidence** or admission' provided that the circumstances were left unexplained."" (emphasis added by President Keating DCJ)

39. Having considered the above authorities, in my view the Commission can draw an inference as to the existence of a work capacity assessment, however, as is the case when any inference is sought to be drawn, there must be a sufficient evidentiary basis to do so.

40. The respondent submitted the evidence was in no way enough to make an inference of work capacity decisions having been made. Counsel for the respondent submitted the more likely explanation for the absence of a work capacity assessment or decision in evidence is that the relevant claims officer failed to make a work capacity decision and instead simply paid the applicant post the second entitlement period.

41. Counsel for the respondent further submitted there are numerous inferences available as to why payments continued in the section 38 period, however, an inference that the claims officer made a decision but failed to record or communicate it to anyone is not available on the evidence.

42. The applicant submitted an examination of the documents in evidence and those produced by the respondent's insurer provide a basis for drawing the inference that work capacity assessments had from time to time been made, both before the expiration of the second entitlement period and from time to time thereafter. The inference to be drawn from the evidence, the applicant submitted, is the respondent had assessed the applicant as having no work capacity.

43. As previously noted, the respondent's insurer wrote to the applicant on 31 August 2016 confirming that he was currently being paid under section 37 of the 1987 Act during the second entitlement period. In that letter, the insurer referred to the provisions of section 38 and advised the applicant of some requirements for continuation of weekly payments after 130 weeks. The insurer further advised that the claims officer would undertake a work capacity assessment.

44. The insurer then requested the applicant complete the Application for Further Weekly Payments form, which he in turn completed and returned to the insurer on 8 February 2017.

45. In the letter dated 31 August 2016, the insurer also advised the applicant that in the event he was eligible to receive weekly payments after 130 weeks, a work capacity assessment would be conducted by the insurer every two years at a minimum.

46. On 6 April 2017, the insurer's case manager wrote to the applicant advising that she was undertaking a review of the applicant's file to make an assessment in relation to his current work capacity "over the next few weeks." The letter advised the applicant could expect the assessment to take place on or about 28 April 2017. Notwithstanding the contents of that letter, the respondent has not produced any work capacity decision made on or about 28 April 2017, or indeed any made thereafter.

47. A schedule of payments produced by the respondent records the weekly compensation paid to the applicant pursuant to sections 37 and 38 of the 1987 Act. A decision in relation to the applicant's preinjury average weekly earnings (PIAWE) was made on 27 January 2016. From 22 February 2016, the applicant's weekly compensation payment rate was $1,904.14.

48. That figure appears in a payment schedule produced by the respondent for the period 16 November 2015 to 22 November 2015, and regularly thereafter until the period 12 August 2016 to 18 August 2016, at which time the amount was reduced.

49. There is no issue that, regardless of the specific quantum of each of the weekly payments recorded in the payments schedule in 2015, 2016 and part of 2017, the insurer has recorded the statutory basis for each payment as "second entitlement – current work capacity working less than 15 hours." A distinction in the payment schedule is made between payments in the period "14 – 52 weeks" and payments in the period "53 – 130 weeks."

50. The payment schedule also records the insurer made payments to the applicant after the expiry of the second entitlement period (that is, after 130 weeks). Payments made from 11 August 2017 to 24 November 2017 are recorded as being in respect of "post-second entitlement – no current work capacity due to surgery." From 1 March 2018, the schedule records regular payments each successive week with effect from that date as "post-second entitlement – no work capacity." The amounts paid, PIAWE as indexed in April and October each year, are consistent with weekly payments for the applicant having no work capacity.

51. On 24 September 2018, the insurer again wrote to the applicant to advise him about a recent increase to his weekly payments as a result of indexation. The applicant's weekly compensation rate thereafter increased to $2,016 per week, less any earnings and deductions.

52. The applicant had been paid $2,000 per week since April 2018. That amount increased to $2,016 per week effective from 1 October 2018 and is the maximum payable pursuant to section 38 of the 1987 Act.

53. In my view, payment by the respondent to the applicant after 130 weeks is consistent with an inference the insurer had assessed the worker at that point in time to have no work capacity. If the insurer had assessed the worker to have some capacity, it would be borne out by a payment of an amount of less than $2,016, which is the maximum amount payable.

54. I accept the applicant's submission that each time the insurer increased the payments, it was making a decision as to the applicant's capacity pursuant to section 38. In each case, it was assessing the applicant to have no work capacity. The remittances for weekly compensation payments made during this period are all referred to under the payment type in the schedule as "post-second entitlement – no work capacity." For the following reasons, I am prepared in the circumstances to infer that the respondent made ongoing payments to the applicant pursuant to section 38(2) as a result of having made work capacity assessments of the applicant.

55. I reject the respondent's submission that there are a number of inferences which are equally available to be drawn in this matter. In my view, the following evidence supports an inference being drawn in favour of work capacity assessments being made by the respondent in accordance with section 38:

    (a) the respondent writing to the applicant on 31 August 2016 advising his payments would cease after 130 weeks unless he satisfied the requirements of section 38;

    (b) the respondent's claims officer writing to the applicant in April 2017 advising she would complete a work capacity assessment within the next few weeks;

    (c) advising the applicant in the same letter that the respondent would undertake a work capacity assessment every two years in the event the applicant was assessed as eligible to receive payments after week 130;

    (d) thereafter, the respondent paying the applicant beyond the 130-week period, and from time-to-time increasing the level of payments made, and

    (e) the categorisation of payments made beyond the 130-week period altering from time to time in the payment schedule.

56. The schedule of payments confirms they continued to be made until 8 September 2019. The cessation of the payments was not pursuant to any work capacity assessment and remains unexplained. During the period beyond week 130 up to cessation of payments, the schedule variously describes the relevant payments made to the applicant as "Post 2nd entitlement – Current Work Capacity due to Surgery" (11 August 2017 to 24 November 2017) and "Post 2nd Entitlement – No Work Capacity" (19 February 2018 to 8 September 2019). The categories of payment and the amounts paid under them supports an inference that decisions as to the applicant's work capacity were being made from time to time by the respondent.

57. Section 44A(2) of the 1987 Act provides a work capacity assessment must be conducted in accordance with the Workers Compensation Guidelines. Relevantly, the Guidelines provide:

    "**5.1 Work capacity assessment**

    …

    A work capacity assessment can be based on available information (such as a certificate of capacity), or it can require the insurer to gather more information, for example when the worker has some capacity but cannot return to their pre-injury employment.

    The insurer must keep a record of any work capacity assessment in the worker's file.

5.2 When to conduct a work capacity assessment

Work capacity assessments are to be conducted throughout the life of the claim whenever new information about the worker's claim, such as a certificate of capacity, is received. This is a part of the normal claims management process.

These assessments may be based on available information or may require the gathering of additional information."

58. It is apparent the Guidelines do not necessitate an injured worker attending an examination as part of a work capacity assessment, though an insurer can require a worker to be examined. The fact the insurer did not require the applicant to attend a medical examination after the 130-week period is not inconsistent with work capacity assessments being undertaken, as the assessments may be based on available information.

59. The documents attached to the Application and those produced by the respondent include a number of medical certificates which were forwarded to the respondent by the applicant. The last certificate provides the applicant had no capacity for employment up to 16 August 2019.

60. In my view, the increase for indexation of the applicant's payments pursuant to section 38 is also supportive of the respondent having assessed the applicant as having no capacity for work.

61. The respondent argued it had produced its entire file, and that file disclosed no work capacity decisions were ever made. However, an examination of the documents produced reveal the complete file was not, in fact, produced. For example, the schedule of payments is incomplete, and there are plainly remittances missing from the documents produced.

62. I do not make that observation as a criticism of the respondent's legal representatives, who informed the Commission based on instructions that the entirety of their client's file had been produced. In those circumstances, there can be no criticism levelled at either the respondent's attorneys or counsel for any deficiency in the documents produced. Nevertheless, the submission by the respondent that the entirety of its file had been produced and therefore no work capacity decision had been made is plainly not sustainable, if for no other reason than the incomplete production of the payment schedule and remittances render the assertion of complete production having taken place incapable of being accepted.

63. Moreover, if there was evidence which obviated the inference I have drawn, that evidence was solely within the power of the respondent to produce, as it was the respondent's insurer which made the payments. No statement from any claims officer, past or present, has been placed into evidence which provides any explanation for payment to the applicant during the section 38 period, nor to explain why the payment schedule from time to time reflects an altered basis for payment made to the applicant during the section 38 period. There is also no explanation provided as to why payments ceased.

64. Absent such explanation, and in light of the evidence which I have set out above, I infer the respondent conducted work capacity assessments from time to time, and that the result of the last assessment preceding the cessation of the applicant's payments was the applicant had no capacity for employment and was entitled to receive weekly benefits at the rate of $2,040 per week.

Is there a dispute between the parties?

65. The respondent submitted there was no dispute between the parties, and as such it was not required to issue a section 78 notice. I reject those submissions. The applicant was in receipt of weekly compensation payments which the respondent ceased without reason. In my view, that constitutes a dispute. The fact the respondent's insurer did not issue a dispute notice pursuant to section 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) does not mean the fact of a dispute is not proven. Were that the case, it would be open to an insurer to simply cease communication with an injured worker at the time they ceased paying them compensation and thereby obviate the jurisdiction of the Commission by claiming the absence of a notice pursuant to section 78 means no dispute exists. That argument is plainly a logical fallacy.

The Commission's jurisdiction

66. The respondent also argued the Commission had no jurisdiction to hear a dispute beyond the 130-week period, or to determine the applicant's weekly benefits contrary to any work capacity decision. For reasons which I have already set out, I am satisfied the respondent did make work capacity assessments and decisions relating to the applicant and relevantly paid him on the basis that he had no capacity for employment up to September 2019.

67. The Commission is not asked in this matter to make a decision for the payment of weekly compensation contrary to an assessment made by the respondent's insurer. Rather, the Commission is asked by the applicant to make a decision in accordance with the work capacity decisions, the existence of which I have already indicated I am prepared to infer from the evidence put before me by the applicant and my acceptance of the submissions of Mr Tanner.

68. I also note the applicant's claim for weekly benefits is for a closed period which expires after the payment of 260 weeks' worth of benefits from the date they were originally paid pursuant to section 36 of the 1987 Act. Accordingly, there is no application of section 39 in the current proceedings.

69. I therefore determine the Commission has jurisdiction to hear the dispute between the parties. Had the respondent issued either a work capacity assessment limiting or ceasing the applicant's payments, the situation may be different, as the Commission could not act contrary to the insurer's assessment.

Cessation of weekly payments

70. Regardless of whether the respondent had been making payments to the applicant in error, or as I have inferred in accordance with work capacity decisions, section 78(1)(b) of the 1998 Act makes it clear an insurer must give notice of any decision to discontinue weekly payments. There is no evidence any such notice was provided, nor did the respondent suggest such a notice was provided to the applicant.

71. In my view, the respondent's cessation of weekly benefits without the provision of due notice was invalid and a nullity.

The applicability of section 53 of the 1987 Act

72. The respondent also argues the applicant is not entitled to weekly compensation by virtue of the operation of section 53 of the 1987 Act. The applicant argues the respondent has not obtained leave to raise a dispute not previously notified.

73. The respondent sought leave to raise the question of section 53 at the hearing. The parties made submissions in relation to it, including in written submissions. The applicant submitted leave should not be granted to the respondent, however, in the circumstances of this matter I accept the respondent's submission that the interaction between sections 38 and 53 of the 1987 Act was ventilated by the parties at the hearing. Moreover, the argument is a legal one and, in my view, does not require the Commission to take further evidence. In the circumstances, I intend to deal with the substantive arguments of the parties concerning section 53.

74. The respondent argued the applicant was disentitled to weekly benefits by virtue of the operation of section 53. I reject that submission for the following reasons.

75. The applicant did not leave Australia with the view to reside in China. The evidence discloses he left for the purposes of seeing family members and having a holiday. The fact that he is now detained in China does not, in my opinion, constitute him "ceasing to reside" in Australia.

76. Section 53 has no operation in this matter as the applicant was not in receipt of an award of weekly compensation. That phrase refers to an award by the Commission. As President Keating DCJ noted in *Paterson* at [108]:

> "A decision by an insurer cannot be conflated with a decision or award of the Commission for the purpose of satisfying a jurisdictional fact necessary to invoke the Commission's jurisdiction under s 53 of the 1987 Act. As the legislative history demonstrates, s 53 of the 1987 Act introduced the requirement that for an order under s 53 to be made by the Commission, the worker must be receiving or entitled to receive weekly payments of compensation "under an award"."

77. In this case, the respondent has assessed the applicant as being totally incapacitated and, for its own reasons ceased paying him. It is settled law that section 53 only applies to payments pursuant to an award of the Commission. There is no such award in this matter.

78. Accordingly, I do not accept section 53 has any applicability to this matter.

SUMMARY

79. For the reasons set out above, the Commission will make findings and orders as set out on page one of the Certificate of Determination.