

WORKERS COMPENSATION COMMISSION

INTERIM PAYMENT DIRECTION

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

Matter Number: 4236/20
Applicant: Brady Kochel
Respondent: Ready Workforce (a Division of Chandler Macleod) Pty Ltd
Date of Determination: 2 September 2020
Citation: [2020] NSWCCCR 7

The Registrar directs:

1. That the application for an interim payment direction is dismissed.

BACKGROUND

1. Brady Kochel sustained an injury to his left knee whilst employed by Ready Workforce (a division of Chandler Macleod) Pty Ltd (the respondent) on 18 February 2020. Following his injury, Mr Kochel received weekly payments of compensation.
2. On 11 May 2020, the respondent's insurer, Allianz, issued a notice under section 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) advising that a decision had been made under sections 43(1)(a), (b), (c) and (d) of the *Workers Compensation Act 1987* (the 1987 Act). That decision was a Work Capacity Decision (WCD) advising that:
 - (a) Mr Kochel had a current capacity to work in suitable employment for seven hours a day, five days per week based the certificates of capacity from Dr Chiwara.
 - (b) The identified roles of Despatching and Receiving Clerk, Warehouse Administrator, and Administrator Officer was suitable employment based on the Vocational Assessment Report of Prestige Health Services dated 24 April 2020 and applying the definition of suitable employment in section 32A of the 1987 Act;
 - (c) Mr Kochel could earn in suitable employment \$1,195.95; and
 - (d) That Mr Kochel's pre-injury average weekly earnings (PIAWE) were \$990.90.
3. The respondent said Mr Kochel had no entitlement to weekly compensation because his ability to earn in suitable employment was higher than 95% of his PIAWE. The WCD came into effect on 21 May 2020.
4. Mr Kochel, through his solicitors filed his Application on 31 July 2020. In his Application, Mr Kochel seeks weekly compensation from 22 May 2020 to date and continuing pursuant to section 37 of the 1987 Act.

PROCEDURE BEFORE THE COMMISSION

5. The parties attended a telephone conference on 18 August 2020. Mr Kochel was represented by Ms Renee Lawes, solicitor, and the respondent was represented by Mr Robin Young.
6. The parties were unable to reach an agreed resolution of the dispute. Ms Lawes made submissions and Mr Young made submissions in response. The proceedings were sound recorded.
7. I was satisfied that the parties to the dispute understood the nature of the application and the legal implications of the assertions made in the information supplied.

ISSUE FOR DETERMINATION

8. The issue in dispute is whether the applicant is able to return to work in suitable employment, having regard to the roles identified by the respondent.
9. There is no dispute that Mr Kochel is not able to return to his pre-injury employment. There is also no dispute that Mr Kochel's PIAWE is \$990.90.

EVIDENCE

10. The following documents were in evidence before the Commission and have been taken into account by me in making this determination:
 - (a) Application, and attachments; and
 - (b) Reply, and attachments;

APPLICABLE LAW

11. Part 5 of the 1998 Act sets out the process for expedited assessments in the Commission. Part 5 applies disputes referred to the Commission that concern weekly payments of compensation (section 295(1)(a)).
12. The Registrar is to presume that an interim payment direction for weekly payments of compensation is warranted unless it appears to the Registrar that, amongst other things, the claim concerned has minimal prospects of success (section 297(3)(a)).
13. A dispute concerning work capacity requires consideration of whether a worker has current work capacity. Section 32A of the 1987 Act relevantly defines "current work capacity" and "suitable employment" as follows:

"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."

"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 Workers Compensation Guidelines may specify, and
- (b) regardless of:
- (i) whether the work or the employment is available, and
 - (ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and
 - (iii) the nature of the worker's pre-injury employment, and
 - (iv) the worker's place of residence."

REASONS

Is Mr Kochel able to return to work in suitable employment?

14. On 18 February 2020, Mr Kochel, who was employed as a picker-packer, suffered an injury to his left knee during a work warm up routine, which involved throwing a football.
15. By 19 February 2020, his treating general practitioner, Dr Lazurus Chiwara, certified him as having capacity for some type of work on a regular basis, with restrictions (Reply page 1).
16. Mr Kochel consulted Dr Daniel Biggs, orthopaedic surgeon, who did not recommend surgery and opined Mr Kochel was able to complete office based duties, if offered, but was unfit for work that involved repetitive bending, twisting, kneeling, stair climbing or heavy lifting (Reply pages 30, 32).
17. The medical information, including the certificates of capacity support that Mr Kochel is able to work regular hours with restrictions.
18. Mr Kochel has not challenged the decision made by the respondent that he has a current capacity to work in suitable employment for seven hours a day, five days per week based on a certificate of capacity of Dr Chiwara. Mr Kochel's challenges the type of work that the respondent considers to be suitable employment.
19. On 24 April 2020, a detailed vocational assessment was undertaken by Prestige Health Services. The vocational assessment report concluded Mr Kochel has capacity for some type of work with certain restrictions having regard to his functional tolerances, education and training. The report identified vocational options as Despatching and Receiving Clerk, Warehouse Administrator, and Administrator Officer (Reply page 32).
20. On 4 May 2020, Dr Chiwara approved the vocational options for Mr Kochel as suitable employment for his return to work (Reply page 59).
21. In a statement dated 18 June 2020, Mr Kochel said the vocational options were not within his education, skills or work experience. He said he did not have "much" warehouse knowledge in relation to systems and procedures, he did not know how to enter data, and was not proficient in using a computer or warehouse software (Application page 28 – 29).

22. In a vocational assessment report dated 8 July 2020 Ms Georgie Lazaridis of the Workers Health Centre opined that the vocational options identified by Prestige Health Services were not suitable due to Mr Kochel's lack of prior experience in the proposed fields and his basic to intermediate computer skills (Application, page 30 – 31).
23. During the proceedings, Mr Kochel submitted the vocational options were not suitable employment because he does not have the requisite education, skills or work experience. Mr Kochel submitted he has no prior work experience in the vocational options and has never worked in an office-based role. He reiterated his computer skills were basic and limited to Microsoft Word.
24. I have considered the following matters in determining whether Mr Kochel is able to engage in suitable employment of the type proposed by the respondent:
- (a) The nature of Mr Kochel's incapacity is the subject of evidence from both Drs Chiwara and Biggs. Both doctors give evidence that Mr Kochel has capacity for some type of employment with restrictions of lifting up to 3kg, avoiding prolonged standing and avoiding pushing/pulling. Mr Kochel's physical capabilities are consistent with the suggested vocational options;
 - (b) Mr Kochel is 21 years old. Whilst completing year 12 he obtained Certificate II in Outdoor Recreation and Certificate II in Tourism through NSW TAFE. In 2017 Mr Kochel completed Certificate III in Process and Manufacturing. Whilst Mr Kochel is a relatively young worker, he has demonstrated to have applied himself to acquiring these certifications. I infer that completion of such courses would require using computers;
 - (c) Mr Kochel's claim to have limited computer skills is not consistent with the vocational assessment report of Prestige Health Services, which records he confirmed he was computer literate and able to operate Microsoft Office applications and utilise search engines, email and smartphone applications (Reply page 39). It is also inconsistent with Ms Lazaridis' report, which records Mr Kochel has basic skills with Excel, intermediate skills with Word, intermediate skills with email and internet and basic skills with PowerPoint. According to Ms Lazaridis, Mr Kochel advised "he is not familiar with any other software but is confident that if he were provided with training in any software, he could pick it up relatively quickly" (Application page 36). Both vocational assessment reports record Mr Kochel has provided assistance to family and friends with computers (Application page 36; Reply page 36);
 - (d) As a young man who has completed post-school education, including a Certificate III in process and manufacturing, Mr Kochel would have the requisite skills to be able to operate the basic computer programs required to perform the identified roles. The identified roles do not require a high level of technical ability or use of complex computer programs or systems. Mr Kochel has basic to intermediate computer skills and would be capable of acquiring knowledge about use of required programs to enable him to perform routine tasks such as documenting incoming stock onto Excel spreadsheets or entering data into a computer. I am not persuaded that any shortcoming of computer skills would be a barrier to Mr Kochel undertaking suitable employment in the types of roles identified;

- (e) Whilst Mr Kochel does not have work experience in the identified roles, this is not a factor that weighs in favour of the roles not being suitable. The roles do require any formal qualifications or industry experience. Mr Kochel has completed year 12 and the above courses, including a Certificate III in Process Manufacturing which provides the competencies required by advanced production workers who use a range of equipment and provide support functions directly related to producing products;
- (f) I reject Mr Kochel's submission that the need for him to undertake training to perform the identified roles proves the employment is not suitable. A lack of work experience in a proposed role does mean the role is not being suitable. The test under section 32A requires consideration of the nature of the proposed role, having regard to the worker's age, education, skills and work experience, regardless of the nature of the pre-injury employment;
- (g) I reject the opinion of Ms Lazaridis that the roles are not suitable for Mr Kochel. I find that the lack of computer or data entry skills or previous employment is not a barrier to the roles being suitable. Ms Lazaridis has also based her opinion on a number of irrelevant considerations, such as the limited availability of jobs on the open labour market.

25. For the above reasons, on the evidence before me, I find that Mr Kochel has current work capacity and is able to return to work in suitable employment as a Despatching and Receiving Clerk, Warehouse Administrator, and Administrator Officer. Mr Kochel's physical capabilities are consistent with these vocational options. I accept the evidence, which is not contradicted, that the average weekly earnings of the Despatching and Receiving Clerk and Warehouse Administrator exceed Mr Kochel's PIAWE.

26. Accordingly, I find that the presumption that an interim payment direction for weekly payments of compensation is warranted is displaced, because the applicant's claim has minimal prospects of success: s 297(3)(a) of the 1998 Act.

27. I decline to make an interim payment direction.

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

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

