

WORKERS COMPENSATION COMMISSION

INTERIM PAYMENT DIRECTION

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

Matter No: 4247/20
Applicant: Hossein Bokan
Respondent: Coles Supermarkets Australia Pty Ltd
Date of direction: 24 August 2020

The Registrar directs:

1. I decline to make an interim payment direction.

Background

2. Mr Bokan, born in Iran in 1960, came to Australia at the age of 27 and has lived here since. He speaks and reads English but he self-described his language skills as basic. However, he participated in the teleconference without the aid of an interpreter.
3. Since arriving in Australia, he has worked mainly for two employers. For 14 years, he was employed by Toyota in various roles, ending his career with them in 2002 as a team leader. He then commenced work with Coles, working with them until he was dismissed on 31 October 2019 as he was unable to return to his pre-injury position and there were no other suitable positions available.
4. Mr Bokan's injury occurred on 9 July 2015 when was working in the delicatessen area at Coles Manly Vale. He slipped on chicken fat, rolling his right ankle. He tried to rest his foot over the next few days, but returned to work and on his next shift, reported the injury.
5. Eventually the injury led to surgery on 28 November 2016. Dr Carmody performed a right ankle arthroscopy, lateral talar dome debridement and repair peroneus brevis with tenosynovectomy. The surgery was initially reported as having "gone well", but by February 2017, it was noted that Mr Bokan was "making quite slow progress from his surgery". There appears to have been a reliance on a cam boot, against the suggestion of his treating physiotherapist (report dated 27 February 2017).
6. By 11 April 2017, Dr Carmody report that Mr Bokan was going quite well but recently his ankle "is giving way without any clear reason", which also involved pain. He was referred for an MRI and orthotics. By June 2017, Mr Bokan was still reporting pain around his lateral hindfoot, and planned to take four months off on long service leave (report of Dr Carmody dated 27 June 2017).
7. On further review in November 2017, Dr Carmody reports Mr Bokan's ongoing ankle pain, and opines that there is nothing surgical that he can offer him. He notes that "it seems clear given the nature of Hossein's job and the nature of his symptoms these are not compatible" (report dated 21 November 2017).
8. He sought a second opinion from Dr Wines, who said he was "approaching the stage" where he would require further, more complicated surgical intervention (report dated

22 January 2018). On review with Dr Carmody on 22 May 2018, Mr Bokan suggested that he did not want another operation.

9. By 15 October 2019, Dr Carmody suggested that Mr Bokan had reached maximum medical improvement. When he presented on that day, Dr Carmody opined that “he seems not to have improved at all since I last saw him”.
10. Mr Bokan has been in receipt of weekly payments for a number of years and is currently in the section 38 period (being after 130 weeks). On 23 April 2020, Coles issued a section 78 notice on the basis of a work capacity assessment, with the result that Mr Bokan’s weekly payments were reduced to nil from 3 August 2020.

Issues in dispute

11. The parties are agreed as to the applicant’s PIawe, being \$1,245.52. The applicant contends that Mr Bokan has no current work capacity and the work capacity decision should be set aside.

The legislation

12. In considering this matter, I am applying the relevant sections as those in force prior to their amendment by the *Workers Compensation Legislation Amendment Act 2018*. References to sections in this decision will reflect the legislation as it was and as is applicable in relation to these proceedings.
13. Clause 7 of Part 19L of Sch 6 to the *Workers Compensation Act 1987* (the 1987 Act) provides that:

“the earnings amendments (other than Schedule 3.1[10] to the amending Act) do not apply to an injury received by a worker before the commencement of the amendments.”

14. Section 32A of the 1987 Act provides the following relevant definitions:

“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 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."

15. Section 297(1) of the 1998 Act provides:

"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*."

The evidence

Mr Bokan's statement

16. I have recounted Mr Bokan's employment history under "Background" above. This is taken from Mr Bokan's statement. In his statement, Mr Bokan also reports the ongoing issues he had with pain following his ankle injury, and the effects of the surgery, which ultimately proved to be unsuccessful.

17. Mr Bokan describes the suitable duties Coles provided him (which I note are a requirement under the legislation) as "making up a job for me to do because I was on workers compensation". Mr Bokan goes on to state:

"Coles employs thousands of people all over the country in many Coles roles requiring various degrees of physical activity. The fact that Coles could not find anything for me to do made me realise how serious my restrictions were. I began to worry that I would never find work anywhere else. I began regularly applying for jobs outside of Coles (mainly in customer service)."

18. Mr Bokan then goes on to outline his attempts to find suitable work within his restrictions, noting that he has applied for over 200 jobs. From these applications, he has had a few phone interviews, but no job offers. Mr Bokan states that no one would want to hire someone in customer service with his medical restrictions, especially given his age.

19. The general tenor of the statement is that in his own opinion, Mr Bokan is unemployable, although willing to work in suitable employment if it were available and offered to him.

The reports of Dr Carmody

20. I have discussed the ongoing complications of Mr Bokan's work injury above. The majority of that history was taken from the various reports of Dr Carmody, Mr Bokan's treating surgeon.
21. In addition to the history recorded concerning the ongoing complications arising from Mr Bokan's injury, Dr Carmody also notes the poor result from surgery, and the lack of reasonable treatment options to improve Mr Bokan's condition. The most recent report, dated 15 October 2019, summarises Dr Carmody's ultimate conclusion, after treating Mr Bokan for a number of years, quite succinctly:

"He seems not to have improved at all since I last saw him. It has now been four years since his injury and I think he has reached maximal medical improvement. As previously outlined in my prior consultations, I do not think there is any role for surgery and I do not think he is really going to improve from here. The symptoms that he has now which seem to prevent him from being able to return to work, I suspect will remain. It may be time for him to have a final assessment by the insurers. There is nothing further that I can add to his treatment I am afraid."

The certificates of capacity

22. A number of certificates of capacity are attached to the Application, including dating back to 2010, for an unrelated left knee injury.
23. The most recent certificate of capacity, signed by Mr Bokan's treating GP Dr Artinian, for the period 18 May 2020 to 18 August 2020, records Mr Bokan as being capable of working for 4 hours a day, 4 days a week in some type of employment, with the following restrictions:
 - (a) lifting/carrying – 5kg;
 - (b) standing – no more than 0.5 hours;
 - (c) pushing/pulling – to avoid;
 - (d) bending/twisting/squatting – to avoid;
 - (e) driving – not able, and
 - (f) to wear comfortable shoes.
24. This is described as a permanent modified duties certificate.

Reports of Dr Machart

25. Dr Machart, an independent medical expert, provided three reports on behalf of the respondent.
26. In his report dated 14 February 2018, he records a history of injury occurring on 14 July 2015 involving a slip on an oily floor in the deli department of Coles. Dr Machart refers to the surgery provided by Dr Carmody and records:

"Mr Bokan reported that he was no better after the operation. He had more physiotherapy. He continued to suffer pain in the right ankle, apparently worse

since the operation, widespread anterolateral, now also posterior and anteromedial. There has not been much change in the severity of his condition in the recent past.”

27. At the time of this report, Mr Bokan was working light duties, 4 hours per day 4 days per week.

28. He provides the following diagnosis:

“Mr Bokan suffered an inversion injury to the right ankle. There is evidence of osteochondral lesion, repaired peroneous tendon and scarring around the lateral ligament complex.

The severity of the pain and disability was not in keeping with objectively defined pathology. These type of injuries can be of nuisance value or may be limiting capacity for running and to some degree walking, but not to the extent described as inability to walk more than 60 metres. This is difficult to explain despite the pathology evident.”

29. In response to a question concerning fitness for pre-injury duties, Dr Machart opines:

“Mr Bokan is fit for full-time work. I would encourage him to return to full-time work with physical limitation essentially predominantly sedentary job, no more than half of his working time standing or walking with opportunities to sit down. He is fit for customer service with the provision of a stool, which would be helpful, administrative work, mark downs, code checks, walking and standing, as outlined above.”

30. Dr Machart suggests that Dr Carmody’s indication that he should look at permanently modified duties “may be reasonable if there is no suitable work available within his current work environment”.

31. In a report dated 20 March 2018, Dr Machart comments on the report of Dr Wines who recommended surgery. He describes it as “reasonably indicated to tackle the pathology” but that he “personally would be reluctant to offer him surgery”. He opined that it was “highly unlikely there will be full recovery”, and that the prognosis was guarded.

32. In his report dated 25 November 2019, Dr Machart records that the severity of Mr Bokan’s symptoms had increased since the previous assessment. When asked to consider the certification of Dr Artinian, he comments:

“While empirically agreeing that there may be some degree of pain when standing for lengthy periods of time, standing limitation at half-an-hour appears reasonable, interspaced with opportunity to sit for 5 minutes. I did not see validity of stipulating limitation of working hours 4 hours per day, 4 days a week. There does not appear to be medical reason for limiting working hours, providing limitation of physical capacity is observed, if necessary limiting standing capacity further, in order to achieve full-time employment”.

33. Dr Machart opined that Mr Bokan had the capacity to complete the roles of customer service manager, production/workshop manager and practice manager on a full-time basis.

34. Dr Machart assessed whole person impairment at 4%.

Transferrable skills assessment report

35. Ms Wendy Kurta, a rehabilitation consultant, provides a report dated 24 August 2018 concerning Mr Bokan. The purpose of the assessment was described as:

“The purpose of assessment is to undertake an analysis of transferable skills identified through assessment, review of medical, functional, training and qualification information and interview with Mr Hossein Bokan. In doing so, appropriate return to work vocational options are identified. Rehabilitation Services contacted Wesfarmers Group Work Cover on 17.08.2018 to confirm that there will be no Labour Market conducted at this stage. Suitable employment options and a supplementary Labour Market Analysis report will be provided pending upgrades to Mr Bokan’s capacity and restrictions.”

36. The report considers the certificate of capacity of Dr Artinian and the supermarket tasks analysis prepared by Coles. In respect of Mr Bokan’s language skills, it is recorded:

“Mr Bokan’s English verbal communication skills were observed to be strong as he spoke in a coherent manner and displayed confident communication skills, without the aid of an interpreter.”

37. In respect of the Orebo Musculoskeletal Pain Questionnaire, it was reported:

“These findings suggest that Mr Bokan has expressed avoidant and fear behaviours in relation to completing daily activities and has expressed beliefs that his pain will become persistent despite treatments including medication. Further, Mr Bokan has expressed beliefs that he will not be able to return to work within the next six months, despite currently performing his role as a Duty Manager.”

38. Mr Bokan’s employment history is recorded in detail:

- (a) 1987-1989 – car detailer with Toyota;
- (b) 1989-1992 – air conditioning repair/maintenance with Toyota;
- (c) 1992-2002 – team leader in repairs of air conditioning with Toyota;
- (d) 2002-2003 – floor staff with Coles;
- (e) 2003-2005 – night fill captain with Coles, and
- (f) 2005-date of injury – duty manager with Coles.

39. English language proficiency testing was performed, in which Mr Bokan scored poorly. The results were interpreted to indicate:

“As per the results of the Congruence Occupation Reading Test, Mr Bokan is not likely to be suitable for most clerical positions in terms of his reading ability. The results indicate that he could work in a factory or undertake driving work. His reading is likely to be limited to basic work documents such as dispatch notes and standardized forms. However, Mr Bokan has extensive experience within managerial roles at Toyota and Coles, which would require at least incidental reading ability to fill out shrinkage reports, rosters or dispatch notes.”

40. The roles of customer service manager, production/workshop manager and practice manager were considered, and in each case, in the opinion of the author, were suitable for Mr Bokan.

The labour market assessment report

41. The respondent relies on this report, dated 4 February 2020, prepared by Mr Joseph Lennon, described as “Area Manager – Sydney Metro”. The report considers the transferrable skills assessment report, discussed above.
42. The purpose of the assessment was described as “to assist in determining viability of a vocational goal via review of national statistics and real world labour market contacts”. Three vocational options are considered:
 - (a) information officer;
 - (b) tourist information officer, and
 - (c) customer service representative.
43. The analysis involved telephone contact with multiple employers, review of advertised positions on online job portals, and analysis of ANZSCO statistical data and job outlook.
44. The author contacted a variety of employers on 3 February 2020 and discussed matters with each including the duties undertaken, the functional requirements, the educational or licensing requirements, the key skills required for employment, whether Mr Bokan would be a good candidate for the role, the hourly rate and whether there were any specific age requirements associated with the role.
45. The report summarises that the three identified vocational options would be suitable employment for Mr Bokan.
46. The report was sent to Dr Artinian for his sign off. In each case he approved the roles as suitable so long as the restrictions placed in his certificate were complied with and available in the roles identified.

The late evidence

47. Prior to the teleconference, Mr Bokan filed an Application to Admit Late Documents evidencing his various unsuccessful job applications made.

Submissions

The applicant

48. The applicant first referred to the statement prepared by Mr Bokan. He was born in Iran in 1960 and came to Australia in 1987 at the age of 27. He has basic English literacy skills, and no formal qualifications. His two significant employers in Australia have been Toyota and Coles, where his roles were not really in customer service, but in management.
49. Counsel referred to the suboptimal result from surgery which left him with significant problems. He was unable to return to his previous employment and suitable duties were withdrawn, ultimately leading to his termination from Coles.

50. The applicant referred to the size of Coles as a national employer and submitted that if Coles couldn't find Mr Bokan a position, it is not surprising that he could not find a job elsewhere. He has applied for over 200 jobs and has not had any success.
51. The applicant's case is predicated on the position that Mr Bokan has "no current work capacity" as defined in section 32A of the 1987 Act. The certificates of capacity say he can work, but he has significant restrictions placed on him by his treating general practitioner.
52. The section 78 notice is based on a vocational report, which the applicant submits is a conglomeration of jobs found online. The applicant submitted that the report could be given little weight on the basis that elements of the report clearly involved cut and paste and exact sentences are repeated time and again.
53. Regarding the customer service type roles identified, it was submitted that jobs in customer service are not suitable based on the relevant factors in section 32A of the 1987 Act. Whilst Dr Artinian has signed off on the roles, one can assume he has signed off without being given any detail of the jobs.
54. The applicant submitted that taking the material as a whole, the applicant can not be considered to be suited for any of the roles since he left his employment with Coles.
55. With regard to the certificates of capacity provided by Dr Artinian, the applicant submitted that I would not be bound by the certificates, but per the definition in section 32A, that is just one factor to take into account. The appellant identified item (a)(ii) of the definition (the age, education, skills and work experience) of Mr Bokan as the major factor for consideration. The applicant submits there is nothing available to him based on his restrictions and experience. When one takes into account the definition of suitable employment, Mr Bokan has no work capacity as defined in section 32A.
56. The applicant referred to *Wollongong Nursing Home Pty Ltd v Dewar* [2014] NSWCCPD 55 (*Dewar*) at [59] to [63] and submitted that the job identified must be real and not theoretical.

The respondent

57. In reply, the respondent submits that the applicant has received in excess of 190 weeks of weekly payments, putting him in the section 38 period. The applicant does not satisfy the requirements of section 38(3), in that he has a current work capacity, has not returned to work for at least 15 hours per week/is earning \$155 per week, and is not likely to continue to indefinitely be incapable of undertaking further additional employment. The basis of the work capacity decision is that Mr Bokan does not meet the requirements of section 38(3).
58. The respondent submits that Mr Bokan has capacity to return to work, referring to the certificates of capacity of Dr Artinian, which have not changed for a long period, as well as the report of Dr Machart. With regard to that report, the respondent submits that I could consider Mr Bokan capable of working 38 hours per week, based on the opinion of Dr Machart.
59. The respondent relies on the transferrable skills analysis. The respondent submits that I can consider all jobs identified, being information officer, tourist information officer and customer service representative. Prospective employers say that he is suitable. Dr Artinian has also signed off on the roles identified, and it was noted that the entire report was sent to Dr Artinian.

60. The respondent submits that essentially all the applicant can rely on is his statement evidence.
61. In respect of the applicant's evidence of job seeking, the respondent submits that a number of these records indicate that Mr Bokan is applying for unsuitable roles, including driver when he has limited access to a car. In those circumstances, I should give little weight to the number of unsuccessful job applications made by Mr Bokan.
62. The respondent submits that the roles identified in their section 78 notice are not supermarket roles, acknowledging that those roles are diverse and would require the performance of tasks outside Mr Bokan's restrictions. It is for that reason that the customer service roles were identified and relied on. Customer service roles in other industries could be suitable based on Mr Bokan's medical restrictions. In his role with Coles, Mr Bokan handled customer enquires and had capacity to do so in other roles.
63. The respondent submits that there is no medical evidence from the applicant other than the certification of his general practitioner, and there is no evidence to counter the vocational evidence obtained by the respondent.

The applicant in response

64. The applicant addressed the respondent's submissions going to the job applications in response. He submits that although there may well be a scattergun approach to the applications, Mr Bokan has been genuine in his attempts. Mr Bokan wants to work, but there is simply nothing out there suitable for him.

Discussion

65. Medically, it is clear that Mr Bokan had a poor result from the surgery undertaken following his ankle injury in 2015. He has persisting pain and significant and ongoing restrictions on his capacity.
66. Mr Bokan has also worked with two employers (excluding his very brief period as a tyre fitter when he first came to Australia) in his working career in Australia. I have limited information about his employment before he came to this country, but it has not been relied on in any of the documents leading to the work capacity decision.
67. The section 78 notice determined that Mr Bokan has some capacity for work, and in accordance with section 38(3), he is not entitled to ongoing weekly payments. The applicant's case is that due to Mr Bokan's medical restrictions, as well as his skills, experience and qualifications, there is no suitable employment available to him and accordingly he has no work capacity.
68. In considering whether suitable employment is available, there are certain factors that I can consider and certain factors that I cannot consider, according to section 32A of the 1987 Act.

The nature of the incapacity

69. Mr Bokan's treating general practitioner has certified him fit for suitable duties, four hours a day, four days a week. He has also placed a number of restrictions on the activities he can undertake in employment, outlined at [23].

70. Dr Machart, who provided an opinion on behalf of the respondent, opined in 2018 that Mr Bokan was fit for full-time work, provided the job is predominantly sedentary with no more than half of the time standing or walking.
71. In his report from 25 November 2019, Dr Machart stated that “There does not appear to be medical reason for limiting working hours, providing limitation of physical capacity is observed”. He did agree that a standing capacity of half an hour seemed reasonable.

The worker’s age, education, skills and work experience

72. Mr Bokan is approaching 60 years of age. This, along with his medical restrictions, is no doubt contributing to his lack of success in applying for jobs.
73. His education is limited, having completed studies in Iran and having no formal qualifications of note.
74. However, Mr Bokan has extensive transferable skills that he has gained on-job during the course of his career, first through Toyota and then with Coles. Whilst it seems that some of the skills outlined in the Transferable Skills Assessment report are “skills” in the loosest sense (such as “well presented” and “light cleaning”), some are particular relevant, including Mr Bokan’s 20 years of experience in managerial positions and the skills associated with such roles.
75. Likewise, Mr Bokan’s work experience provides him with a competitive resume, having had, until his injury, a consistent career with two separate employers. The nature of his duties at Coles, in particular, have been considered and relied on in the section 78 notice.
76. Mr Bokan speaks and writes English at a fairly basic level, but does not require the aid of an interpreter and has worked in customer-facing roles with Coles for a number of years.

Plans or documents prepared as part of the return to work process

77. I have not been referred to any return to work plans and no relevant documents are before me under this heading.

Occupational or rehabilitation services

78. As far as I am aware Mr Bokan is not currently being provided with any occupational or rehabilitation services. He is self-managing the ongoing effects of his injury.

Decision

79. The volume of evidence in this case is strongly in favour of the respondent, particularly medically. Dr Artinian, Mr Bokan’s treating general practitioner, has consistently certified Mr Bokan as fit for suitable duties for an extensive period of time (from my understanding, since his employment was terminated with Coles). The certification of 16 hours per week means that were Mr Bokan employed (and earning more than \$155), he would meet the requirements of section 38(3) of the 1987 Act.
80. Dr Artinian has also accepted the roles proposed in the labour market assessment as suitable, so long as his restrictions placed in the certificate of capacity are complied with.

81. Taking it further, Dr Machart has opined that Mr Bokan is able to work full time, presuming that he is not required to stand for more than 30 minutes. He suggested that Mr Bokan was fit for a customer service role with the provision of a stool. Dr Machart also assessed Mr Bokan as suffering from 4% whole person impairment, which in the scheme of workers compensation injuries, is relatively low. That is not to suggest that Mr Bokan's complaints of pain and ongoing symptoms are not real and significant. The assessment of impairment often does not reflect the disabling effects an injury can have on a worker.
82. The respondent, consistent with their obligations, has performed a number of assessments and relied on those in making their determination outlined in the section 78 notice. I have found the transferable skills analysis report to be quite thorough and well considered. The report acknowledges Mr Bokan's basic English literacy skills (particularly written) but also recognises that he has worked in roles dealing with people in the past. In each of the roles identified, the suitability of that role is considered in detail. The author also liaised with an occupational therapist who confirmed each role would be suitable, in consideration of his medical issues.
83. The report acknowledged that Mr Bokan failed to specify any administrative responsibilities in his roles with Coles, but based on a task analysis for each role, it was apparent that he would have performed duties consistent with those functions. The report concludes with the following:
- "With the proposed sedentary vocational options, Mr Bokan is unrestricted in his physical capacity to perform the relevant duties. The roles do not require significant lifting or carrying, bending, twisting, pushing or pulling. All proposed vocations are primarily seated and does not (sic) require Mr Bokan to stand for lengthy periods at a time. The WorkCover Certificate of Capacity reported no cognitive restriction and Mr Bokan has presented strong mental abilities in his managerial and supervisory duties, making him a good candidate for the aforementioned job roles."
84. The respondent also relied on a labour market assessment report dated 4 February 2020. The applicant addressed submissions to the weight that could be placed on the report and to some extent I am in agreement with those submissions. I find it difficult to consider that Mr Joseph Lennon – Area Manager, Sydney Metro, is an "expert" in the commonly used sense of the word in this jurisdiction. He does not appear to have any special qualifications or skills that he relied on in the preparation of the report – rather he seems to have called a variety of prospective employers and recorded what they apparently told him. I am galvanized in this view by the repeated use of the following (indicating that apparently multiple contacts shared an identical view, expressed in identical words):
- "The employer contact stated that Mr Bokan's 13 years of customer service experience at Coles where he progressed from floor staff to Duty Manager, effective communication skills and basic computer skills are suitable for the role."
85. However, aspects of the report are highly relevant to my consideration, namely the summary of duties required in each role and how they interact with Mr Bokan's medical restrictions.
86. Dr Artinian has signed off on the proposed roles identified in that report. The respondent indicated that he had been sent the entire report and considered it before adding his signature. Although the weight that can be given to the report in terms of the availability of jobs is quite low, the fact that the tasks required for each role are

listed and have been considered by Dr Artinian gives greater weight to his approval. Had he not been provided with the list of tasks and duties, I am not sure how much weight I could give to his approval.

87. Having considered all of the evidence, I am satisfied that Mr Bokan has a “current work capacity” as defined in section 32A. He is able to return to work in suitable employment.
88. I am satisfied that the role of customer service representative, as identified in the section 78 notice, is suitable employment per the definition in section 32A of the 1987 Act.
89. Mr Bokan has experience in dealing with customers as a duty manager at Coles, the role he was performing when he was injured. In the transferrable skills report, he self-reported that he would handle customer complaints and requests. The Coles tasks analysis also reports “light customer service” and “customer door greeting” as duties required in the role. Mr Bokan was employed as a duty manager for 10 years before his injury, and in that time I am satisfied that he has developed the skills necessary to perform the role of customer service representative.
90. A number of specific jobs identified in the labour market assessment report I would consider suitable. For example, the role at Tweed City Shopping Centre requires answering questions, providing service to centre visitors, and other matters dealing with visitors to the centre. Mr Bokan’s experience at Coles would be relevant here. The same can be said for the duties outlined in what appears to be similar roles with Stockland Shopping Centre and AMP Capital Shopping Centre. I note the location of these roles, but I am unable to consider Mr Bokan’s place of residence under section 32A.
91. Further to the above, the applicant has not tendered any evidence to counter that provided by the respondent (other than his statement). The applicant bears the onus of proof in this case. Absent any supporting evidence, combined with the weight that I have given to the evidence before me including the transferrable skills analysis and the GP sign off provided by Dr Artinian, that onus has not been met.
92. The applicant highlighted the fact that given that Coles were unable to offer Mr Bokan continuing employment, it is unlikely he would be successful in finding employment elsewhere. I accept the respondent’s submissions in response. The type of duties required at Coles are mixed and may involve lifting and completing actions outside of Mr Bokan’s restrictions. I do not think the fact that Coles terminated Mr Bokan on the basis that he was unable to complete the requirements of his role is fatal to the respondent’s case. They have deliberately identified customer service roles outside of supermarket positions.
93. The applicant filed a large bundle of material in an Application to Admit Late Documents, being evidence of the jobs that he has applied for and been unsuccessful in receiving offers. I have no doubt that Mr Bokan is genuine in his desire to work. However, I am mindful of the nature of those job applications. As the respondent pointed out, a number of them are clearly inappropriate considering his restrictions and his qualifications. Further, I am not sure what weight I can give to the number of unsuccessful job applications a worker has made, outside a qualitative analysis of why those applications have been unsuccessful (for example, by comparing the application and resume provided by Mr Bokan with the feedback given by the employer).

94. The applicant relies on *Dewar*. I do not think that *Dewar* is presently relevant. The respondent has not identified a theoretical job or a conglomeration of duties that Mr Bokan is capable of completing. They have identified a specific role that I have accepted is suitable (customer service representative). The labour market analysis report shows that this is a real job. Deputy President Roche provided in *Dewar*:

“Thus, the task requires the identification of whether there are any “real jobs” (*Giankos v SPC Ardmona Operations Ltd* [2011] VSCA 121 at [102]) which, having regard to the matters in sub-s (a) of the definition, the worker is able to do, regardless of whether those jobs are “available” (to the worker) or are “of a type or nature that is generally available in the employment market”. The Arbitrator did not properly undertake that task and did not resolve the conflict in the evidence about the nature of the light duties Mrs Dewar performed (see [4] and [5] above).”

95. Accordingly, *Dewar* does not assist the applicant.
96. As the applicant has not met the onus to prove, 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 PARNEL McADAM, REGISTRAR'S DELEGATE, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

