

WORKERS COMPENSATION COMMISSION

INTERIM PAYMENT DIRECTION

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

Matter No: 4610/20
Applicant: Carlin Hall
Respondent: Crew Services Group Australia Pty Ltd
Date of direction: 11 September 2020
Citation: [2020] NSWCCR 9

The Registrar directs:

1. I decline to make an interim payment direction.

Background

2. Ms Hall was in the employ of the respondent, building a merchandising display, when suffered quite a severe injury on 3 April 2019. Ms Hall slipped on a wet floor, contaminated by what she thinks was shoe polish. She suffered an injury to her left knee, which had previously been subject of an ACL reconstruction in 2015.
3. After consulting with her general practitioner, noting her continuing pain, Ms Hall was referred to an orthopaedic surgeon, Dr Sunner, who had performed the previous ACL reconstruction. Dr Sunner noted that in the long run she would need to have a revision ACL reconstruction, surgery which was performed on 24 June 2019.
4. Ms Hall proceeded through the appropriate recovery from that surgery, including physiotherapy, and her capacity, as certified in certificates, has increased over that time. On 6 May 2020, the respondent issued a work capacity decision which determined that Ms Hall had capacity for employment and identified the vocational options of receptionist, concierge and call contact centre operator as suitable employment.

Issues in dispute

5. The issue in dispute in these proceedings is whether Ms Hall is capable of working in the suitable employment identified by the respondent in their section 78 notice.

The legislation

6. As this dispute concerns suitable employment, I must consider the definition in section 32A of the 1987 Act:

“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."

7. 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

8. On review of the medical evidence attached to the application, it is clear that there is a consistency amongst opinions that Ms Hall is capable of returning to some sort of employment, and that she is not currently fit for her pre-injury duties. The proceedings were mainly focussed on (a)(ii) within the definition of suitable employment in section 32A, but it is still appropriate to briefly discuss the medical evidence attached.

Certificates and responses from Dr Igbojiaku

9. Dr Igbojiaku is Ms Hall's treating general practitioner. As indicated above, Ms Hall has proceeded quite well through her recovery from surgery. The earliest certificate of capacity attached to the application is for 27 September 2019 to 25 October 2019, which certifies Ms Hall as having no current capacity for any work.

10. Meanwhile, the most recent certificate of capacity that I can decipher covers the period 2 July 2020 to 30 July 2020, and certifies Ms Hall as having capacity for some type of work for 6 hours a day 4 days a week (noting that there is a later certificate attached to the Reply, covering a period in August, that is unreadable).

11. The July certificate places the following restrictions on Ms Hall's capacity for activities:

(a) Lifting/carrying 9kg;

(b) Pushing/pulling of 9kg

(c) Standing tolerance 45 minutes, and

(d) Allowed to squat.

12. Dr Igbojaiku has, throughout the course of Ms Hall's injury, responded to questionnaires posed by the insurer and vocational providers.
13. On 26 January 2020, he approved the roles of receptionist and call or contact centre operator as appropriate, without commenting, whilst not approving sales representative.
14. The same two roles were again approved on 5 February 2020, with the additional role of admissions clerk being approved.
15. Receptionist, concierge and call or contact centre operator were approved on 24 March 2020, with receptionist being circled (although with no explanation or indication why).

Reports of Dr Sunner

16. Dr Sunner is Ms Hall's treating surgeon. Prior to her work injury, he had previously performed an ACL reconstruction on her left knee. Following that surgery, she was able to get back to her normal activities. On initial consultation, on 22 May 2019, he advised that she first needed physiotherapy to improve her range of motion, but would eventually need a revision ACL reconstruction.
17. On 24 June 2019 that operation was performed, "without any complications". On her six-week review, Dr Sunner noted that she needed to exercise her quadriceps to improve control.
18. By 11 September 2019, Dr Sunner noted that she had regained full motion of the knee. In regard to her pre-injury employment, he states:

"while the lifting and carrying itself is not an issue, it is what happens after you pick something up, if you are going to be twisting on that knee, then she is not able to do that type of work".

19. On 22 January 2020, Dr Sunner indicated that he was:

"happy to her to start resuming work but she should avoid any activities that require her to uncontrolled twisting against heavy objects such as pushing heavy trolleys etc. Simply loading and unloading the shelves or constructing the shelves should be fine to do".

Report of Dr Ian Smith

20. Dr Ian Smith provides an injury management assessment report following an assessment that occurred on 24 March 2020.
21. At the time of the assessment Ms Hall was certified as fit for work 6 hours a day, 3 days per week. He records the following:

"However, she does function all day, every day and with that in mind she is happy to get a certificate for her pre-injury hours with appropriate restrictions on her walking, standing, twisting, etc. She will do this when she next meets with her general practitioner.

She said she has already been looking for work. She thought she might want to get into aged. Meanwhile she is applying for various retail outlets but does not expect to get work due to the employment downturn from the ongoing pandemic."

22. He recommends that “she potentially will struggle with long hours of standing and with that in mind the return to work goal should be pre-injury hours in a job which does not involve so much time on her feet, less pushing and pulling and less squatting.”

Report and certification of Megan Tomkins, Physiotherapist

23. In a report dated 7 May 2020, Ms Tomkins records that Ms Hall is “currently on track with a 12 month rehabilitation usually required following ACL reconstruction”. I note the 12 month rehabilitation would have been completed towards the end of June 2020. Ms Hall had not been cleared for twisting, changing of direction or climbing up and down steps.
24. Ms Tomkins was also asked to complete a medical questionnaire, which she signed on 28 May 2020. In that, she opined that her current work capacity was 6 hours per day, 4 days per week, with 10kg lifting and pushing/pulling, 1-2 hours standing, no twisting, but bending + squatting as tolerated. She indicates that Ms Hall’s prognosis to return to pre-injury duties was good, and anticipated the timeframe to be 8-10 weeks (which would be the end of July to the start of August).

Report of Dr Charles New

25. Dr New provides a report dated 1 September 2020. The report was obtained by the applicant on the morning of the teleconference that took place in this matter. The applicant had emailed a copy of the report to the respondent, who took no objection to its admission and did not require the opportunity to obtain further evidence. A copy of the report was emailed to me by Mr Morson, the applicant’s solicitor, during the teleconference, and was admitted into the proceedings at that time.
26. Dr New records a history of injury consistent with the other evidence, and notes that “she continues to have quite debilitating pain in her knee and has been considered unfit for her normal duties, but could return to light duties”. He records that she can only lift very light weights of 3-5kg, walk for approximately 100 metres, and sit or stand for one hour. He suggests that Ms Hall needs to lose approximately 20kg in weight and have a follow up with Dr Sunner. He also recommends a functional and vocational assessment to assist with rehabilitation and training for a suitable job.
27. He opines that she is unlikely to be able to return to her pre-injury duties and that her long term prognosis is guarded.

Reports of SIS Rehab

28. SIS Rehab have provided a number of vocational and rehabilitation reports regarding Ms Hall.
29. An “initial vocational assessment report” was completed on 20 December 2019. At that time Ms Hall was still in the early to middle recovery stage of her injury, following her surgery, and had fairly significant restrictions placed on her in her certificate of capacity.
30. In addition to medical issues arising out of the injury, the report considers Ms Hall’s previous employment history, her transferable skills, and considers three vocational options, being receptionist, sales assistant and call contact centre operator. In relation to each of these roles, the physical requirements were considered, as well as a brief comment on any relevant skills required.

31. On 24 March 2020, SIS Rehab completed a labour market assessment report. At this time Ms Hall was certified to work 6 hours per day, 3 days per week in suitable employment. The vocational options of receptionist, concierge and call contact centre operator were identified. In each case, SIS Rehab contact a number of prospective employers who provided feedback on the roles advertised relevant to Ms Hall's physical limitations and background.
32. An updated labour market assessment report was provided on 23 April 2020, with a similar structure and content.
33. There are also a number of SIS Rehab progress reports which discuss Ms Hall's physical progress with her limitations as well as return to work and job seeking progress. The most recent of these reports, dated 31 July 2020, records:

“Ms Hall has maintained capacity for pre-injury hours and is independent in job seeking having all modules completed and signed off. Ms Hall engages in fortnightly job seeking meetings with Consultant during which job seeking efforts and strategies are reviewed and search for suitable employment conducted. Consultant will continue to assist Ms Hall with job seeking and encourage her to seek for work independently outside of sessions. Consultant conducts job canvassing on Ms Hall's behalf to assist with securing suitable employment as soon as possible.”
34. Also attached to the reply is a “job lead log form” showing applications made from 23 March 2020 up until 24 June 2020. Many of these jobs were in the fields identified in the section 78 notice and the rehab reports provided by SIS Rehab.

The section 78 notice

35. The section 78 notice which has been disputed by the applicant was issued on 6 May 2020. In that notice, the insurer indicates that they are of the view that Ms Hall is currently able to work 6 hours per day, 4 days per week in suitable employment as a receptionist, concierge and call contact centre operator. The section 78 notice relies on the vocational assessment report and labour market analysis reports prepared by SIS Rehab, as well as the certification of Dr Igbojiaku, who approved the roles.
36. The result of the section 78 notice was that Ms Hall would be able to earn more than her PIAWE, bringing her payments to an end.

Submissions

The applicant

37. The applicant submitted that Ms Hall is a young worker, aged 21 years, who suffered a serious injury in her employment. The applicant referred to the section 78 notice and Dr Igbojaiku's approval of the roles identified, which was acknowledged, but submits that this was perhaps in an objective sense.
38. The applicant submitted that Ms Hall does not have the skills required for those roles as identified in the SIS Rehab reports. The applicant referred to her statement, which indicates she left school in year 11, has had no retraining to be suitable for the roles identified by the insurer, and the jobs would be beyond her based on her skills, age and experience.

39. The applicant referred to a number of clinical notes taken by Dr Igbojaiku. In particular, the note on 29 March 2020 which records:

“came for workers comm certificate
her work did not allow her to come back
says she needs to be 100% before she can come back
knee is painful after big walk, after physio
this gets her mental health
has been crying a lot
mother said she is depressed
lack of motivation
wanted to do aged care but surgeon does not like
patient told about the likely jobs that were approved for her”

40. The applicant referred to the records of anxiety and PTSD throughout the clinical notes, submitting that she would not be ideal for the positions identified.
41. The applicant then referred to the report of Dr New who opined that Ms Hall’s current medical restrictions are appropriate.
42. The applicant submitted that Ms Hall has some residual earning capacity of \$250 per week with a residual incapacity of \$500 per week. The PIAWE figure of \$753 was agreed.

The respondent

43. The respondent first noted that the surgery performed was an ACL reconstruction not a left knee reconstruction.
44. The respondent referred to Ms Hall’s current capacity for 24 hours per week with restrictions. Dr Sunner, in his report dated 22 January 2020, supported Ms Hall returning to work. This is also supported by the applicant’s treating physiotherapist. The respondent submitted that I should conclude that Ms Hall is medically capable of working 24 hours per week.
45. The respondent then referred to the vocational assessment undertaken by SIS Rehab. Ms Hall has had an employment history in customer service and food preparation. The vocational assessment identifies transferable skills that would be suitable for the jobs identified. The respondent submitted that perhaps the applicant was underselling her abilities.
46. The respondent noted in relation to the position of receptionist, no formal qualifications are required and the customer service and administrative skills possessed by Ms Hall would be relevant. The same was submitted relevant to the other roles identified.
47. The respondent referred to the updated vocational report, which mainly brings the medical certification of Ms Hall up to date. It was noted that the employers contacted identified Ms Hall as being suitable for the roles advertised.

The applicant in response

48. The applicant made brief submissions in response, noting that the respondent may be “overcooking” Ms Hall’s abilities, rather than the applicant “underselling” her. Generally, the applicant has tried to get on with things but has been unsuccessful, and all of the rehabilitation assistance provided has also been unsuccessful in securing employment for Ms Hall.

Discussion

49. From a review of the medical evidence before me, it seems consistent across all experts that Ms Hall has some capacity for work, medically. She has been certified fit for 24 hours per week, which has increased over time as her condition following surgery has improved.
50. The respondent has identified a number of suitable roles for Ms Hall, relied upon in their section 78 notice. The applicant did not challenge whether those roles were medically suitable for Ms Hall. I think it is sufficient to say that light, administrative and office type jobs are exactly the kind of jobs that Ms Hall would be suited for, at least medically.
51. Section 32A of the 1987 Act provides the definition of suitable employment including matters that can be considered and matters that cannot. The two relevant parts of that definition, for present purposes, are the nature of the incapacity and the worker's age, education, skills and work experience.

The nature of the incapacity

52. Ms Hall has been certified fit to perform some type of employment with restrictions. She is not fit to perform her pre-injury duties, and there is some doubt that she will ever be fit to do so. I note that I am not limited to considering the certificate of capacity provided by Ms Hall's treating general practitioner.
53. I am satisfied that physically, Ms Hall is capable of performing the roles identified by the respondent in their section 78 notice. The applicant did not argue to the contrary. Whilst Ms Hall, in her statement, says that "she would struggle to work 6 hours a day with the state of my knee", that is inconsistent with the medical evidence in this case. There is no explanation as to why she would struggle or what specifically is the state of her knee, in comparison with the expert medical evidence that has been provided and relied on by both parties to this dispute.
54. She also states that "besides very light duties for only a few hours a day I don't really know what I could". Firstly, the roles identified in the section 78 notice could be described as "very light duties". All are sedentary and in any event have been approved by her treating general practitioner. Again, the suggestion that Ms Hall is only capable of working "a few hours a day" is inconsistent with all of the treating and expert medical evidence before me.
55. During the course of submissions, the applicant referred to clinical notes recording a history of anxiety and PTSD. I am unable to give much weight to these records. There is no report or explanation of Ms Hall's symptoms and whether they are affecting her capacity to work. Further, I am required to consider Ms Hall's capacity as a result of her work injury. There is no evidence before me linking the psychological symptoms to any work injury, and specifically the left knee injury the subject of present proceedings. The clinical notes do not assist the applicant's case.

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

56. Ms Hall is 21 years of age, and left school in year 11. This factor presents a delicate weighing exercise. On the one hand, not completing high school (and not immediately obtaining trade qualifications, as is common) shows limited education and is certainly a relevant factor for consideration under section 32A. On the other hand, Ms Hall has been continuously employed since 2012, in a number of different roles. Upon leaving school, she worked at both Kidz Zoo as an animal attendant (where she had been working since 2012) and commenced work at Hungry Jacks as a crew member/checkout operator.

57. Following her employment with Hungry Jacks, Ms Hall worked at Slice Pizza, another fast food role, before commencing work with the respondent.
58. Prior to her employment with the respondent, all of Ms Hall's roles involved interaction with customers and members of the public. This highlights her strong communication, customer service and interpersonal skills, which were considered to be relevant transferrable skills in the vocational and labour market reports of SIS Rehab. Other transferrable skills included computer skills, prioritisation and time management skills, and problem-solving skills.
59. Whilst Ms Hall's employment with the respondent was clearly quite a physical role, involving erecting and dismantling of displays, this is not the kind of matter where it is suggested that a worker who has only ever worked in labouring would be suitable for an office type role. Ms Hall has some varied experience (admittedly in customer service and the fast food industry), and a variety of transferrable skills, as per the SIS Rehab report, which I accept as accurate in that regard.
60. Whilst Ms Hall's employment history does not specifically include any of the jobs identified, they are clearly entry level roles that do not require formal qualifications, but where transferrable skills would be relevant. For example, the role of receptionist with an accommodation facility involves communicating with guests, using a point of sales system (with training provided, although I note that Ms Hall has extensive experience in using a point of sales system having worked in the fast food industry for a number of years). That employer indicated that experience in hospitality was a plus (although admittedly preferably in a hotel or accommodation area).
61. Ultimately the applicant's case largely hinged on the fact that Ms Hall left school in year 11. In submissions the applicant referred to this factor, as evidenced in the statement attached to the Application, a number of times. I have considered and placed some weight on this factor in consideration of the requirements of section 32A. However, I am satisfied that the applicant has the relevant experience and skills to consider the roles identified by the respondent as suitable employment.
62. The applicant suggested that she was capable of working some hours, perhaps earning up to \$250 per week with a loss of \$500. I am not sure what this submission was based on. It was not explained in great detail. Medically, she has been certified fit for 24 hours per week. The applicant points to no evidence that supports the suggestion that she can work less (by my calculation, probably around 10 hours per week). The substantial issue in this case concern whether the roles identified by the respondent were suitable for Ms Hall in terms of her age, skills and experience. If the roles were not suitable, she is entitled to continuing payments at the full amount under the legislation.
63. The applicant has not met her onus to prove. The evidence does not support a suggestion other than that she is capable of working in suitable employment, being receptionist, concierge, or call centre operator.

Decision

64. For the reasons set out above, I decline to make an interim payment decision.

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

