

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 4475/20
Applicant: Derek Watson
Respondent: Murrays Australia Pty Limited
Date of Determination: 8 January 2021
Citation No: [2021] NSWCC 9

The Commission determines:

1. The applicant suffered an injury to his lower back in the course of his employment with the respondent on 30 July 2018.
2. As a consequence of the injury referred to in (1) above, the applicant suffered a consequential condition by way of umbilical hernia whilst performing rehabilitation exercises.
3. At the date of injury, the applicant's Pre-Injury Average Weekly Earnings were \$1,160 per week.
4. As and from 1 April 2020, the indexed amount of the applicant's Pre-Injury Average Weekly Earnings is \$1,198.98 per week.
5. As a result of injury and consequential condition at issue, the applicant has suffered partial incapacity for employment.
6. Following the injury and consequential condition, the applicant returned to work for more than 15 hours per week.
7. On 19 March 2020, the applicant was stood down from employment because of the impact of the COVID-19 pandemic. Since being stood down, the applicant has been receiving Job Keeper Payment, which forms part of his assessable earnings for the purposes of calculating any entitlement to weekly compensation.
8. As and from 19 June 2020, the applicant has not been paid weekly compensation.
9. As and from 19 June 2020, the applicant continues to have partial incapacity for employment.
10. As and from 19 June 2020, the applicant has not engaged in paid employment.
11. As and from 19 June 2020, the applicant has received income at an average rate of \$705.09 per week.
12. Pursuant to section 37 (3) of the *Workers Compensation Act 1987*, the respondent is to pay the applicant weekly compensation from 19 June 2020 to date and continuing at the rate of \$254.10 per week.
13. The respondent is to pay the applicant's reasonably necessary medical and treatment expenses referable to both the injury and consequential condition upon production of accounts, receipts and Medicare Australia Notice of Charge.

14. The parties have liberty to apply within 14 days to make further submissions regarding the applicant's actual earnings during the period claimed.

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.

A MacLeod

Ann MacLeod
Acting Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. On 30 July 2018, Mr Derek Watson (the applicant) suffered a lumbar spine injury while unloading a suitcase from a bus in the course of his employment with the respondent. In or about March 2019, the applicant suffered a consequential umbilical hernia while undertaking rehabilitation for the accepted lumbar spine injury.
2. The respondent accepts the fact of both the injury and the consequential hernia. There is agreement the applicant has partial incapacity for employment and that his Pre-Injury Average Weekly Earnings (PIAWE) were \$1,160 per week. There was also agreement at the hearing that the applicant's actual earnings for the period claimed (namely from 19 June 2020 to date and continuing) have averaged \$632 per week.
3. Since the hearing, further material as to the applicant's actual earnings has come to light and has been filed in the respondent's second Application to Admit Late Documents (AALD) dated 21 October 2020. The respondent contends this evidence discloses the applicant's actual earnings for the period claimed was an average of \$705.09 per week as opposed to \$631.91 per week, which had previously been agreed.
4. The applicant brings these proceedings seeking payment of weekly compensation from 21 June 2020 to date and continuing, together with a payment of medical and treatment expenses for both the accepted injury and the consequential condition, the latter of which had been in dispute until the hearing.

ISSUES FOR DETERMINATION

5. The parties agree that the only issue remaining in dispute is the correct rate of payment of the applicant's benefits for partial incapacity pursuant to section 37 of the *Workers Compensation Act 1987* (the 1987 Act).
6. The applicant submitted the starting point for the calculation of his benefits ought to be 95% of his PIAWE, as he had returned to work and was working not less than 15 hours per week (section 37(2)(b) of the 1987 Act) until the respondent's business closed owing to the impacts of the COVID-19 pandemic. For its part, the respondent contends the starting point for the applicant's benefits should be 80% of his PIAWE, pursuant to section 37(3) of the 1987 Act, as he is not working greater than 15 hours per week.

PROCEDURE BEFORE THE COMMISSION

7. The parties attended a conference/hearing on 2 November 2020. On that occasion, they entered into the lengthy settlement negotiations and resolved certain matters, particularly in relation to the claim for medical and treatment expenses and liability with respect to the consequential hernia. The parties also agreed on the applicant's PIAWE, and that he had ongoing partial incapacity. I am satisfied that the parties have had sufficient opportunity to explore settlement and they have been unable to reach an agreed resolution of the remaining matters in dispute. The parties were informed of my intention to determine the dispute "on the papers" following receipt of written submissions by both parties.
8. At the hearing, Ms E Grotte of counsel instructed by Ms K Harley, solicitor appeared for the applicant. Mr R Stanton of counsel appeared for the respondent, instructed by Mr D Veasey, solicitor.

9. The applicant's written submissions were lodged with the Commission on 14 November 2020, and the respondent's written submissions on 20 November 2020. The parties agreed that following the receipt of these submissions, the matter would be determined "on the papers".

EVIDENCE

Documentary evidence

10. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute (the Application) on attached documents;
 - (b) Reply and attached documents;
 - (c) the applicant's Application to Admit Late Documents dated 29 October 2020;
 - (d) the respondent's Application to Admit Late Documents dated 21 October 2020, and
 - (e) the applicant's second AALD dated 9 November 2020.

Oral evidence

11. There was no oral evidence called at the hearing.

FINDINGS AND REASONS

The applicable rate of weekly compensation

12. In terms of the applicant's actual earnings for the period claimed, no objection has been raised to the respondent's second AALD. Taking into account the material contained within that document, in my view the applicant's average actual weekly earnings over the claimed period amount to \$705.09 per week. I note that figure is contrary to the agreed amount of \$631.91 per week, however, the totality of the evidence supports a finding of the larger figure.
13. Given the unusual manner in which this matter has been conducted, should the applicant wish to be heard on the calculation of his actual earnings over the period claimed, the parties will be granted liberty to apply in relation to that issue alone within 14 days of the date of this decision.
14. There is no issue the applicant returned to work following his injury and consequential condition. Likewise, it is uncontroversial that he was working more than 15 hours per week, when the COVID-19 pandemic began. He was stood down on 19 March 2020 because of COVID-19 and has been receiving the Job Keeper Payment since he was stood down.

The applicant's submissions

15. There is no issue the period claimed falls within the second entitlement period and is governed by the provisions of section 37 of the 1987 Act.
16. The applicant submitted his claim falls within section 37(2)(b), as he was working not less than 15 hours per week prior to being stood down because of the pandemic.

17. That section reads:
- “(2) The weekly payment of compensation to which an injured worker who has current work capacity and has returned to work for not less than 15 hours per week is entitled during the second entitlement period is to be the lesser of the following rates –
- (a) 95% of the worker’s Pre-Injury Average Weekly Earnings, less the worker’s current weekly earnings,
- (b) The maximum weekly compensation amount, less the worker’s current weekly earnings.”
18. The applicant submitted, and I accept that the *Workers Compensation Amendment (COVID-19 Weekly Payment Compensation) Regulation 2020* deals with the calculation of a worker’s PIAWE during the period of the COVID-19 pandemic but provides no assistance in relation to the matter in issue. Ms Grotte submitted that in accordance with the 2020 Regulation, the Job Keeper Payment is to be taken into account as earnings in calculating the second entitlement period pursuant to section 37(2)(a) – that is, 95% of his PIAWE less his actual earnings.
19. The applicant submitted he had complied with the requirements of section 37(2), in that he has been certified as having current capacity and has returned to work for not less than 15 hours per week. It was submitted there are no other criteria for the assessment of his weekly benefits.
20. Ms Grotte noted the intention of the provision is to encourage workers to return to work, and the applicant complied with the terms of the section, however, the situation created by the pandemic was not within his control. She submitted the applicant would be at work carrying out his usual duties not less than 15 hours per week were it not for the pandemic, and he should not be prejudiced by his employer’s business closing in such extraordinary circumstances.

The respondent’s submissions

21. For the respondent, Mr Stanton submitted that because the applicant has not worked any hours since March 2020, he is not “working for more than 15 hours per week”, for the purposes of section 37.
22. Mr Stanton noted that section 37(2) referred to “the weekly payment of compensation”. He submitted that as a matter of practicality, when the Commission considers disputes regarding past entitlements, averages over convenient periods of time are generally used, however, that does not alter the fact that the rate of weekly entitlement may change from week to week depending on an injured worker’s capacity at any given time.
23. The respondent submitted the applicant’s contention essentially stood for the proposition that once a worker has returned to work for more than 15 hours per week, they have satisfied the requirements of section 37(2) and therefore any entitlement from that time onwards must be calculated by reference to that section using 95% of the injured worker’s PIAWE, even if in subsequent weeks they work less than 15 hours per week.
24. The respondent submitted that if the applicant’s proposition was correct, it will mean that by working for a single week for more than 15 hours, a worker would forever prevent section 37(3) from applying to them, which is not consistent with the wording or intent of the 1987 Act.

25. Mr Stanton noted that the applicant's interpretation would render section 37(3) otiose for a large number of workers and ignore the evident intention of Parliament to provide for lower weekly payments for weeks when workers with current capacity are working for less than 15 hours. The respondent also submitted that if the provisions had been intended to create entitlements for income substitution benefits for longer periods of time than week by week, the legislation would clearly have provided for that. Instead, the provisions only refer to a "weekly" benefit.
26. Mr Stanton therefore submitted that the appropriate starting point for the calculation of the applicant's ongoing benefits is 80% of his PIAWE, pursuant to section 37(3) of the 1987 Act.

Discussion

27. In my view, the appropriate base rate for calculating the applicant's ongoing weekly benefits is 80% of his PIAWE, for the following reasons.
28. Whilst I have a great deal of sympathy for the applicant's situation, in that were it not for the pandemic he would likely have been working for more than 15 hours per week, the terms of section 37 in my view contain both a temporal element and a requirement that the injured worker is carrying out greater than 15 hours *per week* of paid work.
29. I accept the respondent's submission that the applicant's construction of section 37(2) and 37(3) is contrary to the intentions of Parliament. Division 2 of the 1987 Act contemplates weekly compensation being payable to an injured worker suffering incapacity for work as a result of a workplace injury. Section 33 clearly states the payment shall be made weekly during the incapacity. It is clear from the wording of sections 33, 36 and 37 of the 1987 Act that Parliament envisaged the payments for lost income being made on a weekly basis referable to the incapacity and circumstances of an injured worker at any given time.
30. Thus, as Mr Stanton noted, there may be periods where an injured worker returns to work and satisfies the provisions of section 37(2) before having periods of total incapacity or partial incapacity which render them unable to work greater than 15 hours per week. In those circumstances, the amount of weekly compensation will alter in accordance with the provisions of the Act.
31. In my view, an injured worker does not render the provisions of section 37(3) irrelevant to their claim by merely working a single week, or a period of several weeks, for greater than 15 hours per week then either ceasing work or working less than 15 hours per week.
32. As noted, the circumstances of the applicant ceasing post-injury employment were beyond his control, and I accept Ms Grotte's submission that were it not for the pandemic, he would have continued working and would have satisfied section 37(2). However, the unfortunate nature of the applicant's circumstances does not obviate the operation of the relevant statutory provisions.
33. Accordingly, I find that the relevant figure for the calculation of the applicant's weekly compensation during the claimed period is 80% of his PIAWE, namely \$959.19. The average earnings for the period claimed from 20 March 2020 to date and continuing is \$705.09. Applying the relevant formula as set out in section 37(3) of the 1987 Act, the relevant weekly figure of compensation payable by the respondent to the applicant is therefore \$254.10 per week, and the Commission will order the respondent to pay the applicant compensation at that rate from 19 June 2020 to date and continuing.

Medical Expenses

34. The respondent having accepted liability for the injury and consequential condition at the hearing, there will be a general order that the respondent pay the applicant's reasonably necessary medical and treatment expenses in relation to both the original injury and the consequential condition.