

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 3383/19
Applicant: LUKE ANTHONY SMITH
Respondent: COLES SUPERMARKETS AUSTRALIA PTY LIMITED
Date of Determination: 3 SEPTEMBER 2019
Citation: [2019] NSWCC 291

The Commission determines:

1. Award in favour of the applicant against the respondent in respect of weekly payments of compensation pursuant to the *Workers Compensation Act 1987* (1987 Act):
 - (a) From 9 November 2015 to 8 February 2016 in the sum of \$1,866.10 per week (section 36(2)(b)).
 - (b) From 9 February 2016 to 31 March 2016 in the sum of \$1,866.10 per week (section 37(3)(b)).
 - (c) For the period 1 April 2016 to 30 September 2016 in the sum of \$1,892.80 per week (section 37(3)(b)).
 - (d) From 1 October 2016 to 31 March 2017 in the sum of \$1,908.10 per week (section 37(3)(b)).
 - (e) From 1 April 2017 to 30 September 2017 in the sum of \$1,934.90 per week (section 37(3)(b)).
 - (f) From 1 October 2017 to 31 March 2018 in the sum of \$1,951.70 per week (section 37(3)(b)).
 - (g) From 1 April 2018 to 7 May 2018 in the sum of \$1,973.38 per week (section 37(3)(a)).
2. A general award is made in favour of the applicant in respect of medical and associated treatment expenses pursuant to section 60 of the 1987 Act.
3. The matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) to determine the extent of the applicant's whole person impairment, if any, which results from psychological injury deemed to have occurred on 9 November 2015.
4. The Registrar is requested to place before the AMS a copy of the Application to Resolve a Dispute (Application) and attachments, a copy of the Reply and attachments and a copy of these Reasons for Decision.

A brief statement is attached setting out the Commission's reasons for the determination.

PHILIP YOUNG
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 PHILIP YOUNG, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Jackson

Ann Jackson
Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Luke Anthony Smith (the applicant) is a 61-year-old man who first commenced employment with Coles Supermarkets Australia Pty Limited (the respondent) on 1 October 1977. He was engaged initially as an Assistant Manager and progressed as Store Manager at various of the respondent's premises in NSW and the ACT.
2. The applicant claims weekly benefits, past medical expenses and lump sum compensation. He relies upon a deemed date of injury of 9 November 2015. On 25 January 2018, the applicant gave notice of having suffered psychological injury as a result of the nature and conditions of his employment with the respondent.
3. In the latter regard, it is necessary only to refer in general terms to the applicant's statement which includes various incidents to which he was subjected in the course of his employment. Although the claim for compensation was late, the applicant addresses the reasons in this regard and the respondent has not made any submissions concerning late notice of injury or claim.

ISSUES FOR DETERMINATION

4. The following matters are relevant to the issues in dispute:
 - (a) Although the respondent's section 74 Notice relies upon several sections of the *Workers Compensation Act 1987* (the 1987 Act), ultimately this matter refined to a consideration of the extent of the applicant's capacity for work between 9 November 2015 and 7 May 2018.
 - (b) It was agreed that the applicant's relevant pre-injury average weekly earnings was the sum \$2,654.23 per week and that 95% of that figure is \$2,521.50. 80% of the applicant's pre-injury average weekly earnings is at all relevant times the sum \$2,123.38 per week.
5. For the purposes of these Reasons the maximum weekly benefits figure prescribed by section 34(2)(a) of the 1987 Act, for various periods, affects the weekly payments calculation.

PROCEDURE BEFORE THE COMMISSION

6. The matter came for conciliation and arbitration hearing in Newcastle on 27 August 2019. Mr S Grant of Counsel instructed by Mr D Twohill, Solicitor, appeared for and with the applicant. Mr S McMahon of Counsel instructed by Ms M Browne, Solicitor and Mr N Byers, Paralegal, appeared for the respondent.
7. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

8. During the conciliation stage, Mr McMahon requested that the matter be referred to an AMS for the determination of the extent of the applicant's whole person impairment, if any, which results from injury deemed to have occurred on 9 November 2015. The Commission determined that this was not a matter where such a referral was necessary nor appropriate, particularly having regard to the fact that such an application had not been made at the teleconference and further, that the applicant's entitlement should not be delayed by such a referral.
9. The matter proceeded to an arbitration hearing and a sound recording of a summary of the submissions made by each party and the interlocutory decision is available on application to the Registry.

EVIDENCE

Documentary evidence

10. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application and attached documents;
 - (b) Reply and attached documents.

Oral evidence

11. No oral evidence was given.

THE APPLICANT'S SUBMISSIONS

12. Mr Grant submitted that regardless of any view of the medical evidence, the applicant suffered a psychological injury for the whole period the applicant was unfit for any work, in reality, between 9 November 2015 and 7 May 2018. The applicant's general practitioner has certified the applicant unfit ever since 9 November 2015.
13. The applicant in his statement refers to the type of work he was performing before his injury. During the relevant period (9 November 2015 to 7 May 2018) the applicant could perform up to eight hours per week volunteering for his church, but this depended upon his condition on the day and he was usually only able to perform work at the church with the support of his good friend, Gary.
14. When regard is had to the applicant's symptoms and the development of them to the point that the applicant could not work, as well as a current view regarding what he can and cannot do, the Commission should conclude that the applicant is unfit for any work.
15. Doctor Goswell's report of 14 June 2019 concludes that the applicant remains unfit for work. Doctor Goswell's records show a large number of attendances by the applicant since 5 July 2013 in respect of his psychological condition.
16. On 29 October 2018, Doctor Takyar noted that the applicant realistically lacks capacity for performing more than three to five hours work per week.
17. Doctor Vickery in his second report (Reply page 30) in his assessment table for whole person impairment under "employability" says only that the applicant was performing work six hours per week.

18. Because of the applicant's unreliability, in terms of his inability to commit to work on any given day, he is effectively unemployable and therefore has no capacity to perform any work.

THE RESPONDENT'S SUBMISSIONS

19. Mr McMahon's submissions initially focused upon the precise period of capacity claimed, namely 9 November 2015 to 7 May 2018.
20. On 20 January 2017, within this period, the applicant consulted Doctor Goswell seeking a letter of clearance for undertaking diving. The risks were discussed on this occasion and the applicant gave a history that he was working hard doing mowing and tree pruning for the elderly.
21. The medical certificate then issued and on 20 March 2017 (Application page 106) the notation includes reference to ear-wax and a blocked right ear: "been diving". In relation to the applicant's mood on that occasion, the applicant was generally happy but had low motivation.
22. On 12 January 2018 the applicant consulted his general practitioner for anxiety and depression. On 17 April 2018 the applicant volunteered that he was unable to continue as a Manager but that he was currently managing his volunteer work, including lawn mowing.
23. Mr McMahon then addressed the medical history and position after 7 May 2018. In October 2018, Doctor Takyar recorded that the applicant was working eight hours per week performing volunteer work in his church. The applicant at that time had no problem with reading, was still doing volunteer work, although had some lapses in his concentration. Given this history and his examination of the applicant, Doctor Takyar regarded the applicant in October 2018 as capable of working between three to five hours per week.
24. The applicant saw Doctor Vickery in February 2018 and the history was given that the applicant could drive his car, was mowing lawns for up to eight hours each week, had been renovating their granny flat over the last five months and enjoys going to movies. Doctor Vickery thought that the applicant could perform work for eight hours per week.
25. In Doctor Vickery's second report of 14 February 2019 it was recorded that the applicant continues babysitting (grandchildren), attends church and counts the money at church. Doctor Vickery thought that this work might be of the order of three hours per week.
26. Mr McMahon submitted that the applicant's capacity for work was the order of 6 to 10 hours per week and that in assessing this capacity the appropriate hourly rate for those hours was the applicant's pre-injury rate of \$61.09 per hour.

APPLICANT'S SUBMISSIONS IN REPLY

27. The nature of the applicant's psychological condition fluctuates up and down from time to time. In some weeks, the applicant can do volunteer work for eight hours but the evidence is that he cannot work effectively and consistently.
28. On the applicant's presentation to Doctor Goswell on 17 October 2016, Doctor Goswell was told that the applicant was not wanting to socialise, he had low motivation and was a "bit grumpy".
29. On the applicant's presentation to Doctor Goswell on 12 January 2018, the applicant complained that he had been getting more reclusive, he needed support and on occasions he was down on energy.

FINDINGS AND REASONS

30. The first step to be taken is an evaluation, whether during the relevant period, the worker has “current work capacity” or “no current work capacity” within the meaning of section 32A of the 1987 Act. It is necessary to evaluate all of the evidence, including as Mr Grant submitted the nature of the injury, as well as the consequences of the injury for the applicant and the available medical evidence.
31. In terms of the definition of “suitable employment” in section 32A of the 1987 Act, the factors to be considered are set out in the definition. These include the matters just mentioned, but also Doctor Goswell’s medical certificates, the applicant’s age, education, skills and work experience, amongst other matters. The definition of suitable employment in section 32A of the 1987 Act commands that consideration is not given to the availability of employment, nor whether the nature of the work is available in the general employment market, nor the nature of the worker’s pre-injury employment, nor where he lives.
32. The various consultations the applicant had with Doctor Goswell demonstrate that Doctor Goswell was aware of both the applicant’s involvement in diving and in volunteer lawn moving. Doctor Goswell notwithstanding these matters continued to take the view that the applicant had no capacity for work, or although (as Mr Grant puts it) in Doctor Goswell’s report of 14 June 2019, the doctor speaks in terms of “unfit” for work. This assessment was of course made more than 12 months after the period of the weekly payments claim. Further, I do not apprehend that “unfit” for work or “totally unfit” for work necessarily equates to “no capacity for work”.
33. Doctor Takyar in his report of 29 October 2018 noted that the applicant was realistically without capacity for work for more than three to five hours per week. Doctor Vickery in his report of 14 February 2019 believes an appropriate assessment is six hours per week, but again this opinion is well outside of the period of weekly payments claimed.
34. I accept Mr Grant’s submission that the nature of the applicant’s psychological injury means that his capacity for work during the period claimed fluctuates from time to time. This is one relevant consideration within the definition of “suitable employment” pursuant to section 32A of the 1987 Act. In my view, the reality is that at various times during the period of 9 November 2015 to 7 May 2018, the applicant had varying capacities for work. I accept the applicant’s evidence, however, that he had been able to perform sometimes eight hours per week with mowing and tree lopping and the like, however, this was not performed every week.
35. There is no detailed evidence concerning the nature of the work the applicant performed in renovating a granny flat from what I understand to be about September 2017 to February 2018. The renovations could be minor or major. The applicant may have physically performed all or some physical work, or may have supervised others to do so.
36. Regardless of the extent of the applicant’s involvement in the granny flat renovations, his involvement nonetheless as a matter of human experience would infer that decisions needed to be made and the applicant had some involvement in those decisions. Similarly, the applicant’s enjoyment in going to movies would infer that the applicant had some ability to apply his mind in watching and appreciating the movies which he saw. To my mind, the applicant had the ability to make reasonable decisions, consistent with his age and experience, notwithstanding that he was experiencing significant “incapacity” as the term is understood pursuant to section 33 of the 1987 Act.

37. Balancing the various matters outlined in the submissions of both counsel and the consideration to which I have referred, I take the view that the applicant had some ability to return to work in some suitable employment during the period claimed. It follows that the applicant had “current work capacity” within the meaning of section 32A of the 1987 Act.
38. The extent of the applicant’s current work capacity in my view was, during the relevant period, of the order of six hours per week. In arriving at this amount, I am mindful of the applicant’s voluntary work for his church but I accept that he was not able to perform eight hours voluntary work each and every week. I am unassisted by the “granny flat” work except to say that the expression “was renovating a granny flat” enables the Commission to arrive at the conclusion that the applicant was to some extent during the nominated five-month period able to apply his mind to the appropriate renovations.
39. The next consideration is the relevant hourly rate. I do not accept Mr McMahon’s submission that this should be \$61.09 per hour for the reason that the applicant’s pre-injury work as a Store Manager necessitated high level, efficient and in many respects constant application of his mind in circumstances where he was burdened with great responsibility. That is to say, I do not believe that the applicant after cessation of his employment possessed the previously-held high level skills necessary to earn \$61.09 per hour. Rather, having regard to the work performed by the applicant in a voluntary capacity (mowing and the like), my assessment is that he would be capable of earning \$25 per hour. The applicant’s capacity for work was, on this analysis, \$150 per week.
40. Turning now to a consideration of sections 36 and 37 of the 1987 Act and bearing in mind the effect of section 34(2)(a) of the 1987 Act, the calculations appear in the following Table:

TABLE

Entitlement Period	PIAWE	Percentage of PIAWE	Section	Section 34(2)(a) “MAX”	Section 35 “E” (a)	Calculation
9 November 2015 – 8 February 2016 First entitlement period	\$2,654.23	\$2,521.15 (95%)	s 36(2)(b)	\$2,016.10	\$150	\$2,016.10 (\$150) \$1,866.10 p/w
9 February 2016 – 31 March 2016 Second entitlement period	\$2,654.23	\$2,123.38 (80%)	s 37(3)(b)	\$2,016.10	\$150	\$2,016.10 (\$150) \$1,866.10 p/w
1 April 2016 – 30 September 2016	\$2,654.23	\$2,123.38 (80%)	s 37(3)(b)	\$2,042.80	\$150	\$2,042.80 (\$150) \$1,892.80 p/w
1 October 2016 – 31 March 2017	\$2,654.23	\$2,123.38 (80%)	s 37(3)(b)	\$2,058.10	\$150	\$2,058.10 (\$150) \$1,908.10 p/w
1 April 2017 – 30 September 2017	\$2,654.23	\$2,123.38 (80%)	s 37(3)(b)	\$2,084.90	\$150	\$2,084.90 (\$150) \$1,934.90 p/w

1 October 2017 – 31 March 2018	\$2,654.23	\$2,123.38 (80%)	s 37(3)(b)	\$2,101.70	\$150	\$2,101.70 (\$150) \$1,951.70 p/w
1 April 2018 – 7 May 2018	\$2,654.23	\$2,123.38 (80%)	s 37(3)(a) Note changed maximum	\$2,128.50	\$150	\$2,123.38 (\$150) \$1,973.38 p/w

41. There will be a general award in favour of the applicant in respect to section 60 expenses and the matter will be remitted to the Registrar for referral to an AMS for assessment of the applicant's whole person impairment.
42. Liberty is granted to the parties to approach the Registry for rectification of any incorrect calculations, if so required.

SUMMARY

43. The Commission makes the following orders, awards and requests: -

(a) Award in favour of the applicant against the respondent in respect of weekly payments of compensation:

- (i) From 9 November 2015 to 8 February 2016 in the sum of \$1,866.10 per week. (Section 36(2)(b)).
- (ii) From 9 February 2016 to 31 March 2016 in the sum of \$1,866.10 per week. (Section 37(3)(b)).
- (iii) From 1 April 2016 to 30 September 2016 in the sum of \$1,892.80 per week. (Section 37(3)(b)).
- (iv) From 1 October 2016 to 31 March 2017 in the sum of \$1,908.10 per week. (Section 37(3)(b)).
- (v) From 1 April 2017 to 30 September 2017 in the sum of \$1,934.90 per week. (Section 37(3)(b)).
- (vi) From 1 October 2017 to 31 March 2018 in the sum of \$1,951.70 per week. (Section 37(3)(b)).
- (vii) From 1 April 2018 to 7 May 2018 in the sum of \$1,973.38 per week. (Section 37(3)(a)).

44. Liberty is granted to the parties to approach the Registry of the Commission seeking rectification of any of the calculations in the above Table and Awards should they be considered incorrect.

45. A general Award is made in favour of the applicant in respect of medical and associated treatment expenses pursuant to section 60 of the 1987 Act.

46. The matter is remitted to the Registrar for referral to an AMS to determine the extent of the applicant's whole person impairment, if any, which results from psychological injury deemed to have occurred on 9 November 2015.

47. The Registrar is requested to place before the AMS a copy of the Application and attachments, a copy of the Reply and attachments and a copy of these Reasons for Decision.

