

WORKERS COMPENSATION COMMISSION

AMENDED CERTIFICATE OF DETERMINATION

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

Matter Number: 312/20
Applicant: Nader Namo
Respondent: Star Entertainment Group Limited
Date of Determination: 21 May 2020
Date of Amendment: 25 May 2020
Citation: [2020] NSWCC 168

The Commission determines:

1. The applicant suffered injury in the course of his employment by way of aggravation of a pre-existing condition to his lower extremities (hips and feet) in the course of his employment with the respondent, with a deemed date of injury of 24 March 2019.
2. As a result of the injury referred to in (1) above, the applicant has suffered incapacity for employment.
3. The respondent is to pay the applicant weekly compensation pursuant to section 36 of the *Workers Compensation Act 1987* of \$190.30 per week for the period 14 June 2019 to 13 September 2019.
4. The respondent is to pay the applicant weekly compensation pursuant to section 37 of the *Workers Compensation Act 1987* from 14 September 2019 to date and continuing at the rate of \$43.20 per week.
5. The respondent is to pay the applicant's reasonably necessary medical and treatment expenses pursuant to section 60 of the *Workers Compensation Act 1987*.

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.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. In November 2018, Nader Namu (the applicant) started working as a full-time security guard with the Star Entertainment Group Limited (the respondent). He usually worked three to four shifts per week, each shift lasting 12 hours, including short hourly breaks and a half hour lunch break.
2. The applicant's duties were consistent with those of a doorman, namely prolonged standing; screening customers; checking identification; welcoming customers to the casino; and intermittent crowd control. Relevantly, the applicant wore black lace up shoes issued to him by the respondent, which also provided him with an insole for his shoes.
3. After approximately three months, in February 2019, the applicant says he began to feel symptoms in both hips and feet, particularly the soles and heels of his feet. He says his pain worsened but he kept working until 25 March 2019, when he eventually told his supervisor about his alleged injury. He consulted his general practitioner and was certified unfit for work for approximately nine days.
4. The applicant returned to work on 3 April 2019 on restricted duties. He says he remained on suitable duties until 11 June 2019, when he says they were withdrawn and the respondent denied liability for his claim.
5. An examination of the evidence reveals that on 14 June 2019, the respondent issued a section 78 notice declining liability on the basis the applicant's employment was not the major contributing factor to any aggravation of an underlying condition in his hips and feet.

ISSUES FOR DETERMINATION

6. The parties agreed that the following issues remain in dispute:
 - (a) Whether the applicant sustained a workplace injury by way of either a disease or the aggravation of a disease in the course of his employment (section 4(b)(i) and 4(b)(ii) of the *Workers compensation Act 1987* (The 1987 Act));
 - (b) If the answer to (a) is in the affirmative, what is the level of the applicant's incapacity for work, if any, caused by his injury?
7. There is no issue the applicant has some capacity for employment and has returned to his previous role as an Uber driver, albeit not on a full-time basis. The issue for determination is the level of incapacity for the period claimed in the event he is found to have suffered a workplace injury.

PROCEDURE BEFORE THE COMMISSION

8. I am satisfied that the parties to the dispute understand the nature of the Application and to 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 and accept that they have used their best endeavours to try to resolve the proceedings but have been unable to do so. Accordingly, the matter proceeded to an arbitration hearing before me on 20 April 2020.

9. On that occasion, Mr C Tanner of counsel appeared for the applicant instructed by Mr T Gauci and Mr J Beran of counsel appeared for the respondent instructed by Ms B Walsh.

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) and attached documents;
 - (b) Reply and attached documents;
 - (c) A bundle of documents attached to the section 78 notice filed without objection and marked exhibit a;
 - (d) The respondent's Application to admit late documents (AALD) dated 7 April 2020 and attachments.

Oral evidence

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

FINDINGS AND EVIDENCE

Injury

12. The applicant has the onus of proving he has suffered an injury, as that term is defined in section 4 of the 1987 Act. That definition includes a disease injury. A disease injury is either a disease contracted in the course of employment where employment is the major contributing factor or the aggravation, exacerbation, acceleration or deterioration of any disease where employment is the major contributing factor to the aggravation, exacerbation, acceleration or deterioration.
13. In this matter, the applicant submitted his injury was either one which filled in section 4(b)(i) or in the alternative within section 4(b)(ii).
14. The nature of the applicant's duties are set out in his statement from paragraph six and disclose he was on his feet for protracted periods of time. As Mr Tanner noted, that evidence is not disputed.
15. Likewise, there is no issue the applicant had suffered problems with his feet in 2016. He deposes to that in his statement. As with the evidence regarding the nature of his duties, the applicant's statement that he was pain-free at the time he commenced employment with the respondent is uncontested. I note the applicant's symptoms in his feet in 2016 were diagnosed as plantar fasciitis. That diagnosis is not in issue.
16. In my view, the preponderance of the evidence favours the applicant, in that his treating doctors, Dr Khan and Dr Erian together with independent medical examiner (IME) Dr Dias support the finding of injury, be it one of the onset of a disease caused by the applicant's employment (section 4(b)(i)) or an aggravation of a disease process (section 4(b)(ii)).

17. I accept the applicant's evidence that at the time he was employed by the respondent he was free of any symptoms in his feet and hips. As already noted, that evidence is uncontested and is supported by the diagnosis of Dr Dias, who had the benefit of the prior history of plantar fasciitis in 2016. Notwithstanding that prior history, at page 45 of the Application, Dr Dias says:

"With respect to Mr Namó's compensable physical injuries stemming from the nature and conditions of his employment with the Star Entertainment Group, Mr Namó has symptoms and signs consistent with the following conditions:

- Mr Namó suffers from right-sided plantar fasciitis;
- Mr Namó suffers from a left-sided plantar fasciitis;
- Mr Namó has sustained a persisting aggravation of degenerative right hip osteoarthritis;
- Mr Namó has sustained a persisting aggravation of degenerative left hip osteoarthritis."

18. Dr Dias, having taken a detailed history, concludes at page 47 of the Application:

"In my opinion, Mr Namó's employment between November 2018 and March 2019 is consistent with development of his conditions affecting his right and left hips and right and left heel conditions. I have taken into account Mr Namó's work roster, which includes that Mr Namó worked approximately 49 shifts between November 2018 and March 2019, with each shift being approximately 12 hours in duration, and the vast majority of these shifts involving prolonged standing for up to 95% of the shift duration. In my opinion, Mr Namó's nature and conditions of his employment [sic] between November 2018 March 2019 is entirely consistent with the development of bilateral plantar fasciitis and the development of persistent aggravation of previously asymptomatic degenerative bilateral hip osteoarthritis...

In my opinion, Mr Namó's employment was and remains the main substantial contributing factor to the development of his conditions affecting his right and left feet, and the main contributing factor to the aggravation and exacerbation of his previously asymptomatic condition of early bilateral hip osteoarthritis.... In my opinion, Mr Namó's employment with the Star Entertainment Group is entirely causally responsible for the development of his condition of bilateral plantar fasciitis."

19. In his report dated 12 July 2019, treating physician Dr Khan noted the history provided by the applicant and diagnosed an aggravation of plantar fasciitis and an aggravation of degenerative osteoarthritis of both hips. Dr Khan disagreed with Dr Minter, the respondent's IME who said in his report dated 6 May 2019 that the applicant merely had foot pain as he was not used to standing for long periods. Dr Khan said at page 53 of the Application:

"The IME report of the one of Dr Minter is noted with thanks. Respectfully, [I] clinically disagree with the clinical opinion of Dr Minter. Mr Namó has point tenderness over the plantar fascia at its site of insertion at the calcaneus. [I] am happy to organise MRI referrals to establish diagnostic clarity with regard to the status of plantar fascia."

20. At page 54 of the Application, Dr Khan provides the following diagnosis:

"Aggravation of bilateral plantar fasciitis.

It is noted that Mr Namu has bilateral plantar enthesophytes. Consequential to having to perform prolonged standing duties in company issued footwear with company issued in-soles, Mr Namu had developed plantar fasciitis, it is now difficult to stand and weight bear for a prolonged amount of time due to bilateral heel pain."

Aggravation of degenerative osteoarthritis to bilateral hips.

[I am] advised that Mr Namu is employed as a security guard for the Star Casino and is required to stand and weight bear on his feet for 10+ hours for his shift on every shifting company issued footwear, company issued in-soles, on an ongoing basis. The prolonged weightbearing has caused an aggravation to the underlying osteoarthritis involving both hips. He now finds it difficult to weight bear, mobilise, squat, crouch, lunge for prolonged timeframes with discomfort."

Dr Khan went on to state the applicant's employment with the respondent was the main contributing factor to the conditions which he had diagnosed.

21. Dr Minter's view that the applicant does not have plantar fasciitis stands alone and is contrary to the preponderance of the evidence. His comment that the applicant is simply not used to standing for long periods is not, in my opinion, more than an unexplained contention. He does not provide sufficient reasons as to why the applicant's condition was simply caused by not being used to standing for long periods. This is a particularly important omission in the face of radiological evidence showing the presence of calcaneal pathology, albeit pre-existing.
22. Moreover, Dr Minter does not deal at all with the question of the applicant's hip condition. On balance, I do not accept his views.
23. X-rays of the applicant's feet and hips taken on 25 March 2019 revealed the presence of calcaneal spurs in the applicant's feet and minor degenerative changes in both hips.
24. Mr Beran noted the applicant had plantar fasciitis in 2016. He submitted the applicant had downplayed that condition with a cursory mention of it in his statement, and that the documents revealed he had suffered from its effects to the point where he sought treatment. He also noted that when the applicant reported his injury to the respondent, he did not mention any problem with his hips.
25. Although the applicant did not mention any hip problem in the incident report form completed on 25 March 2019, in the claim form completed on the same day his condition is described as "aggravation of bilateral plantar fasciitis and aggravation of degenerative osteoarthritis to bilateral hips with so much pain" and lists the injured body parts as "hips, legs, feet". That being so, I do not consider there to be any meaningful delay in the applicant mentioning problems with his hips. Rather, he has informed the respondent of the alleged hip injuries on the date he first left work suffering from symptoms.
26. On balance, I find the evidence in this matter supports a finding of injury to the applicant's feet and hips as a result of the nature and conditions of his employment with the respondent aggravating asymptomatic pre-existing degenerative conditions. In so finding, I prefer the views of the treating practitioner Dr Khan and general practitioner Dr Erian to the views of Dr Minter, for the reasons already advanced.

27. As to the differences between the diagnoses of Dr Dias and Dr Khan relating to plantar fasciitis, I prefer Dr Khan's view as treating practitioner. Despite this disparity of opinion, both doctors find the applicant suffered injury to his feet and that its main contributing factor is employment with the respondent. The only difference between the doctors is Dr Dias finds the applicant's employment caused the plantar fasciitis, whereas Dr Khan finds the employment has been the major contributing factor to an aggravation of otherwise asymptomatic plantar enthesophytes. In my view, Dr Khan's opinion is consistent with the radiological evidence of 25 March 2019 and I prefer it.
28. In terms of the applicant's hips, I am likewise satisfied his employment caused aggravation of pre-existing but asymptomatic pathology. Contemporaneous radiological evidence reveals osteoarthritic changes in the applicant's hips, and he complained of problems with them in the claim form on the day he first left work as a result of his injury. I accept the applicant's evidence that his hips were asymptomatic before he commenced employment with the respondent. As noted, his evidence in that regard is uncontested. Likewise, the only medical evidence in the case which deals with the applicant's hips is unanimous in finding his condition was aggravated by his duties with the respondent. I accept that evidence and note that Dr Minter for the respondent does not deal with the alleged hip injuries.
29. On balance, I am of the view the medical evidence overwhelmingly favours a finding of injury to the applicant's feet and hips by way of an aggravation of asymptomatic changes in those body parts.

Incapacity

30. Having found in favour of the applicant on the question of injury, it is necessary to determine the level of incapacity, if any, suffered by him as a result of the injury.
31. The applicant's preinjury average weekly earnings (PIAWE) is agreed to total \$980.11 per week. In the event of incapacity, the base rate of entitlement pursuant to section 36 for the applicant is 95% of his PIAWE, in this case \$931 per week less any capacity to earn income. Thereafter, pursuant to section 37 of the 1987 Act he is entitled to 80% of his PIAWE (in this case is \$784 per week) less any capacity to earn income.
32. Mr Beran submitted, and I accept, that the evidence establishes the applicant is capable of performing his former role as an Uber driver. Mr Beran submitted he could do so on a full-time basis. I reject that submission, and I accept that the applicant is currently working to the utmost of his capacity. In my view, there is little doubt the applicant has ongoing incapacity given the problems from which he continues to suffer in both his feet and hips.
33. Mr Beran submitted the applicant could earn at least as much as a driver as he had working as security guard with the respondent. I reject that submission, noting the ongoing pain the applicant has in his hips and legs. As Mr Tanner submitted, the applicant is driving occasionally, and to the best of his ability. I accept that submission and find the applicant suffers an ongoing partial incapacity for employment.
34. There is no vocational assessment in this matter to assist in determining the extent to which the applicant can engage in productive income. However, doing the best I can, I am of the view he is capable of earning the minimum wage by working full-time hours, albeit on restricted duties consistent with the medical certificates provided from time to time by Dr Khan and Dr Erian. Having made that finding, in my view, the applicant's loss can be characterised as follows:
 - (a) Pursuant to section 36 the 1987 Act, for the first 13 weeks from 14 June 2019 to 13 September 2019 of \$190.30 per week, being 95% of his PIAWE less the minimum wage of \$740.80 per week; and

- (b) Pursuant to section 37 of the 1987 Act, from 14 September 2019 to date and continuing at the rate of \$43.20 per week, being 80% of the applicant's PIAWE (\$784 per week) less the minimum wage of \$740.80 per week.

SUMMARY

- 35. For the above reasons, the Commission will make the findings and orders as set out on page 1 of the Certificate of Determination.