WORKERS COMPENSATION COMMISSION

INTERIM PAYMENT DIRECTION

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

Matter Number:	**3072/19**
Applicant:	**Jennifer Stefanac**
Respondent:	**Secretary, Department of Family and Community Services**
Date of Direction:	**11 July 2019**
Citation:	**[2019] NSWWCCR 4**

The Registrar directs:

1. That the application for an interim payment direction is dismissed.

Background

2. Mr Jennifer Stefanac (the applicant) lodged an Application to Resolve a Dispute seeking weekly payments of compensation where a work capacity decision (WCD) is in dispute. On 25 June 2019, Ms Farrell, as Delegate of the Registrar directed the matter be dealt with under Chapter 7 Part 5 (Expedited Assessments) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act).

3. The applicant's claim arises from a psychological injury she sustained during the course of her employment as an Aboriginal case worker for the Respondent, deemed to have occurred on 2 June 2016.

4. The applicant has been paid weekly payments, which have been subject to numerous reviews and determinations. Throughout these reviews, and to date, the applicant has continued to receive weekly payments. These decisions culminated in a WCD on 18 March 2019 (also referred to as dated 15 March 2019 in the papers filed by the parties), which will be referred to as "the last WCD". The respondent has calculated the applicant's pre-injury average weekly earnings (PIAWE), at $1,640 per week in the last WCD.

5. The last WCD is a work capacity decision under Division 2 of Part 3 of the *Workers Compensation Act 1987* (1987 Act), as it involves decisions about: "the workers current work capacity" and "the amount of an injured worker's pre-injury average weekly earnings or current weekly earnings": s 43(1)(a) and (d) of the 1987 Act.

6. This decision is said to be based on a work capacity assessment dated "18/03/2019". However, I am unable to locate any such work capacity assessment bearing that date in the papers filed by the parties. This point has not been raised by the applicant and the matter proceeds on the basis of the last WCD. In any event, a work capacity assessment is not necessary for the making of a WCD: s 44A (3) of the 1987 Act.

7. The last WCD decided the applicant had a current work capacity for employment of eight hours, five days per week as an "administrative officer". It held that the option as an "administrative officer" was suitable employment for the applicant. It further held that the applicant's ability to earn in that suitable employment was $1,307.58 per week.

8. The last WCD was in fact based on a work capacity assessment on 24 August 2018, said to have been completed on 28 September 2018. On the basis of that work capacity assessment, and other material, the following decisions were made:

   (a) You have current work capacity for employment of 8 hours 5 days per week restriction on not working at Western Sydney FACS.

   (b) The vocational options of Administrative Officer is suitable employment for you

   (c) You are able to earn $1,307.58 in suitable employment.

   (d) The amount of your pre-injury average weekly earnings (PIAWE) is $1,640.00

   (e) "Current weekly wage rate $132.00" (sic).

9. Somewhat confusingly, the work capacity assessment referred to in the last WCD was said to have a likely outcome that the applicant's "current weekly wage rate" was $132. This is unsatisfactory as the various mis-statements of the required determinations by the insurer were criticised in the previous reviews, including the very expression "current weekly wage rate" which does not appear in Part 3 Division 2 of the 1987 Act.

10. For the last WCD, the respondent also relied upon the approval dated 17 April 2018 by Dr Robinson of the recommendations of the vocational report, and an independent medical report from Dr Jager, psychiatrist dated 30 January 2018.

11. Although the Application was filed by the applicant personally, at teleconference on 10 July 2019, Mr Jones, solicitor, appeared for and with her. The respondent was represented by Ms Israel, solicitor and Ms Borg, from the respondent's insurer. Mr White, solicitor, also sat in on the conference with Ms Israel.

12. 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.

The Documents

13. The following documents and the attachments were filed by the parties:

   (a) The Application to Resolve and Dispute;

   (b) The Reply.

The Issues

14. Mr Jones concedes that on the weight of the evidence in the materials before the Commission, the applicant is considered fit to perform the duties of her substantive position as an Aboriginal case worker in any location other than her usual places of employment in Mt Druitt and Blacktown. The issues, based on the evidence before me, therefore are reduced to whether the applicant's capacity to earn in suitable employment provides her with any entitlements to weekly compensation in the application of s 37 of the 1987 Act.

Evidence and Submissions

15. I have not been taken directly to any of the evidence filed by either party. Various submissions were made by the parties' representatives as to what the applicant's current capacity for suitable employment may be. These included Mr Jones' description of the applicant's recent attendance upon Dr Robinson, allegedly resulting in a referral to an unnamed psychiatrist. Ms Borg, from the respondent's insurer, advised that she had since contacted Dr Robinson who informed her that the applicant had requested a downgrade of her capacity in her certificates of capacity and he had declined to provide them. All of this information, however, is not before me and it would be unfair on both parties for me to consider it as evidence and proceed on the basis of that information. To determine the matter, I intend to proceed upon the documents filed.

16. I also note an option for the application to be discontinued was not adopted by the applicant.

17. Mr Jones made a general submission that a failure by the respondent to provide the applicant with suitable duties in a case worker position in or nearer to her place of residence in the Hunter Valley may establish some other rights. However, no submissions on how that issue would affect the outcome were forthcoming.

18. Mr Jones also commented that the assessment of what constitutes suitable duties or the applicant's ability to earn in suitable duties, was not something within the work capacity assessment process. No further submissions to explain or expand upon that matter were made either.

19. Ms Israel for the respondent made a general submission that there was no evidence to form a basis for bringing the proceedings to challenge the findings of the last WCD.

Discussion

20. No authorities have been cited by either party.

21. The nature of the proceedings is not an administrative review of the last WCD or any other decision of the insurer. I treat the proceedings as "a dispute referred to the Commission that concerns …... weekly payments of compensation": s 295(1)(a) of the *Workplace Injury Management and Worker Compensation Act 1998* (the 1998 Act). This involves a consideration as to whether or not an interim payment direction for weekly payments should be made pursuant to Chapter 7 Part 5 Division 2 of that Act.

22. The relevant sections of Chapter 7 Part 5 Division 2 of the 1998 Act are:

> **"297 Directions for interim payment of weekly payments or medical expenses compensation**
>
> (1) 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***.
>
> (1A) Section 298 does not apply to a dispute concerning a decision by the insurer to discontinue or reduce weekly payments of compensation on the basis of a work capacity decision under Division 2 of Part 3 of the 1987 Act.

(2) An interim payment direction for payment of medical expenses compensation cannot be for an amount of more than $7,500 or such other amount as may be prescribed by the regulations.

Note. The amount of $7,500 is subject to adjustment under Division 6 of Part 3 of the 1987 Act.

(3) The Registrar is to presume that an interim payment direction for weekly payments of compensation is warranted unless it appears to the Registrar that:

(a) the claim concerned has minimal prospects of success, or

(b) the worker has returned to work, or

(c) the injury was not reported by the worker as required by section 44 (Early notification of workplace injury), or

(d) insufficient medical evidence is available concerning the period of incapacity of the worker, or

(e) circumstances exist that are prescribed by the regulations as circumstances in which it is not to be presumed that such a direction is warranted.

….

((4) to (7) not relevant)

23. There is no notice disputing liability pursuant to s 78 of the 1998 Act.

24. Part 3 Division 2 of the 1987 Act governs the entitlement to weekly payments. Section 37 of the 1987 Act is as follows:

37. “Weekly payments in second entitlement period (weeks 14-130)

(1) The weekly payment of compensation to which an injured worker who has no current work capacity is entitled during the second entitlement period is to be at the rate of:

(a) (AWE × 95%) − D, or

(b) MAX−D,

whichever is the lesser.

(2) The weekly payment of compensation to which an injured worker who has current work capacity is entitled during the first entitlement period is to be at the rate of:

(a) (AWE × 95%) − (E + D), or

(b) MAX − (E + D),

whichever is the lesser.”

25. Relevant provisions include:

Section 32A

"***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."

and

"***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."

Findings and Reasons

26. Mr Jones' concession as to the current state of the evidence is properly made. The applicant's capacity to earn is limited only by her inability to attend the office in Mt Druitt or Blacktown. As recently as 12 February 2019, the applicant's treating psychologist, Dr Tanya Hollier, noted that despite the continuing evidence of post-traumatic stress symptoms, anxiety and stress (which had been recently exacerbated by the stress surrounding the premature birth of the applicant's grandchild), the applicant would "continue to benefit from return to work". Dr Hollier noted the applicant felt wronged by the system and the outcome of other proceedings in the New South Wales Civil & Administrative Tribunal based on her perception of discrimination, the details of which are not before me. However, Dr Hollier opined that the applicant "still has proven capacity to complete her Aboriginal case worker role" and did not want to move to another position or retrain. Dr Hollier noted that the applicant had been "deemed mentally well by several clinically appropriate people (psychiatrist, GP, doctor, clinical and health psychologist [sic]) to return to her original position in another location closer to home".

27. Some time earlier, on 30 January 2018, Dr Jager, psychiatrist, who examined the applicant at the request of the respondent, concluded that the applicant did have a mixed anxiety/depressive disorder on the basis of perceived discrimination (not concluding as a matter of fact whether or not there had been bullying, harassment or other slights against her). He believed at the time that although she should not undertake a child protection case worker role, her condition did "not preclude her from undertaking a less onerous task, or at least a task with no client contact" in which she could work full-time. He then recommended treatment.

28. It is apparent that by the time Dr Hollier reported in February 2019 the applicant had received treatment and her condition had improved significantly.

29. On the basis of this evidence and the absence of challenge to various other assessments related to earnings I make the following findings:

    (a) The applicant has capacity to undertake suitable employment.

    (b) I bear in mind the fact that I am not to have regard to the applicant's place of residence or whether the suitable employment is generally available in the employment market (s 32A of the 1987 Act). I find that the applicant has the capacity to work in an Aboriginal case worker's role in any place other than Blacktown or Mt Druitt. The fact that the applicant's wishes are to be closer to her family does not alter the application of s 32A in the circumstances.

    (c) There is no suggestion that the respondent has provided any undertakings that the applicant would be provided with alternative roles more suitable to her personal circumstances, nor are there any issues under s 48 or s 48A of the 1987 Act raised (*Cross v Secretary, Department of Education* Cr [2019] NSWWCCPD 20).

    (d) The applicant's capacity to earn in the suitable employment as an Aboriginal case worker is most likely to be at or near her pre-injury average weekly earnings of $1,640 per week. Because of the application of s 37 and the reduction of PIAWE by 20% for the purpose of calculating entitlements, the actual finding does not make much difference. In fact, however, I find the applicant's capacity to earn, in suitable employment, to be $1,640 per week.

    (e) In the application of s 37, the applicant has no entitlements to weekly compensation.

    (f) Accordingly, I find that the presumption that an interim payment direction for weekly payments of compensation is warranted is displaced because the applicant's claim has minimal prospects of success: s 297(3)(a) of the 1998 Act.

30. 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 GERARD EGAN, REGISTRAR'S DELEGATE, WORKERS COMPENSATION COMMISSION.

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Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar