

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 1342/19
Applicant: Vera Dotlic
Respondent: CFMEU (NSW Branch) Construction
Date of Determination: 13 February 2020
Citation: [2020] NSWCC 43

The Commission determines:

1. In accordance with the decision of the Medical Appeal Panel dated 9 October 2019, the respondent is to pay the applicant permanent impairment compensation for a 12% whole person impairment in respect of an injury to the lumbar spine on 28 April 2014.
2. At the date of the injury referred to in paragraph 1 above, the applicant's pre-injury average weekly earnings were \$833 per week.
3. As a result of the injury referred to in paragraph 1 above, the applicant was totally incapacitated for employment from 16 August 2014 to 25 February 2016.
4. As a result of the injury referred to in paragraph 1 above, the applicant was partially incapacitated for employment from 26 February 2016 to 20 October 2016 and had a capacity to earn during that period of \$200 per week.
5. The respondent is to pay the applicant weekly compensation pursuant to section 37 of the *Workers Compensation Act 1987* as follows:
 - (a) For the period 16 August 2014 to 25 February 2016, at the rate of \$666.40 per week (being 80 per cent of the applicant's PIAWE);
 - (b) From 25 February 2016 to 20 October 2016 at the rate of \$466.40 per week.
6. The respondent is to pay the applicant's reasonably necessary medical and treatment expenses pursuant to section 60 of the *Workers Compensation Act 1987* upon production of accounts, receipts and/or Medicare Australia Notice of Charge.

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 Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. On 9 October 2019, a Medical Appeal Panel (MAP) of the Commission assessed Ms Vera Dotlic (the applicant) as suffering a 12% whole person impairment as a result of an injury to her lumbar spine suffered in the course of her employment with the respondent on 28 April 2014.
2. The applicant was employed as a cleaner, and her injury arose from pain she felt after twisting and falling while opening the gates at the respondent's premises.
3. Following the incident at issue, the applicant was absent from work and paid weekly compensation up to 15 August 2014, at which time the respondent disputed her claim. She has not worked since and claims weekly benefits for 113 weeks from 16 August 2014 to 20 October 2016. Her degree of incapacity, if any, for this period is in issue. It is agreed her pre-injury average weekly earning (PIAWE) is \$833 per week.
4. The applicant also seeks an order for payment of reasonably necessary medical and treatment expenses pursuant to section 60 of the *Workers Compensation Act 1987* (the 1987 Act).

ISSUES FOR DETERMINATION

5. The parties agree that the following issues remain in dispute:
 - (a) The applicant's capacity for employment between 16 August 2014 and 20 October 2016;
 - (b) The applicant's entitlement to medical and treatment expenses.

PROCEDURE BEFORE THE COMMISSION

6. The parties attended a hearing on 29 January 2020. On that occasion, Mr F Curran of counsel appeared for the applicant and Mr R Hanrahan of counsel for the respondent. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to 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.

EVIDENCE

Documentary Evidence

7. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) The Application to Resolve a Dispute (the Application) and attached documents;
 - (b) The Reply and attached documents;
 - (c) The applicant's Application to Admit Late Documents (AALD) dated 2 December 2019;
 - (d) A bundle of material filed by the applicant attached to a second AALD dated 20 January 2020, admitted without objection and marked exhibit A.

Oral Evidence

8. There was no oral evidence called at the hearing

FINDINGS AND REASONS

Issue 1 - Incapacity

9. The applicant's treating general practitioner, Dr Todorovic provided a number of medical certificates. Each of them certifies the applicant as totally unfit, and they range in date from April 2014 to May 2015.
10. The applicant came to lumbar spine surgery at the hands of Associate Professor Van Gelder, neurosurgeon on 24 August 2015. It was Mr Curran's contention that the applicant was totally unfit from the date of injury until at least six months after that surgery.
11. The respondent relied on the absence of certification after approximately May 2015 to assert that the applicant had not satisfied the onus of proof in establishing she lacked capacity for employment beyond that date.
12. The respondent also relied upon the opinion of Dr Wallace, independent medical examiner (IME). Mr Hanrahan submitted Dr Wallace's opinion is of importance as he places the complaints of symptomology by the applicant into context and allows for the pre-existing condition, which he also opined had surpassed any aggravation suffered in the injury at issue.
13. I do not accept that submission for the following reasons. The views of Dr Wallace are at odds with the preponderance of the medical evidence in this matter. He rejects the notion of any long term effect arising from the injury, which places him squarely at odds with the Approved Medical Specialist (AMS) Dr Truskett, who examined the applicant and provided a Medical Assessment Certificate dated 5 July 2019 which found the applicant to be suffering from a 12% whole person impairment as a result of the injury at issue.
14. Dr Wallace's opinion is also at odds with the views of the MAP which confirmed the findings of the AMS, and also with the views of Dr Van Gelder (treating neurosurgeon), Dr Todorovic general practitioner and Dr Guirgis, IME for the applicant.
15. I reject Dr Wallace's opinion as to the ongoing effect of the relevant injury and accept the preponderance of the medical evidence as listed above. In his report dated 21 July 2014, Dr Wallace said the applicant suffered no more than a temporary aggravation, the effects of which had passed. Dr Wallace did not, however, provide any reasoning as to why this conclusion ought to be accepted, and instead merely offered a pronouncement that any aggravation suffered by the applicant had passed. By contrast, it is apparent from the findings of the AMS as confirmed by the appeal panel that the applicant did suffer a serious ongoing injury to her lumbar spine, the effects of which led to her suffering a significant whole person impairment.
16. It is important at this point to note that the presence of whole person impairment does not, of itself, lead to a finding of incapacity. They are different tests and different categories of loss. Nevertheless, I find the views of the AMS and appeal panel persuasive as compared to Dr Wallace in assessing the nature and extent of the aggravation and injury suffered by the applicant, and on the question of whether its effects are ongoing.
17. Mr Curran also noted the applicant has been in receipt of sickness benefits from Centrelink and suggested this points to her suffering an ongoing incapacity for work, rather than being suggestive of an unwillingness to work. He stressed this was the case, particularly given the applicant's long and stable work history from the time of her immigration to Australia in or about 2000 until she suffered the injury at issue.

18. Mr Hanrahan noted Dr Todorovic's certificates dealt with both right knee and lumbar spine injuries, and that the findings of injury by the appeal panel only related to the lumbar spine. He submitted this was a matter which the Commission would take into account in rejecting the views of Dr Todorovic as to the applicant's incapacity, and also as to whether that incapacity related to an injury suffered as a result of her employment with the respondent.
19. The difficulty with this submission is that the level of impairment suffered by the applicant as referred to in her various uncontested statements and in the medical opinions of both AMS, appeal panel, IME and treating surgeons all suggest she has suffered a significant injury to her spine, one which I am satisfied has led to her suffering incapacity for employment for reasons which I set out below.
20. Section 32A of the 1987 Act sets out a number of factors to which regard should be had in determining a worker's suitability and capacity for employment. They relevantly include the nature of the incapacity and details provided in the medical information; the age, education, skills and experience of the worker and any return to work plan or document issued in relation to the injured worker.
21. I note there is no return to work plan or document applicable to the applicant, however, I take into account her limited command of English and reliance for nearly 15 years on manual work in the nature of cleaning in order to earn a living. I accept Mr Curran's submission that the applicant has little in the way of transferable skills which would enable her to obtain employment on the open labour market. I also accept that her injury is sufficiently serious as to render her incapacitated, given her particular levels of experience, her age, education and skills, to earn a living on the open labour market. In other words, I am satisfied that for the period claimed the applicant suffered an incapacity.
22. Notwithstanding the absence of medical certificates from May 2015 onwards, I am satisfied that the applicant remained totally incapacitated from 16 August 2014 until six months after her surgery, which took place on 24 August 2015. In so finding, I note the nature of the surgery which was a lumbar microscopic laminectomy at the L3 and L5/S1 levels. In so finding, I accept the applicant's condition did not improve from the time she was last paid weekly benefits until the date of her surgery. I also accept that, given the nature of the surgery performed and the time one would reasonably expect to recover from the operation, the applicant would have remained totally incapacitated until a least 24 February 2016.
23. I note the submissions of Mr Hanrahan to the effect that the applicant would have had capacity to carry out other employment, such as a babysitter, quality controller or light process worker from the time the respondent ceased making weekly payments. I reject that submission owing to the requirement for surgery arising from the injury suffered by the applicant, which was serious enough to require multilevel laminectomy. As Mr Curran noted, occupations such as baby sitting, childcare, quality control and light process work can be notoriously hard on a worker's back, and given the particular nature and extent of the injury suffered by the applicant in this matter, I am satisfied she has demonstrated a total incapacity up to 24 February 2016.
24. For the period from 25 February 2016 to 20 October 2016, namely 34 weeks, doing the best I can, I accept the applicant would have had some capacity to earn income on the open labour market, albeit a very limited capacity owing to the particular nature of her education, skills, experience and age. I assess her ability to earn income between 25 February 2016 and 20 October 2016 at \$200 per week, and therefore order the respondent to pay the applicant weekly compensation as follows:
 - (a) For the period 16 August 2014 to 25 February 2016, at the rate of \$666.40 per week (being 80 per cent of the applicant's PIAWE);
 - (b) From 25 February 2016 to 20 October 2016 at the rate of \$466.40 per week.

MEDICAL AND TREATMENT EXPENSES

25. I note the applicant made a general claim for medical expenses pursuant to section 60 of the 1987 Act. Given the nature and extent of the applicant's lumbar spine injury as found by the appeal panel and the AMS, I am satisfied the respondent should pay the applicant's reasonably necessary medical and treatment expenses in respect of the injury on 15 August 2014, upon production of accounts, receipts and/or Medicare Australia Notice of Charge.

SUMMARY

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

