

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2889/19
Applicant: Shereen Abdelmalek
Respondent: Australian Unity Home Care Service Pty Ltd
Date of Determination: 8 September 2020
Citation: [2020] NSWCC 305

The Commission determines:

1. The applicant suffered injury to her thoracic spine, lumbar spine, left upper extremity (shoulder) and right upper extremity (shoulder) during the course of her employment with the respondent, with a deemed date of injury of 15 February 2018.
2. As a result of the injury referred to in (1) above, the applicant suffered partial incapacity for employment.
3. By consent, the applicant's Pre-injury Average Weekly Earnings (PIAWE) for the first 52 weeks of claimed incapacity was, including shift and overtime allowances, \$1,185.23.
4. The applicant's PIAWE beyond the first 52 weeks of claimed incapacity, excluding shift allowance and overtime, is \$894.63.
5. The respondent paid the applicant weekly compensation benefits for 34 weeks from 14 February 2018 to 27 November 2018.
6. The applicant's residual capacity for employment as a result of the injury referred to in (1) above is \$250 per week.
7. The respondent is to pay the applicant weekly compensation pursuant to section 37 of the *Workers Compensation Act 1987* as follows:
 - (a) From 28 November 2018 to 3 April 2019 (18 weeks) at the rate of \$698.18 per week (being 80% of the agreed first 52 weeks PIAWE figure of \$948.18 (namely \$758.54) less \$250 per week in residual capacity);
 - (b) From 4 April 2019 to 11 August 2020 at the rate of \$465.70 per week (being 80% of the applicant's post-52 week PIAWE of \$894.63 (namely \$715.70) less \$250 per week in residual capacity).
8. The respondent is to pay the applicant's reasonably necessary medical and treatment expenses in respect of the injuries referred to in (1) above, 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.

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Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Shereen Abdelmalek (the applicant) is a former care worker who sustained injuries to her thoracic spine, lumbar spine, left and right shoulders during the course of her employment with Australian Unity Home Care Service Pty Ltd (the respondent) with a deemed date of injury of 15 February 2018.
2. On 25 September 2019, the matter came before me for a conciliation/arbitration hearing and on 11 November 2019 I issued a Certificate of Determination in which findings were made in favour of the applicant in relation to claimed injuries as set out in paragraph (1) above. An award for the respondent on the applicant's claim for injuries to her cervical spine and lower extremities was also entered.
3. The applicant's proceedings seek payment of weekly benefits, medical expenses and permanent impairment compensation. The permanent impairment compensation claim was remitted to the Registrar for referral to an Approved Medical Specialist (AMS) to assess the permanent impairment arising from the injured body parts.
4. On 5 February 2020, AMS Dr Meakin issued a Medical Assessment Certificate (MAC) certifying the applicant as suffering from no permanent impairment to her thoracic and lumbar spine, 4% whole person impairment to her left upper extremity (shoulder) and 1% whole person impairment to her right upper extremity (shoulder).
5. On 14 March 2020, the applicant lodged an Application to Appeal Against the Decision of Approved Medical Specialist. On 5 May 2020, the Medical Appeal Panel (MAP) issued a MAC in which it confirmed the findings of the AMS with respect to the applicant's thoracic and lumbar spine, however, the MAP found the applicant's whole person impairment to her left upper extremity and right upper extremity had not reached maximum medical improvement.
6. The matter was then listed before me for post medical assessment certificate telephone conference on 9 June 2020, at which time I issued direction for production orders and made directions for written submissions by the parties dealing with the question of the applicant's capacity. The applicant's claim for medical expenses was not the subject of submissions, as that claim was limited to one for reasonably necessary expenses relating to the relevant injuries in accordance with section 60 of the *Workers Compensation Act 1987* (the 1987 Act).
7. The applicant filed her written submissions on 13 August 2020, and the respondent its written submissions on 28 August 2020. The applicant's submissions in reply were filed on 7 September 2020. The submissions relate only to the question of the applicant's entitlement (if any) to weekly benefits compensation.

ISSUES

8. The parties agree that the only issue for determination is whether the applicant is entitled to an award for weekly benefits, and if so in what amount.

PROCEDURE BEFORE THE COMMISSION

9. The procedure before the Commission is set out in the heading "Background" above. The parties were informed of my intention to determine the dispute without holding a further conciliation conference or arbitration hearing and have agreed to the determination of the claim for weekly benefits "on the papers" without a further conference or formal hearing.

EVIDENCE

Documentary evidence

10. All of the pleadings in this matter were placed into evidence before the Commission and taken into the consideration in reaching this decision. Those pleadings include the following:
 - (a) Application to Resolve a Dispute (the Application) and attachments;
 - (b) Reply and attachments;
 - (c) Applicant's Application to Admit Late Documents (AALD) lodged on 19 August 2019;
 - (d) Respondent's AALD dated 19 August 2019;
 - (e) A pay slip of the applicant for the period 19 August 2017 to 1 September 2017;
 - (f) Applicant's AALD dated 18 November 2019;
 - (g) Respondent's AALD dated 10 December 2019;
 - (h) Respondent's AALD dated 29 May 2020; and
 - (i) Applicant's AALD dated 5 June 2020.
11. The applicant objects to the inclusion into evidence of the supplementary report of Associate Professor Shatwell, filed with the respondent's AALD dated 29 May 2020. That objection is on the basis the report is late, given the matter was first listed for hearing in August 2019. I note the AALD was served on the applicant on 29 May 2020, more than a week ahead of the teleconference on 9 June 2020 at which the orders for submissions were made. No objection to the report was taken at the teleconference, despite a timetable for production of documents being made which gave the applicant ample time to address the report had she wished to do so.
12. On balance I believe the document should be admitted into evidence in the interests of justice. Dr Shatwell is the Independent Medical Examiner (IME) for the respondent, and in my view his views are relevant to the matters in issue between the parties.

Oral evidence

13. There was no oral evidence taken in this matter.

FINDINGS AND REASONS

Pre-injury Average Weekly Earnings

14. There was an agreement between the parties that the applicant's Pre-injury Average Weekly Earnings (PIAWE) is agreed at \$1,185.23 per week for the first 52-week period of potential entitlement. The parties also agree that after the initial 52-week period, the applicant's appropriate PIAWE falls to \$894.63 per week, as that figure removes shift allowance and overtime entitlements.

The period claimed

15. The applicant initially claimed weekly compensation from 7 December 2018 to date and continuing, pursuant to section 37. Quite appropriately, when the respondent supplied a list of payments with its written submissions, the applicant acknowledged she has received 34 weeks of weekly benefits from 14 February 2018 to 27 November 2018. In light of the documentation filed with the respondent's submissions, the parties agree the applicant's entitlement to weekly benefits pursuant to section 37 expired on 11 August 2020, being 130 weeks from 14 February 2018, the date on which she was first paid weekly benefits.
16. It follows from this finding that the actual period of the applicant's claim is from 28 November 2018 to 11 August 2020.
17. Having accepted the second entitlement period pursuant to section 37 expired on 11 August 2020, it follows the Commission has no jurisdiction to make any award of weekly compensation beyond that date (see *Lee v Bunnings Group Limited* [2013] NSWCCPD 54). An injured worker is entitled to receive weekly payments after the second entitlement period pursuant to section 38 of the 1987 Act, however, there is no suggestion the worker meets the requirements of that section in order to qualify for ongoing weekly benefits.

Capacity

18. The applicant submitted that at no time since the cessation of weekly benefits has she had capacity for work. In support of that submission, she relied upon the WorkCover medical certificates provided by her general practitioner Dr Toomey (Application 165-187). Dr Meakin, AMS, examined the applicant in December 2019, and found that she had a restricted range of motion in her shoulder. The applicant submitted that such a finding is supportive of a lack of capacity to carry out employment. Moreover, in his report dated 20 March 2019, Dr Toomey provided an opinion that the applicant was unfit for any type of employment or to work any hours.
19. Treating surgeon Dr Guirgis, provided an opinion (Application 58) that the applicant was unfit for activities which placed stress on her spine and that she ought to avoid heavy lifting, bending or twisting of her back together with any activities which caused jolting, jerking or jarring. Relevantly, at the time of his consultation, the applicant was on Norspan patches, and Dr Guirgis was of the view that these rendered it unsafe for the applicant to drive.
20. The evidence discloses the applicant remains on Norspan patches and Tramadol, and is unable to drive whilst taking this medication (statement [3]–[4]). Additionally, she relies upon the fact that English is her second language and her communication skills are basic at best.
21. In reply to the respondent's earning capacity report dated 12 August 2019, the applicant denied she was fit to do the work of either a cashier, pathology courier or a customer service representative. I accept that, owing to the medication which she still takes, the applicant would be unsuited to work as a pathology courier as she is precluded from driving. In terms of the role as a cashier, the applicant states that she is only able to sit for approximately 40 minutes at a time and that her English language skills would militate against her being able to perform this work. Likewise, the applicant indicates she has no computer skills, which are usually required in a role as a customer service representative.
22. The applicant also noted, and I accept that the various jobs referred to in the earning capacity report had not been put to the applicant's treating doctors, and as such none of them have suggested the applicant is physically fit for any of the three jobs suggested.

23. The applicant also relied upon the report of the respondent's IME Dr Shatwell dated 19 October 2018, in which he stated the applicant has a capacity for light work of a suitable nature and that she was physically unsuited to heavy work such as that she was doing in her work with the respondent.
24. For its part, the respondent disputes the applicant's submission that she has no current capacity for employment and has lacked such capacity since December 2018.
25. I accept the respondent's submission that the relevant issue is whether the applicant is "able to return to work in suitable employment" as that term is defined in section 32A of the 1987 Act. As has been noted in a line of authority commencing with the decision of Roche DP in *Wollongong Nursing Home Pty Ltd v Dewar* [2014] NSWWCPCD 55, the determination of what is suitable employment is a practical exercise having regard to the nature of an injured worker's incapacity together with their age, education, skills and work experience. There is no issue that the question of whether a worker is fit for suitable employment must be made regardless of whether the work or employment is available. In other words, the question is solely whether the worker has capacity, rather than whether suitable work is available to them on the open labour market.
26. The respondent submits, and I accept that there is a consensus in the medical evidence that the worker is fit for suitable duties. In making this finding, I have considered various medical evidence of the IMEs retained by both parties, together with the treating medical experts. Notwithstanding the applicant's general practitioner having certified her as totally unfit for employment from December 2018 to date, in my view the preponderance of the medical evidence, particularly the specialist medical evidence, is supportive of a finding that the applicant does suffer an incapacity for employment, however, that incapacity is a partial rather than total one. Notwithstanding the applicant's submission that she has no capacity, the treating medical and IME evidence on balance shows she does retain some capacity, albeit limited.
27. The question, of course, is what suitable duties can the applicant perform and for how many hours per week? The respondent relied upon the vocational assessment conducted by ProCare, which noted the applicant as having a large number of transferable skills and assessed her as being capable of carrying out roles as a cashier, pathology courier and customer service representative.
28. I do not accept, for reasons already stated, that the applicant is capable of performing the role of a pathology courier. Put simply, she is unable to drive owing to the medication which she takes.
29. Likewise, I do not accept the applicant as being capable of carrying out employment in all cashier roles. In my view, given the particular restrictions and difficulties which she faces, the applicant would only be suitable for limited roles. For example, given the ongoing issues with her arms and shoulders, I do not believe a role as a cashier where she had to reach, handle, move and transfer multiple items across a counter would be suitable. Nevertheless, the evidence discloses the applicant is fit for certain sedentary roles on reduced hours in accordance with her restrictions.
30. The respondent submits the applicant is fit to work full-time hours and to earn at least as much as 80% of her PIAWE. In doing so, it relies on the supplementary report of Dr Shatwell dated 21 May 2020. In that report, Dr Shatwell makes limited comment on the applicant's capacity, however, he states:

“Finally, you ask me to comment on Ms Abdelmalek’s capacity for employment. I note her academic achievement of a Bachelor’s Degree in Commerce and employment as an Accountant for 16 years prior to migration to Christchurch in New Zealand. She had experience of managing a franchise as a cleaner for 2 years in Christchurch and 6 years’ experience working in community care in Australia. I note Ms Abdelmalek completed a Certificate III in Aged Care and a Certificate III in Individual Support for her work as a carer. She is therefore very well educated to undertake a number a clerical positions or perform light manual work with a lifting limit of 10kg. Clerical or light office work would be ideal. She has sufficient command of English to reach an appropriate level of responsibility.”

31. I note Dr Shatwell was aware of the applicant’s work history when he examined her in 2018. Indeed, he referred to it in his initial report dated 19 October 2018. At that time, he opined:

“Ms Abdelmalek has a capacity for light work of a suitable nature which does not involve a great deal of bending and lifting. Although she has managed work as a personal carer for the last six years, she is physically unsuited to heavy work and would be better employed in clerical or light office work which did not involve heavy lifting. She is physically challenged by her work and unlikely to be able to manage her previous work activities as judged by her presentation today. Her anxiety and continuing disability over the last eight months make it unlikely that she would be able to achieve general fitness for her caring work.”

32. Dr Shatwell had not seen the applicant between his first and second reports. In my view, the doctor does not provide sufficient reasons for his change in opinion regarding the applicant’s capacity to include some physical work, as opposed to his previous view that she could only carry out more sedentary vocations. Moreover, his recent report does not take into account the applicant’s anxiety, to which he had specifically referred as a reason for her limited capacity in October 2018. Likewise, the implied notion that the applicant could carry out work in the accounting field in Australia by relying on qualifications from an overseas university which she obtained more than 20 years ago is, with respect, not sustainable. Plainly the applicant would require retraining to qualify for work in that field, and as such does not currently have the capacity to carry it out.
33. Additionally, Dr Shatwell’s view of the applicant seemingly having greater capacity than in 2018 is obtained without further examination. I do not offer that as a criticism of the doctor, given the limitations practitioners were operating under during the height of the pandemic, but it is still a relevant consideration in assessing whether to prefer an expert opinion.
34. In my view, the preponderance of the medical evidence establishes an ongoing incapacity on the part of the applicant. Doing the best I can taking into account her age, education, transferable skills and the nature and extent of her physical difficulties which she suffers, in my view for the relevant period claimed, the applicant had a capacity for employment of no more than \$250 per week. In this regard, the applicant’s capacity has, in my view, remained relatively static over the period claimed.
35. I note the applicant has reasonable English skills, though they are not particularly proficient. Additionally, the work capacity report relied on by the respondent has recommended three vocations which I do not accept are suitable for the applicant to perform. As indicated, she could not work as a pathology courier given her medication prevents her from driving. Likewise, any cashier role which requires repetitive and heavy movements of the upper extremities is, in my view, unsuitable for her given the opinions set out in the balance of the medical evidence. I accept, however, some cashier roles may be suitable, as would some customer service roles, though not all by virtue of both the applicant’s physical limitations and her English language skills.

SUMMARY

36. Accordingly, for the reasons advanced above, the respondent will be ordered to pay the applicant weekly compensation for the period 28 November 2018 to 11 August 2020 as follows:
- (a) From 28 November 2018 to 3 April 2019 (18 weeks) at the rate of \$698.18 per week (being 80% of the agreed first 52 weeks PIAWE figure of \$948.18 (namely \$758.54) less \$2500 per week in residual capacity);
 - (b) From 4 April 2019 to 11 August 2020 at the rate of \$465.70 per week (being 80% of the applicant's post-52 week PIAWE of \$894.63 (namely \$715.70) less \$250 per week in residual capacity).
37. In light of these findings, the Commission will make the orders set out on page 1 of the Certificate of Determination.

