

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 3306/20
Applicant: Michael Robert Saunders
Respondent: Hettich Australia - A Limited Partnership
Date of Determination: 17 July 2020
Citation: [2020] NSWCC 246

The Commission determines:

1. The Work Capacity Decision and section 78 notice dated 9 March 2020 are set aside.
2. The respondent is to pay the applicant weekly compensation from 16 June 2020 at the rate of \$865.76 per week.

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. On 23 July 2010, Michael Robert Saunders (the applicant) was lifting a heavy carton from a pallet in the course of his employment with Hettich Australia - A Limited Partnership (the respondent) when he suffered a serious lumbar spine injury.
2. On 11 July 2011, the applicant underwent an L4-5 microdiscectomy at the hands of Dr Kam. The symptoms in his lower back and left sciatic pain continued, and on 30 July 2012 Dr Kam performed a spinal fusion. There was some reduction in the frequency and intensity of the applicant's left leg symptoms, however, weakness and numbness continued down both legs.
3. On 5 May 2017, the applicant's Independent Medical Examiner (IME) Dr Deveridge provided a report certifying the applicant's whole person impairment at 26%. On 25 July 2017, the respondent's insurer wrote to the applicant confirming it accepted his whole person impairment exceeded 20% and that he was entitled to continue to receive weekly payments beyond 260 weeks, as section 39 of the *Worker's Compensation Act 1987* (the 1987 Act) did not apply to him.
4. In or about mid-2019, the applicant attended the rooms of his treating doctor, Dr Cameron for the purposes of a telephone conference with his case officer to discuss the applicant's capacity for employment. As a result of that meeting, Dr Cameron changed the applicant's capacity from zero to four hours per day, three days per week. Thereafter, the applicant undertook regular meetings with a vocational assessor from an organisation known as iPar. On 21 June 2019, iPar issued a vocational assessment report in which it referred to suitable employment which the applicant could carry out. Among the roles discussed in the report was that of small engine mechanic.
5. On 9 March 2020, the respondent notified the applicant of the outcome of its work capacity decision and issued a section 78 notice. In that notice, the applicant was advised that his weekly payments of compensation would be reduced to \$471.08, on the basis that he could work for four hours per day, three days per week on restricted duties as a small engine mechanic. The applicant then filed an Application for Expedited Assessment with the Commission seeking to set aside the work capacity decision.

ISSUES FOR DETERMINATION

6. The parties agree that the only matter in dispute is whether the work capacity decision made by the respondent and set out in its section 78 notice dated 9 March 2020 should be set aside.

PROCEDURE BEFORE THE COMMISSION

7. The parties attended a hearing via telephone on 15 July 2020. 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 been unable to reach an agreed resolution of the dispute.
8. At the hearing, Mr J Gaitanis of counsel appeared for the applicant, instructed by Mr A Bell, solicitor. Mr D Russel, solicitor, appeared for the respondent instructed by Mr N Bennett of the respondent's insurer.

EVIDENCE

Documentary evidence

9. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application for Expedited Assessment (the Application) and attached documents, and
 - (b) Reply and attached documents.

Oral evidence

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

FINDINGS AND REASONS

Whether the work capacity decision should be set aside

11. On balance, I am of the view that the respondent's work capacity decision dated 9 March 2020 should be set aside for the following reasons.
12. The work capacity decision relies solely on the applicant being able to work as a small engine mechanic for four hours per day, three days per week. It does so in reliance of the vocational assessment completed by iPar dated 21 June 2019.
13. That report lists three potential employers for the applicant in the role as small engine mechanic. According to the report, the duties of that role include:
 - diagnosing faults;
 - previous experience repairing power tools and similar products;
 - repairing electric and power tools;
 - computer experience;
 - providing technical support;
 - servicing and repairing customer machinery;
 - servicing and repairing pressure washers and associated parts, and
 - an ability to manipulate small parts, usually working from seated or standing bench height.

The role also requires some carrying when moving parts from one location to another together with minimal occasional bending to lift the parts of machinery onto and off a work bench. At page 47 of the Application, the iPar report says:

"Mr Saunders has a limited capacity for employment as per his SIRA Certificate of Capacity, however, he has been assessed as having greater capacity as per the outcome of the IMC review. **As a result of the limited capacity on his certificate he is currently not suitable for the employment options listed above.**" (my emphasis)

It is therefore apparent that on the face of the vocational report upon which the respondent himself relies; the applicant is not fit for the duties which the respondent claims he can carry out.

14. Dr Cameron, treating doctor provided a report found from page 83 of the Application. In that report, Dr Cameron provides an explanation as to why he altered the applicant's certificate of capacity from no work capacity to 12 hours per week. Dr Cameron says:

"For this period, I only have my notes from 16.7.2019. That day I had a case conference with Mel and Tristan and discussed the vocation options. I agreed to upgrade him to 12 hours to explore the options and said I would review him in six weeks. I also noted that he had seen Dr Russo (pain specialist) who had recommended a spinal cord stimulator, and Mr Saunders was due to see a pain psychologist the next day."

15. Dr Cameron then said that after now fully understanding the duties of a small engine mechanic, he did not believe the applicant had capacity to work in that role for three days per week, four hours per day. When asked to provide reasons for that answer, Dr Cameron said at page 84 of the Application:

"Mr Saunders is in significant pain, enough to warrant a spinal cord stimulator inserted into his back. As you can imagine, this is not an insignificant undertaking. When vocational options are proposed by rehabilitation consultants, we rely on the rehabilitation consultant providing accurate information about a role. This is not always the case and many times what initially appears suitable, turns out not to be on closer examination and further information. Mr Saunders has not had capacity to work for many years and I believe the chances of finding suitable employment for a man of his age and skills set considering his physical problems was quite low. I upgraded him on a trial basis to have one last look at rehabilitation to see if they could find anything suitable, even for a few hours per week. This has turned out to have been unsuccessful."

16. The applicant also provided a statement from Michael Thometzek, who is a small engine mechanic. Mr Thometzek's statement is found at page 15 of the Application and lists the nature of the work and physical demands of a small engine mechanic. He noted that there are a number of machines which mechanics work on, including whipper snipers, lawnmowers, chainsaws, water pumps, concrete mixers, petrol driven log splitters, self-propelled lawnmowers, petrol powered concrete cutting machines, electric generators, commercial ride on lawnmowers and outboard motors for small boats. He described the work of a small engine mechanic as physically demanding, with the physical exertion required by the mechanic depending upon the particular engine being worked on, as well as the machine to which the engine is attached.
17. In his statement, the applicant notes he has no experience working on machinery or diagnosing problems with it. He also has no computer skills. He noted that he worked at a smash repair business in South Penrith with a friend of his checking off parts that came in for cars which were being repaired at the time, however, he was unable to cope even with that work and therefore stopped it. The applicant states he worked in that role for five months and was able to do so because the manager of the business was a good friend of his, who allowed him to sit down and take breaks as required.
18. The applicant's evidence, which is uncontested, is that he has no experience repairing machines and power tools, nor does he have any formal trade qualifications. He noted that he would be unable to stand for prolonged periods, or squat, crouch, and kneel on a frequent basis. Likewise, the work as set out by Mr Thometzek would require frequent twisting or bending of the applicant's back which he is not able to do.

19. The applicant also relied upon the report of Dr Bodel, orthopaedic surgeon IME. Dr Bodel had the benefit of the section 78 notice, together with the statement of Mr Thometzek and the vocational assessment report. Dr Bodel stated, in light of all the evidence in the matter that:

“I think it most unlikely that he will be able to return to work because of his ongoing incapacity. In particular, he has very limited bending, twisting, and lifting capacity and also standing and sitting capacity, which will make it almost impossible for him to undertake work for which he has appropriate levels of physical fitness and training.”
20. In relation to work as a small engine mechanic, Dr Bodel said:

“He would need to be retrained into alternative duties, and work as a small engine motor mechanic is not ideal as there is a lot of bending and lifting involved in that... Although technically the small engine mechanic work is relatively light work, it can involve some bending and lifting and prolonged sitting with prolonged postures which are not going to be tolerated by a man with this type of spinal complaint.”
21. Mr Gaitanis submitted the overwhelming medical evidence in this matter is to the effect the applicant is in no way fit to work as a small engine mechanic and that the work capacity decision should be set aside. He submitted there was no evidence to contradict the applicant's case that the nature and extent of the duties of the small engine mechanic are such that he has no capacity to perform them.
22. For the respondent, Mr Russell submitted that the work capacity decision was based upon the capacity as set out by the treating doctor, Dr Cameron, who had certified the applicant as fit for three days per week, four hours per day. The difficulty with that submission is Dr Cameron's report explains the reason why he took to certifying the applicant as fit on that basis, namely so that he could have “one last look” at rehabilitation, which proved unsuccessful. Mr Russell also referred to the report of Dr Bodel which indicated the applicant could do some sedentary work and submitted the only issue in this matter was capacity. He submitted that the section 78 notice and work capacity decision should be maintained given Dr Cameron's certification of the applicant.
23. In reply, Mr Gaitanis submitted the issue of whether the applicant might be able to undertake other suitable duties is irrelevant in circumstances where the work capacity decision and section 78 notice relies only on suitable employment as a small engine mechanic. He submitted the respondent could then not rely on other options, as the decision was made on the sole basis of work in that role.
24. In my view, the treating and qualified medical evidence in this matter is overwhelming. Dr Cameron indicates that he certified the applicant as fit for restricted duties on a part-time basis purely so he could make a last-gasp attempt at work as a man in his 60s with a significant lumbar spine disability. Moreover, the iPar report itself indicates that the applicant is not fit for the occupations listed in it, including small engine mechanic.
25. The respondent has therefore issued a work capacity decision stating the applicant is fit for an occupation which the very report which forms the basis for that decision says he is incapable of performing. The fact the applicant has no trade qualifications or computer skills is also indicative of the role of small engine mechanic being unsuitable for him, as is reinforced by the statement of Mr Thometzek. It is noteworthy that once Dr Cameron had the benefit of being fully appraised of the nature and extent of the duties of a small engine mechanic, he indicated the applicant was not capable of working in that vocation.

SUMMARY

26. For the above reasons, the work capacity decision and section 78 notice will be set aside. The respondent will be ordered to pay the applicant weekly compensation from 16 June 2020 at the rate of \$865.76 per week, being 80% of the applicant's agreed preinjury average weekly earnings