

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 1428/20
Applicant: Graham Kent
Respondent: Mecfab Holdings Pty Ltd
Date of Determination: 15 May 2020
Citation: [2020] NSWCC 157

The Commission determines:

1. The respondent is to pay the applicant weekly compensation of \$1,098.18 from 30 October 2019 to date and continuing.

A brief statement is attached setting out the Commission's reasons for the determination.

Catherine McDonald
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 CATHERINE McDONALD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Graham Kent was employed by Mecfab Holdings Pty Limited (Mecfab) as a boilermaker, fitter and machinist when he suffered an injury to his neck on 14 January 2016. He underwent surgery on 28 July 2016.
2. On 4 February 2019, Mr Kent and Mecfab entered into an agreement under which he was paid compensation in respect of 30% whole person impairment.
3. In June 2017, Mr Kent began working for Salmon Buckets and Attachments Pty Limited (SBA) as a supervisor. His position was made redundant on 29 October 2019.
4. Mr Kent claims weekly compensation in respect of total incapacity for work since that time.
5. The issue for determination in these proceedings is the extent of Mr Kent's capacity for work and whether the work at SBA was suitable employment as defined by s 32A of the *Workers Compensation Act 1987* (the 1987 Act). Mr Kent conceded that if the work at SBA was suitable employment, then he was not entitled to compensation.

PROCEDURE BEFORE THE COMMISSION

6. The claim was listed for conciliation conference and arbitration hearing by telephone on 1 May 2020. Mr Stockley of counsel, instructed by Mr Murray appeared for Mr Kent and Ms Barter of counsel, instructed by Ms Ireland, appeared for Mecfab.
7. 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 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 have been unable to reach an agreed resolution of the dispute.
8. The parties agreed that Mr Kent's pre-injury average weekly earnings were \$1,372.73 and that 80% of that amount is \$1,098.18.

EVIDENCE

9. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute and attached documents;
 - (b) Reply;
 - (c) Mr Kent's Application to Admit Late Documents provided during the conciliation conference, and
 - (d) Mecfab's Applications to Admit Late Documents dated 27 April 2020 and 1 May 2020 (provided during the conciliation conference).
10. There was no oral evidence.
11. Much of the evidence in the file relates to the injury in January 2016 and the subsequent treatment and is not relevant to the issue I have to determine. Counsel did not refer to that evidence in detail.

12. Mr Kent signed a detailed statement dated 11 March 2020. He said that he moved to Australia from the United Kingdom in 2007 and settled on the Central Coast. He began working for Mecfab in mid 2015. His employer was based at Botany and his work involved the maintenance of heavy equipment at Sydney Airport. He said that the work was extremely heavy.
13. Mr Kent described the injury on 14 January 2016. After an extended period welding under a truck wearing a full face welding helmet, he attempted to stand and struck his head. His injury was initially thought to be a right shoulder injury but investigations confirmed an injury to his neck. Dr J Curtis, neurosurgeon, undertook an anterior cervical decompression and fusion at C5/6 and C6/7 on 28 July 2016.
14. Because he was anxious about the pain he suffered and fearful of the prospect of surgery, his general practitioner, Dr Won, referred him to Ms Kelly Gay, a psychologist, whom he consulted before and after the operation. Dr Won prescribed anti-depressant medication in April 2017.
15. Mr Kent said that he asked Dr Won to upgrade his capacity to work to eight hours on five days to enable him to return to work in May 2017 despite continuing to suffer pain. In about June 2017, he commenced to work at SBA at Somersby. His duties were largely supervisory and he worked between eight and ten hours a day, despite suffering right arm and shoulder pain.
16. His role required him to manage 25 to 30 staff and he arrived at work at about 6 am before those staff arrived. He allocated work in accordance with the specifications and work plans provided to him. He planned future jobs, ensuring the materials were available and ordering those which were not. He consulted with engineers and draftsmen. Mr Kent was on his feet for most of the day.
17. Mr Kent worked from 6 am to 4.30 pm and had to be encouraged to take lunch breaks. He said that after a period, he was unable to keep working until 4.30 and began to finish work at 3.00 pm. He continued his duties despite significant right arm pain and sleeping disruption. He went to bed at 7.30 pm to be able to get enough sleep to wake at 5.00 am. He discussed his sleeping problems with Dr Won on 30 September 2019 and Dr Won prescribed sleeping tablets to assist with insomnia but Mr Kent found that he woke with increased pain from sleeping in one position. Mr Kent said that he suffered anxiety.
18. Mr Kent's role was made redundant on 29 October 2019 and he immediately began applying for work in the hope that he could pay his mortgage and provide for his family. He applied for jobs that he did not believe he would be able to perform. Mr Kent estimated that he had applied for more than 200 jobs but, having disclosed his injury and disability, he had received only two enquiries from employers. He had attended one interview in Silverwater but did not get the job.
19. Mr Kent said that he contacted Mecfab's insurer and asked for further rehabilitation intervention with a view to improving pain and strengthening prospects for employment but nothing was done.
20. Mr Kent said:

"Whilst I had been applying for various jobs, I honestly don't know whether I would be able to perform them, particularly any jobs involving any type of physical activity. However, at this point I have not received any Centrelink benefits and the worker's compensation insurer has disputed any liability to pay me weekly compensation, and I am left in a dire financial position with a family that relies upon me.

...

Whilst I continued my job with SBA up until I was made redundant on 29 October 2019, my ongoing physical and psychological symptoms caused me significant difficulty in carrying out those duties, and I was extremely doubtful that I would be able to continue that employment beyond Christmas 2019 irrespective of the redundancy.”

21. Mr Kent said that he had undertaken a TAFE course in 2D Autocad/Revit design software but did not consider his skills current enough to gain employment. He said that the neuropathic pain in his right hand and arm prevent him from undertaking computer work beyond short periods.
22. On 5 February 2020, Mr Kent saw Dr Won about his physical symptoms and ongoing depression and pressed him to certify him fit for some work so that he could apply for work. Dr Won then certified him as having no current work capacity. He also referred Mr Kent to see Ms Gay.

Dr Won

23. Dr Won’s detailed notes appear in the file. They set out the history following the injury in 2016 and surgery. On April 2017, Dr Won noted that a vocational assessment had been sought and noted that “capacity increased to 8 hours per day 5 days a week.” On 4 May 2017, in a case conference, Dr Won was informed that Mr Kent’s former employer had some modified duties for Mr Kent. Mr Kent doubted that suitable duties were available and Dr Won said that he was “worried” about modified duty. On 19 May 2017, Dr Won noted that Mr Kent was “being interviewed for factory manager on the coast.” On 7 June 2017, he recorded that Mr Kent had started his new job and was very happy. On 3 August 2017, Dr Won recorded that Mr Kent felt some stress about his job. On 28 September 2017, Dr Won noted that Mr Kent had residual numbness in his right fingers. The numbness is noted until at least mid 2018.
24. Dr Won’s notes throughout 2018 and 2019 record that Mr Kent’s right arm and shoulder pain were unchanged and controlled by medication. For example on 14 June 2018, Dr Won noted that the pain was under good control with Lyrica and Panadeine Forte. On 30 September 2019, Dr Won recorded that Mr Kent was suffering from insomnia and was concerned about his capacity to work to age 55. Dr Won prescribed Restiva.
25. On 30 October 2019, Dr Won noted that Mr Kent had received notice of redundancy. Mr Kent was depressed and his right arm and shoulder pain were unchanged and had been bothering him at work. Dr Won issued a certificate on 30 October 2019 stating that Mr Kent had no current work capacity.
26. On 18 December 2019, Dr Won recorded that Mr Kent was “still a bit down about his arm pain”, which was unchanged. He noted that Mr Kent had been to a “few job interview” [sic].
27. On 16 January 2020, Dr Won recorded that Mr Kent was to start work on 2 February but on 31 January noted that the job was “not happening now.” He noted that Mr Kent suffered poor sleep. He administered a K10 questionnaire and diagnosed depression. Dr Won completed a mental health care plan, prepared a referral to Ms Gay and prescribed Zoloft. He also completed a certificate of capacity in which he said that Mr Kent had capacity for employment for eight hours a day, five days a week. Dr Won said that Mr Kent’s capacity for lifting/carrying, pushing/pulling and driving were “as tolerated.” Sitting, standing and bending/twisting/squatting were normal and Dr Won said that total travelling time to work should be less than one hour each way.

28. On 5 February 2020, Dr Won completed a certificate of capacity in which he said that Mr Kent had capacity for employment for eight hours a day, five days a week. His lifting/carrying capacity was less than 2 kg in his right hand/shoulder and his capacity for pushing/pulling was the same.
29. On 19 February 2020, Dr Won recorded "I believe patient has no capacity for working at this stage because of his worsening anxiety/depression." Dr Won issued a certificate stating that Mr Kent had no current work capacity.
30. Dr Won prepared a report to Mecfab's claims advisor dated 28 February 2020. He set out the questions he was asked and his answers:

"Please advise how the workplace injury is the main contributing factor to the added diagnosis of depression on the worker cover certificate.

Mr Kent has been suffering from depression because of his constant R arm paraesthesia & R neck muscle spasm in despite of neurosurgical intervention under Dr Curtis.

Having consulted with Dr Curtis in the past, Dr Curtis reportedly suggested his symptoms may or may not resolve in the future

Patient has been referred by me to see Dr Kelly Gay (psychologist) for his depression and he has completed one session of psychotherapy.

Pain specialist review was suggested during consultation today

Please advise if the worker wasn't made redundant would depression of still been added onto the work cover certificate? [sic]

Like Mr Kent, patient suffering from residual symptoms (i.e. pain & paraesthesia) after neurosurgery have an increased risk of developing depression. Employment would be helping a patient to cope with depression."

31. Dr Won repeated that opinion in a report to Mr Kent's solicitors dated 4 April 2020 and added:

"Unfortunately, Mr Kent has been suffering from increasing concerns from his neurological symptoms. Like Mr Kent, patient suffering from residual symptoms (i.e. pain & paraesthesia) after neurosurgery have an increased risk of developing depression.

Owing to his neurological symptoms and depression, his current capacity to work is extremely limited."

Ms Kelly Gay

32. Ms Gay's notes commence on 19 May 2016. She recorded a description of the injury and that Mr Kent was heavily medicated. Mr Kent saw Ms Gay again on 21 June 2016 and on 30 August 2016 when she noted that the surgery had gone fairly well.
33. On 11 February 2020, Ms Gay noted that Mr Kent had had surgery three years ago and had been "struggling to hold job down, lack of sleep due to neck, made redundant Oct 19 ... Most jobs I know I can't do."

Dr Curtis

34. Dr J Curtis, neurosurgeon, operated on 28 July 2016 and performed a C5/6 and C6/7 anterior decompression, discectomies, removal of osteophytes, wide foraminotomies and instrumented interbody fusion.

35. On 20 January 2017, Dr Curtis wrote to Dr Won and said that Mr Kent had not yet experienced a full neurological recovery. Dr Curtis said:

“His main concern at this point, and that which has limited his return to work so far, has been ongoing right-sided neck discomfort, and his ongoing concern about his persisting numbness particularly in the thumb and index finger on the right hand.

...

His range of movement of the neck is slightly decreased due to pain, but I was able to reassure him today that his X-rays look excellent, and that he has partly recovered and hopefully in time will enjoy further neurological improvement. I would strongly encourage Graham to continue with his self-directed pool work, and also recommend that he return to the gym to improve his strength and stamina. I would be happy for him to return to light duties provided that there is some way that he can negotiate the long trips, which he has found difficult in the car.”

36. On 16 February 2018, Dr Curtis wrote:

“Graham has successfully returned to work and has been coping quite well, however he has become aware of some intermittent pains and of more concern numbness affecting predominantly the right thumb and index finger, but also some of the middle fingers.

...

to rule out any ongoing or recurrent radicular problems, I have suggested he have a CT guided steroid injection to the right C6 and C7 nerve roots.”

37. After his next review on 8 June 2018, Dr Curtis wrote:

“At my last review he mentioned some symptoms of concern involving the thumb and index finger on the right side but he feels that this has stabilised now. He still has these symptoms but is not getting any pain shooting down the arm, and from a neck perspective he has also remained relatively stable with intermittent neck discomfort on moving the neck. Otherwise he has been relatively intact. In addition to the flexion extension images of the neck which I had asked him to have he also proceeded with the CT guided right C6 and C7 perineural injections . He is not aware that this helped his symptoms greatly and has mentioned these symptoms for the current time appear to have stabilised.”

Applications for work

38. Mecfab issued a notice for production to Mr Kent for details of the job applications he made. Summaries of the applications and some of the email responses are attached to Mecfab's Applications to Admit Late Documents. Counsel did not take me to those documents in detail. In summary, they show that Mr Kent applied for a wide range of jobs on the Central Coast, in the Sydney metropolitan area and in Newcastle. They include supervisory and trainee positions, positions in manufacturing and in sales. The applications commenced on 29 October 2019.

Dispute notice

39. Mecfab's insurer issued a notice on 4 December 2019 in which it disputed that Mr Kent was entitled to weekly payments because he did not have total or partial incapacity for work. It noted that Mr Kent had been paid compensation until August 2018 when he returned to work with no wage loss and a pre-injury duties certificate. It noted that Mr Kent had worked before and after the assessment of 30% permanent impairment without wages loss.
40. The insurer set out its attempts to obtain a report from Dr Won which explained the downgrade in Mr Kent's capacity after "a business redundancy." It said there was no explanation why Mr Kent was suddenly unfit when he had been certified fit for pre-injury duties and had demonstrated that fitness by working at SBA.
41. There is no medical evidence attached to the dispute notice or the Reply.

SUBMISSIONS

42. Mr Stockley took me to Mr Kent's statement and his account of increasing difficulty performing his duties at SBA. He said that it showed that, despite his disability, Mr Kent battled on in his efforts to obtain employment when most would not.
43. Mr Stockley said that the evidence also showed that by the time Mr Kent's position was made redundant, he was not fit for the work he was performing. Once he had left SBA, he was without capacity. He pointed to Ms Gay's notes and the list of payments which showed that the insurer had previously paid for three sessions with Ms Gay, showing that there had previously been a psychological element to Mr Kent's incapacity.
44. Dr Won's notes were terse, Mr Stockley said, setting out the reason for the visit in a few words. The entries for the visits after Mr Kent ceased work confirmed that pain had been bothering him at work and that worsening anxiety and depression contributed to his incapacity.
45. Ms Gay had seen Mr Kent in 2016 before and after the surgery. She saw him again on 11 February 2020 after liability had been denied but "outside the forensic arena". Mr Kent said that he was struggling to hold down his job due to lack of sleep because of his neck and that he was unable to do most jobs he knew.
46. Mr Stockley said that Dr Won's short reports dated February and April 2020 were consistent with the medical certificates he provided and confirmed that once Dr Won concentrated on the psychological effects of the physical injury, he provided certificates which stated that Mr Kent had no current work capacity. From at least 19 February 2020, Mr Kent had no current work capacity within the meaning of s 32A of the 1987 Act and the evidence was consistent with him having no current work capacity since he ceased work at SBA. Dr Won had certified Mr Kent as having no current work in his certificate dated 30 October 2019. The change in the certificates is consistent with Mr Kent's evidence that he had pleaded for a certificate which certified him fit for work.
47. Mr Stockley noted that there were many applications for work which Mr Kent made and on which Mecfab relied. His own assessment was not determinative and his unrealistic expectations did not reflect his capacity, citing *Wollongong Nursing Home Pty Limited v Dewar*¹ (*Dewar*).
48. Mr Barter said that Mr Kent had current work capacity and that he had been unable to find work because it is notoriously difficult over the Christmas period and since February the coronavirus has impacted on the availability of work, noting that Mr Kent had applied for management jobs consistent with his skills.

¹ [2014] NSWCCPD 55 at [53].

49. Mr Barter noted that Dr Curtis had said that Mr Kent was not fit for the long commute from the Central Coast to Botany, where Mecfab is located. SAB was at Somersby. He said that Mr Kent had undertaken that work between 5 June 2017 and 20 November 2019. When he was able to do that, it is hard to argue that he was not fit for it. Mr Kent had applied for many jobs within his skills as a manager.

50. Mr Barter referred to the definition of suitable employment in s 32A of the 1987 Act

“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.”

51. Mr Barter referred me to *Dewar* and to *Broadspectrum Australia Pty Ltd v Skiadas*², and said that the latter case added a gloss to the definition in s 32A of the 1987 Act such that suitable employment must be a “real job”. He said I would not take Mr Kent’s inability to travel into account in determining what was suitable employment. The fact that work of a kind for which Mr Kent is fit is not available is not relevant. He had not found work because of the state of the labour market and not because the work was unsuitable.

52. In reply, Mr Stockley said that Mr Barter’s submissions did not take account of the matters set out in Mr Kent’s statement and that it could be said that he was “pushed before he jumped” from SBA. Mr Stockley noted the Deputy President’s comment in *Dewar* that it was necessary to exercise caution when considering earlier authorities and their application after the 2012 amendments but said that the earlier cases can be instructive.

53. He said that the facts in *Moran Health Care Services Pty Limited v Woods*³ were analogous, leaving aside the different tests to be applied. Ms Woods had returned to work after a back injury, initially on restricted duties and later on full duties. She was undertaking full duties when she resigned because of constant pain. The Court of Appeal held that it was open to the trial judge to find that Ms Woods was totally incapacitated from the time she ceased work. Mason P said with respect to total incapacity:

“The expression is not defined in the Act. However an authoritative point of reference is *Ball v William Hunt & Sons Ltd* [1912] AC 496. There Lord Loreburn LC said (at 499):

² [2016] NSWCCPD 34

³ [1997] NSWSC 147.

'In the ordinary and popular meaning which we are to attach to the language of this statute I think there is incapacity for work when a man has a physical defect which makes his labour unsaleable in any market reasonably accessible to him, and there is partial incapacity for work when such a defect makes his labour saleable for less than it would otherwise fetch.'

54. Mr Stockley said that proposition was relevant if it was accepted that Mr Kent was "hanging on by the skin of his teeth" before the redundancy. He said it was relevant to ask what Mr Kent could sell his labour for, noting that he was not fit for the work at SBA not with the respondent and there was no medical evidence to the contrary.
55. Mr Stockley also referred to the decision of the Court of Appeal in *Lawarra Nominees Pty Ltd v Wilson*⁴ (*Lawarra Nominees*) where Mahoney P said:

"The incapacity for work upon which the right to compensation depends is a physical incapacity for doing work in the labour market in which the employee was working or might reasonably be expected to work: *Arnotts Snacks Products Pty Ltd v Yacob* [1985] HCA 2; (1983) 155 CLR 171 at 177. That principle has been applied frequently by this Court: see, eg, *Holden v Toll Chadwick Transport Ltd* (1987) 8 NSWLR 222 at 226-9. As the *Arnotts* case illustrates, partial incapacity involves the physical incapacity for doing some but not all of such work.

Normally, a court in determining whether a worker is totally or partially incapacitated will, in a practical sense, ordinarily consider two questions: what is the relevant labour market, i.e., what work was the worker doing or could he reasonably be expected to do; and of that kind of work, what is he physically able to do."

56. Mr Stockley said that in Mr Kent's case, the answer to the second question was "nothing much." He referred again to *Dewar* and said that if the work at SBA was not a real job which Mr Kent was able to do, then it was difficult to identify anything else he was able to do and in that case he had no current work capacity.

FINDINGS AND REASONS

57. It is common ground that Mr Kent is not fit for his employment at Mecfab. Mecfab contends that the work at SBA was suitable employment and that Mr Kent remains fit for it, the redundancy being the reason he is currently not working. Mr Stockley conceded on behalf of Mr Kent that if the work at SBA was suitable employment, then he had no entitlement to compensation.
58. Mr Kent said that he was struggling with his work at SBA in the period before the redundancy. In late 2017 and early 2018, Dr Won recorded complaints of numbness in Mr Kent's right hand. Mr Kent had worked long hours but reduced them because of right arm pain and resulting disrupted sleep. This is consistent with Dr Won's notes which record that his right arm and neck pain was unchanged throughout 2018 and 2019. His notes confirm that Mr Kent was taking Lyrica and Panadeine Forte, suggesting that the pain was significant.
59. Mr Kent's complaints of ongoing pain are consistent with Dr Curtis' reports and to treatment by way of injections in mid 2018. Dr Curtis said that Mr Kent's pain had stabilised and that is confirmed by Dr Won's notes.
60. Mecfab did not provide any medical evidence to the contrary. The agreement that Mr Kent suffered 30% whole person impairment as a result of the injury in 2016 confirms that it agrees the injury was significant.

⁴ [1996] NSWCA 315.

61. Dr Won prescribed medication in September 2019 to help Mr Kent sleep. Dr Won noted that Mr Kent was concerned about his ability to continue to work until he was 55. At the date of that consultation, he had just turned 52. This suggests that Mr Kent may have been suffering psychological symptoms before the date of the redundancy and supports his own evidence that he was suffering from anxiety. Dr Won's letter dated 20 February 2020 confirms that Mr Kent's psychological condition is related to his physical condition and the fact that the symptoms from the 2016 injury may not resolve.
62. I am satisfied that, by the time he ceased work, Mr Kent was not fit for the duties he was undertaking at SBA so that the work at SBA was no longer suitable employment for him within the meaning of s 32A of the 1987 Act.
63. Dr Won certified Mr Kent unfit immediately after the redundancy. He subsequently certified him fit for selected duties. He did not explain why in his notes. Mr Kent said that he pressed Dr Won for a change in certification and it is clear from the notes that Mr Kent was telling Dr Won about the applications he was making for jobs. I am satisfied that Mr Kent's requests were the reason for the change in certification and there is no inconsistency between those certificates and Dr Won's letter dated 4 April 2020. His opinion is that physical and psychological conditions render his capacity for work extremely limited.
64. I must therefore determine if that extremely limited capacity means that Mr Kent has current work capacity.
65. "Current work capacity" and "no current work capacity" are defined in cl 9 of Schedule 3 of the 1987 Act:

- (1) An injured worker has **current work capacity** if the worker has a present inability arising from the injury such that the worker is able to return to the worker's pre-injury employment, or is able to return to work in suitable employment, but the weekly amount that the worker has the capacity to earn in any such employment is less than the weekly amount that the worker had the capacity to earn in that employment immediately before the injury.
- (2) An injured worker has **no current work capacity** if the worker has a present inability arising from an injury such that the worker is not able to return to work, either in the worker's pre-injury employment or in suitable employment."

66. In *Dewar, Roche DP* said:

"(It should be noted that the mere fact that Mrs Dewar applied for certain jobs is not, on its own, determinative of whether she has a current work capacity: *Boral Recycling Pty Ltd v Figueira* [2014] NSWCCPD 41 at [39].)

In light of the 2012 amendments, care must be exercised in relying on *Lawarra Nominees* and *Woods*. Under those authorities, the task of assessing whether a worker was wholly or partially incapacitated was a 'practical exercise' that 'involve[d] the assessment of a capacity 'for work' having regard to the realities of the labour market in which [the worker] is to be engaged' (Mahoney P at [30] in *Lawarra Nominees*).⁵

...

⁵ At[53]-[54].

It is the emphasised words in the two preceding paragraphs that have effectively been eliminated by the directions in s 32A that employment for which the worker is currently suited is determined ‘regardless of’ whether the work or employment is “available” and regardless of whether it is “of a type or nature that is generally available in the employment market”. However, other aspects of *Lawarra Nominees and Woods* remain relevant in determining whether a worker is ‘suited’ for suitable employment.

There is nothing in the context of the definition of suitable employment to suggest that ‘available’ should be given anything other than its relevant dictionary meaning. The third meaning attributed to ‘available’ in the *Shorter Oxford English Dictionary* (Oxford University Press, 6th ed, 2007) is ‘[a]ble to be used or turned to account; at one’s disposal; within one’s reach, obtainable’. Thus, just because the suitable employment the worker is able to perform is not ‘available’ in the labour market in which the employee was working or might reasonably be expected to work does not justify a finding that the worker has no current work capacity.

However, while the new definition of suitable employment has eliminated the geographical labour market from consideration, it has not eliminated the fact that ‘suitable employment’ must be determined by reference to what the worker is physically (and psychologically) capable of doing, having regard to the worker’s ‘inability arising from an injury’. Suitable employment means ‘employment in work for which the worker is currently suited’ (emphasis added).

The word ‘employment’ is not defined in the legislation. Its common meaning is ‘the state of being employed’. However, ‘worker’ is defined. It means, subject to specified exclusions, ‘a person who has entered into or works under a contract of service or a training contract with an employer’ (s 4 of the 1998 Act). In context, the phrase ‘employment in work’, in the definition of suitable employment, ‘in relation to a worker’, must refer to real work in the labour market. That is, it must refer to a real job in employment for which the worker is suited.⁶

67. As those passages show, the definition of suitable employment removes the location of work from the consideration of suitable employment. As Mr Stockley submitted, the other aspects of *Lawarra Nominees and Woods* remain relevant and in particular, a consideration of what kind of work would Mr Kent be expected to do and what is he able to do.
68. It is clear from his statement that Mr Kent has a strong work ethic and feels responsible to provide for his family. The number of job applications made since the redundancy attests to that and the range of jobs applied for suggests a degree of desperation. The jobs he has applied for are not determinative of his capacity.
69. The fact that Mr Kent is unable to travel for more than an hour to work is irrelevant when considering the location of suitable employment but confirms that he is unable to undertake work which requires him to travel in the course of that work.
70. Mr Kent is clearly unfit for the manual work in which he has experience. The work he was performing at SBA was supervisory work and I am satisfied he is not fit for that work, even though he worked up to the date of his redundancy. Because of numbness and pain in his right hand he is unable to use a computer other than for very short periods. He applied for a number of sales jobs but there is no evidence that he has experience in sales and the features of the work at SBA which may it unsuitable would also apply to sales or to maintenance roles. I am satisfied that there are no real jobs for which Mr Kent has capacity.

⁶ At [56]-[59].

71. Taking all of those matters and Dr Won's opinion into account, I am satisfied that Mr Kent has no current work capacity. Under s 37 of the 1987 Act, he is entitled to weekly compensation at 80% of his pre-injury average weekly earnings
72. I therefore order the respondent to pay weekly compensation of \$1,098.18 from 30 October 2019 to date and continuing.

