

**RECENT DECISIONS**

## Dispute on Work Capacity Decision determined by the Workers Compensation Commission

*Jennifer Stefanac v Department of Family and Community Services* [2019] NSWWCCR 4  
(11 July 2019)

[Link to decision](#)

### Summary

The Workers Compensation Commission has made a determination concerning a work capacity decision in dispute as an Expedited Assessment under Chapter 7 Part 5 of the *Workplace Injury Management and Workers Compensation Act* 1998 (the '1998 Act').

Section 43 of the *Workers Compensation Act* 1987 (the '1987 Act') provides that decisions by an insurer about an injured workers current work capacity and ability to earn in *suitable employment* or to discontinue or reduce weekly compensation payments is a work capacity decision ('WCD').

An Arbitrator, acting in the capacity of the Registrar's Delegate declined to make an interim payment direction as he found that the worker had capacity to earn in suitable employment having regard to the definition under section 32A that was most likely to be at or near her pre-injury average weekly earnings. The onus is on the worker to provide evidence by which to properly challenge the decision.

### Background

The worker suffered psychological injury in the course of her employment as an Aboriginal case worker with FACS. She was certified as medically fit for her role in any location other than at Blacktown or Mt Drutt.

The insurer provided vocational rehabilitation assistance to the worker who told her treatment providers that she wished to be placed at another location ideally closer to where she lived in the Hunter region.

The insurer made a WCD on the basis that the worker had an ability to work eight hours a day, five days per week as an Administrative Officer. The WCD was supported by a vocational assessment, the GP's sign off on suitable roles and various WorkCover Certificates of Capacity. The worker's entitlement to weekly compensation was reduced to \$132.

The WCD was subject to review by the insurer, SIRA and WIRO. Each review maintained the decision until WIRO revoked the WCD based on a procedural error and recommended that a new WCD be issued.

The SIRA's merit review found that the worker had an ability to earn as an Aboriginal case worker referring to a job advertisement for such a position. It is not known whether the advertisement was for a role with FACS or another employer. In any event, the advertisement showed that the role met the definition of suitable employment, by which the worker had an ability to earn more than her PIAWE. The insurer made a new WCD based on SIRA's merit review by which the worker's weekly benefits would cease from 24 June 2019.

The worker filed an Application for an Expedited Assessment ('AEA') with the Commission on 24 June 2019.

The AEA enables workers to challenge the cessation of weekly benefits under a WCD with a teleconference appointed within a few weeks to enable the parties to make submissions and present evidence in support of their positions.

### Determination by WCC

The AEA was referred to a Registrar's Delegate for determination and the matter listed for teleconference on 10 July 2019.

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The issues were effectively reduced to whether the worker's capacity to earn in suitable employment provided her with any entitlements to weekly compensation on applying section 37 of the 1987 Act.

The Registrar's Delegate noted the definitions of 'current work capacity' and 'suitable employment' under section 32A of the Act meaning work for which the worker is currently suited, having regard to subsections (a)(i)-(v), being regardless of 'the worker's place of residence' - subsection (b)(iv).

The insurer submitted that the worker's evidence did not provide any basis upon which to dispute the WCD. Significantly, the worker did not advance any evidence that challenged any aspect of the WCD, i.e. to challenge her work capacity, or that the role was outside the scope of the definition under section 32A.

The worker's solicitor submitted that the Insurer had failed to provide suitable duties in a position nearer to the worker's place of residence. However, no further submissions were made as to how that would affect the outcome of the proceedings.

The Registrar's Delegate noted an option for the worker to discontinue the AEA, however, this was not adopted.

Following submissions, the Registrar's Delegate indicated that he was not satisfied that the worker had any entitlement to weekly compensation.

On 11 July 2019, the Registrar's Delegate issued a determination declining to make an interim payment direction and dismissing the application. Having regard to all of the evidence, and the absence of challenge to various other assessments related to earnings, the Registrar's Delegate found:

1. That the worker had a capacity to undertake suitable employment.
2. That he was not to have regard to the worker's place of residence or whether suitable employment is generally available in the employment market (section 32A of the Act); He found that the worker had the capacity to work as an Aboriginal case worker in any place other than Blacktown or Mt Druitt. The fact that her wishes were to be closer to her family did not alter the application of section 32A.
3. There was no suggestion that the employer had provided any undertakings that the worker would be provided with alternative roles more suitable to her personal

circumstances, nor were there any issues under section 48 or section 48A of the 1987 Act raised.

4. The worker's capacity to earn in suitable employment was \$1,640 per week.
5. On applying section 37, the worker had no entitlements to weekly compensation.
6. Accordingly, the presumption that an interim payment direction for weekly payments of compensation is warranted is displaced because the worker's claim has minimal prospects of success: section 297(3)(a) of the 1998 Act

The Registrar's Delegate declined to make an interim payment direction and the application was dismissed.

### Implications

The decision emphasises the importance of ensuring that steps are taken to formulate an appropriate return to work plan and to notify injured workers of their obligations in terms of injury management to facilitate the return to work outcome.

The Registrar's Delegate will pay close attention to the medical evidence available and whether the WCD notice is adequately supported. In this case, the various vocational assessments, case conferences, and the GP's sign off for suitable roles were all relevant to the final determination.

The decision underscores the need to properly consider the definition of suitable employment and the factors to be brought into account in accordance with the definitions under section 32A.

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