

# QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Habibi Arehjan v Workers' Compensation Regulator* (No 2) [2023] QIRC 230

PARTIES: **Habibi Arehjan, Nadia**  
(Appellant)

v

**Workers' Compensation Regulator**  
(Respondent)

CASE NOS: WC/2019/157  
WC/2020/36  
WC/2020/37

PROCEEDINGS: Appeals against decisions of the Workers' Compensation Regulator

DELIVERED ON: 8 August 2023

HEARING DATES: 8, 9, 10 and 11 November 2021

MEMBER: O'Connor VP

HEARD AT: Brisbane

ORDERS: 1. **Appeals WC/2019/157; WC/2020/36; and WC/2020/37 are dismissed.**

(a) **In respect of WC/2019/157, I order that pursuant to s 558(1)(a) of the *Workers' Compensation and Rehabilitation Act* 2003, the review decision of the Respondent, dated 2 August 2019 is confirmed.**

(b) **In respect of WC/2020/36, I order that pursuant to s 558(1)(a) of the *Workers' Compensation and***

***Rehabilitation Act 2003, the review decision of the Respondent, dated 18 March 2020, is confirmed.***

- (c) **In respect of WC/2020/37, I order that pursuant to s 558(1)(a) of the *Workers' Compensation and Rehabilitation Act 2003*, the review decision of the Respondent, dated 18 March 2020, is confirmed.**

**2. In respect of WC/2019/157; WC/2020/36; and WC/2020/37, I order pursuant to r 41(1) of the *Industrial Relations (Tribunals) Rules 2011* that:**

- (a) **the parties are to exchange and file written submissions on the costs of the hearing of no more than five (5) pages by 4.00 pm on Tuesday 29 August 2023; and**
- (b) **in the absence of any application to make oral submissions in respect of costs, the question of costs will be decided on any written submissions filed without further oral hearing.**

**CATCHWORDS:**

**WORKERS' COMPENSATION - ENTITLEMENT TO COMPENSATION - appeal against review decision of the respondent - where termination of appellant's entitlement to compensation from 2 May 2019 pursuant to sections 144A and 144B of the *Workers' Compensation and Rehabilitation Act 2003* - where appellant suffered work related injury - whether appellant has entitlement to weekly payments of compensation on and from 2 May 2019 - where respondent contends appellant was not**

incapacitated for employment on and from 2 May 2019 and has no entitlement to compensation under ss 144A and 144B of the *Workers' Compensation and Rehabilitation Act* 2003 - whether appellant has entitlement to weekly payments of compensation from 13 June 2018 to 23 July 2018 - whether appellant has entitlement to weekly payments of compensation on and from 16 August 2019 - where respondent contends appellant has no entitlement to weekly payments of compensation from 13 June 2018 to 23 July 2018 and on and from 16 August 2019 pursuant to s 144A of the *Workers' Compensation and Rehabilitation Act* 2003 - determined all three appeals are dismissed - determined all three review decisions are confirmed.

#### LEGISLATION:

*Workers' Compensation and Rehabilitation Act* 2003, s 144A, s 144B, s 147, s 168, s 540

*Industrial Relations (Tribunal) Rules* 2011, r 98

#### CASES:

*Arehjan v Workers' Compensation Regulator* [2020] QIRC 098

*Arnotts Snack Products Pty Ltd v Yacob* (1985) 155 CLR 171

*Colbran v Workers' Compensation Board of Queensland* (1996) 152 QGIG 1180

*Commonwealth v Muratore* (1978) 22 ALR 176; 141 CLR 296

*Thompson v Armstrong & Royse Pty Ltd* (1950) 81 CLR 585; [1950] ALR 891; (1950) 24 ALJR 329

#### APPEARANCES:

Ms N. Habibi Arehjan representing herself, the Appellant.

Ms H. Blattman of Counsel directly

instructed by Ms A. Schultz for the Respondent.

### **Reasons for Decision**

- [1] Ms Nadia Habibi Arehjan ('the Appellant') has filed three appeals in the Queensland Industrial Relations Commission ('the Commission'), (WC/2019/157, WC/2020/36 and WC/2020/37) against separate decisions of the Workers' Compensation Regulator ('the Regulator'). By decision of 3 July 2020 the Commission determined pursuant to r 98 of the *Industrial Relations (Tribunal) Rules* 2011 that the appeals be joined and heard together.<sup>1</sup>

#### **The appeals**

- [2] Each of the appeals emanated from a motor vehicle accident described by the Appellant as "[o]n 10<sup>th</sup> of February 2017, I hit the tree to avoid hitting a truck and to save my life ..." ('the accident').<sup>2</sup> At the time the Appellant was employed as an electrical engineer with Incitec Pivot Ltd ('Incitec').
- [3] As a consequence of the accident, the Appellant suffered multiple injuries. A brief description of each of the Appeals follows:
- Appeal WC/2019/157 was filed on 2 September 2019 in respect of the Respondent's decision to confirm the termination of weekly entitlements for musculoligamentous injury to the cervical spine on and from 2 May 2019, in accordance with ss 144A and 144B of the *Workers' Compensation and Rehabilitation Act* 2003 ('the WCR Act'). It is contended that the basis for termination was evidence from the Appellant's treating specialist that there was no longer an "incapacity for work or a requirement for ongoing treatment with respect to your accepted work related neck injury".
  - Appeal WC/2020/36 was filed on 17 April 2020 in respect of the Respondent's decision to confirm the termination of weekly entitlements in the period 13 June 2018 to 23 July 2018, with respect to all accepted injuries except for the left wrist EDC tendonitis, in accordance with s 144A of the WCR Act. It is contended that the basis for termination was that WorkCover was not satisfied the Appellant had a "total or partial incapacity for work due to the accepted work-related injuries as at 13 June 2018".

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<sup>1</sup> *Arehjan v Workers' Compensation Regulator* [2020] QIRC 098.

<sup>2</sup> WC/2019/157 - Appellant's Statement of Facts and Contentions filed 3 January 2020.

- Appeal WC/2020/37 was also filed on 17 April 2020 in respect of the Respondent's decision to confirm the termination of weekly entitlements in accordance with s 144A of the WCR Act on and from 16 August 2019, for left wrist EDC tendonitis. It is contended that the basis for termination was that WorkCover was not satisfied the Appellant had an "incapacity for work as a result of your accepted work-related injury and as such, I consider you are not entitled to any further payments of weekly benefits".

### **The relevant law**

- [4] The underlying rationale for a workers' compensation scheme is to pay compensation to a worker who suffers an injury or disease arising from, or during, his or her employment. Workers' compensation benefits encompass the payment of: incapacity payments to compensate for lost earnings; medical and related expenses; and lump sum payments for permanent impairment or death.
- [5] In short, the purposes of workers' compensation are to:
- provide injured workers with financial support;
  - provide injured workers with medical benefits and other forms of non-economic support;
  - enable employers and workers to work cooperatively to maintain an injured worker at work, or to achieve an early, safe and appropriate return to work.
- [6] Chapter 3, Part 8A, ss 144A and 144B of the WCR Act provide when an entitlement to weekly payments of compensation stops and when the payment of medical treatment, hospitalisation and expenses stop:

#### **144A When weekly payments of compensation stop**

- (1) The entitlement of a worker to weekly payments of compensation under part 9 stops when the first of the following happens -
  - (a) the incapacity because of the work related injury stops;
  - (b) the worker has received weekly payments for the incapacity for 5 years;
  - (c) compensation under this part reaches the maximum amount under part 6.
- (2) If subsection (1)(b) or (c) applies, the worker's entitlement to further compensation for the injury stops.
- (3) Subsection (2) does not apply to the worker's entitlement to compensation under chapter 4A.
- (4) This section does not limit another provision of this Act that stops weekly payments.

#### **144B When payment of medical treatment, hospitalisation and expenses stops**

- (1) The entitlement of a worker to the payment of medical treatment, hospitalisation and expenses under chapter 4 for an injury stops when -

- (a) the entitlement of the worker to weekly payments of compensation under part 9 stops; and
  - (b) medical treatment by a registered person is no longer required for the management of the injury because the injury is not likely to improve with further medical treatment or hospitalisation.
- (2) Subsection (1) does not apply in relation to section 220 or part 5A.

[7] Sections 144A and 144B of the WCR Act provide criteria to guide the exercise of the power to terminate the payment of compensation pursuant to s 168 of the WCR Act. Section 540(1)(b)(ii) of the WCR Act makes reviewable a decision pursuant to s 168.

[8] In *Colbran v Workers' Compensation Board of Queensland*<sup>3</sup> the Industrial Court endorsed the following passage from the decision of McTiernan J in *Thompson v Armstrong & Royse Pty Ltd*<sup>4</sup> namely:

The phrase [incapacity for work] does not merely mean inability to work for the employer in whose service the worker was injured. An injury results in incapacity for work according to the intention of the Act, when it takes away or diminishes the power of the worker to earn wages in some suitable employment.

[9] In *Arnotts Snack Products Pty Ltd v Yacob*,<sup>5</sup> with reference to *Thompson v Armstrong & Royse Pty Ltd*<sup>6</sup>, the test was expressed in this way:

Fullagar J said (81 CLR at 613): "A man is totally incapacitated for work when he is, by reason of his injury, physically unable to work. The words in their natural and primary sense mean that. When their meaning has been expounded by reference to inability to earn wages, the purpose has been to make the meaning more specific, and the result has been to extend rather than restrict the meaning".

The same point was made, though less directly, by Kitto J who remarked (81 CLR at 621): "Loss of wages is in most cases a result of, but it does not itself constitute, the relevant economic fact. That fact is the inability, or the reduced ability, by reason of a physical deficiency, to sell work for wages". See also McTiernan J (81 CLR at 602-3).

The judgments in *Thompson* were discussed by Jacobs J (with whom Gibbs, Stephen and Aickin JJ agreed) in *Commonwealth v Muratore* (1978) 22 ALR 176 at 179-80; 141 CLR 296 at 300-1, which related to the *Compensation (Commonwealth Government Employees) Act 1971* (Cth). His Honour said (at (ALR) 179; (CLR) 300): 'It has always been recognized that 'incapacity for work', those words being taken to refer to physical incapacity, is only relevant where it produces an economic incapacity.' He was speaking, as the passage at the foot of p 301 makes plain, of compensable incapacity for work, so that the employee's incapacity is: '... measured by the extent that the amount per week that he is able to earn in some suitable employment or business is less than his average weekly earnings before his injury.'<sup>7</sup>

## Background to Appeals

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<sup>3</sup> (1996) 152 QGIG 1180.

<sup>4</sup> (1950) 81 CLR 585, 602-603; [1950] ALR 891; (1950) 24 ALJR 329; BC5000480.

<sup>5</sup> (1985) 155 CLR 171.

<sup>6</sup> (1950) 81 CLR 585.

<sup>7</sup> (1985) 155 CLR 171 at 177-178.

[10] At the time of the accident on 10 February 2017 the Appellant was driving a motor vehicle from her motel to a worksite in the Australian Capital Territory ('ACT'). Immediately following the accident, the Appellant was admitted to Canberra Hospital and was diagnosed with the following injuries:

- a. fractured nose;
- b. closed multi-fragmentary supracondylar fracture left femur;
- c. soft tissue injury left shoulder; and
- d. soft tissue injury left wrist.<sup>8</sup>

[11] On 10 February 2017 the Appellant had open reduction and internal fixation of the left femur (surgery) at the Canberra Hospital. The Appellant was certified unfit for work with Incitec and lodged a WorkCover claim for "upper leg, other fractures elsewhere classified" arising out of the accident. WorkCover accepted liability to pay compensation as at 10 February 2017 pursuant to the WCR Act for "fracture of femur".

[12] On or about 7 April 2017 the Appellant returned to work at Incitec with restrictions on weight bearing and walking on uneven terrain and was paid her pre-injury wage from that time until she ceased work at Incitec on the grounds of redundancy on 13 June 2018.

[13] Following the initial acceptance, WorkCover accepted liability to pay compensation with respect to:

- a. fracture left femur and subsequent knee problems;
- b. adjustment disorder with mixed anxiety and depressed moods - moderate severity;
- c. left shoulder strain with referred neck pain;
- d. fractured nose;
- e. capsuloligamentous injury and soft tissue injury left wrist;
- f. musculoligamentous injury to the cervical spine;
- g. fracture of the distal sacrum/coccydynia; and
- h. lumbosacral junction pain.<sup>9</sup>

[14] On 27 April 2017 an ultrasound of the Appellant's left shoulder was performed and was normal. Dr Hoa Lu, Consultant Physician and Geriatrician examined the Appellant on 28 April 2017 and reported as follows:

- a. the Appellant would resume full-time work five days per week after the Labour Day long weekend;
- b. the Appellant did not complain of much pain and was not taking medication except for Ostelin for Vitamin D deficiency;
- c. the Appellant was able to fully weight bear and could start using crutches to tackle stairs;
- d. the Appellant reported no pain in the left shoulder at rest and manageable pain at the extremes of internal rotation;

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<sup>8</sup> Respondent's statement of facts and contentions filed 30 March 2021, [4].

<sup>9</sup> Ibid, [8].

- e. left knee flexion had improved; and
- f. the Appellant should continue to work with her physiotherapist on the left shoulder and left knee.<sup>10</sup>

- [15] In a letter dated 24 May 2017 to Dr Greg Stirling, Incitec reported, as was the case, that the Appellant had been performing her role at the Gibson Island, Brisbane facility 8 hours per day, 5 days per week since April 2017. She was able to drive to and from work (approximately 30 minutes) and able to walk 500 metres to her desk. She had not needed to walk up or down stairs to get to her desk.
- [16] On 25 May 2017 an MRI of the Appellant's left shoulder and scapula was performed showing mild to moderate AC joint degeneration and an equivocal signal abnormality in the posterosuperior labrum evident only on the axial imaging.
- [17] On 29 May 2017 Dr Rimmington examined the Appellant's left shoulder and did not recommend surgery. He noted she was to have some physiotherapy. In a report dated 8 June 2017 Dr Rimmington stated that there was nothing specific that the Appellant needed in terms of her shoulder. No cause was found on the MRI scan.
- [18] The Appellant informed Dr Rimmington on 18 July 2017 that she was still having some wrist pain and cervical or upper thoracic spine pain.
- [19] On 24 July 2017 the Appellant was examined by Dr Andrew Ryan, Orthopaedic Surgeon who considered that she had suffered from a capsuloligamentous and soft tissue injury to her left wrist. He considered that the Appellant was fit for suitable duties.
- [20] On 23 August 2017 Dr Maurice Stevens, Otolaryngologist reported that the Appellant was having recurrent epistaxis from the left side of her nose and also had some external nasal deformity.
- [21] Dr Greg Stirling, Orthopaedic Surgeon reported that on 15 September 2017 the Appellant required ongoing physiotherapy for instability in her left knee, and a knee splint. He considered she could perform most of her duties but with limitations regarding walking and standing for longer than 15-20 minutes at a time and site visits were still not appropriate.
- [22] On 15 November 2017 Dr Maurice Stevens reported that the Appellant would benefit from a revisional septorhinoplasty to correct the subtle deformity caused by the subject accident.

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<sup>10</sup> Respondent's statement of facts and contentions filed 30 March 2021, [9A].



- [23] On 21 November 2017 Dr Ryan reported that the Appellant's progress was good and in all likelihood the Appellant would be successful in returning to full duties over the next 8-12 weeks from the point of view of her left wrist.
- [24] In relation to the Appellant's neck problems, Dr Rimmington reported on 16 February 2018 that he had suggested ongoing physiotherapy, although the MRI did not show anything untoward.
- [25] On 29 March 2018 Dr Sterling reported that the Appellant was slowly improving, that she should continue with physiotherapy, hydrotherapy and gym strengthening and he would expect her to take another six months or so to fully recover.
- [26] On 10 April 2018 Dr Rimmington requested a referral for the Appellant for an independent medical examination of the Appellant's left shoulder. He stated that she was reporting 11/10 pain in her medial border of the left scapular, but he could not find any lesion, disruption or internal derangement on the imaging which could be causing the pain.
- [27] The Appellant was examined by Dr Phil Allen, Orthopaedic Surgeon on 27 April 2018. Dr Allen reported the Appellant's cervical spine revealed no spasm or tenderness and she had symmetrical movement in all directions which was within normal range. Dr Allen could not find any objectively verifiable pathology in the left shoulder.
- [28] Dr Sterling certified the Appellant as fit for suitable duties with no restrictions in hours or days on or about 5 June 2018. The Appellant signed the suitable duties program on 8 June 2018.
- [29] On 6 June 2018 Dr Sterling reported that the Appellant was now only using a single walking stick intermittently. She still needed ongoing support for her leg injury in the form of physiotherapy and hydrotherapy. At work, the only thing she should not do would be going up and down ladders when on site.
- [30] On or around 13 June 2018 the Appellant was made redundant and paid five weeks' pay in lieu of notice. At that time the Appellant had been performing her normal role with some restrictions.
- [31] On 28 June 2018 the Appellant was examined by Dr Simon Journeaux, Orthopaedic Surgeon, who stated:
- (a) the Appellant reported a burning pain in the mid to low cervical spine intermittently three to four times per week;
  - (b) the Appellant denied having any symptoms referable to the left or right shoulder;
  - (c) the Appellant had likely suffered a musculoligamentous injury to the cervical spine;
  - (d) that no further treatment would be of benefit in relation to the neck injury and

- (e) the Appellant had the capacity to work in her substantive role but had partial incapacity related to ladder work and working on certain sites as a consequence of her left knee/femoral fracture.<sup>11</sup>

- [32] In a report dated 10 July 2018 Dr Sterling reported to WorkCover that the Appellant did not want any further treatment at that stage with respect to her left knee. Dr Sterling did not agree with Dr Journeaux that there was no further need for allied health treatment.
- [33] On 1 August 2018 Dr Stevens reported that the Appellant had undergone revision septorhinoplasty to open up her nasal valve which had gone well.
- [34] The Appellant obtained full time employment as an electrical engineer for Sun Metals on 6 August 2018.
- [35] On 24 September 2018 Dr Riccardo Caniato, Psychiatrist reported that, provisionally, he considered the Appellant had an adjustment disorder with mixed anxiety and depressed mood. She did not want medication. She appeared to be working full time as an engineer on full hours and duties.
- [36] On 5 October 2018 Dr Caniato reported that he had been given a report from a psychologist, Katayoon Haghseresht dated 7 December 2017 which indicated that the Appellant was suffering from situational depression related to her work stressors, not the accident. Dr Caniato considered that there may also be some symptoms associated with or caused by her physical injuries.
- [37] On 17 October 2018 Dr Sterling reported that the Appellant was keen to proceed with removal of the plate fixing the femoral fracture, as well as a knee arthroscopy and injection following which she would require two to three weeks off work. Full recuperation was expected to take two to three months.
- [38] On 16 November 2018 Associate Professor Satish Karunakaran, consultant neuropsychiatrist, provided a report stating that the Appellant was suffering from an adjustment disorder with mixed anxiety and depressed moods, of moderate severity. He considered that the work-related physical injuries were "a major factor for her psychological injury". Any incapacity for work due to psychological symptoms appeared to have ceased, but she remained symptomatic with considerable amounts of distress. She should go on antidepressant medication and have 12 sessions of psychological treatment.
- [39] On or about 24 November 2018 the Appellant resigned from Sun Metals.

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<sup>11</sup> Respondent's statement of facts and contentions filed 30 March 2021, [24].

- [40] On 27 November 2018 Dr James Price, consultant Orthopaedic Surgeon provided a report stating that the Appellant was suffering from coccydynia. At that time, she was managing her employment duties well, but doing only desk-based work. She could work full hours and duties in Dr Price's opinion.
- [41] An MRI performed in Tehran on 5 December 2018 reported fracture of the inferior segment of the sacrum with mild anterior displacement.
- [42] On 10 December 2018 the Appellant had surgery on her right knee.
- [43] In a report dated 18 December 2018, Dr Gregory Day, Orthopaedic Surgeon recommended CT guided injection into the sacrococcygeal articulation at the site of the fracture with local anaesthetic.
- [44] In a report dated 24 January 2019, Dr Sterling stated that the Appellant required ongoing therapy for her knee. She would not be ready to resume work until March 2019.
- [45] On 18 February 2019 the Appellant was examined by Dr Bryant, Neurosurgeon who noted that the Appellant had had a good result from the injection in the sacrococcygeal junction and the pain was reasonably well controlled.
- [46] On 25 February 2019 the Appellant had an MRI of the cervical spine which showed no significant disc protrusion and no cervical cord pathology. A whole-body bone scan with SPECT CT of cervical spine was performed on the Appellant and showed no abnormality. Dr Bryant reviewed the MRI and SPECT CT scans on 25 March 2019 and found them to be entirely unremarkable. He concluded that the most likely diagnosis was a muscular ligamentous whiplash type injury.
- [47] On 2 April 2019 Dr Bryant advised that the Appellant had no particular ongoing incapacity from her neck and specifically, nothing that related to her work injury and did not require any further treatment for her neck condition.
- [48] On 15 April 2019 Dr Bryant stated there was no incapacity for work at that point in time, with no restrictions placed on the Appellant's work. WorkCover ceased medical treatment and incapacity benefits on 3 May 2019 in relation to the "musculoligamentous injury to the cervical spine" condition.
- [49] On 29 May 2019 Dr Zofia Piotrowska-Hess, General Practitioner issued a workers' compensation medical certificate diagnosing the Appellant with a "[p]ainful left wrist" and deeming her totally incapacitated for work until 14 June 2019.
- [50] On 14 June 2019 Dr Piotrowska-Hess issued a WorkCover medical certificate certifying the Appellant totally unfit for work from 8 May 2019 until 30 June 2019 and

stated the Appellant's case needs to be renewed. She also diagnosed the Appellant to be suffering from "whip lash injury - neck"; "needs pain control" and referred the Appellant to Dr Rice, Pain Specialist.

- [51] Dr Ryan, Orthopaedic Surgeon issued a workers' compensation work capacity certificate on 17 June 2019 wherein he diagnosed the Appellant with "L wrist EDC + 4<sup>th</sup> extensor compartment" and certified her fit to undertake suitable duties. The only restrictions noted were "self-managed within pain limits".
- [52] In a report dated 18 June 2019 Dr Sterling stated that the Appellant had ongoing symptoms about her left knee. Progress had been minimal. The condition was stable and stationary. The only ongoing treatment she required was supportive with a slight reduction in her activities at work and ongoing symptomatic treatment of the post traumatic knee arthrosis.
- [53] On 29 June 2019 Dr Pankaj Relan reported the Appellant was suffering from an adjustment disorder with mixed anxiety and depressed moods. Her employment was the major significant contributing factor. She had a reasonable capacity to engage in full-time work and he did not consider that further treatment would be of any additional benefit.
- [54] On 1 July 2019 Dr Peter McCombe, Orthopaedic Surgeon reported that the Appellant was complaining of pain in the sacrum, coccyx and occasionally the lumbosacral junction. This pain was markedly worse when sitting, particularly in a hard chair. She could sit for only a few minutes in an unsuitable chair though she could manage one to two hours on a suitable soft chair. She had no problems with standing or walking which was unlimited. Lifting weights of more than about 5 kg however caused her lower back and sacral pain. Dr McCombe diagnosed coccydenia and possibly a soft tissue injury. The coccydenia did not affect her ability to continue working in her current job.
- [55] Dr Ryan reported on 30 August 2019 that he considered the Appellant had suffered an aggravation of her wrist during a functional capacity assessment. However, she was continuing in her normal functional duties which she was performing prior to the aggravation.
- [56] On 6 March 2020 Dr Ryan provided a report stating that when he last reviewed the Appellant on 6 February 2020, she was performing predominantly office duties. All that was required was persistence with her strength and proprioceptive program. He hoped that by April or May 2020 she would be ready to return to field work.

### **Relevant employment history**

[57] At the time of the motor vehicle accident on 10 February 2017, the Appellant was employed as an Electrical Engineer with Incitec. She commenced her employment with Incitec on 1 February 2016.<sup>12</sup>

[58] The Appellant's employment with Incitec was terminated by way of a redundancy on 13 June 2018. Clause 1.1 of the redundancy agreement states:

Ms Habibi Arehjan's employment will be terminated for reasons of redundancy, effective 13 June 2018.<sup>13</sup>

[59] At clause 2.2 of the agreement, it says:

On the 1st business day after the 1st of July, the company will pay Ms Habibi Arehjan:

- a) an amount equivalent to Ms Habibi Arehjan's leave entitlements (if any) accrued to the End Date; and
- b) the amount equivalent to five (5) weeks' notice; and
- c) a redundancy payment of \$30,000

in each case less amounts required to be deducted by the Company for taxation.<sup>14</sup>

[60] Consistent with the redundancy agreement, the Appellant accepted that she received her statutory leave entitlements, five weeks' pay in lieu of notice, and a redundancy payment of \$30,000.<sup>15</sup>

[61] The Appellant was paid by her employer for the period 13 June 2018 to 18 July 2018 and had no loss of earnings in that period.<sup>16</sup>

[62] During cross-examination the following exchange took place:

MS BLATTMAN: All right. And you continued on suitable duties plans up until the date you ceased to work, which was the 13th of June 2018; correct.

APPELLANT: No. I continued suitable duty up to my surgery, because just my suitable duty issued in 4th of June, and it's supposed to be reviewed in October 2018. So it was valid up to October 2018. Then, in 2018, then I presented MRI from Iran, because in Australia, they didn't have a - they had the [indistinct] deduction technique, but they took the MRI and CT. It didn't show anything in my leg, and the - it was multiple things together that I went to Iran, my mother had a stroke, I had some medical appointment - multiple things. I cannot say exactly one. In Iran, they had the good [indistinct] of the MRI. They did the MRI and brought - - -

HIS HONOUR: Well, can we just answer the question. You were on suitable duties up till and including - - -

APPELLANT: Yeah, still I was.

HIS HONOUR: Up to and including the 13th of June 2018.

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<sup>12</sup> Exhibit 37.

<sup>13</sup> Exhibit 34.

<sup>14</sup> Exhibit 34.

<sup>15</sup> TR1-88, LL36-40.

<sup>16</sup> Exhibit 34.

APPELLANT: Yes, and it continued.

- [63] On the same day that the Appellant was made redundant, she applied for a new position with Sun Metals Corporation Pty Ltd.<sup>17</sup>
- [64] On 24 July 2018 Dr Maurice Stevens, a consultant Ear Nose and Throat specialist performed a revision rhinoplasty on the Appellant.
- [65] During the period 24 July 2018 and 5 August 2018, the Appellant was certified as 'Not able to work at all' by Dr Stevens.<sup>18</sup> During this period, the Appellant received workers' compensation benefits.<sup>19</sup>
- [66] By letter dated 1 August 2018, Sun Metals Corporation Pty Ltd made an offer of fixed term employment to the Appellant. The Appellant accepted the offer and commenced employment as an Electrical Instrumentation Engineer on 6 August 2018 on an annual salary of \$125,000.<sup>20</sup>
- [67] The Appellant's employment with Sun Metals was subject to the completion of all pre-employment medical tests. In her oral evidence she told the Commission that she completed her pre-employment medical assessment but that: " ... it was horrible, very heavy. After the medical assessment I laid down on my back of my car for two hours on my - it's too much because of the pain that I had in my back, and my leg was shaking ... ." <sup>21</sup>
- [68] On 21 September 2018, the Appellant received a positive probation review noting that her performance and conduct met the employer's expectations during the review process.<sup>22</sup>
- [69] The Appellant resigned from Sun Metals on or about 24 November 2018.
- [70] The Appellant was employed by Arcadis as a Senior Engineer from 24 June 2019 on an annual salary of \$125,000.<sup>23</sup>
- [71] From 30 September 2019, the Appellant was employed by SAGE Automation Pty Ltd as an Electrical and Instrumentation Engineer with APT Management Services Pty Limited for 38 hours per week on a rate of \$98 per hour including superannuation.<sup>24</sup>

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<sup>17</sup> TR1-122, LL12-16.

<sup>18</sup> Exhibit 13.

<sup>19</sup> Exhibit 7.

<sup>20</sup> TR1-123, LL11-34; Exhibit 36.

<sup>21</sup> TR1-74, LL14-17.

<sup>22</sup> Exhibit 38.

<sup>23</sup> T1-134, LL1-17.

<sup>24</sup> Exhibit 40.

- [72] On 6 December 2019 the Appellant was offered employment with BRS Pty Ltd as a Senior Electrical Engineer on an annual salary of \$125,000 in line with Classification Level 4 of the Professional Employees Award 2010.<sup>25</sup>
- [73] From 20 April 2020 the Appellant was employed by Alchemy Recruitment Consulting as an Electrical Project Manager on a rate of \$700 per day. Her assignment was with BHP.<sup>26</sup>
- [74] At the time of hearing these appeals, the Appellant was working in Karratha employed as a senior electrical engineer on an annual salary of \$165,000 per annum plus superannuation.<sup>27</sup>

### **Consideration**

#### ***WC/2019/157***

- [75] The Appellant claimed an entitlement to weekly payments of compensation or to the payment of medical treatment, hospitalisation, or expenses pursuant to ss 144A and 144B of the WCR Act. The Respondent rejects the fact that the Appellant has any entitlement under either ss 144A or 144B of the WCR Act. This appeal concerns the termination of weekly entitlements for a musculoligamentous injury to the cervical spine on and from 2 May 2019
- [76] The Respondent contends that any incapacity suffered by the Appellant on and from 2 May 2019 is not attributable to any "[m]usculoligamentous injury to the cervical spine" condition. The Appellant does not require any further medical treatment by a registered person in relation to any "[m]usculoligamentous injury to the cervical spine" condition. Further medical treatment is not likely to improve any "[m]usculoligamentous injury to the cervical spine" condition.
- [77] Dr Dale Rimmington, an orthopaedic surgeon specialising in knee and shoulder surgery prepared a report dated 25 May 2018 in which he opined:

Her MRI done to her cervical spine in July 2017, was unremarkable and I personally did not think she needed any ongoing care with the neck other than a period of physio she has had...<sup>28</sup>

- [78] In the report of Dr Phil Allen, Orthopaedic Surgeon dated 30 April 2018, he opined:

I could find no objectively verifiable pathology in the left shoulder. I therefore conclude that regards to the left shoulder any work related injuries of the 10<sup>th</sup> February 2017 have now ceased.

There is no incapacity for work as an Electrical Engineer with respect to the left shoulder.

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<sup>25</sup> Exhibit 41.

<sup>26</sup> Exhibit 42.

<sup>27</sup> TR1-140, LL1-40.

<sup>28</sup> Exhibit 77.

In the absence of any objectively verifiable pathology in the left shoulder there is no indication for any further medical treatment or hospitalisation.<sup>29</sup>

[79] Dr Michael Bryant, orthopaedic surgeon in a report dated 2 April 2019<sup>30</sup> sets out the following responses to a series of questions:

**1. Where there has been a change to the diagnosis of her neck complaint?**

The diagnosis in Nadia for her cervical complaint is that of "muscular ligamentous whiplash type injury". There is no specific disc injury nor any compression of the nerve and certainly nothing that surgery is going to help.

**2. Is Nadia incapacitated as a result of her neck condition?**

Nadia has no particular ongoing incapacity from her neck and specifically, nothing that relates to her work injury.

**3. Does Nadia require further treatment for her neck condition?**

No

**4. Has the neck injury ceased?**

Yes.

[80] In the report of 15 April 2019, Dr Bryant stated that the Appellant required no specific treatment nor any ongoing need for rehabilitation. Further, there was, at that time, no incapacity for work nor was it necessary to place restrictions on the Appellant's ability to return to work.<sup>31</sup>

[81] Dr Bryant further noted in his report of 17 July 2019 that:

I do not feel there is any surgically amenable cervical injury in Nadia's circumstance with a Musculo-ligamentous strain the most likely explanation for her reported ongoing symptoms. This should be considered partial incapacity. The degree of incapacity should be formally assessed by an independent assessor specifically trained in the degree of impairment assessments.<sup>32</sup>

[82] Dr Bryant went on to observe that he did not feel that there is any surgically correctable neck injury related to the reported work accident that should be impacting significantly on the Appellant's hours or days of work. Further, he believed no other hospitalisation or medical treatment was necessary at that time.<sup>33</sup>

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<sup>29</sup> Exhibit 80.

<sup>30</sup> Exhibit 90.

<sup>31</sup> Exhibit 91.

<sup>32</sup> Exhibit 93.

<sup>33</sup> Ibid.



- [83] In a file note dated 4 November 2021<sup>34</sup> Dr Bryant clarified his reference to 'partial incapacity' in his report of 17 July 2019 by stating that he did not consider the Appellant to have any incapacity to work because of her musculoligamentous injury to her cervical spine, as stated in his reports of 2 April 2019, 15 April 2019 and 12 July 2019. His statement about 'partial incapacity' in his report was based on the Appellant's self-reports of pain rather than on any objective signs of injury.
- [84] No evidence has been adduced by the Appellant to suggest that at the time of the cessation of the compensation payments that she had any entitlement associated with a musculoligamentous injury to the cervical spine.
- [85] I accept the medical evidence, and, in particular the evidence of Dr Bryant, which does not support a conclusion that the Appellant had a total or partial incapacity for work because of the accepted work-related neck injury beyond 2 May 2019. Further, the evidence does not support a conclusion that there is a requirement for the Appellant to undergo further medical treatment, hospitalisation or other expenses for the management of the accepted work-related neck injury beyond 2 May 2019.
- WC/2020/36*
- [86] This appeal concerns the Respondent's decision to confirm the termination of weekly entitlements in the period 13 June 2018 to 23 July 2018, with respect to all accepted injuries except for the left wrist EDC tendonitis.
- [87] The issue before the Commission is whether the Appellant was incapacitated for work or otherwise entitled to incapacity benefits for the period of 13 June 2018 to 23 July 2018 for any of the identified work-related injuries.
- [88] The Respondent contends the Appellant was not incapacitated for employment in the period 13 June 2018 to 23 July 2018 and consequently has no entitlement to weekly payments of compensation pursuant to s 144A of the WCR Act.
- [89] The evidence before the Commission was that the Appellant received a Work capacity certificate dated 20 February 2017 stating that she was cleared to return to work 'if the patient does not need to weight bear'.<sup>35</sup>
- [90] The Appellant returned to the office 'for eight hours a day, five days a week' on suitable duties from late April 2017.<sup>36</sup>

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<sup>34</sup> Exhibit 95.

<sup>35</sup> Exhibit 5.

<sup>36</sup> Exhibit 7; TR1-84, LL43-44.

[91] In the medical report of Dr Greg Sterling, Orthopaedic Surgeon dated 6 June 2018<sup>37</sup> he notes that the Appellant was performing most of her work duties with the only exception being going up and down ladders when on site.

[92] Dr Sterling certified the Appellant as fit for suitable duties with no restrictions in hours or days which was signed by the Appellant on 8 June 2018.

[93] The Appellant's work restrictions were expressed as follows:

Able to walk indoors/outdoor with no aid up to 250m  
 Use of single point stick for walking >250m indoors and outdoors walking  
 Able to walk on even ground as tolerated with walking stick or crutch  
 Able to stand/walk on uneven ground (single point stick or crutch) as tolerated with walking stick or crutch  
 Able to use stairs with rail or stick/crutch (no ladders higher than 6 meters)  
 Avoid repetitive or prolonged squatting  
 Non-slip mat to be used when showering on site trips.<sup>38</sup>

[94] In her oral evidence, the Appellant accepted that she was able to perform her duties at Incitec with the restrictions, and recommendations listed in the suitable duties plan.<sup>39</sup>

[95] In respect of her shoulder, Dr Rimmerton said in his report of 9 November 2017 that the Appellant's shoulder was "back to normal". In a facsimile to WorkCover dated 26 February 2018 in answer to a question as to whether the Appellant was able to return to full duties in respect of her left wrist Dr Ryan replied: "[y]es, this was likely, given her progress at her last consultation".<sup>40</sup> Further, Dr Allen expressed the view that: "There is no incapacity for work as an Electrical Engineer with respect to the left shoulder".<sup>41</sup>

[96] At the request of WorkCover, Dr Journeaux, Orthopaedic Surgeon, completed an independent medical examination of the Appellant on 28 June 2018. In his report of the same date Dr Journeaux notes:

The claimant indicates she had approximately two months off work totally incapacitated. She then returned to work on suitable duties and sadly indicates has lost her job as of the end of June 2018. She is back to around 95% functional capacity for her employment but is unable to do ladder work or attend certain sites.<sup>42</sup>

[97] On 9 July 2018, Dr Zofia Piotrowska-Hess, General Practitioner, issued a workers' compensation medical certificate certifying the Appellant fit for suitable duties. The certificate did not indicate any restrictions including no restrictions on hours or days in which the Appellant could work.

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<sup>37</sup> Exhibit 85.

<sup>38</sup> Exhibit 11.

<sup>39</sup> TR1-121, LL40-44.

<sup>40</sup> Exhibit 57.

<sup>41</sup> Exhibit 80, Report of Dr Philip Allen dated 30 April 2018.

<sup>42</sup> Exhibit 100.

[98] The work-related injury suffered by the Appellant has not resulted in an incapacity for work within the meaning of s 144A of the WCR Act. The injury has not taken away or diminished her power to earn wages in some suitable employment.<sup>43</sup> Indeed, the evidence before the Commission is that the Appellant was in full employment albeit on suitable duties from late 2017.

[99] Moreover, in *Commonwealth v Muratore*<sup>44</sup> Jacobs J (with whom Gibbs, Stephen and Aickin JJ agreed) said:

It has always been recognized that "incapacity for work", those words being taken to refer to physical incapacity, is only relevant where it produces an economic incapacity.

[100] No economic incapacity has been demonstrated.

[101] In accordance with the Settlement and release agreement entered into by the Appellant on 13 June 2013, it was agreed that she would be paid on the first business day after 1 July 2018, amongst other things, five weeks' notice.

[102] On the Appellant's own evidence, she accepted that she was paid the five weeks' notice.

[103] Section 147 of the WCR Act provides that a worker cannot receive more than if the injury had not been sustained. In particular, sub-section (1) of s 147 of the WCR Act provides:

(1) A worker must not receive an amount under this part that is more than the worker would have received from the worker's employment if the worker were at work and the injury had not been sustained.

[104] In respect of WC/2020/36 I find that, based on the expert evidence which I accept, the Appellant was not otherwise entitled to incapacity benefits for the period of 13 June 2018 to 23 July 2018 for any of her accepted injuries.

### ***WC/2020/37***

[105] The Respondent contends the Appellant was not incapacitated for employment on and from 16 August 2019. Alternatively, any incapacity for employment suffered by the Appellant on and from 16 August 2019 is not attributable to her "left wrist ECD tendonitis" condition.

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<sup>43</sup> *Thompson v Armstrong & Royse Pty Ltd* (1950) 81 CLR 585 at 602–603; [1950] ALR 891; (1950) 24 ALJR 329; BC5000480.

<sup>44</sup> (1978) 22 ALR 176 at 179–80; 141 CLR 296 at 300–1.

[106] This appeal is in respect of the Respondent's decision to confirm the termination of weekly entitlements in accordance with s 144A of the WCR Act on and from 16 August 2019, for left wrist EDC tendonitis.

[107] The Respondent contends the Appellant has no entitlement to weekly payments of compensation pursuant to s 144A of the WCR Act on and from 16 August 2019.

[108] The evidence of Dr Ryan, orthopaedic surgeon who treated the Appellant for her left wrist injury does not support the contention that the Appellant was incapacitated for work or otherwise had an entitlement to incapacity benefits after 16 August 2019.

[109] In the report dated 30 August 2019, Dr Ryan wrote:

During a Functional Capacity Assessment Evaluation, she has felt a sudden pain in her left wrist which she had previously injured in a motor vehicle accident on 10 February 2017. There was some concern regarding a new injury and as such she was referred for further review.

On clinical assessment she was tender around the intercarpal region and the radiocarpal joint dorsally. There was no fluctuance, crepitus or swelling and no tendon instability nor could I detect any capsuloligamentous instability of the wrist. She had a full range of movement although diminished strength secondary to pain. There were no neurovascular signs.

I took the liberty of organising an MRI and some stress views of her wrist. They show maintenance of carpal alignment and no signs of extensor synovitis or intrinsic carpal capsuloligamentous injury.

I suspected that she had experienced some symptoms related to her intermittent synovitis given her underlying physiological laxity.

I recommended a range of movement and strength and proprioceptive program with a hand therapist and would expect her symptoms to dissipate over a 6-12-week period.<sup>45</sup>

[110] Dr Ryan went on to record in his report that "[c]urrently she is continuing in her normal functional duties which she was performing prior to the event on 27 May 2019". He noted that her prognosis was good and expected a full recovery given the radiological imaging.

[111] The 6 March 2020 report of Dr Ryan records that the Appellant was '... performing predominantly office duties and no field work at present whilst she continues to recover from her multiple injuries'.<sup>46</sup>

[112] The report of Dr Ryan of 25 August 2020 records the following:

I most recently saw Nadia on 30 July 2020. She was managing quite well. She had a great response to her intersection syndrome injection back in April at the Wesley Hospital. She has not had any recurrence of her symptoms, although gets an ache at times. She is managing by altering the way she carries her coat and performs other activities at work while visiting jobsites.<sup>47</sup>

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<sup>45</sup> Exhibit 54.

<sup>46</sup> Exhibit 59.

<sup>47</sup> Exhibit 63.

[113] In the report of 29 March 2021, Dr Ryan notes:

She was managing her normal work duties. At the multidisciplinary clinic, Nadia, the therapist and myself felt that she would benefit from further work hardening and strengthening over a 6-8 week period. At that stage, she will have reached maximum improvement.<sup>48</sup>

[114] In respect of WC/2020/37 based on the expert medical evidence of Dr Ryan, which I accept, together with the Appellant's employment history as set out above, I find that the Appellant was not relevantly incapacitated for employment on and from 16 August 2019.

### **Conclusion**

[115] The Appellant bore the onus of proof to show that the Regulator had erred. In short, the only question for determination by the Commission is whether the Appellant has shown that she was entitled to weekly payments and the payment of medical treatment, hospitalisation and other expenses.

[116] For the reasons set out above, I have determined that the Appellant is not entitled to compensation payments pursuant to s 144A of the WCR Act on the basis that the incapacity because of the work-related injury has stopped; and further, she has no entitlement under s 144B of the WCR Act as medical treatment, hospitalisation and other expenses are no longer required to manage the work-related injury.

[117] Having failed to discharge the onus, each of the appeals before the Commission must be dismissed.

### **Orders**

[118] I order as follows:

- 1. Appeals WC/2019/157; WC/2020/36; and WC/2020/37 are dismissed.**
  - (a) In respect of WC/2019/157, I order that pursuant to s 558(1)(a) of the *Workers' Compensation and Rehabilitation Act 2003*, the review decision of the Respondent, dated 2 August 2019, is confirmed.**
  - (b) In respect of WC/2020/36, I order that pursuant to s 558(1)(a) of the *Workers' Compensation and Rehabilitation Act 2003*, the review decision of the Respondent, dated 18 March 2020, is confirmed.**

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<sup>48</sup> Exhibit 67.

- (c) In respect of WC/2020/37, I order that pursuant to s 558(1)(a) of the *Workers' Compensation and Rehabilitation Act 2003*, the review decision of the Respondent, dated 18 March 2020, is confirmed.
- 2. In respect of WC/2019/157; WC/2020/36; and WC/2020/37, I order pursuant to r 41(1) of the *Industrial Relations (Tribunals) Rules 2011* that:
  - (a) the parties are to exchange and file written submissions on the costs of the hearing of no more than five (5) pages by 4.00 pm on Tuesday 29 August 2023; and
  - (b) in the absence of any application to make oral submissions in respect of costs, the question of costs will be decided on any written submissions filed without further oral hearing.