

## IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/NP/269/00/LS

In the complaint between:

C J Potgieter

Complainant

and

Metal & Engineering Industries Permanent

Respondent

Disability Scheme

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### **SECOND PRELIMINARY DETERMINATION IN TERMS OF SECTION 30J OF THE PENSION FUNDS ACT OF 1956**

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1. On 6 August 2001, I handed down a preliminary determination on the basis of which I issued a rule nisi calling upon the parties to show cause why the following order should not be made final.

The complaint is dismissed.

2. The respondent has not responded to the preliminary determination.
3. The complainant has responded to the preliminary determination by way of additional submissions, a statement by the complainant dated 22 August 2001, a letter dated 17 September 1996 from his previous employer, Prospect Engineering (Pty) Ltd, a medical report dated 21 August 2001 by Dr J van Eeden, a general practitioner, and a letter dated 17 September 1999 from H D Fabrications CC who employed the complainant briefly in or about 1999 on a part-time basis.

4. Whilst I have examined the additional submissions and new evidence in their entirety, I find it necessary to deal with only two points made by the complainant.
5. It should be noted that it was only after I had handed down my preliminary determination that the complainant was provided with copies of all the medical reports upon which the fund relied to repudiate his claim for disability.
6. The facts appear from the preliminary determination aforesaid.
7. The first point relates to the meaning of the definition of disability contained in the rules. To reiterate the definition reads:

“Permanently Disabled” shall mean a member becoming permanently disabled or incapacitated and not being able to engage in further employment in whatsoever capacity in the Industries.

8. “Industries” in turn are defined as

the group of industries known as the iron, steel, engineering and metallurgical industries

9. The complainant states that only certain types of employment opportunities are available in the industries and submits that any investigation into the ability of the complainant to work must, in terms of the definition of disability, determine his ability to perform in any capacity whatsoever *in the industries* as defined.
10. I agree with the above submission and acknowledge that this important aspect of the definition was not sufficiently canvassed in my preliminary determination. “In the industries” qualifies the word “capacity” so as to

broaden the ambit of the definition as a whole. Thus a member is not required to be incapable of performing any occupation but only any occupation *within the industries*. The significance of this is apparent on re-examination of the evidence of the occupational therapists, Ms Ho and Ms van Biljon.

11. Ms Ho states in her report dated 9 December 1998 that

Mr Potgieter is totally and permanently disabled from performing his own occupation as a Fitter and Turner. However, he can be trained and redeployed to suitable alternative occupation within the open labour market.

12. Ms van Biljon in her report dated 3 April 200 states that if the complainant's pain was successfully managed, he could still work in the open labour market in an appropriate alternative occupation.
13. The above reveals that both the opinion of Ms Ho and Ms van Biljon is based on the complainant's ability to pursue an occupation *in the open labour market*. This is problematic in that the enquiry whether the complainant is capable of performing any occupation in the open labour market is not the same enquiry as whether he is capable of performing any occupation in the industries as required in terms the definition.
14. Whilst I do not agree with the complainant that one should disregard the evidence of Ms Ho and Ms van Biljon entirely on this basis, it is clear that the value of the latter's evidence is diminished by this consideration.
15. This in turn affects the finding in my preliminary determination regarding the weight of the medical evidence (see paragraphs 38 and 39 thereof) and brings me to the second point to which I refer in paragraph 4 above.

16. In his additional submissions, the complainant discusses in detail the reports of the various orthopaedic surgeons who examined him including that of Dr Tuson (the orthopaedic surgeon appointed by the fund) upon which I relied in my preliminary determination to support my finding that the complainant is capable of engaging in further employment in the industries.

17. Although Dr Tuson states in his report that the complainant is able to do light manual work or sedentary manual work, he also states the following:

His current spine degeneration and disability status is permanent, he will probably have intermittent exacerbation episodes, and his symptoms may deteriorate with time. In view of his past history and record, he is likely to have repeat injury episodes and time off duty. This may impact on his work effectiveness and reliability. It is doubtful whether further surgery or physiotherapy or other treatment modalities would enable him to return to his normal work.

18. Thus Dr Tuson is saying that the complainant's disability will probably deteriorate over time; furthermore that should he return to work, he would probably have to take a lot of time off; furthermore that it is unlikely that any kind of treatment would cure him.

19. The above certainly does not support a finding that the complainant is capable of engaging in any kind of occupation. On the contrary, it supports a finding that the complainant's disability renders him incapable of performing any occupation *effectively*. It should be noted that being able to engage in further/alternative employment must be taken to mean being able to engage *effectively* in further/alternative employment.

20. The above also affects the finding in my preliminary determination regarding the weight of the medical evidence.

21. The medical evidence may now be summarized as follows: Ms Ho and Ms van Biljon, both occupational therapists, opine that although the complainant is not capable of performing his work as a fitter and turner, the injury to his back does not prevent him from pursuing an alternative occupation within the open labour market; Ms Ho and MS van Biljon do not however comment on the complainant's ability to work in the industries; Ms Oeschger and Ms Stirrat, also occupational therapists, do not comment on the complainant's ability to work; Dr du Plessis and Dr Nainkin, both orthopaedic surgeons, opine that the complainant is incapable of pursuing any occupation at all; Dr Tuson also an orthopaedic surgeon opines that although the complainant is capable of doing light manual work, he would however probably have to take a lot of time off to accommodate his disability; therefore he is not able to pursue any occupation effectively.
22. In light of the above, I am satisfied that the weight of the medical evidence supports a finding that the complainant is incapable of engaging in further employment in whatsoever capacity in the industries and accordingly qualifies for the disability benefit.
23. However since the respondent has not had an opportunity to respond to the new findings and arguments raised here, justice requires me to afford it an opportunity to make additional submissions should it wish to do so.
24. The order of this tribunal is accordingly as follows:

The respondent is invited to make additional submissions on or before **21 December 2001** whereupon I shall hand down my final determination.

DATED at CAPE TOWN this 30th day of NOVEMBER 2001.

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**JOHN MURPHY**

PENSION FUNDS ADJUDICATOR