

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 4133/19
Applicant: Feng Cui
Respondent: Unity International Cargo Pty Ltd
Date of Determination: 19 September 2019
Citation: [2019] NSWCC 305

The Commission determines:

1. The applicant sustained injury to his abdomen, left leg, lower back and a psychological injury on 28 November 2018.
2. The applicant's employment was a substantial contributing factor to his injury.
3. The applicant has had no current work capacity since 28 November 2018.
4. The applicant's Pre-Injury Average Weekly Earnings are \$1,127.66.

The Commission orders:

5. The respondent to pay the applicant weekly compensation as follows:
 - (a) \$1,071.28 per week from 29 November 2018 to 27 February 2019 pursuant to section 36(1)(a) of the *Workers Compensation Act 1987*, and
 - (b) \$902.13 per week as adjusted from 28 February 2019 to date and continuing pursuant to section 37(1)(a) of the *Workers Compensation Act 1987*.
6. Liberty to the parties to apply with respect to these calculations within 14 days of the date of this determination.
7. The respondent to have credit for payments already made.
8. No order as to costs.

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

Glenn Capel
Senior 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 GLENN CAPEL, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Jackson

Ann Jackson
Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Feng Cui (the applicant) is 56 years old and commenced employment with Unity International Cargo Pty Ltd (the respondent) as a truck driver on a trial basis on 5 November 2018. He did not formally commence until 7 November 2018.
2. There is no dispute that the applicant injured his abdomen, lower back and left leg, and a psychological injury on 28 November 2018, when he was crushed by an unmanned forklift. He was taken by ambulance to St George Hospital where he remained until 6 December 2018. I understand that he has been certified as having no current work capacity since the incident.
3. On 12 February 2019, Employers Mutual Ltd (the insurer) issued a Work Capacity Decision (WCD) in accordance with s 43 of the *Workers Compensation Act 1987* (the 1987 Act). In the absence sufficient wage information, the insurer assessed the applicant's Pre-Injury Average Weekly Earnings (PIAWE) in the amount of \$511.75, but this was only on an interim basis. It advised that payments in the sum of \$486.16, being 95% of the PIAWE, would be made as from 28 November 2018.
4. On 26 February 2019, the insurer issued a further WCD and assessed the applicant's PIAWE at \$664.93. It advised that payments in the sum of \$631.71, being 95% of the PIAWE, would be made as from 28 November 2018.
5. On 19 March 2019, the insurer advised the applicant that his payments would reduce to \$531.94 (80% of the PIAWE) as from 28 February 2019.
6. On 6 May 2019, the applicant's solicitor requested a review of the applicant's PIAWE. The applicant alleged that he reasonably expected to have been paid \$33.28 per hour after four weeks and he would have worked at least 50 hours per week, resulting in a PIAWE of at least \$1,664.
7. On 24 July 2019, the insurer advised the applicant that it had reviewed the WCD and it had decided to increase the applicant's PIAWE to \$886.57 as from 28 November 2018.
8. The insurer advised the applicant that it had determined his PIAWE based on his ordinary earnings of \$2,659.72 over the period of three weeks. This resulted in average ordinary earnings of \$886.57 per week.
9. The list of payments shows that the applicant was paid \$842.24 per week, being 95% of this revised PIAWE, from 29 November 2018 to 28 February 2019, when payments reduced to \$709.26, being 80% of the PIAWE. The PIAWE was indexed on 1 April 2019 to \$895.98, and the applicant has received \$716.78 per week since that time.
10. The applicant filed an Application for Expedited Assessment, where a work capacity decision is in dispute (the Application), which was registered in the Workers Compensation Commission (the Commission) on 15 August 2019.
11. The applicant claims weekly compensation from 29 November 2018 to date and continuing pursuant to ss 36 and 37 of the 1987 Act based on a PIAWE of \$1,664, due to injury sustained to his abdomen, left leg and lower back, together with a psychological injury, on 28 November 2018.

PROCEDURE BEFORE THE COMMISSION

12. Section 297 (1) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) provides me with the power, as delegate of the Registrar, to direct the insurer to pay weekly compensation by way of an interim payment direction.
13. Section 298 (1) of the 1998 Act limits the payment of weekly compensation to a period of 12 weeks and s 298(2) of the 1998 Act allows for a payment in respect of a period of 10 weeks before the direction is made.
14. Section 297 (1A) of the 1998 Act provides that s 298 does not apply to a dispute concerning a decision by the insurer to discontinue or reduce weekly payments of compensation on the basis of a work capacity decision.
15. In this matter, as the insurer increased payments to the applicant, s 298 of the 1998 Act applies, meaning that the only direction that I could make as an interim payment direction which would be limited to a period of 12 weeks. In the circumstances, I was not satisfied that this matter should proceed as an expedited assessment.
16. On 16 September 2019, I issued the following Direction:

“The Application for Expedited Assessment matter is transferred to the Commission and will be dealt with as Form 2 – Application to Resolve a Dispute.

 1. Liberty to the parties to apply in respect of this direction.”
17. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.
18. The parties were informed of my intention to determine the dispute without holding a conciliation conference or arbitration hearing.
19. Written submissions were filed by the applicant on 9 September 2019 and by the respondent on 16 September 2019. Submissions in reply were filed on 18 September 2019.

ISSUES FOR DETERMINATION

20. The following issue remains in dispute:
 - (a) quantification of the applicant’s entitlement to weekly compensation – ss 36 and 37 of the 1987 Act.

EVIDENCE

Documentary evidence

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

REVIEW OF EVIDENCE

Applicant's statement

22. The applicant provided a statement on 12 August 2019. He advised that he obtained his heavy vehicle driver's licence on 28 April 2017 and he worked for two days with the respondent. When this occurred was not disclosed. He claimed that he was paid \$25 cash per hour.
23. The applicant stated that he contacted the respondent after seeing an advertisement. He did not ask about his salary because he already knew that truck drivers received \$25 nett per hour. He worked briefly on 5 November 2018 and it was agreed that he would formally commence on 7 November 2018. He sustained injury on 28 November 2018 and he was unable return to work.
24. The applicant stated that when he received his first pay packet of over \$600, he thought that he had been underpaid, so he asked Mr Lee for an explanation. Mr Lee stated that his salary had not yet been discussed, but after four weeks, he would be paid \$25 nett per hour. The applicant told Mr Lee that he would not work for the respondent for less than 10 hours per day. He claimed that Mr Lee guaranteed that he would work for a minimum of 10 hours per day. They also agreed on two weeks' notice of termination.
25. The applicant stated that the respondent paid his rent of \$480 and gave him cash of \$1,200 when he was in hospital. He received a third payment of over \$400 when he was discharged. He did not know how his salary was calculated. He considered that he was a full-time employee after the four-week probation period.
26. The applicant claimed that he generally worked for more than 10 hours per day. He had not seen his payslips until they were given to him by his solicitor.

Time Sheets

27. The applicant's time sheets show that he worked for 3.56 hours from 11.28 am to 3.02 pm on 5 November 2018, 8.96 hours from 9.02 am to 6.00 pm on 7 November 2018, 9.38 hours from 10.06 am to 7.28 pm on 8 November 2018 and 10.25 hours from 9.16 am to 7.31 pm on 9 November 2018. This amounted to 32.15 hours at \$19 nett per hour.
28. In the period of 10 days from 12 November 2018 to 23 November 2018, the applicant worked a total of 87.73 hours and was paid a nett amount of \$1,666.87. From 26 November 2018 to 28 November 2018, he worked a total of 21.68 hours and he was paid a nett amount of \$410.78.

Applicant's Payslips

29. The applicant's payslip for the pay period 29 October 2018 to 11 November 2018 shows nett earnings of \$610.85. This is in respect of the 32.15 hours worked on about 3.5 days from 5 November 2018 to 9 November 2018. This equates to \$19 nett per hour. It was noted that he was a part-time employee.
30. The applicant's payslip for the pay period 12 November 2018 to 25 November 2018 shows gross earnings of \$2,048.87 and nett earnings of \$1,666.87. This is in respect of the 87.73 hours worked during this 10-day period. This equates to \$23.35 gross per hour.
31. The applicant's payslip for the pay period 26 November 2018 to 28 November 2018 shows nett earnings of \$410.78. This is in respect of the 21.68 hours worked by the applicant during this 2.5-day period. This equates to \$18.95 per hour.

Applicant's documents

32. According to the Road Transport (Long Distance Operation) Award 2010 (MA00039) and a print out from the Fair Work Ombudsman, the Grade 3 driver full-time hourly rate is \$31.79 and the applicant would have earned \$1,589.50 for a 50-hour week.
33. It is suggested that under the Road Transport and Distribution Award 2010 (MA00038), the base hourly salary for a full-time Grade 3 [sic] Transport worker is \$21.45 per hour for a standard 38-hour week, but when 12 hours of overtime are added, the earnings would be \$1,334.24. Casual rates would be greater.
34. A print out from an online recruitment organisation suggests that the average rate for truck drivers in Sydney is \$31.92 per hour.

Respondent's documents

35. On 24 May 2019, Winnie of the accounts section of the respondent, provided a response to an email sent to her by icare workers insurance. She advised that the applicant was employed on a part-time basis during his probation period. If he proved to be a satisfactory worker, he would be employed in a full-time position. There was no written contract.
36. Winnie advised that the applicant was not guaranteed 50 hours of work each week. Full-time drivers averaged 38 to 40 hours per week. Overtime was available when required by the business.
37. In an email dated 21 August 2019, Roger Lee of the respondent advised that the applicant was recruited as a MR licence driver, not an HR licence driver, because the respondent only had two axle vehicles. He stated that it was agreed that the applicant would be paid \$19 nett per hour.
38. Mr Lee advised that drivers of two axle rigid vehicles were classified as Transport Workers Grade 3 under the Road Transport and Distribution Award 2010 (MA00038) 2018. The weekly pay rate was \$814.20 or \$21.43 gross per hour. He advised that the applicant's part-time rate was \$19 nett per hour and there was no guarantee as to the applicant's working hours.
39. Mr Lee stated that the applicant did not have any industry experience and he had poor English skills. Mr Lee told the applicant that the respondent could train him for the driving job in the future, but it was unable to assist with his English skills. He stated that the suggestion by the applicant that he had agreed to pay him \$25 per hour after four weeks did not make sense, as he had only worked for one week. The working hours depended on whether the applicant could handle the demands of the job. There was also no discussion regarding notice of termination during the probation period.
40. Mr Lee stated that the applicant was provided with payslips that were posted to his address when he was in hospital. He advised that the applicant had paid \$240.21 for petrol and this had been reimbursed to him.

Comparable driver payslips

41. The comparable driver payslips show that in the pay period 22 October 2018 to 11 November 2018, the full-time employee was paid \$1,760 gross. This seems to be a period of three weeks, but is not clear precisely when this employee worked. The timesheets are not in evidence, but assuming that this employee worked for 38 hours per week, this suggests a gross salary of \$880 per week or \$23.16 gross per hour.

42. The payslips for the pay period 12 November 2018 to 25 November 2018 and 26 November 2018 [sic] to 9 December 2018 show similar earnings.

Work Capacity Decision

43. On 24 July 2019, the insurer issued its third WCD. It advised that it proposed to increase the applicant's PIAWE to \$886.57 as from 28 November 2018. This was determined by dividing his gross earnings of \$2,659.72 by three weeks, to arrive at a weekly rate of \$886.57. The insurer also noted that a comparable truck driver averaged \$880 per week.

APPLICANT'S SUBMISSIONS

44. The applicant's counsel, Mr Hickey, submits that the applicant only worked or was paid for 3.56 hours on 5 November 2018 when he attended for induction and assessment for the position. This did not represent a full working day and the applicant did not work on 6 November 2018. The time sheet for the period 7 November 2018 to 9 November 2018 only reflects three days' work, not a full week. Accordingly, the hours worked on 5 November 2018 should be excluded from any calculations.
45. Mr Hickey submits that the applicant only worked for five hours instead of 9.5 hours on 28 November 2018. Similarly, the hours worked on 28 November 2018 should be excluded.
46. Mr Hickey submits that the applicant was an experienced bus and heavy vehicle driver. He claimed that he sought permanent employment from the respondent in excess of 50 hours per week. The applicant stated that in conversations with Mr Lee, it was indicated that he would not work for less than 10 hours per week and he would be paid \$25 per hour nett after four weeks.
47. Mr Hickey submits that the applicant stated that he generally worked for more than 10 hours per day and according to the respondent, it was agreed that he would start on a part-time basis for \$19 nett per hour. He did not receive any payslips until after he claimed compensation.
48. Mr Hickey submits that the payslips appear to be somewhat unreliable when one compares them with what the applicant was to be paid and what he was actually paid. The payslip for the period 29 October 2018 to 11 November 2018 at page 27 of the Application referred to three dates in December 2018 at the bottom of the document. The payment date was identified as 14/11/2018. Further, the payslip of the comparable employee at page 13 of the Application had a payment date of 11/14/18 [sic]. The applicant's other payslips did not show any tax deductions and only referred to nett payments.
49. Mr Hickey submits that when the applicant's earnings of \$67.64 (3.56 hours @ \$19 per hour) and \$87.78 (4.62 hours @ \$19 per hour) are excluded, the applicant's earnings for three weeks from 7 November 2018 to 27 November 2018 were \$2,916.08, or \$972.02 per week.
50. Mr Hickey submits that ss 44C, 44D(1) and 44E of the 1987 Act provide a choice for determining the applicant's PIAWE, but the authorities confirm that the most beneficial application should apply¹.
51. Mr Hickey submits that if the Road Transport and Distribution Award 2010 (MA000038) applied, then s 44C(2) of the 1987 Act could be relied upon because the section "may" provide for a more beneficial and accurate assessment of the PIAWE than a mere averaging of the earnings of the worker under s 44C(1) of the 1987 Act.

¹ *Cha v Buzz Restaurants Pty Ltd* [2017] NSWCC 56; *Dick's Diesel Pty Ltd v Caddaye* [2015] NSWCCPD 68.

52. Mr Hickey submits that the application of s 44C of the 1987 Act is prospective and looks to the earnings that would be reasonably expected in that employment rather than merely averaging the past income.
53. Mr Hickey submits that in assessing prospective earnings pursuant to s 44C(2) of the 1987 Act, one should have regard to the applicant's past qualification as a heavy vehicle driver, his intention to work permanently for the respondent for at least 10 hours per week and the fact that he averaged 9.5 hours per week over a three week period.
54. Mr Hickey submits that if the applicant worked for 7.6 hours per day at the award rate of \$21.45 per hour, he would earn \$815.10 gross per week. If one allowed 1.9 hours of overtime each day at the rate of \$34.32 per hour, the applicant would earn \$326.04 gross per week in overtime. The total would result in a PIAWE of \$1,141.14 for the first 52 weeks from the date of injury.
55. Mr Hickey submits that the applicant's entitlement would be \$1,084.08 per week (95% of \$1,141.14) from 29 November 2018 to 27 February 2019 pursuant to s 36 of the 1987 Act and \$912.91 (80% of \$1,141.14) per week from 28 February 2019 to date and continuing pursuant to s 37 of the 1987 Act.

RESPONDENT'S SUBMISSIONS

56. The respondent's solicitor, Ms Tancred, submits that the applicant alleges that he knew that truck drivers employed by the respondent received \$25 nett per hour. The source of this information was not disclosed.
57. Ms Tancred submits that according to Mr Lee, the applicant was recruited as an MR licenced driver, not an HR licenced driver, and it was agreed that the applicant would be paid \$19 nett per hour on a part-time basis. He did not work 50 hours per week prior to his accident and there was no agreement as to the number of hours that the applicant would work.
58. Ms Tancred submits that a driver of a two-axle vehicle is classified as a Grade 3 driver and this position has an hourly rate of \$21.43 gross per hour or \$814.20 gross per week.
59. Ms Tancred submits that s 44C(2) of the 1987 Act refers to the average earnings that the worker could reasonably have been expected to have earned in that employment. The applicant was engaged as a MR truck driver, working various hours, at the rate of \$19 nett per hour. A broad overview of the industry is not sufficient as it does not reflect the actual employment that the applicant was undertaking at the time of his injury.
60. Ms Tancred submits that the applicant as employed for 23 days or 3.2 weeks prior to the incident. He had gross earnings of \$3,070.50 at an average of \$959.53 per week. This represents the most appropriate way of calculating the applicant's PIAWE.

Legislation

61. Given the brief period that the applicant was employed by the respondent, s 44C of the 1987 Act is of relevance. It provides:

"44C Definition—pre-injury average weekly earnings

(1) In this Division, ***pre-injury average weekly earnings***, in respect of a relevant period in relation to a worker, means the sum of:

- (a) the average of the worker's ordinary earnings during the relevant period (excluding any week during which the worker did not actually work and was not on paid leave) expressed as a weekly sum, and

(b) any overtime and shift allowance payment that is permitted to be included under this section (but only for the purposes of the calculation of weekly payments payable in the first 52 weeks for which weekly payments are payable).

(2) If a worker has been continuously employed by the same employer for less than 4 weeks before the injury, **pre-injury average weekly earnings**, in relation to that worker, may be calculated having regard to:

(a) the average of the worker's ordinary earnings that the worker could reasonably have been expected to have earned in that employment, but for the injury, during the period of 52 weeks after the injury expressed as a weekly sum, and

(b) any overtime and shift allowance payment that is permitted to be included under this section (but only for the purposes of the calculation of weekly payments payable in the first 52 weeks for which weekly payments are payable).

(3) If a worker:

(a) was not a full-time worker immediately before the injury, and

(b) at the time of the injury was seeking full time employment, and

(c) had been predominantly a full-time worker during the period of 78 weeks immediately before the injury,

pre-injury average weekly earnings, in relation to that worker, means the sum of:

(d) the average of the worker's ordinary earnings while employed during the period of 78 weeks immediately before the injury (excluding any week during which the worker did not actually work and was not on paid leave) (**the qualifying period**), whether or not the employer is the same employer as at the time of the injury expressed as a weekly sum, and

(e) any overtime and shift allowance payment that is permitted to be included under this section (but only for the purposes of the calculation of weekly payments payable in the first 52 weeks for which weekly payments are payable).

(4) In relation to a worker of a class referred to in Column 2 of an item in Schedule 3, **pre-injury average weekly earnings** means the amount determined in accordance with Column 3 of that item, expressed as a weekly sum.

(5) An overtime and shift allowance payment is permitted to be included in the calculation of pre-injury average weekly earnings (but only for the purposes of the calculation of weekly payments payable in the first 52 weeks for which weekly payments are payable) if:

(a) the worker worked paid overtime or carried out work that attracted a shift allowance during the relevant period, and

(b) the worker would, but for the worker's injury, have been likely, at any time during that 52-week period, to have worked paid overtime or carried out work that attracted a shift allowance.

(6) The amount of an overtime and shift allowance payment that is permitted to be included is to be calculated in accordance with the following formula:

$$\frac{A}{B}$$

where:

A is the total amount paid or payable to the worker for paid overtime and shift allowances in respect of the relevant period.

B is the number of weeks during the relevant period during which the worker worked or was on paid annual leave.

(7) If the amount of a worker's pre-injury average weekly earnings is less than any minimum amount prescribed by the regulations as applicable to the worker, the amount of the worker's pre-injury average weekly earnings is deemed to be that minimum amount. Different minimum amounts may be prescribed for different classes of workers, including part-time and full-time workers."

62. Section 44D (1) of the 1987 Act sets out a definition of the "relevant period". It provides:

"44D Definitions applying to pre-injury average weekly earnings—relevant period

(1) Subject to this section, a reference to the **relevant period** in relation to pre-injury average weekly earnings of a worker is a reference to:

(a) in the case of a worker who has been continuously employed by the same employer for the period of 52 weeks immediately before the injury, that period of 52 weeks, or

(b) in the case of a worker who has been continuously employed by the same employer for less than 52 weeks immediately before the injury, the period of continuous employment by that employer."

REASONS

Quantification of the applicant's capacity – ss 36 and 37 of the 1987 Act

63. There is no dispute that the applicant has had no current work capacity since he sustained injury on 28 November 2018.
64. The present Application concerns a dispute regarding the PIAWE in a WCD. The applicant initially sought an expedited assessment, however, given that the claim concerns weekly compensation for a period in excess of 12 weeks, it was appropriate to transfer this matter to be dealt with by me as an Arbitrator of the Commission rather than as a Delegate of the Registrar. In those circumstances, I am not restricted by the provisions in s 298 of the 1998 Act.
65. The applicant commenced work on 5 November 2018, although it seems that he was merely paid for attending for the purposes of an induction and introduction to the workplace. It appears that he was not involved in any actual truck driving duties on his first day. He then worked from 7 November 2018 to 27 November 2018 as a truck driver before he suffered his injury at approximately 2.00 pm on 28 November 2018.
66. The evidence of the applicant and Mr Lee is diametrically opposed and largely uncorroborated. The only documentary material to support Mr Lee's evidence are the time sheets and payslips, and even the reliability of those documents is questionable. I do not have the benefit of the advertisement, which would have been of assistance and there was no written contract.
67. In my view, little weight can be given to the applicant's statement. Whilst he confirmed that he applied for the job with the respondent after seeing an advertisement, he has not addressed Mr Lee's unchallenged evidence that the position was for a MR licence driver, not an HR licence driver. The fact that he was allegedly paid \$25 per hour cash for two days' work at an earlier time has not been corroborated by independent evidence.

68. Mr Lee denied that there had been any discussion about the applicant being paid \$25 nett per hour after four weeks and he denied that he gave the applicant a guarantee that that he would work for at least 50 hours per week. He also disputed that there was any agreement regarding two weeks' notice of termination. The applicant's evidence lacks corroboration regarding this allegation. Winnie also confirmed that the applicant was not guaranteed 50 hours of work each week.
69. The applicant did not disclose how he knew that truck drivers employed at the respondent were paid \$25 nett per hour. In any event, the payslips for the comparable truck driver suggest that the rate paid was \$23.16 gross per hour, which seems to correspond with a nett hourly rate of \$19.45.
70. The applicant indicated in his statement that he generally worked for over 50 hours per week and he indicated that he would not work for less than 50 hours per week, and yet he did so, so this raises some questions about his evidence. The time sheets show that at no stage did he work for more than 50 hours per week.
71. The applicant's evidence regarding the cash payments made by the respondent seems consistent with the payslips and time sheets. The first payslip for \$610.85 seems to accord with the applicant's evidence that his first pay packet was over \$600.
72. The second payslip in the sum of \$1,666.87 would seem to equate to the applicant's evidence regarding the rental payment of \$480 and the cash payment of \$1,200. The final payslip in the sum of \$410.78 is consistent with the applicant's evidence regarding the last cash payment being over \$400.
73. I have great concerns regarding the accuracy of the payslips. The first payslip identified the applicant's gross pay of \$610.85, and yet no tax was deducted. The corresponding timesheet confirmed that the figure of \$610.85 was a nett payment and this was based on \$19 nett per hour. The reference to the work days being in December 2018 is in my view immaterial.
74. The second payslip included a gross pay of \$2,048.87 (87.73 hours @\$23.35 per hour) and year to date gross earnings of \$3,070.50. How this latter figure was calculated is unclear. This suggests that the applicant's gross earnings for the previous pay were \$1,021.63.
75. If one was to apply the gross hourly rate of \$23.35, which was applied in the second payslip, the applicant's gross earnings in the first pay period would have been \$750.70 (nett \$610.85), not \$1,021.63. Therefore, the year to date figure in the second payslip must be incorrect.
76. Finally, the third payslip refers to a gross pay of \$410.85, and yet no tax was deducted. Further, the year to date gross earnings of \$3,070.50 are identical to the figure in the second payslip. Therefore, this payslip is also flawed.
77. In my view, the time sheets seem to be the most reliable evidence regarding the applicant's actual working hours at the respondent. There were two partial days worked. The applicant was paid for 3.56 hours on 5 November 2018 and he only worked for 4.65 hours on the day of his injury.
78. Section 44C(2) of the 1987 Act provides that the PIAWE for a worker who worked for less than four weeks before the injury may be calculated having regard to the average of his ordinary earnings that he could reasonably have been expected to have earned in that employment, but for the injury, during the period of 52 weeks after the injury expressed as a weekly sum, together with any overtime and shift allowances.

79. I consider that the applicant would have an expectation that he would have worked for a full working week during the period of 52 weeks after the injury, so given that he did not perform any truck driving duties on his first day and only worked for half a day on his last day at work, I consider that these hours should be disregarded because they do not reflect a full working day.
80. The time sheets show that over the next three weeks, excluding the date of injury, the applicant worked for a total of 143.29 hours. This equates to 47.76 hours per week or 9.55 hours per day. In my view, these would be the hours that the applicant could reasonably have been expected to earn, but for his injury. I have already rejected the suggestion that he would have expected at least or more than 50 hours per week.
81. The next matter to consider is the appropriate hourly rate that should be applied. The first pay was based on a nett rate of \$19 per hour. The second pay was based on a gross rate of \$23.35 per hour or a nett rate of \$19 per hour. The final pay was based on a nett rate of \$18.95 per hour.
82. There is no evidence to support that applicant's claim that he was to be paid \$25 nett per hour after four weeks. Further, he has not challenged Mr Lee's evidence that he was only employed as a MR licensed driver. Therefore, the applicant's reliance on the Road Transport (Long Distance Operation) Award 2010 (MA00039) and information from the Fair Work Ombudsman is without merit. Further, the information provided by the online recruitment organisation is too general and not specific to the situation at the respondent.
83. According to Mr Lee, drivers of two axle rigid vehicles were classified as a Transport Worker Grade 3 under the Road Transport and Distribution Award 2010 (MA00038) and the base weekly pay rate was \$814.20 or \$21.43 gross per hour. This gross hourly rate is not dissimilar to the gross hourly rate of \$23.35 that was paid to the applicant.
84. The payslips of the alleged comparable driver seem to show that he only worked 38 hours per week and was paid \$23.16 gross per hour. Given that I have accepted that the applicant worked for an average of 9.55 hours per week, the earnings of this driver could not be considered comparable.
85. In my view, the most appropriate and fairest way of calculating the applicant's PIAWE is to have recourse to the Road Transport and Distribution Award 2010 (MA00038). The base weekly pay rate is \$814.20 or \$21.43 gross per hour for a 38-hour week. The applicant averaged 9.55 hours per day (47.75 hours per week), meaning that he would be entitled to 1.95 hours of overtime per day (9.75 hours per week).
86. The Award material in the Reply only refers to the base rate without overtime. The schedule on page 30 of the Application contains figures that are inconsistent with those in the Award. Mr Hickey based his calculations on this incorrect information, so his submissions on quantum can be disregarded.
87. According to cl 15.2 in Pt 4 of the Road Transport and Distribution Award 2010 (MA00038), the minimum wage rate for a Grade 3 driver is \$814.20 or \$21.43 gross per hour. In accordance with cl 27.1 of Pt 5 of the Award, overtime is calculated at time and a half for the first two hours. Therefore, based on the base hourly rate of \$21.43, the overtime hourly rate is \$32.15 per hour for the first two hours.
88. In the circumstances, the applicant's PIAWE will comprise the base rate of \$814.20 plus overtime of \$313.46 (9.75 hours at \$32.15 per hour), giving a total figure of \$1,127.66 per week.

89. Therefore, in accordance with s 36(1)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the first entitlement period is as follows:

- (a) 29 November 2018 to 27 February 2019:
(AWE × 95%) – D
(\$1,127.66 × 95%) - \$0 = \$1,071.28 per week.

90. In accordance with s 37(1)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the second entitlement period is as follows:

- (a) 28 February 2019 to date and continuing
(AWE X 80%) – D =
(\$1,127.66 × 80%) - 0 = \$902.13 per week as adjusted.

91. Therefore, the applicant will be entitled to an award in accordance with the above calculations. The respondent will be entitled to credit for payments made.

92. Given the complexity of the PIAWE calculations, I grant the parties liberty to apply within 14 days of the date of this determination.

Costs

93. There will be no order as to costs.

FINDINGS

94. The applicant sustained injury to his abdomen, left leg and lower back, together with a psychological injury, on 28 November 2018.

95. The applicant's employment was a substantial contributing factor to his injury.

96. The applicant has had no current work capacity since 28 November 2018.

97. The applicant's Pre-Injury Average Weekly Earnings are \$1,127.66.

ORDERS

98. The respondent to pay the applicant weekly compensation as follows:

- (a) \$1,071.28 per week from 29 November 2018 to 27 February 2019 pursuant to s 36(1)(a) of the 1987 Act, and
(b) \$902.13 per week as adjusted from 28 February 2019 to date and continuing pursuant to s 37(1)(a) of the 1987 Act.

99. Liberty to the parties to apply with respect to these calculations within 14 days of the date of this determination.

100. The respondent to have credit for payments already made.

101. No order as to costs.

