

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 6721/20
Applicant: LIDONG ZHU
Respondents: BIN FABRICATION AND WELDING ENGINEERING PTY LIMITED
Date of Determination: 17 FEBRUARY 2021
Citation No: [2021] NSWCC 50

The findings of the Commission are as follows:

1. Award in favour of the applicant pursuant to section 36 of the *Workers Compensation Act 1987* for weekly payments of compensation for the period 10 October 2019 to 9 January 2020 in the sum of \$2,144.62 per week being 95% of the applicant's pre-injury average weekly earnings of \$2,257.50 per week.
2. Award in favour of the applicant pursuant to section 37 of the *Workers Compensation Act 1987* for weekly payments of compensation for the period 10 January 2020 to 17 June 2020 in the sum of \$1,806 per week being 80% of the applicant's pre-injury average weekly earnings of \$2,257.50 per week.
3. The respondent is to be given credit for any weekly payments of compensation made during the periods just mentioned.

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

PHILIP YOUNG
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 PHILIP YOUNG, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Disputes Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Lidong Zhu (the applicant) is a 34-year-old man who was employed by Bin Fabrication and Welding Engineering Pty Ltd (the respondent) as a welder/ labourer. He alleges that on 10 October 2019 he lacerated his left middle, ring and little fingers on a sharp piece of metal during the course of his employment.
2. The applicant makes a claim for weekly compensation from 10 October 2019 to 17 June 2020. It is not in dispute that the insurer paid weekly compensation to the applicant during that period. What is in dispute is whether or not the applicant's pre-injury average weekly earnings determined by the insurer were correct or whether the applicant's submission should be accepted that his earnings were much higher.

ISSUES FOR DETERMINATION

3. There is a simple issue for determination:
 - (a) What is the proper pre-injury average weekly earnings figure during the period claimed?

PROCEDURE BEFORE THE COMMISSION

4. The matter came for conciliation and arbitration hearing on 8 February 2021. Mr R Hanrahan of counsel instructed by Ms Zhou, solicitor, appeared for and with the applicant. Mr D Saul of counsel instructed by Mr R Orr, solicitor, appeared for the respondent. Ms J Mitchell represented the insurer and interpreter Ms D Zu was present.
5. At the outset there was an objection by the respondent to the admission into evidence of documents the subject of the applicant's Application to Admit Late Documents dated 28 January 2021. Mr Saul's objection was that the documents were not probative because they were supplied by a third-party company. Mr Hanrahan submitted that the documents were relevant. This Commission determined that because part of the documents had been completed by the applicant, they were relevant and issues concerning the weight of the documents could be considered and addressed during submissions. The documents, being timesheets and a log of attendance, were admitted on that basis.

EVIDENCE

Documentary evidence

6. The following documentary evidence was before the Commission:
 - (a) Application to Resolve a Dispute dated 17 November 2020 and attachments (Application);
 - (b) Reply dated 9 December 2020 and attachments (Reply);
 - (c) Application to Admit Late Documents filed by the applicant on 28 January 2021 and attachments (AALD).

Oral evidence

7. No oral evidence was given.

SUBMISSIONS

8. It is unnecessary to summarise in detail the submissions provided in this matter as a sound recording of the submissions is available to the parties.

DISCUSSION

9. The respondent has paid the Applicant weekly compensation for the period claimed by reference to gross weekly earnings of \$988 per week. This is based upon a number of payslips, namely as follows:
 - (a) 5 August 2019 to 11 August 2019 gross \$988 per week year to date \$988;
 - (b) 12 August 2019 to 18 August 2019 gross \$988 per week year to date \$1,976;
 - (c) 19 August 2019 to 25 August 2019 gross \$988 per week year to date \$2,964;
 - (d) 26 August 2019 to 1 September 2019 gross \$988 per week year to date \$3,952;
 - (e) 2 September 2019 to 8 September 2019 gross \$988 per week year to date \$4,940;
 - (f) 9 September 2019 to 15 September 2019 gross \$988 per week year to date \$5,928;
 - (g) 16 September 2019 to 22 September 2019 gross \$988 per week year to date \$6,916;
 - (h) 23 September 2019 to 29 September 2019 gross \$988 per week year to date \$7,904, and
 - (i) 30 September 2019 to 6 October 2019 gross \$988 per week year to date \$8,892.
10. On the strength of these payslips, the insurer says that the applicant's pre-injury average weekly earnings were \$988 per week.
11. The respondent advised the insurer that it was unable to locate any payslips before 5 August 2019¹. The applicant's evidence is that he commenced in June and Mr Song's evidence appears to be that he worked with the applicant from July 2019. Clearly, then, at least the year to date figures in these payslips simply cannot be correct or payslips were not issued until 5 August 2019.
12. The applicant provides a statement dated 17 August 2020.² The applicant came to Sydney in April 2019.³ In about June 2019 he applied for a job as a welder and a Mr Bin Zhao offered to pay him \$34 per hour. The applicant requested \$35 per hour which was agreed.⁴

¹ See Application page 46-email from insurer to applicant's solicitor.

² Application at page 1.

³ Ibid at page 1.

⁴ Ibid at page 2.

13. The work involved assembling, welding and painting enclosures for generators at the premises of IAC Acoustics in Smithfield.⁵ The applicant states that he started work at any time between 5 am and 7 am and generally finishes around 5 pm. He says on average he worked about 70 hours per week and that the factory recorded his fingerprint to record his time at work.⁶ From about August 2019 he was required to complete a job timesheet every day and record start and finish times and the number of hours worked.⁷
14. The applicant says that he was paid in cash by Mr Zhao at \$35 per hour, that the pay came in an envelope and he was never given any payslips.⁸
15. The applicant's evidence is supplemented by a statement provided by Zengbin Song dated 12 January 2020.⁹ He also obtained a job through Bin Zhao working as a welder alongside the applicant. He corroborates the applicant's evidence to the following extent:
 - (a) A worker needs to scan their finger to enter or exit the factory.¹⁰
 - (b) The applicant was one of his teammates and he and the applicant did the same work duties and completed the same work tasks at about the same speed and quality.¹¹
 - (c) He works Mondays to Fridays 5 am to 5 pm and Saturdays 5 am to 1 pm or sometimes 3 pm. When he works on Sundays it is usually 5 am to 4 or 5 pm.
 - (d) Importantly, Mr Song says¹² "Lidong Zhu worked the same hours as I did". Also, he states that he (Mr Song) was paid \$34 per hour. He says that each week the workers must complete a timesheet which are checked against the fingerprint login and off records kept by the factory.¹³ He has seen Bin Zhao "telling a worker off because that person's timesheet did not match the factory's records".¹⁴ Mr Song received his wages payments in cash every Monday in an envelope and was not given any payslips.¹⁵
16. At pages 9 and 10 of the Application are "BSM job timesheet" documents with BSM's logo on the top of the timesheet. There are two timesheets available because the applicant states that they were the only copies he retained. The first is dated 14 September 2019¹⁶ and records the applicant working on designated jobs with task numbers 56.5 hours between Saturday and Friday. The only day off was Sunday and this is signed by "Aaron". The second timesheet is for the applicant for the week prior to 28 September 2019 and confirms that between the Saturday and the following Friday the applicant worked 60.5 hours per week. This second document is not signed off by a supervisor.
17. The AALD contains a number of timesheets and there was no suggestion that these were not completed by the applicant.¹⁷ In the week ending 20 September 2019 the timesheet records the applicant working 59.5 hours that week. In the week ending 6 September 2019 the timesheet records the applicant working 66.5 hours that week. In the week ending 30 August 2019 the timesheet records the applicant working 82 hours that week. I do not

⁵ Ibid.

⁶ Ibid.

⁷ Ibid [19].

⁸ Ibid at page 3.

⁹ Ibid at pp. 20-21.

¹⁰ Ibid at 20 [8].

¹¹ Ibid at pp. 20-21.

¹² Ibid at page 21 [15].

¹³ Ibid at page 21.

¹⁴ Ibid at page 21 [18].

¹⁵ Ibid at page 21 [19] and [20].

¹⁶ Ibid at page 9.

¹⁷ AALD at pp. 4-22.

propose to outline all of the timesheets except to say that they do record an average of 64.5 hours per week over the relevant period of employment as suggested by Mr Hanrahan. The actual calculation based upon those timesheets was not the subject of any submission on the part of the respondent.

18. The respondent submitted that the payslips were the only evidence of any relevance in this matter. That can hardly be correct. There is no suggestion that the timesheets were not contemporaneously completed by the applicant. The respondent's submission went on to say that the applicant retained no bank statement, no tax return and no financial records of any relevance, otherwise they would have been produced. But the fact remains that there are in existence timesheets showing substantial hours worked by the applicant each week and an independent witness who supports the fact that this witness was performing identical work to the applicant at the rate of \$34 per hour for hours which are consistent with those recorded by the applicant in his timesheets.
19. Mr Hanrahan submitted that the applicant had little knowledge of how the respondent was paying him, i.e. what was recorded as having been paid. There is no evidence disputing the applicant and Mr Song's evidence that the workers were paid in cash.
20. In the circumstances I am comfortably satisfied as a matter of fact that during the approximate four months of employment prior to his injury the applicant was paid an average of 64.5 hours per week at \$35 per hour. This amounts to \$2,257.50 per week. The appropriate orders are as follows:
 - (a) Award in favour of the applicant pursuant to section 36 of the 1987 Act for weekly payments of compensation for the period 10 October 2019 to 9 January 2020 in the sum of \$2,144.62 per week being 95% of the applicant's pre-injury average weekly earnings of \$2,257.50 per week.
 - (b) Award in favour of the applicant pursuant to section 37 of the 1987 Act for weekly payments of compensation for the period 10 January 2020 to 17 June 2020 in the sum of \$1,806 per week being 80% of the applicant's pre-injury average weekly earnings of \$2,257.50 per week.
 - (c) The respondent is to be given credit for any weekly payments of compensation made during the periods just mentioned.