WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **460/20**
Applicant: **Francisco Javier Martin**
Respondent: **State of New South Wales (NSW Police)**
Date of Determination: **20 April 2020**
Citation: **[2020] NSWWCC 122**

The Commission orders:

1. The respondent to pay the applicant weekly payments pursuant to s 40 of the *Workers Compensation Act 1987*, at the rate of $117 per week from 3 October 2019 to date and continuing, with credit for any payments already so made.

2. The respondent to pay the applicant's costs as agreed or assessed.

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

Rachel Homan
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 RACHEL HOMAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mr Francisco Javier Martin (the applicant) is employed by the State of NSW (NSW Police Force) (the respondent) as a police officer. On 1 December 1994, the applicant sustained an injury to his cervical spine. Liability for the injury was accepted by the insurer.

2. The applicant continued to perform operational duties at the rank of Constable and then Senior Constable. On 21 August 2007, the applicant was promoted to the rank of Sergeant.

3. On 18 September 2008, the respondent referred the applicant to the Police Medical Officer due to several recurrences and aggravations of his neck injury. As a result of that examination, the applicant was placed on permanent restricted duties. The restrictions meant the applicant was no longer able to work overtime shifts or "User Pays" shifts.

4. In a notice dated 15 August 2019, issued pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), the respondent notified the applicant of a decision to bring his weekly payments to an end on 3 October 2019.

5. The present proceedings were commenced by an Application to Resolve a Dispute (ARD) filed on 29 January 2020, seeking weekly benefits from 3 October 2019 to date and continuing.

ISSUES FOR DETERMINATION

6. The parties agree that the following issues remain in dispute:

    (a) extent and quantification of the applicant's entitlement to weekly benefits, and
    (b) orders as to costs.

PROCEDURE BEFORE THE COMMISSION

7. The parties appeared for conciliation conference and arbitration hearing on 30 March 2020. The proceedings were conducted by telephone. The applicant was represented by Mr Paul Stockley of counsel, instructed by Ms Susan McTegg. The respondent was represented by Ms Kavita Balendra of counsel instructed by Mr Anthony Morrisey.

8. At the commencement of the arbitration hearing, leave was sought by the applicant to amend the ARD to increase the rate at which weekly benefits were sought from $113 per week to $459.64 per week. The application was opposed by the respondent. After hearing submissions from both parties, leave was granted and oral reasons given and recorded.

9. 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.

EVIDENCE

Documentary evidence

10. The following documents were in evidence before the Commission and taken into account in making this determination:

    (a) ARD and attached documents;

    (b) Reply and attached documents, and

    (c) documents attached to an Application to Admit Late Documents filed by the applicant on 18 March 2020.

11. Neither party applied to adduce oral evidence or cross examine any witness.

Applicant's evidence

12. The applicant's evidence is set out in a written statement made by him on 10 January 2020.

13. The applicant stated that after attesting from the Goulburn Police Academy on 28 April 1989, he was stationed at Hurstville and later Dapto, performing general duties for several years. The applicant also performed duties on a part-time basis with the State Protection Support Unit. (SPSU).

14. On 1 December 1994, whilst on an exercise with the SPSU, the applicant injured his neck whilst negotiating a creek crossing. The applicant claimed compensation and liability was accepted. The applicant continued to perform operational duties in general duties, SPSU and weapons training, initially at the rank of Constable and later Senior Constable.

15. On 21 August 2007, the applicant was promoted to the rank of Sergeant. At the time, the applicant was fully operational and performed duties as a full-time operational safety instructor, part-time SPSU and in the Operational Support Group (OSG).

16. On 18 September 2008, the applicant was referred to the Police Medical Officer by his commander due to several re-recurrences and aggravations of his neck injury. As a result of the examination, the applicant was placed on permanent restricted duties.

17. From 18 September 2008 onwards, the applicant was unable to work "user pays" or overtime shifts due to his restrictions although he was available and willing to do the work. The applicant said:

> "Prior to being placed on PRD in 2008, I was performing on call, user pays and overtime shifts on a regular basis. I carried out specialist duties (OSG) at large planned events such as APEC and World Youth which attracted a considerable amount of overtime and cancelled rest days."

18. The applicant said that he would have been eligible to work user pays shifts for the Central Metropolitan, Wollongong and St George police area commands. Such shifts were regularly advertised. The applicant annexed to his statement a document titled "Events open for applications", which showed that in the period 12 December 2019 to 2 February 2020 there were 80 shifts which the applicant would have been eligible to work had he not sustained his injury and been placed on permanent restricted duties.

19. Also attached to the ARD is a document titled, “Command Imposed Restricted Duty Agreement”. Amongst the special conditions attached to the agreement were conditions that the applicant was not to wear police uniform in public and was not to perform operational OSG duties.

20. The applicant attached emailed examples of advertisements for on-call duties and user pays events for OSG officers dated around the time of the Restricted Duty Agreement.

Respondent’s Review of Probable Average Weekly Earnings (PAWE) calculations

21. A document attached to both the ARD and Reply on plain letterhead titled, “Review of PAWE calculations” indicates that a review of the applicant’s claim was performed on 28 March 2019.

22. The document sets out earning reports for two comparable employees, Sgt James Woodbury, a year nine weapons trainer, and Sgt Adam Proudfoot, also a year nine weapons trainer.

23. Sgt Woodbury’s additional earnings for the period 29 June 2018 to 27 June 2019 indicated that he was paid volunteer user paid hours totalling $16,258.03 and overtime totalling in excess of $7,200.

24. Sgt Proudfoot’s additional earnings for the same period totalled $1,124.83, comprising overtime and penalty shifts.

25. The document indicates that the applicant’s additional earnings would have been similar to what was calculated in 2012 based on a factor of 1.0476, which equated to $113 per week.

26. This document notes that the applicant was placed on permanent restricted duties on 18 September 2008 but remained in the same position performing the same tasks. The restrictions had no impact on his role as a weapons instructor.

27. It was noted that had the applicant remained as a Senior Constable, his probable earnings would have been about $2,160 per week. The applicant’s actual earnings, including s 40 payments were about $2,500 per week or $2,385 without the s 40 payments.

28. It was said the applicant was now in a more beneficial position when compared to his rank at the date of injury. Due to the promotion, there was said to be no compensable loss of earnings.

Other evidence

29. Attached to the ARD are payslips dated between 17 October 2019 and 9 January 2020, indicating that the applicant’s annual salary was $112,102 plus a loading of $12,892 and teacher allowance of $2,541, thus totalling $127,535.

30. Also in evidence are a series of email communications between the applicant’s solicitor and the insurer. One such email, dated 27 November 2019, from a team leader for the insurer indicates that it was not disputed that the applicant was performing user pays overtime prior to his injury. The email says the PAWE factor was calculated on the basis of that user pays overtime and the applicant was now earning more than what he would have earned as a Senior Constable working user pays shifts at the original PAWE factor.

31. Attached to the Reply is an earnings report for another officer, Sgt Gary Broadhurst, for the period 29 June 2018 to 27 June 2019, indicating that he received $330.95 for volunteer user paid hours, $599.69 for penalty shifts and $1,352.81 in overtime, totalling $2,283.45.

Applicant's submissions

32. Mr Stockley said the applicant's entitlement to weekly benefits was to be determined by application of the statutory test in s 40(2) of the *Workers Compensation Act 1987* (the 1987 Act). Mr Stockley said that the test required a hypothetical assessment of the applicant's probable earnings but for injury. Mr Stockley submitted that the language in s 40(2) was taken from the former s 11(1) of the *Workers' Compensation Act 1926*, which was considered by the High Court in *Johnston v Commissioner for Railways*[1] *(Johnston*). Mr Stockley quoted from [16] of the judgement of Stephen J:

> "16. If, in the relevant phrase of s. 11(1)(a), 'employment' bears the meaning 'occupation' the reference to the worker continuing 'to be employed in the same or some comparable employment' means that the worker is to be treated as if he continued in the same or some similar occupation as that in which he was engaged when injured. Neither the same employer nor the same task, classification or rank is stipulated but this will occasion no difficulty; the Court is, by the sub-section, required to form its own view of what would 'probably' have been the worker's weekly earnings but for the injury and must, from the evidence before it, determine how the worker would have fared in his occupation had he not been injured. (at p 640)"

33. The worker in *Johnston* had been able to point to a probable progression of his career through the ranks of the Railways. In the present case, there was no need to hypothesise about the applicant's career progression because he remained in the same employment.

34. Mr Stockley referred to the applicant's evidence that he was first placed on restricted duties following his 1994 injury in 2008 under conditions imposed by the Restricted Duty Agreement. The applicant's evidence was that under those conditions, he was unable to apply to work operational OSG duties, resulting in a loss of income.

35. Mr Stockley noted that the applicant's proposition as to his entitlement to weekly payments for that lost income had, in the past, been accepted. Mr Stockley referred to the calculation set out in the respondent's PAWE calculations document. Mr Stockley submitted that the document showed that the respondent had taken the applicant's salary had he remained in the same rank as he did prior to injury and applied a loading. Mr Stockley submitted that the applicant's salary as a Sergeant should be taken and a loading applied.

36. Mr Stockley submitted in the alternative that the applicant's earnings were comparable to those of Sgt Woodbury and Sgt Proudfoot. The applicant's statement referred to the additional opportunities he would take were they available to him. In view of this evidence, Mr Stockley submitted that the applicant's probable earnings were more comparable to Sgt Woodbury's than Sgt Proudfoot's earnings.

37. Mr Stockley summarised the applicant's position as follows. There was an accepted injury and restriction of duties resulting in a lack of opportunity to participate in work. The applicant claimed that work was valued at between $113 and $456 per week and that amount should be paid pursuant to s 40(2) of the 1987 Act.

[1] [1973] HCA 46; (1973) 128 CLR 632.

Respondent's submissions

38. Ms Balendra also made reference to *Johnston* at [19] of the judgement of Stephen J but said the issue which arose was whether the applicant's current rank of Sergeant was "comparable employment" to the applicant's pre-injury rank. Ms Balendra submitted that the applicant had changed his role and had been promoted since the date of injury. An assessment was required to be made of the applicant's probable earnings in his pre-injury rank or some comparable employment. Ms Balendra submitted that the rank of Sergeant was not comparable to the rank of Constable.

39. Ms Balendra further submitted that the applicant had made a bare assertion that he would have done the kind of work he was now restricted from performing. The applicant had given no indication of hours he would have worked in these types of duties. No evidence was available as to the amount of this type of work the applicant had performed prior to his present incapacity.

40. Although the applicant had nominated two comparable officers, the earnings of those two comparables were vastly different. One performed no user paid work whilst the other earned in excess of $16,000 per annum performing such duties. The applicant did not say where he sat within that range.

41. Ms Balendra submitted that the applicant was unable to demonstrate that he had suffered a loss and had failed to discharge the relevant onus.

42. Ms Balendra further referred me to the treatment of *Johnston* the presidential decisions *of St Andrews Village Ballina Limited v Mazzer*[2] and *Australian Wheat Board v Pantaleo*[3] (*Pantaleo*).

Applicant's submissions in reply

43. Mr Stockley submitted that the promotion to Sergeant represented a normal progression of the applicant's pre-injury career.

44. Mr Stockley submitted that the situation of the applicant was akin to that of a worker who due to injury was unable to work penalty shifts or overtime. Mr Stockley referred to the judgement of Mason J at [9] of *Johnston*. Mr Stockley also referred to the applicant's evidence that he was previously performing these types of duties.

FINDINGS AND REASONS

45. Section 40 of the 1987 Act as it applies in the present case states:

> "**40. Weekly payments during partial incapacity—general**
>
> (1) **Entitlement**
>
> The weekly payment of compensation to an injured worker in respect of any period of partial incapacity for work is to be an amount not exceeding the reduction in the worker's weekly earnings, but is to bear such relation to the amount of that reduction as may appear proper in the circumstances of the case.
>
> **Note**. Section 35 limits the maximum weekly payment of compensation under this section.

[2] [2010] NSWWCCPD 99.
[3] (1984) 3 NSWLR 530.

(2) **Calculation of reduction in earnings of worker—general**

The reduction in the worker's weekly earnings is (except as provided by this section) the difference between:

(a) the weekly amount which the worker would probably have been earning as a worker but for the injury and had the worker continued to be employed in the same or some comparable employment, and

(b) the average weekly amount that the worker is earning, or would be able to earn in some suitable employment, from time to time after the injury.

Note. The difference between (a) and (b) is the maximum amount of compensation payable to the worker. It is not a limit on the combined total of compensation and earnings.

…

(3) **Ability to earn in suitable employment**

The determination of the amount that an injured worker would be able to earn in some suitable employment is subject to the following:

(a) the determination is to be based on the worker's ability to earn in the general labour market reasonably accessible to the worker,

(b) the determination is to be made having regard to suitable employment for the worker within the meaning of section 43A.

…

(5) **Maximum rate of compensation**

The weekly payment of compensation to an injured worker in respect of any period of partial incapacity for work is not to exceed the weekly payment that would be payable to the worker if it were a period of total incapacity for work."

46. The steps to be followed for the calculation of an injured worker's entitlement to weekly payments pursuant to s 40 of the 1987 Act prior to amendment were set out by the Court of Appeal in *Mitchell v Central West Area Health Service*[4] as follows:

(1) determine the weekly amount the worker would probably have been earning but for the injury (s 40(2)(a));

(2) determine the average weekly amount that the worker is earning or would be able to earn in some suitable employment from time to time after the injury (s 40(2)(b)) based on the worker's ability to earn in the general labour market reasonably accessible to the worker (s 40(3)) and having regard to suitable employment for the worker within the meaning of s 43A;

(3) subtract the figure derived from (2) from the figure derived from (1) (s 40(2));

[4] (1997) 14 NSWCCR 526.

(4) decide whether and to what extent the reduction calculated above appears proper in the circumstances (s 40(1)), and

(5) make an award in the amount arrived at in step 4.

47. The dispute in the present case centres around the weekly amount which the applicant would probably have been earning as a worker but for the injury had the worker continued to be employed in the same or some comparable employment, pursuant to s 40(2)(a).

48. The respondent says this requires an assessment of the amount the applicant would have been earning but for injury had he remained at the same rank at the date of injury.

49. The applicant says that promotion to the applicant's current rank of Sergeant was part of the normal progression of the applicant's career and the assessment required by s 40(2)(a) should be undertaken by reference to what the applicant would have been earning in that rank but for the injury.

50. There is no dispute that the applicant performed user pays shifts and overtime prior to being placed on permanently restricted duties. Ms Balendra has, however, submitted that there is no evidence of the amount of such work the applicant was actually performing. It is also not disputed that the restrictions placed on the applicant in 2008 as a result of the injury now prevent him from volunteering for such work.

51. Both parties referred me to the consideration of s 11(1)(a) of the *Workers' Compensation Act 1926* in *Johnston* which was cast in similar terms to those in s 40(2)(a). In that case, the worker was injured whilst a casual cleaner within the Railways. The applicant claimed that but for his injury he would have progressed, as a matter of normal promotion from that position through various ranks within the locomotive branch to a position as engine driver, which position he would have attained at the date of the hearing. The judge at first instance calculated the worker's entitlement to weekly benefits based on the amount the worker would have been earning from time to time had he so progressed. That approach was rejected by the majority of the Court of Appeal which regarded s 11(1)(a) as requiring an assessment by reference to what the worker would have been earning had he continued at all times to be employed as a cleaner as he was when injured.

52. Mr Stockley referred me to an extract from the judgement of Stephen J in the High Court in which it was considered that the expression "employment" in s 11(1)(a) bore the meaning "occupation" without reference to a particular employer, task classification or rank. Justice Stephen said:

> "It follows from the view which I have formed concerning the phrase 'employed in the same or some comparable employment' that when his Honour, having heard Johnston's application for an award of compensation, made the findings of fact which he did, he was then required, in ascertaining the weekly amounts which Johnston would probably have been earning but for his injury, to postulate Johnston's continued engagement in the occupation in which he was engaged when injured. On the facts as found Johnston's occupation was that of an officer of the Commissioner employed in the locomotive branch of the Commissioner for Railways and in those circumstances his Honour was, in my view, required to act as he did and to pay regard to the promotion within his chosen occupation which Johnston would probably have received had he not been injured." (at p 642)

53. Justice Mason agreed with Stephen J's interpretation of s 11(1)(a) stating:

> "To my mind it is the purpose of s. 11 (1) (a) and the character of the payments to which it relates that are the decisive consideration in determining the choice which has to be made between the two meanings. The sub-section provides a yardstick by which weekly payments by way of compensation for incapacity are

> to be measured. It conforms more closely with the compensatory character of the provision that the weekly payments should be assessed by reference to the probability of what the employee would have earned in his occupation had he not been injured and had he continued in that occupation rather than that the weekly payments should be assessed by reference to probable earnings in the performance of the particular work or duties which the employee happened to be performing at the date of his injury. (at p 644)
>
> The appellant's occupation was that of railway servant; on the findings of fact it is probable that he would have advanced at the relevant date from cleaner, acting fuelman, to engine-driver in that occupation. Account must therefore be taken of the likely earnings of a railway servant who had advanced to that grade or classification. (at p 644)"

54. In some circumstances it is appropriate to estimate probable earnings in some comparable employment. In *NSW Harness Racing Club Ltd v Forrest* (1995) 12 NSWCCR 217 (*Forrest*) Mahoney JA said:

> "There is, in my opinion, substantial force in this submission in the sense that as a matter of principle, a court in estimating the uninjured earnings of an applicant will ordinarily have regard to what the applicant would have earned in the employment in which she was at the time of the injury rather than in some other comparable employment. But that principle, to the extent that it is accepted, does not require that in every case the court must confine its attention to the same employment as that in which the uninjured applicant was engaged. Circumstances may make it appropriate for the court to assess the uninjured earnings by reference to another comparable employment." (at 220)

55. In *Pantaleo*, Kirby P identified indicia of comparability in this context as including:

- physical attributes of the former and hypothesised job,
- reasonably expected career progression if the worker had remained uninjured; or even unorthodox career paths if the evidence supports its likelihood,
- award classifications likely to be open to a person such as the injured worker,
- range of salaries that might have been within the workers pre-injury achievement, as a worker.

56. Applying the authorities to which I have been referred to the circumstances of the applicant, I am satisfied that the applicant's "employment" or occupation at the time of injury was that of a police officer in the NSW Police Force. The applicant remains in that occupation or "employment" today. It is not necessary in the circumstances to consider "comparable employment".

57. It has not been disputed that a progression to the rank of Sergeant was a probable or likely career progression for a Constable or Senior Constable. That was in fact the applicant's career progression and I am satisfied that it is appropriate, having regard to *Johnston* to consider the amount the applicant would have been earning during the relevant period as a fully operational Sergeant but for the injury.

58. The respondent argues that it has not been established how much additional earnings the applicant would have received had he remained fully operational and been able to volunteer for overtime or user pays duties. The evidence suggests there is a significant variation between the amount other Sergeants in positions comparable to the applicant have earned in the performance of such duties.

59. At one end of the scale are the earnings of Sgt Woodbury, which were in the region of $23,000 per annum in the 2019 financial year. At the other end of the scale are the earnings of Sgt Proudfoot at a little over $1,100 per annum.

60. Although the applicant has claimed that his additional earnings would have been more akin to those of Sgt Woodbury, I accept Ms Balendra's submission that there is no evidence before me as to the actual amount the applicant was paid prior to his injury in the performance of such duties. There is, however, evidence in the PAWE calculations sheet and in an email from the insurer that this had been calculated previously by application of a factor of 1.0476 to the applicant's base salary plus loading and teaching allowance. It appears that this method of calculation was not challenged by the applicant until the present proceedings were commenced. I am satisfied that this constitutes an appropriate basis for determining the amount the applicant would probably have been earning but for the injury.

61. Based on the payslips in evidence I am satisfied that the applicant's actual earnings on an annual basis during period of weekly benefits now claimed totalled $127,535. Applying the factor of 1.0476 to these earnings, I find the amount the applicant would have been earning but for injury would be $133,606 per annum.

62. The calculation required by s 40(2) leaves a difference of $6,070 per annum, which equates to a weekly figure of $117 per week. This is slightly above the rate at which the applicant was paid prior to the cessation of s 40 payments but can be accounted for by an increase in the applicant's annual salary since the previous calculation.

63. I am satisfied for the purposes of s 40(1) that this reduction appears proper in all the circumstances. No specific submissions were made with regard to the exercise of the discretion in s 40(1).

64. There will be an award for the applicant for weekly compensation pursuant to s 40(1) from 3 October 2019 to date and continuing at the rate of $117 per week.

Costs

65. As the applicant is a police officer, this application is exempt from the repeal of the costs provisions.

66. Mr Stockley made submissions at hearing that a costs order should be made in the event the applicant was successful. In terms of the matters to be taken into account in considering whether an uplift for complexity was appropriate, Mr Stockley noted that the matter involved some complexity in the legal arguments raised and proceeded to a contested hearing. The respondent made no submissions other than to say that any uplift should apply to both parties if it applied at all.

67. Whilst I accept there was a degree of legal complexity in this case related to the proper interpretation of s 40 in the applicant's circumstances, I am not satisfied that it was of a degree sufficient to warrant an uplift. The dispute involved a single issue, the volume of evidence was modest and although there was a contested hearing, the submissions were not especially lengthy.

68. I am not persuaded that an uplift is appropriate in the circumstances. As the applicant has been successful, however, I will order the respondent to pay the applicant's costs as agreed or assessed.

SUMMARY

69. The respondent to pay the applicant for weekly compensation pursuant to s 40(1) from 3 October 2019 to date and continuing at the rate of $117 per week.

70. The respondent to pay the applicant's costs as agreed or assessed.