WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**974/20**
Applicant:	**LI JUAN ZHU**
Respondent:	**STATE OF NSW (ST VINCENT'S HOSPITAL SYDNEY LIMITED)**
Date of Determination:	**12 MAY 2020**
Citation:	**[2020] NSWWCC 149**

The Commission determines:

1. Award in favour of the applicant against the respondent: -

   (a) pursuant to section 36 of the *Workers Compensation Act 1987* (1987 Act) in the sum of $1,482.86 per week, as adjusted from 4 June 2019 to 3 September 2019, and

   (b) pursuant to section 37 of the 1987 Act in the sum of $1,248.72 per week, as adjusted, from 4 September 2019 to date and continuing.

2. The respondent is to be given credit for weekly compensation and wages paid to the applicant between 4 June 2019 and 25 September 2019.

3. General award in favour of the applicant against the respondent in respect to section 60 expenses.

4. Liberty is given to the parties to approach the Commission in the event that arithmetical adjustments are required.

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
Senior Dispute Services Officer
As delegate of the **Registrar**

STATEMENT OF REASONS

BACKGROUND

1. Li Juan Zhu (the applicant) is a 60 year old lady who was employed by State of New South Wales (St Vincent's Hospital Limited) (the respondent) as a nurse. She alleges that as a result of instances which occurred in the course of her employment on 4 June 2019 and 7 June 2019, she suffered injury in the nature of adjustment disorder with anxious and depressed mood.

2. Allegations brought by the respondent against the applicant related to the death of a patient at the respondent's premises on 8 August 2018. After the patient's death, the respondent instigated a "Root Cause Analysis" investigating the conduct of a nurse. Following the Root Cause Analysis one of the respondent's senior managers determined that other staff may have also been involved in the provision of sub-optimal care.

3. One of those additional staff members was the applicant. On 4 June 2019, the applicant was handed a letter detailing allegations of misconduct and requiring her to attend a meeting to be interviewed on 7 June 2019. The applicant duly attended the meeting. She explained her position as a result of which in July 2019 the applicant was totally exonerated.

4. The claim is made from 7 June 2019 to date and continuing in respect of weekly payments and a general order is sought in respect of section 60 expenses.

ISSUES FOR DETERMINATION

5. The main issue for determination is whether the applicant's injury was caused by reasonable action taken by the respondent with respect to discipline. The second issue concerns the extent of the applicant's capacity.

PROCEDURE BEFORE THE COMMISSION

6. The matter came for conciliation and arbitration via teleconference on 16 April 2020. Ms N Compton of counsel instructed by Ms R Lawes appeared for and with the applicant. Mr F Doak of counsel instructed by Ms K Hayes appeared for the respondent. Mr G Forster was in attendance on behalf of iCare.

7. I was satisfied that the parties to the dispute had ample opportunity to resolve their differences but were unable to achieve settlement. I used my best endeavours to encourage resolution, however, resolution was not possible.

8. The time available for arbitration hearing could not be utilised. Ultimately, I directed that the respondent and the applicant file written submissions on the issues of liability by reason of section 11A of the *Workers Compensation Act 1987* (the 1987 Act) and capacity for work.

EVIDENCE

Documentary evidence

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

    (a) Application to Resolve a Dispute filed 24 February 2020 and attachments (Application);

(b) Reply filed 17 March 2020 and attachments (Reply);

(c) Application to Admit Late Documents and attachments filed by the respondent on 18 March 2020, and

(d) Application to Admit Late Documents and attachments filed by the respondent on 9 April 2020.

Oral evidence

10. No oral evidence was given.

SUBMISSIONS

11. It is unnecessary to summarise in detail the submissions provided in this matter as written submissions have been filed by both parties.

FINDINGS AND REASONS

12. The applicant was interviewed on 7 June 2019 concerning her involvement in events leading up to the death of a patient at the respondent's premises in August 2018.

13. It is part of the applicant's case that having regard to matters which occurred prior to 7 June 2019 it was not reasonable for the applicant to receive a letter notifying her of allegations of misconduct on 4 June 2019, nor to be subjected to formal interviewing and questioning on 7 June 2019.

14. It is of course for the respondent to prove on the balance of probabilities that its actions were reasonable[1].

15. The respondent's submissions proceed on the footing that the investigation process involving the allegations made against the applicant fall within the definition of "discipline" in section 11A(1) of the 1987 Act. The difficulty for the respondent in this regard arises from a letter from the respondent's Director of Integrated Care, Mr D Le Lieve dated 12 July 2019. In this letter Mr Le Lieve states:

> "…please be advised that the investigation was not a disciplinary process, however, it was initiated following a Root Cause Analysis into a serious clinical incident".

16. This statement is in contrast to the letter received by the applicant dated 4 June 2019. The 4 June letter set out three allegations of misconduct on the part of the applicant. Relevantly, these were:

    (a) failure of the applicant to identify a Code Blue "flag" in that the patient's oxygen saturation levels had deteriorated and this was not recorded in the relevant chart;

    (b) failure to escalate the matter to the Nurse Unit Manager, and

    (c) failure to enact the Code Blue protocol.

    The 4 June letter informed the applicant that an investigation would occur into these allegations, that the applicant would be interviewed and was entitled to a support person and an opportunity to comment on the findings of the investigation. In the circumstances, it was clear from this letter that very serious allegations were being considered.

[1] Department of Education and Training v Sinclair [2004] NSWWCCPD 90 at [23].

17. The 4 June letter was issued after the respondent's Sub-Acute Stream Manager, Andrea Ness, had in the course of prior investigation identified additional members of nursing staff who had potentially engaged in misconduct concerning the quality of care provided to the deceased before his death. The interview of the applicant on 7 June 2019 occurred in the context of a Root Cause Analysis having been undertaken, further identification of staff members by Ness and then the compilation of specific allegations concerning the applicant's alleged misconduct (namely those in (a)-(c) above). The basis for the inclusion of the applicant as a person of interest (to use a wide expression) had not then been identified.

18. When the 4 June letter was sent, so too was a copy of the patient's observation charts. Armed with those records, the applicant was able to say on 7 June 2019 in interview that in relation to the two alleged entries concerning oxygen levels, the first entry at 8.15 am was made by the applicant, was accurately recorded and did not justify a Code Blue protocol. The second entry made at 9.15 am was made by another staff member, not the applicant.

19. The question of reasonableness of disciplinary action should be approached by considering what the respondent knew and what it should have known at the time action was taken[2]. In the words of Sackville AJA[3]: -

> "…Ordinarily, the reasonableness of a person's actions is assessed by reference to the circumstances known to that person at the time, taking into account relevant information that the person **could have obtained** had he or she made reasonable inquiries or exercised reasonable care…" (emphasis added)

An important question becomes what the person (in this case Ness) **could have done to establish basic background information** before formulating allegations of serious misconduct in the context of a very serious matter, namely death of a patient in the care of the respondent.

20. The respondent of course bears the onus in this matter. One would expect to have received some evidence from the respondent dealing with why it could not reasonably have determined, before making very serious allegations, whether or not the applicant had completed the 9.15 am notation. Or indeed some detailed evidence from Ness as to why it was thought that the applicant performed the defective 9.15 am observations. Acting fairly[4] the respondent could have asked the applicant for her feedback on whether she made the 9.15 am entry before levelling a very serious allegation of misconduct against her. Viewed in that way, I accept the applicant's submission that the respondent did not carry out an adequate initial review before 4 June 2019, particularly in circumstances where the applicant was not involved at all in the Root Cause Analysis. The applicant was not given adequate opportunity to informally discuss the matter with her manager before being subjected to serious allegations and a rigorous interview process. Had the applicant received the benefit of that process, it is inescapable that no allegations of misconduct would have been made and no formal interview process would proceed. The applicant's injury would not have occurred.

21. It follows that I am not satisfied that the respondent has discharged the onus of proof to establish that the applicant's injury was caused by reasonable action on its part.

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[2] *Heggie v Northern NSW Local Health Network* [2012] NSWWCCPD 9, per Sackville AJA.
[3] Ibid at [61].
[4] *Irwin v Director General of School Education* (NSWCC, Geraghty J, No 14068/97, 18 June 1998).

CAPACITY

22. Dealing with the issue of capacity, it is clear on the medical evidence from both parties that the applicant has suffered a psychiatric injury, namely adjustment disorder with depressed and anxious mood. According to Dr Martin Allen[5] as at 11 February 2020, the applicant had no capacity for work.

23. The opinion of Dr Paisley,[6] when he assessed the applicant in August 2019 was that the applicant was fit to work 12 hours per week. After August 2019, the applicant developed separate unrelated health problems, however, the applicant's general practitioner Dr Lee had on 16 August 2019 recorded that the applicant was "just coping with work at medical records…".[7] On Dr Paisley's view, the applicant had an earning capacity of 12 hours per week in an administrative capacity since August 2019. Perhaps the explanation is that in August 2019, the applicant had returned to light duties. Be that as it may, I accept Dr Allen's more current view of the applicant's capacity because of the recency of it. The relevant pre-injury average weekly earnings have been agreed at $1,560.90 gross per week. The relevant rate pursuant to section 37 of the 1987 Act is $1,248.72 gross per week. Dr Paisley's view about the applicant's capacity will be absorbed in the credit orders that the Commission makes in this matter.

24. The existence of periods of actual earnings in the Application together with Dr Lee's comment concerning the applicant coping in medical records makes it unclear whether the applicant received earnings between 7 June 2019 and 25 September 2019. The applicant submits that she did no work from 4 June 2019[8]. The respondent says it paid weekly compensation to the applicant from 10 June 2019 to 25 September 2019. It is appropriate therefore to make awards from 4 June 2019 but give credit to the respondent for weekly payments and wages paid to 25 September 2019.

ORDERS

25. It is appropriate that the following orders are made:

    (a) Award in favour of the applicant against the respondent:

        (a) pursuant to section 36 of the 1987 Act in the sum of $1,482.86 per week, as adjusted from 4 June 2019 to 3 September 2019.

        (b) pursuant to section 37 of the 1987 Act in the sum of $1,248.72 per week, as adjusted, from 4 September 2019 to date and continuing.

    (b) The respondent is to be given credit for weekly compensation and wages paid to the applicant between 4 June 2019 and 25 September 2019.

    (c) General award in favour of the applicant against the respondent in respect of section 60 expenses.

    (d) Liberty is given to the parties to approach the Commission in the event that arithmetical adjustments are required.

[5] Application pp 571-574.
[6] Application p 559.
[7] Application p 589.
[8] Applicant's Submissions paragraph 6.