WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1311/20**
Applicant: **Georgina Kategiannis**
Respondent: **Decjuba Pty Ltd**
Date of Direction: **31 March 2020**
Citation: **[2020] NSWWCC 101**

The Commission determines:

Order

1. The applicant's pre-injury average weekly earnings are assessed at $469.42.

JOHN HARRIS
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 JOHN HARRIS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

Background

1. Ms Georgina Kategiannis (the applicant) was employed by Decjuba Pty Ltd (the respondent) and suffered an accepted compensable injury on 19 November 2019.

2. This is a dispute concerning the calculation of the applicant's pre-injury average weekly earnings (PIAWE). The uncertainty as to calculation of the PIAWE arises from the short period in which the applicant was employed prior to sustaining the accepted work injury.

3. On 4 February 2020, the respondent issued a notice assessing the applicant's PIAWE at $469.42.[1] On 7 February 2020 the respondent issued a notice pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) which assessed the PIAWE at $390.22.

4. The applicant requested a review of the decision on 14 February 2020.[2] By letter dated 28 February 2020 the respondent completed the review and assessed the PIAWE at $388.15.[3]

5. On 10 March 2020, the applicant filed the Application for Expedited Assessment (Application).

6. The matter was listed for a telephone conference on 24 March 2020. Ms Brown appeared for the applicant and Mr Myles appeared for the respondent.

Evidence

7. The documentation admitted into evidence was:

    (a) Application, and
    (b) Reply.

8. The parties referred to documents that the respondent had forwarded to the applicant on either the day of or the day prior to the telephone conference. These documents were served in response to a notice served by the applicant and dated 16 March 2020.

9. The applicant raised that the respondent had not properly complied with a notice served on it by letter dated 16 March 2020. The respondent asserted that it had complied with the notice.

10. This material was not tendered in evidence and I do not need to decide upon the suggestion that there had been a failure to properly comply with the notice.

Legislation

11. Section 43(1) of the 1998 Act provides that a decision about the worker's PIAWE is a work capacity decision.

12. Following the introduction of amendments made pursuant to the *Workers Compensation Legislation Amendment Act 2018* (2018 Amendment Act) the Commission has power to determine work capacity disputes made on or after 1 January 2019.

[1] Reply, p 1.
[2] Reply, p 13.
[3] Reply, p 40.

13. Part 5 of the 1998 Act is headed “Expedited Assessment”. Pursuant to s 295 of the 1998 Act the Part applies to a dispute referred to the Commission that concerns “weekly payments of compensation”.

14. The functions under Part 5 are exercised by the Registrar (s 296 of the 1998 Act). However, a dispute about a decision by an insurer to discontinue or reduce weekly payments is not to be done by way of interim payments direction (s 297(1A) of the 1998 Act). Accordingly, the standard presumptions in favour of making an interim payment direction pursuant to s 297(3) do not apply with respect to determining this dispute.

15. These functions were delegated to me under the Registrar’s powers. I am determining this matter as an Arbitrator as there are issues of statutory interpretation.

16. It is agreed that the applicant is a short-term worker and was employed for less than four weeks prior to injury. The amendments to PIAWE and related provisions made by the 2018 Amendment Act apply with respect to injuries received on or after 21 October 2019.[4] The submissions proceeded on the basis that the amendments applied to the applicant’s injury.

17. Clause 4 of Schedule 3 of the 1987 Act provides:

> *“4 PRE-INJURY AVERAGE WEEKLY EARNINGS FOR SHORT-TERM WORKERS*
>
> (1) If, at the time of the injury, the injured worker had been continuously employed in employment for less than 4 weeks, the **‘pre-injury average weekly earnings’** in relation to the worker may be calculated having regard to the weekly average of the earnings that the worker could reasonably have been expected to have earned in the employment, but for the injury, during the period of 52 weeks after the injury.
>
> (2) The regulations may make provision for the matters to be taken into account for the purposes of determining the earnings that the worker could reasonably have been expected to have earned in the employment, but for the injury, during the period of 52 weeks after the injury.” (Emphasis in original)

18. Clause 8F of the Workers Compensation Regulations 2016 (2016 Regulations) is the relevant clause enacted pursuant to Schedule 3, clause 4 of the 1987 Act. Clause 8F provides:

> “*8F PRE-INJURY AVERAGE WEEKLY EARNINGS FOR SHORT-TERM WORKERS--SCHEDULE 3, CLAUSE 4(2) OF 1987 ACT*
>
> (1) In determining the earnings that a worker could reasonably have been expected to have earned in employment for the purposes of clause 4(1) of Schedule 3 to the 1987 Act, the following matters are to be taken into account—
>
> (a) any contract of employment made before the date of the injury,
> (b) any award or agreement relating to the employment,
> (c) any hours worked or earnings received by the worker during the period of 52 weeks before the injury.

[4] 1987 Act, Sch 6, Pt 21, cl 7.

(2) If the consideration of those matters does not reasonably assist in determining the earnings that the worker could reasonably have been expected to have earned in the employment, the earnings are to be determined by having regard to the average weekly amount earned during the period of 52 weeks before the injury by other persons for the performance of similar work as the worker (whether or not with the worker's employer)."

Submissions

19. The applicant submitted:

(a) There was no evidence of the applicant's earnings for the 52 weeks prior to injury apart from the short period when employment commenced with the respondent.

(b) Principally relied on her stated intention to work at least 30 hours per week.

(c) Alternatively relied on her roster for the first week and the fact that the applicant would have worked an additional five hours to those hours if she had not attended a doctor's appointment for the injury.[5] The amount of earnings in that week would have been in the order of $608.

(d) Relied on her evidence that other persons were working at least 30 hours per week and there was availability to work more hours because a number of people had ceased working with the respondent.

(e) That the person nominated by the respondent was not similar for a number of reasons including:

(i) that this person worked less than half the number of penalty hours in one year (nine) as the applicant worked injured in three months (19)[6];

(ii) that nothing was known about the person nominated by the respondent and whether they had restrictions on their ability to work such as personal or study commitments;

(iii) the applicant worked significantly more in the first week contrasted with the alleged comparable person; and

(iv) the details were not for the previous 52 weeks prior to injury.

(f) Accepted that Schedule 3 of clause 4 of the Workers Compensation Act (1987) was read subject to clause 8F of the 2016 Regulations. Despite that submission the applicant pressed reliance on earnings of comparable workers following the injury.

20. The respondent submitted:

(a) Clause 8F of the 2016 Regulations was made pursuant to Schedule 3 clause 4 of the 1987 Act. The matters raised in clause 8F(1) did not assist as the contract did not guarantee any work and the applicant did not lead evidence of her previous earnings.

[5] See evidence at Application, pp 19-20.
[6] See Application at p 24.

(b) The reference in clause 8F(1)(c) to "any hours worked or received by the worker" referred to earnings with the respondent.

(c) In these circumstances clause 8F(2) applied which related to the earnings of other employees. The respondent relied on the earnings of the employee whose details were provided to the applicant and summarised in the Reply. This employee earnt an average of $390.22 per week.[7]

(d) The evidence from the respondent[8] is summarised in the Table[9]. The employer stated that this person was "a similar casual"[10] and this evidence satisfied the definition of clause 8F(2).

(e) The respondent had attempted to comply with the applicant's request which was only made on 16 March 2020. It denied failing to comply, noted the difficult times given the emergency restrictions and otherwise did not know what application was being made in respect of the allegation that it had failed to comply with the notice.

(f) Clause 2(2) of Schedule 3 provided that no "regard" is had to subsequent earnings. The applicant could not rely on earnings after the date of injury.

21. The applicant in reply submitted that the applicant's evidence of the hours worked by other employees should be accepted in assessing the applicant's PIAWE.

Evidence

22. The applicant's letter of engagement relevantly provides that the employment is on a casual basis with each period of employment said to constitute a "separate period of employment".[11] Clause 2 of the letter of engagement provides that the terms and conditions of the employment are those contained in the General Retails Industry Award 2010 (Modern Award) and applicable legislation.

23. The applicant stated that at the commencement of her employment with the respondent it was her intention to work 30 hours per week either entirely at the Metcentre or across multiple stores.[12] She identified other casual employees who were either working "30 hours or more per week"[13]. The same employees resigned in March 2020 whereby, the applicant asserted, that there would be "more hours available" for her to work.[14]

24. The applicant disputed the respondent's PIAWE calculation for a number of reasons. The applicant referred to the period from 19 November 2019 to 16 February 2020 when she worked 19.25 hours after 6.00 pm which entitled her to penalty rates. That figure included the 2.25 hours missed on Thursday 21 November 2019 when the applicant saw a doctor for the work injury. This contrasted with the nine hours worked at penalty rates for the entire 12 months by the "similar" employee nominated by the respondent.

25. The applicant also stated that the comparable employee nominated by the respondent worked 9.85 -15 hours a week which is what the applicant is working "at the moment with an injury which prevents [her] from performing many of the tasks required".[15]

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[7] See Application p 46 and Reply p 8.
[8] Application p 46.
[9] Reply, p 8.
[10] Application, p 46.
[11] Reply, p 1.
[12] Application, p 16.
[13] Application, p 17.
[14] Application, p 16.
[15] Application, p 20.

26. The applicant also stated that her "highest earning week" was her first week at the Metcentre which was only a four-day week the store only opened on 20 November 2019. The applicant then worked 17.5 hours, missed a 5-hour shift to attend a doctor and would have worked longer on 19 November except that the applicant was in pain from her injury.

Reasons

27. The submissions raise issues of statutory construction. Some of the submissions are wrong.

28. The principles of statutory construction are clear. The plurality in *Military Rehabilitation Commission v May*[16] stated that the "question of construction is determined by reference to the text, context and purpose of the Act"; citing *Project Blue Sky Inc v Australian Broadcasting Authority*[17] and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[18].

29. Clause 8F(1) of the 2016 Regulations provide that various matters are to be taken into account in determining what the worker could reasonably have been expected to earn. These matters are the contract of employment, the award and, pursuant to reg 8F(1)(c), "any hours worked or earnings received by the worker during the period 52 weeks before the injury".

30. The parties proceeded, correctly in my view, that the contract of employment and award did not assist as the applicant was a casual employee and there was no agreement as to the number of hours that would be worked.

31. The applicant failed to lead any evidence of the hours worked or earnings received by her during the period of 52 weeks prior to the injury.

32. This matter was specifically brought to the applicant's attention during submissions. Despite this, the applicant continued in the absence of this critical evidence.

33. It is relevant to my determination that the applicant has not adduced evidence on this matter. In my view the hours worked or earnings received in the previous 52 weeks in employment would be a powerful indicator of what the worker would have earnt in the respondent's employ. The legislation specifies that this is relevant.[19] I accept that there may be circumstances where this may not be the case as a worker's circumstances may change for a variety of reasons. However, none of this is explained by the evidence.

34. I otherwise reject the respondent's submissions that the evidence would not be relevant. The analogy provided by the respondent that a worker may have changed classification from a specialist to this industry was far-fetched and otherwise inconsistent with the legislative provisions.

35. Clause 8F(1)(c), on a plain meaning, does not restrict the "hours worked or earnings received" to the employment with the respondent. Read in context, such a conclusion would otherwise produce an absurd result as clause 4(2) and the Regulation made under it relate to "short term workers" who have only been continuously employed in employment for less than four weeks.

36. The respondent's interpretation could not work because the clause only applies to workers of less than four weeks with that employer. The respondent's submission that the only wages considered are those with the respondent is incorrect as the clear words of the sub-clause specify that it applies to the period of "52 weeks before the injury".

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[16] [2016] HCA 19 at [10].
[17] [1998] HCA 28 [69]-[71].
[18] [2009] HCA 41 (*Alcan*).
[19] Clause 8F(1)(c) of the 2016 Regulations.

37. Clause 8F(2) is otherwise considered if the matters in clause 8F(1) "does not reasonably assist". I reiterate that clause 8F(1)(c), that is prior earnings over the previous 52 weeks, would have been of significant assistance. However, the state of the evidence means that I am left to make assumptions or draw inferences based on a paucity of relevant evidence.

38. The parties referred to and directed submissions on clause 8F(2) but failed to properly consider the words at the end of the sub-clause. The submissions were directed to the relevance of the worker nominated by the respondent, who the respondent submitted was a worker who performed "similar work as the worker".

39. The respondent's submissions were based on the statement made by its client that the earnings were based on a "similar casual, in a similar sized store who worked consistently for the past 52 weeks".[20]

40. The fact that someone refers to a person as "similar" begs the question as to how and why they are similar. That statement by the respondent was a bare conclusion without any supporting facts. I otherwise agree with the applicant's submissions, set out at paragraph 19(e) and the evidence summarised at paragraphs 24-26 herein, that there are clear reasons why this person would not have worked similar hours.

41. Accordingly, I reject the respondent's submissions that the nominated worker is of assistance in determining the applicant's PIAWE.

42. Clause 8F(2) otherwise provides that where the matters in clause 8F(1) "does not reasonably assist" then:

> "the earnings are to be determined by having regard to the average weekly amount earned during the period of 52 weeks before the injury by other persons for the performance of similar work as the worker (whether or not with the worker's employer)."

43. There are a number of matters concerning this part of the clause that were not adequately addressed by the parties. The parties focused attention on whether the employee nominated by the respondent fell within that classification. For the reasons I have given at paragraph 40 herein, I have rejected that submission.

44. What the parties failed to address is that the provision is not limited to the performance of similar work with the respondent. Clause 8F(2) expressly states that regard can be had to similar work "whether or not with the worker's employer". The applicant could have adduced evidence of work in the industry of workers performing similar work and was not restricted to the respondent's employees.

45. However, the real issue in this matter is not the rate of pay, but the number of hours the applicant would have worked. There is clear evidence both before and after the date of injury as to the rate of pay for the type of work that was to be performed by the applicant with the respondent.

46. The critical issue is the calculation of PIAWE based on the number of hours the applicant would have undertaken. The respondent submitted that the situation after the injury was irrelevant and referred to clause 2(2) of Schedule 3 of the 1987 Act. It submitted that clause 2(2) was a "complete answer" to the applicant's submission that there could be reliance on earnings after the date of injury.

[20] Application, p 42 and p 46.

47. Clause 2(2) provides:

> (2) Except as provided by this clause (or by regulations made under this clause), in calculating the **'pre-injury earnings'** received by a worker in employment for the purposes of subclause (1), no regard is to be had to earnings in the employment paid or payable to the worker for work performed before or after the period of 52 weeks ending immediately before the date of the injury (**'the relevant earning period'**). (Emphasis in original)

48. I reject that submission. Clause 2(2) is a general provision and must give way to the specific provision in clause 4(1) of Schedule 3.[21] Clause 4(1) provides that the PIAWE "may be calculated" by having regard to what 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".

49. The applicant relied on her intention and evidence that there was work available that was greater than what she actually worked following injury and otherwise undertaken by the worker nominated by the respondent.

50. During submissions I advised the parties that the evidence of work available was overtaken by the current health crisis affecting businesses around the state (which is the relevant issue for the purposes of calculations under the 1987 Act) and obviously elsewhere throughout the country and the world. It would be artificial in the extreme to accept the applicant's evidence on vacancies with the respondent in early March as applying to the position only weeks later. The applicant had no adequate response when I observed during submissions that the issue of available work had obviously changed given the lockdowns.

51. The state of the evidence is that there is no evidence of the hours worked by the applicant in the 52 weeks prior to injury. In these circumstances I have been asked to speculate as to the amount of earnings based on an extremely short period of employment in circumstances where I do not accept the applicant's evidence, given the health crisis, that work in this industry is now readily available.

52. I am otherwise not prepared to assess the applicant's PIAWE solely based on the hours that would have been undertaken in the first week of employment when the store was opening as that is an extremely narrow basis to make the calculation.

53. I have otherwise rejected the respondent's case that the worker it nominated "performed similar work as the worker". The rejection of that argument means that the insurer's decision dated 7 February 2020 and the review decision on 28 February 2020 are based on a conclusion that I do not accept.

54. In these circumstances, noting the applicant bears the onus of proof, I accept that the applicant's PIAWE is $469.42 as set out in the insurer's letter dated 4 February 2020.

ORDER

55. The applicant's PIAWE is assessed at $469.42

[21] *Commissioner of Police v Eaton* [2013] HCA 2 at [21].

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE INTERIM PAYMENT DIRECTION ISSUED BY JOHN HARRIS, REGISTRAR'S DELEGATE, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar