WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**2086/20**
Applicant:	**Lauren Jade Hayden**
Respondent:	**State of New South Wales**
Date of Determination:	**27 July 2020**
Citation:	**[2020] NSWWCC 254**

The Commission determines:

1. Dismiss the Application.

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

Paul Sweeney
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 PAUL SWEENEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

INTRODUCTION

1. Lauren Hayden (the applicant) was formerly employed by the Ambulance Service of New South Wales (the respondent) as a communications assistant at the Northern Control Centre at Charlestown.

2. In the years before 22 March 2018, the applicant was exposed to bullying and harassment in the course of her employment. It is common ground that she suffered a psychological injury, which has incapacitated her for work from that time. Since 22 March 2018, she has been in receipt of weekly payments of compensation.

3. In March 2015, the applicant fell pregnant. She commenced maternity leave on 5 November 2015. She returned to work as a communication assistant on 5 November 2016 working 16 hours per week. She continued to work those hours until she was rendered incapacitated for work by her psychiatric illness.

4. The respondent has paid the applicant compensation calculated on the basis of her part-time earnings in the 12 months before her cessation of work. The applicant says, however, that as she intended to return to full-time work in December 2018, she should be compensated from that time on the basis that she was a full-time employee.

5. The applicant seeks a determination that on 1 December 2018 her pre-injury average weekly earnings (PIAWE) were $1,372.54 and an order that the respondent pay her compensation at 80% of her PIAWE from 1 December 2018 to date and continuing.

PROCEDURE BEFORE THE COMMISSION

6. When this matter came on for conciliation and arbitration on 19 June 2020, Ms Grotte, of counsel, represented the applicant and Mr Doak, of counsel, represented the respondent. Although the parties engaged in some discussions, I was informed by counsel that they were unable to agree on the appropriate basis for ascertaining the applicant's compensation after 1 December 2018. I am satisfied that the parties, who were represented by experienced lawyers, had ample opportunity to resolve the dispute before the commencement of the arbitration hearing.

7. During Ms Grotte's submissions, it became apparent that counsel preferred to reduce their respective arguments to writing. Accordingly, I directed both parties to serve and lodge written submissions. The applicant's submissions in reply were received by the Commission on 10 July 2020. Those submissions raised a new issue on the basis that the respondent was entitled to respond to it. The respondent's further submissions were received on 17 July 2020.

EVIDENCE

8. The documents before the Commission are as follows:

    (a) the Application to Resolve a Dispute and the documents attached;
    (b) the Reply and the documents attached;
    (c) the Application to Admit Late Documents lodged by the respondent and the documents attached.

9. There was no objection to the material referred to above at the arbitration hearing. There was no application to adduce further written or oral evidence.

The evidence of the applicant

10. The evidence of the applicant is contained in two signed statements dated 5 September 2018 and 9 March 2020. No aspect of the applicant's evidence was contested at the arbitration hearing.

11. By the second of her statements, the applicant sets out the circumstances of her injury and of her pregnancy. She states:

> "After many occasions of work-related stress I began experiencing symptoms of anxiety which later developed into severe anxiety and depression brought on by the cumulative effect of events at Northern Control".

12. She records that she commenced maternity leave in December 2015 and returned to work on 5 November 2016. She says:

> "I returned to work post-maternity leave on reduced hours, approximately 16-hours per week. I signed a contract setting out the terms and conditions of this employment. I was told that under the State Award, I would be able to return to my previous position with two weeks' notice."

13. The applicant says that she ceased work by reason of her psychological injury on 22 March 2018. She continues:

> "But for my injury, it was my intention to return to full time work on or about December 2018, around my son's 3rd birthday. This would have included taking overtime shifts when possible on the weekends. It was my intention to be able to find full-time childcare which would have allowed me to return to my original contract hours."

14. The terms and conditions of the applicant's return to work on a part-time basis are set out in a letter from the respondent under the hand of Ashley Smith, senior human resources officer. The applicant signed and returned the letter on 30 October 2016. I attempt to reproduce below the relevant parts of the letter:

> - "Return to your substantive position of Control Centre Communications Assistant on reduced hours, from week commencing 5 November 2016, to be reviewed after a period of three (3) months or earlier should this be necessary.
> - Salary et $29.28 per hour - Control Centre Communications Assistant (Year 2).
> - You will be rostered an average of 16 hours per week across a roster period on reduced hours.
> - Rostering arrangements and the allocation of shifts to be negotiated based on operational requirements.
> - You will **be** required to undertake shift work Including Saturdays, Sundays and public holidays with early AM and late PM commencement times.
> - As part of your return to work, you will be required to meet all training competencies, including time spent with Education, QSC and with a mentor for up to 48 hours.
> - While this arrangement is in place you will be managed in line with PD2014_029 - Leave Matters for the NSW Health Service as well as the Ambulance Service of NSW Administrative and Clerical Employees (State) award."

SUBMISSIONS

15. The submissions of counsel are in writing. For this reason, I do not propose to reiterate in full each of the arguments put by counsel. It is necessary, however, to record the general thrust of counsel's arguments so that the way in which the Commission has resolved the case can be understood.

16. It is the applicant's case that her pre-injury average weekly earnings in the relevant period ought to be assessed on the basis of her full-time substantive position. Ms Grotte argues that the applicant "never relinquished" that position even upon her return from maternity leave. There were four reasons for the proposition that her PIAWE should be assessed by reference to her full-time hours.

17. First, by operation of clause 5.10.2 of PD 2014.029 employees who returned to work after maternity leave did not relinquish their "substantive hours". Rather, they had a right to convert to those hours at the end of the approved period of part-time work. The employee retained "their substantive status as full-time staff" and were not entitled to payment of any part-time allowance.

18. Ms Grotte argued that the phrases "ordinary hours" and "ordinary earnings" were a reference to the applicant's substantive full-time position. This was so:

> "Because as at the date she ceased work in March 2018, she was employed pursuant to an arrangement which was not permanent and which was intended to apply for a limited period. It envisaged a return to her full-time substantive position."

19. Secondly, it was submitted that this outcome was "consistent with the beneficial and remedial objectives inherent in the provisions that deal with weekly compensation". The weekly payments amendments introduced by the *Workers Compensation Legislation Amendment Act 2012* No 53 were intended "to support injured workers in accordance with their earnings". They could not have been "intended to disadvantage a worker such as Ms Hayden who was at all times attached to her substantive position".

20. Thirdly, a broad interpretation of the terms "ordinary hours" and "ordinary earnings" was consistent with the language of s 44H(a)(i). That section provides that "ordinary hours" can be agreed or determined between the worker and the employer in accordance with a fair work instrument. In this case, the applicant's ordinary hours had been agreed to be full time hours. Ms Grotte argued:

> "These remained unchanged from pre-maternity to post-maternity leave. All that changed was access to reduced hours during the transition period. Her full-time position remained and she was able to resume it at any time. Sub-section 44H(a)(i) demonstrates that there is a flexibility in the assessment of PIAWE and that there can be agreement between the employer and the worker on the basis of the fair work instrument that exists between those parties".

21. Fourthly, Ms Grotte argued that there was no definition of the of the date or time of "injury" in Part 3 Div. 2 of the Workers Compensation Act *1987* (the 1987 Act). She submitted that the applicant's injury occurred "as a result of the harassment she endured from end or about 14 November 2014 to 22 March 2018". Thus, the "correct approach" is for her entitlement to compensation to be ascertained by reference to the period prior to 14 November 2014 and not the period of 12 months prior to the cessation of her employment.

Respondent's submissions

22. Mr Doak addressed each of the four arguments put by the applicant. First, in respect of the argument that the applicant remained attached "to her full-time position", the respondent submitted that by clause 5.10.2 of PD 2014.029 the applicant was receiving payment for part-time hours of work in the 52 week period prior to 22 March 2018 and that "the balance of the hours attached to her full-time position were recorded as unpaid leave". It submitted that unpaid leave is not relevant to the calculation of PAIWE under s 44C.

23. Reference to "*ordinary earnings*" in s 44C refers to earnings during the "relevant period" that is the 52 weeks prior to 22 March 2018. On a plain reading of s 44C the phrase "ordinary earnings" does not exclude earnings on periods of part-time work or work on reduced hours. The respondent continued:

> "There is nothing in sub-section 44E(1)(a) which would permit the inclusion of hours not worked and taken as unpaid leave on the basis of an entitlement to resume those hours at some future date."

The respondent submitted that the interpretation urged by the applicant sought to read words into the section.

24. Secondly, in respect of the argument that the provisions should be interpreted liberally, the respondent submitted that this principle of construction was only relevant where there was ambiguity in some aspect of the legislation. In this case there was none.

25. Thirdly, the respondent addressed the applicant's submissions that a broad interpretation of the phrase "ordinary hours" was consistent with the language of sub-s 44H(a)(i). That submission ignored the plain words of s 44H(a) which refers to agreement or determination of ordinary hours of work "in relation to a week". In this case, the ordinary hours agreed between the applicant and the respondent were the part-time hours evidenced by the letter of offer signed by the applicant on 30 October 2016. Pursuant to that agreement the applicant worked 16 hours each week in the 52-week period prior to the cessation of her employment.

26. In respect of the date of injury, the respondent argued that the reference to "injury" in s 44D refers to:

> "The time at which the injury gives rise to an incapacity for work in order to be consistent with the clear intention of Division 2 of Part 3 of the WCA."

27. The respondent also submitted that the applicant's psychological condition is a disease of gradual onset and by reason of the operation of s 15 of the 1987 Act, the deemed date of injury is 22 March 2018.

Applicants reply

28. By her submissions in reply the applicant argued that her PIAWE should be determined by analogy with item 9 of schedule 3 of the 1987 Act. Schedule 3 makes provision for the calculation of PIAWE in respect of certain classes of workers. Item 9 concerns a:

> "Worker who, during the period of 52 weeks immediately before the injury, receives advice in writing from the employer that the worker is to be promoted or otherwise appointed to a new position (otherwise than on a temporary basis) with the effect that the worker's ordinary earnings will be increased but has not been so promoted or appointed".

29. Item 9 provides that in these circumstances the worker's PIAWE is to be calculated as if she had been promoted or otherwise appointed to a new position.

30. Ms Grotte argued that this provision amply demonstrated her argument that the legislative intention informing the weekly payments amendments in the Workers Compensation Legislation Amendment Act 2012 was that workers should be compensated "as if uninjured". She continued:

> "It is therefore submitted, *first*, that those full-time hours of her substantive position, as a logical consequence, were her *ordinary hours* at the relevant time and should be considered to be the Applicant's ordinary hours for the purpose of calculating her PIAWE as from December 2018. Such an interpretation of what constitutes ordinary hours is consistent with the purpose of the legislation and consistent with the classes identified in Schedule 3, particularly item 9 and with the purpose of that provision.
> S*econdly*, it is also submitted that, by analogy, the Applicant falls within the class of persons who qualify for item 9 of Schedule 3 of the WCA and that the Applicant's PIAWE can be calculated on the basis of her expected earnings after her return to her substantive position in December 2018."

LEGISLATION

31. At the time the respondent commenced to pay the applicant weekly compensation, section 44C which defines pre-injury average weekly earnings was, insofar as it is relevant, as follows:

> "(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
>
> (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.

(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."

Discussion and Findings

32. It is convenient to deal first with the fourth argument put by the applicant; the contention that her PIAWE should be assessed by reference to the 52 week period before she first experienced bullying and harassment on 14 November 2014.

33. It is true, as the applicant submits, that there is no definition of or reference to the date or time of "injury" in Pt 3 Div. 2, but it is beyond doubt that "injury" must have the meaning it does in section 4 of the 1987 Act. At the risk of oversimplification, it must either be a personal injury or a "disease injury".

34. In my opinion, the evidence does not establish that the applicant suffered an injury on 14 November 2014. Her evidence is that she commenced to experience anxiety "after many occasions of work-related stress". It is not possible to establish precisely when the applicant suffered a physiological change that remains the hallmark of psychological injury: *Austin v Director-General of Education* (1994) 10 NSWCCR 373. It is, therefore, likely, as the applicant states, that her condition was brought on by the "cumulative effect" of harassment over a period of time.

35. In those circumstances, I would characterise the disease as one of gradual process for the purposes of s 15 of the 1987 Act. It follows that the date of injury is the first date of incapacity. A notional injury or deemed injury pursuant to ss 15 and 16 has the same characteristics as a personal injury. It is "treated as having happened, as it were, at one blow" to use the language of Barwick CJ at [27] in *Commissioner for Railways v Bain* [1965] HCA 5. The date in this case is 22 March 2018.

36. In construing the 1987 Act, I have attempted to apply the principles of statutory construction set out in *Alcan (NT) Alumina Pty Limited v Commissioner of Territory Revenue* [2009] HCA 41 (30 September 2009) and *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] 194 CLR 355. The task of construction commences with a consideration of the text of the legislation. It is necessary, however, to consider the text in the legislative context, including the purpose and policy of the Act. It is necessary to give the legislation a coherent and harmonious operation. That may necessitate construing some provisions as dominant and others as subservient.

37. The applicant repeatedly emphasised the beneficial nature of the *Workers Compensation Legislation Amendment Act 2012* and its ostensible purpose of ensuring that employees were compensated as if they had remained uninjured. I doubt whether it can be assumed that the weekly payments provisions of the *Workers Compensation Legislation Amendment Act 2012* were beneficial in nature, although I accept that it was undoubtedly intended to improve the weekly benefits available to seriously injured workers.

38. I also doubt that reading the provisions in Pt 3 Div 2 liberally is likely to provide greater insight into their operation. Identifying provisions "as remedial should not obscure the question of determining the meaning of the relevant words": *Amaca Ltd v Cremer & Ors* [2006] NSWCA 164 per McColl JA [51].

39. In *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18 (16 May 2014) at [29], the plurality stated:

> "It can be accepted, as was put by counsel for Mr Goudappel, that the WCA's remedial character [37] reflects a beneficial purpose which requires a beneficial construction, if open, in favour of the injured worker. But to accept the beneficial purpose of the WCA as a whole does not mean that every provision or amendment to a provision has a beneficial purpose or is to be construed beneficially. The purpose of the provision must be identified."

40. Recent authority has further emphasised the importance of the text and structure of the relevant provision. In *Valuer-General v Fivex Pty Ltd* [2015] NSWCA 53 Leeming JA (Basten and Gleason JJA agreeing), said this:

> "It is wrong to approach the question of construction by confining attention to the legislative purpose and disregarding the text. No particular theory or 'rule' of statutory interpretation, including that of "purposive construction", can obviate the need for close attention to the text and structure of the relevant provision."

41. The scheme of the weekly payments' provisions introduced into the 1987 Act by the *Workers Compensation Legislation Amendment Act 2012* is that workers who are incapacitated for work have an entitlement to compensation. The general entitlement is conferred by s 33 of the 1987 Act. The compensation payable pursuant to that entitlement is to be ascertained in accordance with the subsequent provisions of Part 3 Div 2 of the 1987 Act: see *Sabanayagam v St George Bank Limited* [2016] NSWCA 145 (27 June 2016). Those provisions were substantially amended by the *Workers Compensation Legislation Amendment Act 2018*, but the amendments are immaterial for the purposes of this case as they did not commence until 21 October 2019.

42. Both the extent and the method of ascertaining weekly compensation are decidedly different to that which pertained under the *Workers Compensation Act 1926* and the 1987 Act prior to the *Workers Compensation Legislation Amendment Act 2012*. Thus, cases which considered similar language in these enactments have little relevance. Neither *Lismore City Council v Garland* [1992] 26 NSWLR 542, which considered the phrase "ordinary" earnings in the former section 42 nor *Department of School Education v Boyd* [1996] NSWCA 152, which addressed facts similar to those in this case, were not referred to in argument.

43. The main thrust of the applicant's case is that the terms "ordinary earnings" and "ordinary hours" in Pt3 Div2 refer to the full-time hours of the applicant's position. In my opinion, that hypothesis is not consistent with the text of the legislation. The former section 44C and the succeeding sections establish a regime by which, save for certain defined exceptions, a worker's PIAWE is to be determined by the average of what she actually earned in the 52-week period prior to the injury.

44. The word "earnings" in s 44C indicates monies a worker is entitled to receive from an employer in respect of her work. That is demonstrated by s 44E (1)(a), which provides two methods of establishing "ordinary earnings". The first is based upon the worker's earnings "for ordinary hours in that week during which the worker *worked or was on paid leave*" (My italics). The second is based upon "the actual earnings paid or payable to the worker in respect of that week." In either case, it is evident that performance of work in return for payment of monies is at the heart of an understanding of the word "earnings".

45. As the applicant's "ordinary earnings" are defined by reference to the hours which she worked or for which she was paid, the applicant's argument that "ordinary hours" refers to the full-time hours of her permanent position does not advance her case. Her PIAWE must be assessed by reference to either the hours that she worked or the wages she was paid.

46. While it is unnecessary to consider the question of "ordinary hours" further, I am of the opinion that by the operation of s 44H(a) (i) the applicant and the respondent agreed in October 2016 that she work 16 hours per week "in accordance with a fair work instrument between the worker and the employer". While I was not taken to the relevant award, I note the agreement, evidenced by the letter signed by the applicant on 30 October 2016, is said to be in accordance with Ambulance Service of NSW Administrative and Clerical Employees (State) Award.

47. Thus, the applicant's "ordinary hours" during the relevant period were 16 hours per week.

48. The exceptions to s 44C are also instructive. They are workers who have been employed for less than four weeks at the time of injury; workers referred to in Column 2 of an item in Schedule 3; worker's whose PIAWE is less than an amount prescribed by the regulations; and part-time workers who were seeking full-time employment at the time of the injury and had been predominantly full-time workers during the preceding period of 78 weeks. It was not suggested that the applicant fell within these exceptions. There is no exception for workers who although working reduced hours at the time of the injury have an entitlement to request a return to full-time hours.

49. In the case of a worker employed for less than four weeks regard may be had to what the worker "could reasonably be expected to have earned but for the injury". The exception permits a departure from the general principle that the ordinary earnings are determined by reference to the hours which a worker worked or the monies she was entitled to be paid prior to the injury in these limited defined circumstances. If the section permitted the earnings of all workers to be determined by reference to what they could reasonably be expected to have earned but for the injury, consonant with previous legislation, the applicant would undoubtedly be entitled to the orders she seeks in this case.

50. The use of such language in an exception to the general principle, however, reinforces the conclusion that the appropriate enquiry where the worker was employed for more than four weeks is the earnings that the applicant actually received or was entitled to receive from her employer in the 52 week period prior to her cessation of work.

51. Similarly, the fact that the legislature made specific provision in s 44C (3) for calculating the earnings of part-time workers, who had applied for fulltime work at the time of injury, might suggest that it intended the compensation of other part time workers to be assessed by reference to their part time hours.

52. The applicant argued that the Commission should hold that her ordinary earnings and ordinary hours were those in her full-time position by analogy with item 9 of Schedule 3. I am unable to see any similarity between the circumstances set out in item 9 and those pertaining to the applicant. The applicant did not receive an advice in writing of a promotion or appointment to a new position in the 52 weeks immediately before the injury. As I understand the evidence, the applicant has never been advised in writing of a promotion or appointment to a new position. For this reason, I cannot agree that the exception assists the applicant.

53. It is simply one of a number of exceptions to the general legislative scheme that a worker's PIAWE is to be assessed by reference to their actual earnings in the 52 weeks before the injury. As I have indicated above that scheme is radically different and less flexible than the regime for determining average weekly earnings but for injury prior to 2012. In assessing compensation pursuant to the former section 40, the Commission could determine on all the evidence available the amount of a worker's probable weekly earnings at a particular time. Thus, in this case it could accept the applicant's evidence that she would have return to full-time work on or about 1 December 2018 and assessed her average weekly earnings at that time on the basis of full-time work.

54. That such a result is not available on my construction of the present legislation is unfortunate. However, I doubt that it is an oversight. The legislature was clearly aware that workers are promoted, demoted and voluntarily alter their hours of work for many reasons during the course of a working life and made provision for this in the various exceptions to the general scheme. In s 44D it made specific provision for workers who reduced their hours of work or were promoted in the 52 weeks prior to injury.

55. Part 3 Div 2 in the form which it took prior to the 2018 amendments , however, makes no provision in respect of workers who would have increased their hours or obtained promotion after the injury, save for cases where the employer has advised in writing of that promotion in accordance with Item 9 Sch 3. The applicant is not one of those workers.

56. For reasons that I have given above, I decline to hold that the applicant's PIAWE should be assessed on the basis of full-time hours. I dismiss the Application.