

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 3062/19  
**Applicant:** Toby Hammond  
**First Respondent:** Adam Nelson Painting and Decorating  
**Second Respondent:** Workers Compensation Nominal Insurer  
**Date of Determination:** 11 March 2020  
**Citation:** [2020] NSWCC 72

Further to the determination in paragraphs 1 and 2 of the amended Certificate of Determination issued on 15 January 2020, the Commission determines:

1. The applicant suffered injury to his cervical and thoracic spine on 24 September 2018 in the course of his employment with the first respondent and that employment was a substantial contributing factor to those injuries.
2. The first respondent was uninsured for the purposes of the *Workers Compensation Act 1987* in respect of that injury.
3. The second respondent is to pay the applicant weekly compensation as follows:
  - (a) \$876.45 from 25 September 2018 to 24 December 2018 pursuant to section 36(1)(a) of the *Workers Compensation Act 1987*, and
  - (b) \$738.10 per week from 25 December 2018 to date and continuing pursuant to section 37(1)(a) of the *Workers Compensation Act 1987*.
4. The second respondent is to pay the applicant's reasonably necessary medical expenses pursuant to section 60 of the *Workers Compensation Act 1987*.
5. The compensation above is to be paid from the Workers Compensation Insurance Fund established pursuant to section 154D of the *Workers Compensation Act 1987*.

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

W Dalley  
**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 WILLIAM DALLEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

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



## STATEMENT OF REASONS

### BACKGROUND

1. Toby Hammond (Mr Hammond/the applicant) suffered severe cervical and thoracic spinal injuries on 24 September 2018, when he fell while engaged in painting the roof of a shed situated on a rural property known as “Ulupna Island Station” at Ulupna in the State of Victoria.
2. A finding was made in the current proceedings that Mr Hammond at the time of his injury on 24 September 2018 was a “worker” within section 4 of the *Work Injury Management and Workers Compensation Act 1998* employed by the first respondent who was relevantly uninsured at the time.
3. There is no dispute that Mr Hammond had no capacity for work since the subject injury.
4. The proceedings were adjourned for submissions to be made as to the determination of the pre-injury average weekly earnings attributable to the applicant for the purposes of calculation of weekly payments.
5. Those submissions have now been received and considered.
6. The background to the dispute, the evidence and the procedures before the Commission are set out in the Certificate of Determination issued in the proceedings on 14 January 2020.

### ISSUES FOR DETERMINATION

7. The parties agree that the issue remaining to be determined is the amount of Mr Hammond’s pre-injury average weekly earnings calculated in accordance with Part 3, Division 2 of the *Workers Compensation Act 1987* (the 1987 Act). There is no dispute that Mr Hammond has had no capacity for employment since the date of his injury.
8. Further to the findings previously made in the proceedings:
  1. “The applicant at the time of his injury on 24 September 2018 was a “worker” within section 4 of the *Work Injury Management and Workers Compensation Act 1998* employed by the first respondent.
  2. That employment was employment connected with the state of New South Wales within section 9AA of the *Workers Compensation Act 1987*.”

The evidence establishes that the applicant suffered injury to his cervical and thoracic spine on 24 September 2018 in the course of his employment with the first respondent and that employment was a substantial contributing factor to those injuries.

9. The evidence establishes and it is not disputed that the applicant has incurred costs in respect of and incidental to his medical treatment. It is further not disputed that, from the date of injury to the present time, the applicant has no capacity for employment
10. It is not disputed and the evidence establishes that the first respondent was relevantly uninsured in respect of those injuries.

## SUBMISSIONS

11. The written submissions of the parties addressed the issue of calculation of the pre-injury average weekly earnings. The applicant submitted that the evidence established that Mr Hammond had been continuously employed by the respondent for less than four weeks at the date of his injury. Accordingly the calculation of the pre-injury average weekly earnings (PIAWE) was to be considered pursuant to Clause 3 of Schedule 3 to the 1987 Act. Based upon the pattern of earlier earnings, established by the invoices in evidence, over the 33 weeks in which Mr Hammond had worked as a painter since completing his apprenticeship his average earnings were about \$890 per week. In the then current financial year Mr Hammond had earned an average of \$1136 per week.
12. The applicant submitted that there was some potential for wage growth and that, although Mr Hammond may not have been expected to be continuously employed as a painter, a reasonable assessment would be a finding of \$1100 per week as the rate “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.”
13. The first respondent submitted that up to the completion of his apprenticeship, Mr Hammond had been earning \$20 per week. After undertaking work on his own account he had been paid at the rate of \$25 per hour which was subsequently increased to \$30 per hour.
14. The first respondent submitted that that level of payment was above the going rate for a first year qualified painter. The first respondent submitted:
 

“It is submitted that Mr Hammond’s weekly wage would be \$760.00 (\$20/hour) – \$950.00 (\$25/hour) gross per week if he were determined to be a full-time worker. As Mr Hammond had been determined to be a casual worker, it is admitted his weight should be determined to be lower than that of a full-time worker.”
15. The second respondent submitted that Mr Hammond had earned a total of \$30,445 over the 33 week period from 2 February 2018 to 20 September 2018 giving an average of \$922.58 per week. This would represent an hourly rate of \$24.27 “if working an average of eight hours per day”.
16. The parties were invited to submit further submissions in reply but no further submissions were received.

### Evidence:

17. Mr Hammond stated that he completed his apprenticeship requirements in January 2018 and his employment with Delso Pty Ltd then ceased. He had short period off work and then commenced work as a painter in late January 2018. As noted in the earlier decision Mr Hammond was paid on invoice raised by him initially at the rate of \$25 per hour. His first invoice was dated 2 February 2018.
18. The pattern of earnings prior to injury were set out in a Table in the summary of evidence in the earlier decision. It is convenient to reproduce the Table as reflecting the earnings of Mr Hammond following completion of his apprenticeship in January.

Invoice	Finish	hours	Charge	Rate	Performed for
1	2/02/2018	29	\$737.50	\$25.43	Hammond Painting (brother)
2	27/02/2018	14	\$350.00	\$25.00	Hammond Painting (brother)
3	29/03/2018	33.5	\$837.50	\$25.00	Nelson

4	Cancelled					
5	30/03/2018	22	\$1,200.00	?	B & J Hammond	
6	5/04/2018	24.5	\$612.50	\$25.00	Nelson	
7	12/04/2018	36	\$900.00	\$25.00	Nelson	
8	19/04/2018	37	\$925.00	\$25.00	Nelson	
9	25/04/2018	30	\$750.00	\$25.00	Nelson	
10	7/05/2018		\$1000.000		Hammond Conversions	
11	10/05/2018	32.5	\$812.50	\$25.00	Nelson	
12	17/05/2018	41	\$1,025.00	\$25.00	Nelson	
13	24/05/2018	36.5	\$1,095.00	\$30.00	Nelson	
14	28/05/2018	22	\$660.00	\$30.00	Nelson	
15	30/05/2018		\$500.00		Hammond Painting (brother)	
16	31/05/2018		\$500.00		Hammond Painting (brother)	
17	7/06/2018	39	\$1,170.00	\$30.00	Nelson	
18	14/06/2018	28.5	\$855.00	\$30.00	Nelson	
19	21/06/2018	36.5	\$1,095.00	\$30.00	Nelson	
20	28/06/2018	39	\$1,170.00	\$30.00	Nelson	
21	5/07/2018	39.5	\$1,185.00	\$30.00	Nelson	
22	12/07/2018	48	\$1,440.00	\$30.00	Nelson	
23	19/07/2018	39.5	\$1,185.00	\$30.00	Nelson	
24	26/07/2018	37	\$1,110.00	\$30.00	Nelson	
25	2/08/2018	55	\$1,650.00	\$30.00	Nelson	
26	9/08/2018	47.5	\$1,425.00	\$30.00	Nelson	
27	16/08/2018	33.5	\$1,005.00	\$30.00	Nelson	
28	23/08/2018	40.5	\$1,215.00	\$30.00	Nelson	
29	30/08/2018	45.5	\$1,365.00	\$30.00	Nelson	
30	6/09/2018	42.5	\$1,275.00	\$30.00	Nelson	
31	13/09/2018	40	\$1,200.00	\$30.00	Nelson	
32	20/09/2018	6.5	\$195.00	\$30.00	Nelson	
Total			\$30,445.00			

## Findings and Reasons

19. I accept the evidence of Mr Hammond that invoice number 10 relates purely to the supply of paint to his parents' business and does not relate to labour performed by him. That assertion is supported by the fact that Mr Hammond appears to have been working for the first respondent on the date of that invoice. The sum of \$1000 charged on that invoice does not represent payment for personal exertion and I exclude it from the total earnings.
20. Mr Hammond's earnings therefore total \$29,445. (The figure accepted by the second respondent (\$30,445) includes the \$1000 invoice for the supply of paint).
21. If invoices numbers 15 and 16, both addressed to "Hammond Painting" (Mr Hammond's brother), represent payment at the rate of \$25 per hour then each of those invoices would then represent payment for 20 hours. The total hours would then be 1,016 hours worked over the total period of 33 weeks to 20 September 2018, assuming 2 February 2018 to be the start of the first week for which Mr Hammond was available to perform work.

22. The first respondent based his calculations on a 38 hour week and the second respondent based calculations on a 40 hour week. The invoices establish that Mr Hammond worked less than 38 hours in most weeks. In 11 weeks he worked at least 38 hours and on nine of those weeks he worked 40 hours or more. I accept a 38 hour week is more probable as a standard.
23. Based on a 38 hour week the invoices establish that Mr Hammond worked 26.7 weeks in the total hours worked when divided by 38 ( $1016/38 = 26.7$ ). Averaging the hours in this fashion establishes that Mr Hammond worked the equivalent of 26.7 weeks over a period of 33 weeks.
24. Those figures support the view that, when employed, Mr Hammond was a casual part-time worker. Mr Hammond earned \$29,445 in return for the equivalent of 26.7 weeks of work, an average of \$1102.81 per week. Averaged over the full 33 weeks from 2 February 2018 to 20 September 2018, Mr Hammond earned an average of \$892.27 per week.
25. The invoices demonstrate that employment by Mr Nelson was not continuous. There were a series of engagements. Prior to the subject injury, the invoice number 31 rendered on 13 September 2018 shows 40 hours worked up to Thursday, 13 September 2018. The following invoice, 32, dated 19 September 2018 shows 6.5 hours worked, presumably on Friday, 14 September 2018. There is then no indication of employment until Mr Hammond travelled with Mr Nelson to Ulupna Station on 20 September 2018.
26. The phrase “pre-injury average weekly earnings” is defined in the former Section 44C of the 1987 Act (which remains in force due to the operation of Part 19L of Schedule 6 of the 1987 Act (the transitional provisions) despite its repeal by the *Workers Compensation Legislation Amendment Act 2018*):

“44C Definition—pre-injury average weekly earnings

(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, 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).

(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.

(5) An overtime and shift allowance payment is permitted to be included in the  
calculation of pre-injury average weekly earnings (but only for the purposes of the  
calculation of weekly payments payable in the first 52 weeks for which weekly  
payments are payable) if:

(a) the worker worked paid overtime or carried out work that attracted  
a shift allowance during the relevant period, and

(b) the worker would, but for the worker's injury, have been likely, at  
any time during that 52 week period, to have worked paid overtime or  
carried out work that attracted a shift allowance.

(6) The amount of an overtime and shift allowance payment that is permitted to  
be included is to be calculated in accordance with the following formula:

**A/B**

where:

**A** is the total amount paid or payable to the worker for paid overtime  
and shift allowances in respect of the relevant period.

**B** is the number of weeks during the relevant period during which the  
worker worked or was on paid annual leave.

(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."

27. I have found that Mr Hammond was employed on a casual part-time basis. There was a gap  
in employment between 14 September 2018 and 20 September 2018. On the latter date a  
fresh contract of employment was entered into. I am satisfied that Mr Hammond was a  
worker who had been continuously employed by the same employer for less than four weeks  
before the injury.

28. Although the applicant's submissions referred to Clause 3 of Schedule 3 of the 1987 Act, that schedule, continuing in force by reason of the transitional provisions, makes no reference to the factual situation as found. The relevant equivalent provision is contained in section 44C(2) which directs attention to; "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."
29. I am satisfied that the evidence establishes that over a 33 week period Mr Hammond was able to earn \$29,445 as a painter. His initial rate was \$25 per hour but the evidence establishes that from mid-May 2018 he was able to demand \$30 per hour.
30. I do not accept the submission of the first respondent that it is probable that Mr Hammond would have reverted to a rate of \$25 per hour. The arrangements which Mr Hammond entered into during 2018 were all done with family members or friends and on a fairly informal basis. I think it is probable that this pattern of work would have continued and that, in reality, Mr Hammond would have continued to fund his own holiday pay, sick pay and superannuation. Realistically he would need to be earning \$30 an hour to cover these costs.
31. The second respondent submitted that the average weekly earnings over the 33 week period should form the basis of the calculation. However, I think it is reasonable to assume that the rate of \$30 per hour would have been available in future on the basis that Mr Hammond would have been paid as a casual worker having to fund his own holiday pay, sick pay and superannuation.
32. I accept the applicant's submission that it is more appropriate to consider the earnings from and after 15 June as those earnings were calculated at a rate that was likely to continue in the future. The applicant's submission was that the average weekly earnings would probably be the sum of \$1136.
33. I am satisfied that Mr Hammond would have continued to earn \$30 per hour performing casual work as a painter if he had not been injured. In a 38 hour week he would have earned \$1140.
34. However, Mr Hammond did not have a pattern of continuous employment and his engagement by Mr Nelson, his friend Ryan Becker and members of his family provided employment for the full-time equivalent of 26.7 weeks in a total period of 33 weeks between 2 February 2018 and 20 September 2018.
35. Assuming the continuation of that work rate, it is probable that Mr Hammond would have worked the equivalent of 42 full-time weeks in the 52 week period following 24 September 2018 [ $52 \times (26.7/33) = 42.07$ ]. That adjustment needs to be applied to the expected earnings of \$1140 per week.
36. Adjusting that figure to take account of the likelihood that Mr Hammond would not be able to find continuous work and that, based on prior experience, he would find employment in 42 weeks out of a full year, then the weekly earnings averaged over 52 weeks appear likely to have been close to the figure contended for by the second respondent, \$922.58 per week.<sup>1</sup>
37. I determine the PIAWE, determined pursuant to section 44C(2) of the 1987 Act, to be the sum of \$922.58.
38. Mr Hammond would accordingly be entitled to be paid pursuant to section 36 in the first entitlement period the sum of \$876.45 (95% of PIAWE) and pursuant to section 37 in the second entitlement period the sum of \$738.10 (80% of PIAWE).

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<sup>1</sup> Weekly rate of \$1,140 X (42/52) = \$920.76

