WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **5273/19**
applicant: **Evonne Trita Ward**
respondent: **Lowes Manhattan Pty Ltd**
Date of Determination: **6 January 2020**
Citation: **[2020] NSWWCC 6**

The Commission determines:

FINDINGS

1. I find that the applicant has been underpaid in relation to the relevant six-monthly indexation pursuant to s 82A of the *Workers Compensation Act 1987*, and is entitled to an award for past weekly benefits for the appropriate amounts.

2. Additionally, as the respondent has challenged the applicant's entitlement, it is appropriate that an award for weekly benefits on an ongoing basis be made.

ORDERS

1. Within 14 days, the parties are to submit proposed Consent Orders consistent with these reasons.

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

Gerard Egan
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 GERARD EGAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A MacLeod

Ann MacLeod
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Evonne Ward (the applicant) suffered an injury during the course of her employment with Lowes Manhattan Pty Ltd (the respondent) on 14 March 2017 when she fell off a ladder whilst performing her role as a retail assistant. She injured her left knee, left foot and ankle and her back in the incident. I am told that the respondent has also paid for medical treatment concerning the applicant's neck and left hip as a consequence of injury, but these injuries have not been formally admitted by the respondent.

2. The applicant brings a claim for an award for weekly payments from 14 March 2017 to 8 September 2019 pursuant to s 37 of the *Workers Compensation Act 1987* (the 1987 Act), and then from 9 September 2019 to date and continuing pursuant to s 38 of the 1987 Act. The respondent has paid weekly compensation to date, however there is an argument that the compensation has not been paid at the correct rate, principally based on the indexing of the weekly amount pursuant to s 82A of the 1987 Act on 1 April and 1 October each year.

3. A work capacity decision was made on 20 March 2017 indicating that 95% of the applicant's average pre-injury weekly earnings (PIAWE) was $572. 34. Unavoidably, this means that the PIAWE was calculated at $602.46. The parties agree that that amount continues to apply (although a further letter of 18 April 2017 purported to replace that PIAWE with $383.75, neither Counsel was able to explain how that came into existence and it is apparent that the letter has never been acted upon).

4. In the Reply, the respondent foreshadowed that leave would be sought to dispute a number of additional matters. Leave was not sought nor granted. The following reasons either deal with those matters, or on my findings, do not arise.

PROCEDURE BEFORE THE COMMISSION

5. The matter proceeded to arbitration hearing in Coffs Harbour on 18 December 2019. The applicant was represented by Mr Hickey of Counsel, instructed by Mr Langler. Ms Balendra of Counsel appeared for the respondent.

6. The matter proceeded in a somewhat conversational manner as there appeared to be great difficulty in understanding a number of the documents in evidence, principally, a correlation between payslips issued by the respondent, and a printout of the applicant's periodic pay including hourly rates and taxation details. Nevertheless, the conversational manner of the proceedings enabled the parties to pinpoint the actual issues and satisfactorily make submissions on each of them.

ISSUES FOR DETERMINATION

7. It can be said reasonably bluntly that the applicant brings the claim in order to obtain an award for weekly payments to enliven s 53 of the 1987 Act for the continuation of weekly payments when she departs Australia with the intention of returning to her home country of the United States of America. However, the claim is a little more far-reaching than simply that. There are arrears of compensation sought also, and the respondent has either disputed the applicant's entitlement or failed to properly determine those entitlements, enlivening the jurisdiction of the Commission to deal with it.

8. At the arbitration, the substantive submissions made on the respondent's behalf related to whether or not the applicant's PIAWE was correctly calculated. The matter proceeded on this basis despite it not having been raised in a dispute notice or leave being granted to raise it being sought at the hearing. Nevertheless, Mr Hickey proceeded on the basis that the issue was before the Commission and made submissions accordingly. I will deal with the matter of substance and to the extent it is necessary, grant leave.

9. The question of indexation pursuant to s 82A of the 1987 Act was therefore eventually not central to the argument. The impact of indexation was only relevant in respect of the amount that was said to be indexed. Ultimately, the matter boiled down to a single issue identified by Ms Balendra, that is: whether the applicant's "ordinary earnings" should include higher hourly rates that she earned whilst working on weekends or public holidays.

10. The alternative argument was that the flat hourly rate for work Monday to Friday should apply for the totality of the applicant's pre-injury hours.

11. It is agreed that the period of the applicant's claim relates only to the period after the first 52 weeks of entitlement to weekly payments.

12. Additionally, there is no contest as to the applicant's incapacity for work nor the extent of it. The parties have been proceeded on the basis that the applicant has no current work capacity.

13. Further, for the purpose of s 53 of the 1987 Act, there is no dispute as to the applicant's incapacity being likely to be of a permanent nature.

14. Despite the factual nuances to the question, the only issue therefore is whether or not the applicant is entitled to an award for weekly payments.

EVIDENCE

Documentary evidence

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

    (a) Application to Resolve a Dispute;
    (b) Application to Admit Late Documents dated 9 December 2019;
    (c) The General Retail Industry Award 2010 (the Industrial Award), and
    (d) Reply.

16. There was no oral evidence or cross examination.

17. Although the material before the Commission is voluminous, there are relatively few documents of relevance to the ultimate question distilled at arbitration, given the narrowness of the issues. These documents are in essence the pay records relating to the applicant, the parties' respective schedules of earnings and/or underpayments; and the industrial award.

18. Ultimately, there is no dispute as to the calculations in the parties' schedules. The dispute concerns the amount of the PIAWE, that is the calculation of that PIAWE based on normal earnings.

SUBMISSIONS

19. I will set out the substance of the submissions here, as they were recorded.

Applicant's submissions

20. Mr Hickey's submissions referred to the definition of PIAWE in s 44C of the 1987 Act. He says, in determining the average of the worker's ordinary weekly earnings during the relevant period, it is necessary to determine what the applicant's ordinary hours were during that period.

21. For this, it is submitted that the Industrial Award defines that term, as there is no definition of ordinary earnings in the legislation. He took me to various clauses within the award to make that point and I will deal with those clauses below.

22. Essentially, the submission is that casual employees receive as their ordinary entitlement an additional 25% of the ordinary hourly rate for a fulltime employee (cl 13 of the Industrial Award). Ordinary hours of work are prescribed in cl 22.7 of the Industrial Award, and include hours worked within certain times on weekends (subject to exceptions within various types of shops not applicable to the applicant).

23. No submissions were made, however, on how work during public holidays should be treated. Similarly, no submissions concerning the operation of cl 29.2 (overtime), or 29.4 (penalty payments – specifically sub-clause (d) (Saturday work – casual employee), and sub-clause (e) (Sunday work), and sub-clause (f) (public holidays) were not addressed.

Respondent's submissions

24. Although somewhat detailed, Ms Balendra's submission boiled down to the proposition that the applicant worked Monday to Friday, on weekends, and some public holidays. The ordinary rate of pay was paid for the weekday work, higher amounts for Saturdays and Sundays and higher yet for public holidays.

25. The proposition was that the applicant's PIAWE should be based on the average number of hours per week worked for the relevant period, with pay to be paid at what was submitted to be "the normal base rate of pay", not the increased rates on weekends or holidays.

FINDINGS AND REASONS

26. It is agreed (or at least not disputed) that the applicant was a casual employee pursuant to the Industrial Award. It is also agreed that a Work Capacity Decision determining the PIAWE has been made. The Commission has jurisdiction to make an Award for weekly payments prior to 1 January 2019 not inconsistent with that Work Capacity Decision.

27. Part 3 Division 2 of the 1987 Act (s 32A to s 58 inclusive) governs the entitlement to weekly payments. The applicable provisions are as they were for injuries prior to 1 January 2019 and are reviewed below.

28. Section 32A contains relevant definitions:

> **"32A Definitions**
>
> In this Division and in Schedule 3:
>
> ***base rate of pay***—see section 44G.
>
> ***base rate of pay exclusion***—see section 44G.
>
> ***current weekly earnings***—see section 44I.
>
> ***…***
>
> ***fair work instrument*** means:
>
> (a) a fair work instrument (other than an FWA order) within the meaning of the *Fair Work Act 2009* of the Commonwealth, or

(b) a transitional instrument within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* of the Commonwealth.

…

ordinary earnings—see section 44E.

ordinary hours of work—see section 44H.

pre-injury average weekly earnings—see section 44C."

29. Section 35 contains the following relevant definitions for the purpose of Part 3 Division 2 Subdivision 2 (Entitlement to weekly compensation (s 33 to s 42 inclusive)):

"35 (1) For the purposes of the provisions of this Subdivision used to determine the rate of weekly payments payable to an injured worker in respect of a week:

AWE means the worker's pre-injury average weekly earnings."

30. Section s 37 of the 1987 Act is relevantly as follows:

"37 Weekly payments in second entitlement period (weeks 14-130)

……

(2) The weekly payment of compensation to which an injured worker who has no current work capacity is entitled during the second entitlement period is to be at the rate of:

(a) (AWE × 95%) − D, or
(b) MAX − D,

whichever is the lesser."

31. Section s 38 of the 1987 Act is relevantly as follows:

"38 Special requirements for continuation of weekly payments after second entitlement period (after week 130)

…….

(6) The weekly payment of compensation to which an injured worker who has no current work capacity is entitled under this section after the second entitlement period is to be at the rate of:

(a) (AWE × 80%) − D, or
(b) MAX − D),

whichever is the lesser.

32. It is common ground that the applicant had no current work capacity, the relevant provisions in this case are s 37(1) and s 38(7), and the factors "D" and "MAX" have no role in the current case.

33. Subdivision 4 of Part 2 Division 2 includes s 44C to s 58 (inclusive). Relevant provisions include:

> **"Section 44 C 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)."

34. As the periods concerned are after the first 52 weeks of payments, s 44C(1)(b) means overtime and shift allowances (if paid) are not included in PIAWE.

35. Section 44E provides:

> "(1) Subject to this section, in relation to pre-injury average weekly earnings, the *ordinary earnings* of a worker in relation to a week during the relevant period are:
>
> (a) if the worker's base rate of pay is calculated on the basis of ordinary hours worked, the sum of the following amounts:
>
> (i) the worker's earnings calculated at that rate for ordinary hours in that week during which the worker worked or was on paid leave,
>
> (ii) amounts paid or payable as piece rates or commissions in respect of that week,
>
> (iii) the monetary value of non-pecuniary benefits provided in respect of that week, or
>
> (b) in any other case, the sum of the following amounts:
>
> (i) the actual earnings paid or payable to the worker in respect of that week,
>
> (ii) amounts paid or payable as piece rates or commissions in respect of that week,
>
> (iii) the monetary value of non-pecuniary benefits provided in respect of that week.
>
> (2) A reference to ordinary earnings does not include a reference to any employer superannuation contribution."

36. In this case, there is nothing to suggest that the applicant had "ordinary hours" or that she had a "base rate of pay… calculated on the basis of ordinary hours worked". Paragraph 44E(1)(b) would therefore apply.

37. Section 44G, which goes on to provide a definition for "base rate of pay" is not relevant.

38. Section 44H provides:

"44H Definition applying to pre-injury average weekly earnings and current weekly earnings—ordinary hours of work

In relation to pre-injury average weekly earnings and current weekly earnings, the *ordinary hours of work*:

(a) in the case of a worker to whom a fair work instrument applies are:

(i) if the ordinary hours of work in relation to a week are agreed or determined in accordance with a fair work instrument between the worker and the employer—those hours, or

(ii) in any other case, the worker's average weekly hours (excluding any week during which the worker did not actually work and was not on paid leave) during the relevant period, or

(b) in the case of a worker to whom a fair work instrument does not apply:

(i) if the ordinary hours of work are agreed between the worker and the employer, those hours, or

(ii) in any other case, the worker's average weekly hours (excluding any week during which the worker did not actually work and was not on paid leave) during the relevant period."

39. In this case, a fair work instrument applies (the Industrial Award), and s 44H(a) applies. The ordinary hours of work are set out in cl 27.2 of that instrument, reproduced below.

40. The relevant provisions of the Industrial Award are:

"13. Casual employees

[13—Casual employment renamed as 13—Casual employees by PR994449 *from 01Jan10; varied by* PR510566*,* PR540640*,* PR700568*]*

13.1 A casual employee is an employee engaged as such.

[13.2 substituted by PR540640 *ppc 23Aug13]*

13.2 A casual employee will be paid both the hourly rate payable to a full-time employee and an additional 25% of the ordinary hourly rate for a full-time employee.

…..

27.2 Ordinary hours

(a) Except as provided in clause 27.2(b), (which does not apply) ordinary hours may be worked, within the following spread of hours:

Days	Spread of hours
Monday to Friday, inclusive	7.00 am–9.00 pm

Saturday	7.00 am–6.00 pm
Sunday	9.00 am–6.00 pm

….

29.2 Overtime

[29.2 substituted by PR504525*; corrected by* PR505487*; substituted by* PR598494 *ppc 01Jan18]*

(a) Hours worked in excess of the ordinary hours of work, outside the span of hours (excluding shiftwork), or roster conditions prescribed in clauses 27 and 28 are to be paid at time and a half for the first three hours and double time thereafter.

(b) Hours worked by part-time employees in excess of the agreed hours in clause 12.2 or as varied under clause 12.3 will be paid at time and a half for the first three hours and double time thereafter.

(c) Hours worked by casual employees:

(i) in excess of 38 ordinary hours per week or, where the casual employee works in accordance with a roster, in excess of 38 ordinary hours per week averaged over the course of the roster cycle;

(ii) outside of the span of ordinary hours for each day specified in clause 27.2;

(iii) in excess of 11 hours on one day of the week and in excess of 9 hours on any other day of the week;

shall be paid at 175% of the ordinary hourly rate of pay for the first three hours and 225% of the ordinary hourly rate of pay thereafter (inclusive of the casual loading).

(d) The rate of overtime for full-time and part-time employees on a Sunday is double time, and on a public holiday is double time and a half.

(e) The rate of overtime for casual employees on a Sunday is 225% of the ordinary hourly rate of pay, and on a public holiday is 275% of the ordinary hourly rate of pay (inclusive of the casual loading).

(f) Overtime is calculated on a daily basis.

…

29.4 Penalty payments

…

(d) Saturday work—casual employee

[New 29.4(d) inserted by PR701872 *ppc 01Nov18]*

(i) From 1 November 2018 to 30 September 2019

A penalty payment of an additional 40% loading will apply for ordinary hours worked by a casual employee on a Saturday (inclusive of the casual loading).

(ii) From 1 October 2019 to 29 February 2020

A penalty payment of an additional 45% loading will apply for ordinary hours worked by a casual employee on a Saturday (inclusive of the casual loading).

(iii) From 1 March 2020

A penalty payment of an additional 50% loading will apply for ordinary hours worked by a casual employee on a Saturday (inclusive of the casual loading).

(e) Sunday work

[28.4(c) varied by PR992724*; 29.4(c) substituted by* PR593953 ppc 01 July 2017*; 29.4(d) renumbered as 29.4(e) by* PR701872 *ppc 01Nov18]*

(i) **From 1 July 2017 to 30 June 2018**

A penalty payment of an additional 95% loading will apply for all hours worked by a full-time or part-time employee on a Sunday. A penalty payment of an additional 95% loading will apply for all hours worked by a casual employee on a Sunday (inclusive of the casual loading).

(ii) **From 1** July **2018 to 30 June 2019**

A penalty payment of an additional 80% loading will apply for all hours worked by a full-time or part-time employee on a Sunday. A penalty payment of an additional 85% loading will apply for all hours worked by a casual employee on a Sunday (inclusive of the casual loading).

(iii) **From 1** July **2019 to 30 June 2020**

A penalty payment of an additional 65% loading will apply for all hours worked by a full-time or part-time employee on a Sunday. A penalty payment of an additional 75% loading will apply for all hours worked by a casual employee on a Sunday (inclusive of the casual loading).

(iv) **From 1 July 2020**

A penalty payment of an additional 50% loading will apply for all hours worked by a full-time or part-time employee on a Sunday. A penalty payment of an additional 75% loading will apply for all hours worked by a casual employee on a Sunday (inclusive of the casual loading).

(f) Public holidays

[29.4(d) substituted by PR539248 *ppc 01Aug13; 29.4(d) renumbered as 29.4(f) by* PR701872 *ppc 01Nov18]*

[29.4(d)(i) substituted by PR593953 *ppc 01Jul17; 29.4(f)(i) varied by* PR701872 *ppc 01Nov18]*

(i) Work on a public holiday must be compensated by payment of an additional 125% loading for all hours worked by a full-time or part-time employee. A penalty payment of an additional 150% loading will apply for all hours worked by a casual employee (inclusive of the casual loading).

(ii) Provided that by mutual agreement of the employee and the employer, the employee (other than a casual) may be compensated for a particular public holiday by either:

(A) An equivalent day or equivalent time off instead without loss of pay. The time off must be taken within four weeks of the public holiday occurring, or it shall be paid out; or

(B) An additional day or equivalent time as annual leave.

(iii) The employee and employer are entitled to a fresh choice of payment or time off by agreement on each occasion work is performed on a public holiday.

(iv) If no agreement can be reached on the method of compensation, the default arrangement shall be as per clause 29.4(f)(i)."

41. There is no suggestion by the respondent, and I have not been taken to any evidence in the pay records, that the applicant worked any hours in excess of 38 hours per week, or outside the span of ordinary hours specified in clause 27.2, or in excess of nine or 11 hours on any one day. As those features are required for the applicant to have worked overtime (cl 29.2(c)), the applicant did not work overtime.

42. I have not been taken to evidence that the applicant was paid shift allowances.

43. Clause 29.4(d) provides for loadings to be paid for *ordinary hours* worked by casual employees on Saturdays. It is self-evident that this payment is the normal pay for those ordinary hours.

44. Penalty rates for casual employees for Sunday work (cl 29.4(e)) only relate to overtime worked. As the evidence does not establish that overtime (as defined) was worked, the clause does not apply.

45. Penalty rates for public holidays (cl 29.4(f)) only apply to full time or part time workers, not casual workers.

46. The result of all this is that:

(a) The applicant's PIAWE is the average of the ordinary earnings during the relevant period (s 44C(1)(a)).

(b) Section 44E(1)(b) applies to determine the applicant's ordinary earnings, as a casual employee does not have a base rate of pay. This means that the applicant's ordinary earnings are "the actual earnings paid or payable to the worker in respect of that week".

(c) As the applicant did not work overtime, nor was she entitled to penalties for Sunday or public holiday work for normal hours, the exclusions in s44C(1) do not apply.

SUMMARY

47. In general terms, then, I am satisfied that the applicant has been underpaid in relation to the relevant six monthly indexation, and is entitled to an award for past weekly benefits for the appropriate amounts. Additionally, as the respondent has challenged the applicant's entitlement, it is appropriate that an award on an ongoing basis be made.

48. The precise nature of the award, however, is somewhat complex. I consider it appropriate that the parties agree on the terms of the award and submit consent orders consistent with these reasons within 14 days.\