

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2300/19
Applicant: Darryl John Snow
Respondent: State of New South Wales
Date of Determination: 19 July 2019
Citation: [2019] NSWCC 246

The Commission determines:

1. The Application to Resolve a Dispute is amended in Part 5.1 to claim weekly payments at the maximum statutory rate for a single worker over the age of 21 with no dependents from 13 May 2019 pursuant to section 37 of the *Workers Compensation Act 1987* (the 1987 Act) as preserved by the operation of Schedule 6, Part 19H, clause 25 of that Act.
2. The respondent is to pay the applicant \$440.17 per week from 13 May 2019 to date and continuing with credit to be given for payments made in respect of that period pursuant to section 37 of the 1987 Act as preserved by the operation of Schedule 6, Part 19H, clause 25 of that Act.
3. The respondent is to pay the applicant's costs as agreed or assessed.

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. Darryl Snow (Mr Snow/the applicant) was employed by NSW Fire and Rescue (the respondent) as a Senior Firefighter. On 19 July 2005 Mr Snow suffered an injury to his left shoulder which led to his ceasing employment with the respondent. A claim for workers compensation benefits was accepted and weekly payments made.
2. Mr Snow was then occupied as a carer for his daughter until 2015 when he commenced employment as a sales assistant with a real estate agency based in Milton, New South Wales.
3. Towards the end of 2017 Mr Snow was informed by the owner of the business that he had been unable to find a buyer for the business and intended to cease trading. He offered the business to Mr Snow by way of gift rather than purchase and remained on hand to supervise while Mr Snow obtained the appropriate real estate agent's licence in April 2018.
4. Since that date Mr Snow has been employed in the operation of the real estate agency.
5. By letter dated 26 March 2019 the insurer gave notice of its intention to reduce Mr Snow's weekly payments to \$199.79 per week from 13 May 2019 based upon an assessment that Mr Snow's capacity to earn in suitable employment should be assessed at \$1,490.38 per week.
6. Mr Snow's solicitors filed an Application to Resolve a Dispute (the Application) in the Commission claiming weekly payments at a higher rate. The Reply filed by the respondent maintained the insurer's position as to Mr Snow's capacity to earn.

ISSUES FOR DETERMINATION

7. Mr Snow was employed as a firefighter at the time of his injury and the parties agree that the provisions of the *Workers Compensation Legislation Amendment Act 2012* (the 2012 amending Act) do not apply by the operation of Schedule 6, Part 19H, clause 25 of the *Workers Compensation Act 1987* (the 1987 Act).
8. The parties agree that the only issues in dispute are:
 - (a) the determination of the average weekly amount that Mr Snow is earning or is able to earn in suitable employment as defined by the former provisions of section 43A(1) of the 1987 Act as preserved by the transitional provisions, and
 - (b) whether the determination of weekly payments calculated by deducting Mr Snow's capacity to earn in suitable employment from the agreed amount of his probable earnings but from injury should be reduced because of factors appropriate to be considered pursuant to section 40(1) of the 1987 Act as preserved.

Matters previously notified as disputed

9. The claim asserted in the Application is dated from 30 June 2018 and the amount in dispute as \$377. At hearing leave was granted to amend the claim for weekly payments to commence on 13 May 2018. The amount in dispute was identified as the difference between the amount contended for by the respondent, \$199.79 per week, and the maximum statutory rate available pursuant to section 37 of the 1987 Act as preserved.

10. For the sake of clarity, the claim for weekly payments was accordingly amended to claim weekly payments at the maximum statutory rate for a single worker aged over 21 with no dependents from 13 May 2019 pursuant to section 37 of the 1987 Act as preserved, with credit to be given for payments made.

PROCEDURE BEFORE THE COMMISSION

11. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary evidence

12. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) The Application and attached documents, and
 - (b) Reply and attached documents.

Oral evidence

13. No application was made to adduce oral evidence or to cross examine any witness.

FINDINGS AND REASONS

14. The parties' submissions addressed the steps identified by the Court of Appeal in *Mitchell v Central West Health Service*¹ when determining an award for weekly compensation pursuant to section 40 as preserved. The first step is the determination of the amount that Mr Snow would probably have been earning if uninjured (section 40(2)(a) of the 1987 Act as preserved). The parties agree that Mr Snow's probable earnings but for injury are \$1,690.17.
15. The second step was the subject of contention between the parties. The solicitor for the applicant submitted that Mr Snow's capacity to earn should be assessed by reference to his actual earnings in his occupation as a real estate agent in accordance with *Aitkin v Goodyear Tyre & Rubber Co (Aust) Ltd*² (*Aitkin*). Alternatively, it was submitted that regard should be had to Mr Snow's earnings in the period when he was employed rather than the earnings since he took control of the business. Those earnings were less than the award wage. Even if the top of the scale under the award was adopted Mr Snow would be entitled to an award at the maximum statutory rate.
16. The respondent submitted that Mr Snow's actual earnings did not constitute an appropriate basis for assessment of capacity to earn. Mr Snow, it was submitted, had voluntarily taken over the running of the business which Mr Snow acknowledged was struggling.
17. The evidence relating to the conduct of the business was scant. The Business Activity Statements provided by the applicant identified a corporation, Costa Sur Pty Ltd, as conducting the business. There was no evidence as to Mr Snow's role in the business, his method of remuneration, the company's profit and loss or the state of the relevant real estate market.

¹ (1997) 14 NSWCCR 526 at 529 – 530.

² (1945)62 WN (NSW) 233

18. The respondent noted the only tax returns in evidence predated Mr Snow's assumption of control of the business and do not provide a reliable guide to earnings in the current financial year. In the absence of reliable evidence as to income and expenditure in the business, the Commission is entitled to rely on the labour market report which established the average earnings relied on by the respondent of \$1,490.38 per week.
19. In reply, the applicant pointed to the uncertainties noted in the labour market report, submitting that it was not a reliable guide to capacity to earn.
20. The evidence regarding the earnings from Mr Snow's real estate business is indeed scant. Mr Snow's statement contains no particulars as to his personal exertion, the corporate structure, the terms of his employment and details of the property stock, rent roll or turnover.
21. Mr Snow stated: "Since April 2018 [I] have been self-employed as the owner and principal real estate agent at Coast Real Estate. In the first quarter of 2019 we suffered a loss and I have not been a position to draw any income or wage from the business."
22. Mr Snow produced statutory declarations that he had supplied to the insurer over the period since May 2016. The declarations show weekly income to the date of the declaration from employment as follows:

to 3 May 2015 - \$685.70 per week
to 3 November 2017 – \$608 per week (net)
to 26 July 2018 - nil;
to 4 January 2019 – nil

23. Tax returns in respect of Mr Snow's income for the financial years ended 30 June 2016, 30 June 2017 and 30 June 2018 were in evidence. Income derived from employment in the real estate industry is shown as follows:

Year ended 30 June 2016 - \$26,056;
Year ended 30 June 2017 - \$23,999;
Year ended 30 June 2018 - \$16,897.

The tax returns also show income in those years from a source identified as "NSW Self Insurance Corporation".

24. Business Activity Statements were in evidence showing activity respect of a corporation Costa Sur Pty Ltd which is understood to be the corporate entity through which Mr Snow conducted the real estate business after he took over at the start of 2018. The activity statements disclose the following:

quarter ended 30 September 2018 – total sales \$10,480
quarter ended 31 December 2018 – total sales \$45,262
quarter ended 31 March 2019 – total sales \$335

25. An extract from the Real Estate Industry Award 2010 was in evidence. Clause 14.1 of the award provides rates of pay ranging from Real Estate Employee Level 1 (Associate Level) – first 12 months of employment at this level - \$753.70 per week to Real Estate Employee Level 4 (In-Charge Level) – \$963.10 per week.
26. Clause 14.3 of the award provides; "The minimum weekly wage in clause 14.1 is not payable to an employee engaged on a commission only basis pursuant to clause 16 – Commission only employment."

27. A Labour Market Report – “Assessment of Injured Worker’s Ability to Earn” dated 24 February 2019 was in evidence. The report provides information with respect to the real estate industry. The report notes national availability of employment and a total of 97 estimated positions in the “Illawarra, Rest of, Wollongong Region.” The report suggests employment options in the occupational category “Real Estate Agent Licensee”.
28. The report states that Internet search disclosed two vacancies in the real estate industry in the Ulladulla/Milton region of New South Wales. There is no indication whether those jobs are at the licensee level.
29. The report states that three real estate firms in Ulladulla were contacted to obtain information as to earnings as a “real estate agent/principal of minimum three years’ experience”. The representative from First National Real Estate, Ray White and L J Hooker all at Ulladulla reportedly “indicated that they were unable to provide full earnings as these would differ on the seasons and are usually based on the commission for each season.”
30. The representatives at First National and L J Hooker indicated that the “base wage can range anywhere between \$75,000 to \$90,000 base per annum”.
31. The representative from Ray White Ulladulla indicated that the “base wage can range anywhere between \$65,000-\$80,000 base per annum.”
32. The report states:

“Job opportunities for this occupation tend to be sound. Job opportunities for this occupation are unstable. They are tied to the upturns and downturns of the real estate industry, and also to branch arrangements in the big agency networks. Employment growth between 2011 and 2016 was 44% which was well above the workforce average of 6%. The property market is falling, and the mid-term prospects for new jobs look to be average, while turnover in existing positions leads to regular vacancies.”
33. Section 40(2)(b) of the 1987 Act as preserved requires the determination of the “average weekly amount that the worker is earning or would be able to earn in some suitable employment from time to time after the injury”. Section 40(3) provides that determination is subject to the following:
 - a) the determination is to be based on the worker’s ability to earn in the general labour market reasonably accessible to the worker;
 - b) the determination is to be made having regard to suitable employment for the worker within the meaning of section 43A.”
34. Having regard to Mr Snow’s place of residence and the distance south of the Illawarra region, I am satisfied that the general labour market reasonably accessible to Mr Snow would be limited to the Milton/Ulladulla and adjacent towns being more than 100 kilometres south of the Illawarra and more than 50 km south of Nowra. That is the region specifically addressed by the respondent’s labour market report.
35. The applicant submitted that his capacity to earn should be assessed by reference to his current earnings in accordance with *Aitkin*. I do not accept that submission as the evidence of Mr Snow is that, in the relevant period of the claim, he has no income from work. As noted above Mr Snow acknowledged that the business has operated at a loss in the first quarter of 2019. Mr Snow explained that “I remain optimistic regarding the long-term prospects of the business despite the current difficult sales market.”

36. It is understandable that Mr Snow would wish to persist in an attempt to build a viable business, but the business activity statements relating to the corporate entity that conducts the business confirmed it is likely that Mr Snow is deriving no personal income from that source. The extremely modest earnings of the company do not provide a satisfactory basis for assessment of the earning capacity of the applicant.
37. In *Akora Holdings Pty Ltd v Ljubicic*³ the Court of Appeal stated that there is no set approach to isolate what a worker is earning or able to earn by his or her own endeavours where those earnings are derived through a business wholly or partly owned by the worker. Deputy President Roche referred to that and other authorities in *Office of the Director of Public Prosecutions v Olsen*⁴. The Deputy President suggested a number of possible approaches to ascertaining the value of a worker's services actually provided to a business which the worker is engaged in running either wholly or partly:
- “[31] The first method requires a determination of the net remuneration being received by the worker for his or her labour. This is done by examining the business accounts and making all proper allowances for overhead expenses, costs of materials and other labour, maintenance and depreciation of plant, return on capital invested and the like (Glass JA (Reynolds JA agreeing) at 230G in *Schubert*⁵ in the Court of Appeal, citing Gibbs J at 652 and Windeyer J at 643 in *Nelson*⁶).”
38. That approach is not appropriate in the present case where the accounts of the business are not in evidence and Mr Snow is not in receipt of income from the business.
39. The Deputy President then stated:
- “[32] The second method requires a calculation of the worth of the worker's labour to the business, but without reference to the business accounts. This second method has three possible approaches. First, a determination may be made of the cost to the business of employing someone to do the reduced work the worker is performing (Glass JA (Reynolds JA agreeing) in *Schubert* at 231A). In the alternative, it may be determined by reducing from the cost of employing someone whose work capacity is unimpaired the cost of supplementing the reduced efforts of the applicant so as to produce for the business the services of one fully capable worker (Glass JA in *Schubert* at 231, citing Barwick CJ in *Nelson* at 631-632). The third method is to ‘determine what his work would have been worth in wages if he had been employed by another to do the work’ (per Barwick CJ in *Nelson* at 631).”
40. The first and second alternatives are not appropriate in the present situation where the business is being conducted purely in the hope of building goodwill with a view to future profits in a field far removed from the pre-injury employment of Mr Snow. The preferable approach is to assess the value of Mr Snow's labour as if he had been employed by a separate employer to work as a real estate salesman.

³ [2008] NSWCA 339

⁴ [2009] NSWCCPD 26

⁵ *Cage Developments Pty Ltd v Schubert* [1983] HCA 37; (1983) 151 CLR 584

⁶ *J & H Timbers v Nelson* [1972] HCA 12; (1972) 126 CLR 625 at 633

41. It is clear that the earnings of Mr Snow prior to his taking control of the business and the downturn in the real estate market were based not on the award rate but wholly on commission. I draw that inference, given that Mr Snow is a former senior union official, he is, in my view, unlikely to accept a below award payment. The inference is that these earlier payments were made pursuant to an alternative arrangement available to the parties by way of commission only.
42. The parties' submissions are directed to employment in the real estate field. Consideration needs to be given to the definition of "suitable employment" in section 43A. I accept that Mr Snow is not able to engage in active manual work due to injury to his shoulder. His pre-injury employment was as a firefighter. That occupation is barred to him because of the physical demands of that job. His alternative role in that employment as a union official would be unlikely to be available in the Milton Ulladulla area.
43. Mr Snow is currently aged 59. I accept that he has the educational skills to obtain a real estate agent's licence and he has no relevant experience outside his previous employment as a firefighter and union official.
44. Mr Snow resides at Dolphin Point to the south of the Milton Ulladulla area. There is no issue that he is fit for employment as a real estate salesman or manager thanks to his efforts in retraining in that field.
45. I conclude that Mr Snow is in suitable employment but is not being remunerated in accordance with his potential capacity for work owing to his desire to build up his own business.
46. The evidence provided by the Labour Market Report is that, at the time of the report there were two vacancies in the Milton/Ulladulla region for real estate work. The nature and duties of the particular positions is not specified and no details are available as to whether the positions involve residential, commercial or industrial real estate, property or strata management.
47. Mr Snow in his statement says that "there were no advertised positions in the Ulladulla region for a real estate agent in the February 2019 period that the report was commissioned."
48. The Labour Market Report notes that "job opportunities for this occupation are unstable" and that "turnover in existing positions leads to regular vacancies". The report stresses the seasonal nature of the occupation and the variation in earnings. No details are given of the likely earnings in respect of the positions which the report asserts were available at the time in the region.
49. The range suggested by the report is from \$65,000 per annum (\$1,250 per week) to \$90,000 (\$1,730.77 per week). None of the three agencies have provided information referring to award wages and it is probable that the earnings are dependent on commission.
50. The evidence establishes that up to the financial year ended 30 June 2018 Mr Snow earned a modest amount from his work as a real estate agent but that these earnings are no longer available to him within the framework of his own business and the current real estate market.
51. I am satisfied, given the downturn in the real estate market acknowledged in the Labour Market Report that, while these earnings may have been achievable in the past, they are uncertain in respect of the period claimed and the future.
52. The material provided by the labour market report when weighed against Mr Snow's experience in his own business suggests that any employment he was able to find with another firm would be at the bottom of the suggested range, that is, it is more likely to be no more than \$1,250 per week (\$65,000 per annum).

53. It was submitted on behalf of the applicant that this sum was significantly more than double Mr Snow's earnings prior to his taking over the business. However, no evidence is available as to what hours Mr Snow worked, what his particular specialty, if any, may have been and what hours were necessary for him to devote to learning to obtain his license by April 2018. The reason that he accepted earnings so far below the award rate are not the subject of evidence and suggest that Mr Snow was not exercising his full potential.
54. The evidence is not in a satisfactory state but it seems to me probable that, if Mr Snow were to obtain employment with a rival real estate firm, his experience and particularly his skills in dealing with people that propelled him to the position of President of the Fire Brigade Employees Union, would enable him to sell his labour for at least the sum of \$1,250 per week.
55. The third step identified by the Court of Appeal requires deduction of the sum determined as Mr Snow's capacity to earn in suitable employment from his probable earnings but for injury. Probable earnings having been agreed at \$1,690.17 the deficit is \$440.17.
56. The fourth step requires that I consider whether there are discretionary matters requiring that figure to be reduced. The figure determined as the capacity to earn in suitable employment takes into account that Mr Snow's current lack of earnings is attributable to his wish to build up his own business and, for that reason, he has not sought alternative employment. To the extent that he has not sought remunerative employment voluntarily, that has been taken into account in assessing the second step. There is no other basis suggested as founding a deduction and I am satisfied that the sum of \$440.17 per week is reasonable in the circumstances.
57. Accordingly, Mr Snow is entitled to an award of \$440.17 per week from 13 May 2019 to date and continuing with credit to be given for payments made in respect of that period.

