WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1132/19**
Applicant: **Jessica Kirkbride**
Respondent: **State of New South Wales (Ambulance Service)**
Date of Direction: **5 July 2019**
Citation: **[2019] NSWWCC 236**

The Commission determines:

Finding

1. The applicant's current weekly wage rate pursuant to s 42(1)(a) of the *Workers Compensation Act 1987* is $1,358.50.

Orders

2. The respondent pay the applicant weekly compensation pursuant to s 36 of the *Workers Compensation Act 1987* at $1,358.50 for the period from 6 January 2019 to 27 May 2019 with credit for previous weekly payments of compensation made during this period.

3. I decline to order that the respondent have credit for payments of maternity leave made for the period from 23 March 2019 to 27 May 2019.

4. Respondent pay the applicant's costs as agreed or assessed. I certify the matter as complex within the meaning of Schedule 6 of the Workers Compensation Regulations 2016 and order an uplift of 25% applicable to the parties.

JOHN HARRIS
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF JOHN HARRIS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Ms Kirkbride (the applicant) is employed by the State of New South Wales as a paramedic (the respondent). It is accepted that the applicant sustained a lumbar spine injury in the course of her employment with the respondent on 6 January 2019.

2. This is a claim for weekly compensation pursuant to s 36 of the *Workers Compensation Act 1987* (the 1987 Act). It is agreed that the applicant is an exempt worker within the meaning of Sch 6, Pt 19H, cl 25 of the 1987 Act. Accordingly, references in this decision to the 1987 Act are to those provisions as they existed prior to the amendments made by the *Workers Compensation Legislation Amendment Act 2012* (2012 Amendment Act).

3. The applicant was paid weekly compensation at the rate of $1,046.08 based on total incapacity from 6 January 2019 to 27 May 2019. It is alleged that this is an underpayment of her correct entitlement to weekly compensation.

4. The applicant was otherwise paid maternity leave from the date of birth of her child on 23 March 2019. The respondent is claiming that it should receive credit for maternity payments or that these be considered in any award for weekly compensation for the period from 23 March 2019 until 27 May 2019.

ORDERS MADE AT AND SUBSEQUENT TO THE HEARING

5. The matter was listed for an arbitration hearing on 30 May 2019 when Mr Callaway of counsel appeared for the applicant and Mr Beran of counsel appeared for the respondent. I then made the following orders by consent (Consent Orders):[1]

    1. It is agreed that the applicant is an exempt worker within the meaning of Sch 6, Pt 19H, cl 25 of the Workers Compensation Act, 1987 (1987 Act).

    2. I admit into evidence, without objection, the following documents:

        (a) Application to resolve a Dispute and attachments;

        (b) Reply and attachments;

        (c) Late Application filed by the Applicant dated 8 May 2019.

    3. The applicant is to file and serve, by close of business 3 June 2019, the relevant pay slip(s) preceding the date of injury.

    4. I grant leave to the Respondent, without objection, to raise the issue of re-creditation in respect of maternity leave payments made by it for the period from 23 March 2019 to 27 May 2019.

    5. It is agreed that:

        (a) the applicant is totally incapacitated by reason of the injury for the period from 6 January 2019 to 27 May 2019 and is entitled to an award pursuant to the former s 36 of the 1987 Act for this period;

[1] Orders issued on xxx

(b) the applicant was paid compensation on the basis of total incapacity, for the period from 6 January 2019 to 22 March 2019, and paid compensation on the basis of partial incapacity at $10 per week, for the period from 23 March 2019 to 27 May 2019;

(c) the applicant was also paid maternity leave payments by the employer for the period from 23 March 2019 to date.

6. The following issues remain in dispute:

(a) The relevant rate for weekly compensation pursuant to s 36 of the 1987 Act (calculated in accordance with s 42) for the period from 6 January 2019 to 27 May 2019; and

(b) Whether the respondent is entitled to credit for maternity leave payments made for the period from 23 March 2019 to 27 May 2019 on weekly compensation owing for that period.

7. The respondent is to file and serve, by close of business 7 June 2019, written submissions limited to 3 pages (single spacing, size 11 font). The relevant award can be attached to these submissions.

8. The applicant is to file and serve, by close of business 14 June 2019, written submissions limited to 3 pages (single spacing, size 11 font). The relevant award can be attached to these submissions.

9. By consent, the Respondent is to pay the Applicant weekly compensation pursuant to the former s 40 of the 1987 Act at $20 per week from 28 May 2019 to date and continuing, with credit for the payments made of $10 per week.

6. The parties' filed and served written submissions. The submissions attached pay slips. An extract from an award was also forwarded.

7. The award appears to be an extract from the Operational Ambulance Officers (State) Award (the award) although the exact title is unclear from the document tendered. No submissions were directed to the relevance of the award.

8. On 28 June 2019, the Commission emailed the parties in the following terms:

> "Subject to written opposition, the Arbitrator indicates that he will admit the pay slips enclosed with the respective written submissions and the award sent following the submissions, into evidence.
>
> It is assumed that the extract from the award is the ambulance award applicable to the applicant.
>
> Any submissions opposing the admission or contesting that the award does not apply to the applicant, must be filed and served by close of business, 2 July 2019."

9. In response to this email the respondent advised "on the same assumption [it] has no objection."

10. The applicant did not reply to the email.

ISSUE 1 – CALCULATION OF CURRENT WEEKLY WAGE RATE

Respondent's written submissions

11. The respondent accepted that the applicant's entitlement to weekly compensation for the first 26 weeks is to be determined pursuant to s 36 of the 1987 Act. It submitted that it was uncontroversial when calculating the rate, reference is made to the former s 42 of the 1987 Act.[2]

12. The respondent referred to s 42(1)(a) of the 1987 Act in respect of the calculation of the current weekly wage rate. It was submitted that the pay slip for the period ending 4 January 2019 discloses an award or 'weekly base rate' of $1,046.07 per week and this "appropriately represents the award under which the Applicant was remunerated immediately prior to the accepted injury."[3]

Applicant's written submissions

13. The applicant accepted that she is entitled to compensation "in accordance with her current weekly wage rate within the meaning of s 42 and "the parties rely" on a single payslip covering the period from 22 December 2018 to 4 January 2018.[4]

14. The applicant submitted that the respondent's reliance on "the weekly base rate" is not relevant for the purposes of s 42 and referred to the payslip which disclosed a "Rate" of 34.8691 and "Units" of 77.920 over the previous fortnight. It was submitted that the "Rate" is the hourly rate and the "Units" were the number of hours.

15. It was submitted that for one week the hours were 38.96 and the entitlement was $1,358.51.

Reasons

16. The applicant must prove her case on the balance of probabilities.[5]

17. Section 36 of the 1987 Act provides that weekly compensation in respect of any period of total incapacity during the first 26 weeks shall be the amount of the worker's current weekly wage rate. The current weekly wage rate is, pursuant to s 36(2), determined in accordance with s 42.

18. The parties' submissions accepted that I would determine the applicant's current weekly wage rate in accordance with s 42(1)(a) of the 1987 Act and by reference to the payslip covering the period from 22 December 2018 to 4 January 2019. The submissions did not, and I do not discuss, the various correspondence relating to the applicant's contracted hours. Accordingly, I analyse the applicant's entitlements in accordance with the written submissions.

19. Given that common submission it is only necessary to analyse the payslip for the fortnight prior to injury.

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[2] Respondent's written submissions, paragraph 5
[3] Respondent's written submissions, paragraph 7
[4] Applicant's written submissions, paragraphs 3 and 4
[5] *Nguyen v Cosmopolitan Homes (NSW) Pty Ltd* [2008] NSWCA 246 per McDougall J at [44]- [55], McColl and Bell JJA (as their Honours then were) agreeing; *Chen v State of New South Wales (No 2)* [2016] NSWCA 292 per Leeming JA at [33]-[34]; McColl JA agreeing at [1].

20. Section 36(1) of the 1987 Act relevantly provides:

> "The weekly payment of compensation to an injured worker in respect of any period of total incapacity for work during the first 26 weeks of incapacity shall be the amount of the worker's current weekly wage rate."

21. Section 36(2) defines the current weekly wage rate as "determined from time to time in accordance with s 42".

22. Section 42(1)(a) of the 1987 Act provides:

> (1) Subject to this section, a reference in this Division to the current weekly wage rate of the worker, being a worker who is incapacitated for work and who, immediately before being incapacitated-
>
> (a) was remunerated under an award fixing or providing for the fixing of a rate for a weekly or longer period … is, at any time during the incapacity, a reference to the rate of remuneration under that award at that time for 1 week in respect of the work being performed by the worker immediately before being incapacitated."

23. Section 42(6) provides that amounts paid for shift work, overtime, penalty rates and special expenses are disregarded. Accordingly, I disregard "shift work, overtime, penalty rates and special expenses".

24. There are two payslips for the period from 22 December 2018 to 4 January 2019. The respondent relies on the words and figures:

Weekly Base Rate	$1046.07

25. The applicant relies on:

Normal Hours	34.86912	77.920	2717.02

26. It is clear from the payslips that the award rate is $34.8691 per hour. This is because the payslip shows a simple multiplication of the rate times the units to arrive at the amount on any particular row. It is also consistent with the respondent's submission that the "base rate" is $1046.07 because 30 hours x 34.8691 totals $1046.073.

27. I find that the award rate of pay before the application of any overtime or penalty rate is $34.8691 per hour.

28. In these circumstances, the only issue is the "rate of remuneration under that award at that time for 1 week in respect of the work being performed by the worker immediately" excluding the "shift work, overtime, penalty rates and special expenses".

29. The payslip represents a fortnight period. Whilst there is no direct evidence on the issue, it is reasonable to infer that I divide the fortnight by two to arrive at the relevant figure for the one week prior to injury.

30. The more detailed payslip shows that the applicant worked a total of 5.67 hours of overtime for which she was paid overtime rates of either time and a half (3.0 hours) or double time (2.67 hours). It is clear from the terms of the payslip that those hours are in addition to the 77.920 hours because the calculations show that these amounts have been added to arrive at quite a substantial period for the fortnight period. The applicant was also paid a "penalty" associated with some of the overtime limited to one hour.

31. The applicant has also been paid penalty rates at various rates between 10% and 75% for 52.25 hours and also worked on a public holiday. It is unclear from the payslip how the penalty rates were calculated although a portion relates to working on a Saturday or Sunday.

32. It is reasonable to infer that the penalty rates applied to the "normal hours" because the penalty rates are a fraction, less than one, and therefore must be an increase of previous payments. These penalty rates do not apply to the overtime worked because the payslip has other entries that specifically refer to "Overtime Penalty" where that has been paid.

33. The penalty rates could not be additional hours worked because the applicant would then be paid less for working an hour associated with a penalty, such as on a Sunday when the penalty rate was a factor of 0.75. Accordingly, the penalty rates must be an additional payment to the "Normal Hours".

34. In these circumstances, I infer from the more detailed payslip that the applicant:

    (a) Worked "Normal Hours" paid at the award rate;

    (b) Worked an additional 5.67 hours of overtime for which she was paid a penalty rate for one hour;

    (c) Was paid penalty rates for 52.25 hours which related to the "Normal Hours", and

    (d) Was paid an additional penalty rate for working on a Public Holiday.

35. I was not provided with the relevant parts of the award that showed why various penalty rates were paid. The payment of some penalties is self-evident from the payslip such as where it was paid for working on a Saturday or Sunday when the worker is paid an additional 50% or 75%.

36. I disregard the overtime and penalty rates. I conclude that in the fortnight prior to injury the applicant worked normal hours of 77.92 which is 38.96 hours per week. The overtime hours were in addition to those "normal hours". For these reasons I conclude, based on the precise terms of the payslip, that these hours are "the work being performed by the worker immediately before being incapacitated" within the meaning of s 42(1)(a).

37. The current weekly wage rate is therefore 38.96 hours x $34.8691 totalling $1,358.50.

38. For these Reasons, I accept the applicant's submission that the reference in the payslip to "weekly base rate" is not the correct calculation for the purposes of s 42(1)(a).

39. I note that the determination is greater than what was alleged by the applicant. However, the respondent was clearly on notice as to what was claimed from the submissions. Accordingly, I find that the current weekly wage rate at the time of injury was $1,358.50.

ISSUE 2 – PAYMENT OF MATERNITY LEAVE

Applicant's written submissions

40. The applicant submitted that leave brought about by pregnancy does not affect the applicant's entitlement to compensation during the period of incapacity, referring to *Miller v NSW Police Service (No 2)*.[6]

41. Section 36 is a statutory entitlement. The respondent has been "unable to point to anything in the [1987] Act in support of its submissions"[7]. Section 46 has no application and the statutory nature of the s 36 entitlement precludes any analogy being drawn.[8]

42. The applicant submitted that, "to the extent that it may be relevant":

> "[P]ayment of the statutory amount will not amount to double compensation as the worker's entitlement to maternity leave is limited and she will be no better off overall as she would undoubtedly have been entitled to the same maternity leave allowance concurrently with the nominal s 40 payment until the allowance was exhausted."[9]

Respondent's written submissions

43. The respondent noted that the parties agreed that the applicant was in receipt of maternity leave during the period from 23 March 2019 to 27 May 2019.[10] It accepted that ss 49 and 50 "do not expressly apply to provide adjustment of weekly payments where a worker is in receipt of actual earnings by the employer in respect of maternity leave."[11]

44. The respondent submitted that the applicant "was in receipt of actual earnings [that] would operate to place the applicant in a better financial position that she was prior to injury."[12] This offends "the fundamental principle of compensation to restore an injured worker to their pre-injury status."[13]

45. The respondent submitted that the payment of weekly compensation should be adjusted "similar to the mechanism prescribed in s 46 to allow for the applicant's actual earnings." The respondent was only required to "top up" the maternity leave to meet its liability under s 36 to pay the current weekly wage rate.[14]

46. The respondent submitted that, in the alternative, there should be an order that it be re-credited for payments of maternity leave made during the period.[15]

Reasons

47. It is agreed that the applicant received maternity leave payments for the period from 23 March 2019 to 27 May 2019 when she was totally incapacitated. It is unclear what maternity leave payments were made during this period.

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[6] (*Miller (No 2)*) [2007] NSWWCCPD 216 at [33]
[7] Applicant's written submissions, paragraph 14
[8] Applicant's written submissions, paragraph 15
[9] Applicant's written submissions, paragraph 16
[10] Respondent's written submissions, paragraph 8
[11] Respondent's written submissions, paragraph 9
[12] Respondent's written submissions, paragraph 10
[13] Respondent's written submissions, paragraph 11
[14] Respondent's written submissions, paragraph 12
[15] Respondent's written submissions, paragraph 13

48. The respondent accepted that ss 49 and 50 do not apply with respect to the payment of maternity leave.

49. Section 49 expressly provides that compensation is paid even though the worker has received an allowance or benefit for holidays or annual leave or long service leave under any Act or award.

50. Section 50(1) provides that compensation is payable even though the worker has received sick leave. Relevantly s 50(3) expressly provides that wages paid for sick leave may be "deemed to have been satisfied by that payment".

51. Section 46 does not otherwise assist the respondent. That provision relevantly provides that weekly payments are reduced "to prevent dual benefits of the same kind payable by the employer during and in respect of the incapacity for work."

52. The application of s 46 was discussed by Snell ADP (as he then was) in *Roads & Traffic Authority of NSW v Smith*.[16] The purported dual benefit in that case was the payment by the respondent of a settlement under a wrongful dismissal action. This payment was not held to be a dual benefit.

53. After referring to the High Court decision of *Steggles Pty Ltd v Vandenberg*,[17] Snell ADP stated:[18]

> "In section 46, as in the previous section 13, application of the section requires that the amount payable by the employer be related to the worker's incapacity. Indeed, the required connection between the payment and the incapacity is greater under section 46 than its forerunner. Section 13 required that the payment be 'during the period of his incapacity', whereas section 46 requires that it be 'during and in respect of the incapacity for work'. It is impossible to characterise the sum paid by the RTA, in settlement of the wrongful dismissal proceedings, in this way. The precise basis of the payment is unclear from the evidence. The RTA submits it represented a payment pursuant to section 89(5) of the Industrial Relations Act 1996. Assuming this to be so, having regard to the wording of section 89 of that Act, the payment could not possibly be regarded as one 'in respect of the incapacity for work'. Accordingly, the discretion pursuant to section 46 is not enlivened, and this ground of appeal cannot succeed."

54. The payment of a maternity leave benefit, by its nature, has no relationship or association with the receipt of weekly compensation payments due to incapacity for work. For that simple reason, I reject the respondent's submission that there should be an adjustment consistent with the application of s 46.

55. There is no statutory power to "re-credit" the respondent for payments of maternity leave. Section 46 does not apply. The statutory basis to re-credit provided by s 50 of the 1987 Act only provides for the re-creditation of sick leave. Absent an express statutory power, I cannot make an order that the respondent have credit for payments of maternity leave.

56. The respondent otherwise referred to the payment of "maternity leave" as "earnings". That description gave rise to the submission that the applicant was and is in receipt of earnings that should be considered during the period of total incapacity.

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[16] [2007] NSWCCPD 134 (*Smith*)
[17] [1987] HCA 35
[18] *Smith* at [64]

57. Maternity leave is an allowance or benefit provided by the award. The award forwarded with the submissions show that the maternity leave entitlement arises where the worker has established certain preconditions such as completion of forty weeks of continuous service. The benefit under the award is not a payment in exchange of actual labour and is not properly categorised as earnings.

58. In any event, the applicant has a statutory entitlement, pursuant to s 36 of the 1987 Act, to the receipt of weekly compensation during this period. There is no basis to conclude that the receipt of maternity leave is "earnings" during this period. The payment of the maternity award benefit is not payment for work and is paid by the respondent under specific circumstances as provided by the award.

59. I observe that this submission is otherwise inconsistent with the agreements set out in the Consent Orders that the applicant was totally incapacitated during the relevant period and that she was paid maternity leave for the period from 23 March 2019 to 27 May 2019. Whatever subtle distinction is suggested by the respondent's submission, I do not accept that the payment by it of maternity leave classifies as either actual earnings or a payment of its statutory obligation to pay weekly compensation.

60. I therefore do not accept the respondent's submission that the payment of maternity leave can satisfy its statutory obligation to pay workers compensation entitlements.

61. The respondent otherwise submitted that the receipt of maternity leave and weekly compensation "offends the fundamental principle of compensation to restore an injured worker to their pre-injury status."

62. A worker's entitlement to compensation arises from the provisions of the 1987 Act. The only statutory remedy sought by the applicant is her entitlement to weekly compensation pursuant to s 36 of the 1987 Act. Seen in that context, there is no basis to suggest that the order made by the Commission offends, if the principle exists, the "fundamental principle" of restoring a worker to their pre-injury status.

63. Secondly, as discussed earlier, there is no statutory provision under the 1987 Act to order a re-creditation to the respondent of maternity leave benefits paid under the Award. The statutory powers of the Commission arise under the 1987 Act and the *Workplace Injury Management & Workers Compensation Act 1998*. If there has been any suggestion of unjust enrichment or receipt of an entitlement not otherwise owing, then that remedy arises in another jurisdiction. There is no statutory power in the Commission to order other than what the applicant is entitled to receive pursuant to the provisions of the 1987 Act.

64. This conclusion is consistent with the observations of Roche DP in *Miller (No 2),* referred to by the applicant in her submissions. The Deputy President stated:

> "31 More importantly, an employer's liability does not cease because of supervening incapacity as a result of external non-work related events (see *McCann v Scottish Co-op Laundry Association Ltd* [1936] 1 All ER 475; *Salisbury v Australian Iron & Steel Ltd* [1943] WCR 97 and *Doudie v Kinneil, Cannell & Coking Coal Co Ltd* [1947] AC 377). The position is well summarised in the text *Workers Compensation (New South Wales)*, 1979, second edition, by C P Mills at 244:
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> > 'The question in every such case is whether, had there been no supervening non-employment event, the worker would, at the date in question be incapacitated by the effects of the employment injury operating as a sole or contributing cause of the incapacity.'

32. The issue was also considered in *Australia Wire Industries v Nicholson* (1985) 1 NSWCCR 50 at 55 where McHugh JA stated of the *Workers Compensation Act* 1926 ('the 1926 Act'):

> 'The right to compensation for incapacity is given by section 9 [see sections 9, 33 and 36 of the 1987 Act] and not by section 11. Retirement or intention to retire are not relevant to section 9, which is only concerned with total or partial incapacity for work resulting from injury, nor are they relevant to the first two steps in section 11(1).'

33. The right to compensation under the 1987 Act still arises under section 9, but Division 2 of that Act governs the quantification of weekly compensation. Section 33 of the 1987 Act provides that if total or partial incapacity for work results from an injury, compensation payable shall include weekly compensation. Compensation for total incapacity is determined by the application of sections 34 to 37 inclusive of the 1987 Act. As with section 9 of the 1926 Act, retirement or other supervening events are not relevant to determining entitlement to compensation for total incapacity. They are, however, most relevant to the exercise of the discretion under section 40 (section 11(1) of the 1926 Act), as is well illustrated in *Hirst* and other authorities such as *Wrigley Co Pty Ltd v Holland* [2002] NSWCA 109; (2002) 23 NSWCCR 463 ('*Wrigley*')."

65. Finally, I observe, without any submission from the parties, that the relevant provision of the award admitted into evidence on the interaction between the maternity leave and receipt of workers compensation is unclear.[19] Consistent with what is discussed above in *Miller No 2*, the Commission exercises its statutory power under the 1987 Act in awarding weekly compensation. The question of whether the receipt of compensation otherwise disentitles a worker from any benefit under an award such as maternity leave, is outside any power exercisable by the Commission.

66. For these Reasons, I do not accept that the receipt of maternity leave is a payment made by the respondent for earnings in the period. I decline to order that there be a re-creditation of the maternity leave as I have no power to make that order.

FINDINGS and ORDERS

67. The applicant suggested a costs uplift "towards the higher end of the scale." I accept that the legal issues raised in the written submissions justify that the matter be certified as complex.

68. The findings and orders are set out in the Certificate of Determination.

[19] Clause 32A (i)