

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 1320/20
Applicant: Alan Tout
Respondent: State of New South Wales
(Mid North Coast Local Health District)
Date of Determination: 20 July 2020
Citation: [2020] NSWCC 248

The Commission determines:

1. The applicant's pre-injury average weekly earnings are \$2,460.50.
2. The respondent is to pay the applicant weekly payments pursuant to s 37 of the *Workers Compensation Act 1987* as follows:
 - (a) \$1,968.40 per week for the period from 26 February 2019 to 31 March 2019;
 - (b) \$1,989.07 per week for the period from 1 April 2019 to 30 September 2019;
 - (c) \$2,001.21 per week for the period from 1 October 2019 to 31 March 2020, and
 - (d) \$2,022.01 per week for the period from 1 April 2020 to date and continuing.

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

Brett Batchelor
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 BRETT BATCHELOR, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. This matter was the subject of conciliation/arbitration on 1 June 2020 as a result of which a Certificate of Determination – Consent Orders was issued on that day pursuant to which the matter was remitted to the Registrar for referral to an Approved Medical Specialist for assessment of whole person impairment as a result of primary psychological injury deemed to have been suffered by the Alan Tout (the applicant) on 14 November 2018. The applicant's employer, the State of New South Wales (Mid North Coast Local Health District) (the respondent), was also ordered to pay the applicant's costs and expenses pursuant to s 60 of the *Workers Compensation Act 1987* (the 1987 Act).
2. The parties did not resolve the applicant's claim for weekly benefits at the conciliation/arbitration and the following directions were made in the Certificate of Determination – Consent Orders dated 1 June 2020:
 - “4. The applicant is to lodge and serve by 15 June 2020 written submissions in respect of the quantification of his claim for weekly benefits compensation from 26 February 2019.
 5. The respondent is to lodge and serve by 22 June 2020 written submissions in response.
 6. Subject to order [7] hereunder, at the conclusion of the time allowed for submissions the dispute will be determined 'on the papers.'
 7. If the parties do not resolve the dispute in respect of weekly benefits compensation by 22 June 2020 **and** if the Arbitrator determines that the matter cannot be determined 'on the papers', a request will be made to the Registrar to relist the proceedings for a second telephone conference."
3. The applicant lodged written submissions dated 15 June 2020 with the Commission on that day (the applicant's submissions). The second numbered paragraph of the applicant's submissions is as follows:
 - “2. Furthermore, an email was sent to the Respondent's solicitors and Arbitrator Batchelor on 1 June 2020 which provided further details of the Applicant's claim for weekly benefits and medical expenses. In relation to the claim for weekly benefits compensation, the email stated:

Mr Tout last worked on 14 November 2018. The insurer calculated his PIAWE as \$2,406.50. Mr Tout is happy with this amount.

The statutory weekly payment maximum as at 14 November 2018 was \$2,145.30.

95% of \$2,406.50 is \$2,337.48. This is more than the statutory maximum. So, for the first 13 weeks Mr Tout was paid the statutory maximum. The payment list shows that the insurer, more or less, paid him this amount for the first 13 weeks.

80% of \$2,460.50 is \$1,968.40. This is obviously less than the statutory maximum. The insurer paid Mr Tout this amount from until 25 February 2019 when it ceased payments.

So the dispute starts on 26 February 2019.

You will see in the ARD that I have indexed the PIAWE on 1 April 2019 and 1 October 2019. The new PIAWE as of 1 April 2020 is \$2,527.52, 80% of which is \$2,022.01. Therefore:

1. 26 February 2019 until 31 March 2019 = \$9,842.00 (\$1,968.40 x 5 weeks)
2. 1 April 2019 until 30 September 2019 = \$51,715.82 (\$1,989.07 x 26 weeks)
3. 1 October 2019 until 31 March 2020 = \$52,031.46 (\$2,001.21 x 26 weeks)
4. 1 April 2020 until 1 June 2020 = \$18,198.09 (\$2,022.01 x 9 weeks)"

4. The final submission of the applicant was that he should have the opportunity to lodge and serve submissions in response to the respondent's submissions before the matter was determined on the papers.
5. The respondent, at its request, was granted a short extension of time within which to lodge and serve its written submissions. These undated submissions (the respondent's submissions) were lodged with the Commission on 26 June 2020.
6. The first page of the respondent's submissions is as follows:

"The Respondent's submissions on quantum of weekly compensation

State of NSW (Mid North Coast Local Health District) ats Alan Tout

1320/20

Date

	No of weeks	Rate claimed (per week)	Sum claimed
Weeks 14-130 (Section 37 of the 1987 Act)			
26 February 2019 to 31 March 2019	5	\$1,968.48	\$9,842.40
1 April 2019 to 30 September 2019	26	\$1,968.48	\$51,180.48
1 October 2019 to date and ongoing*	38	\$1,968.48	\$74,802.24
TOTAL			\$135,825.12

* Calculated to 24 June 2020

The Respondent's calculations:

Date of injury:	14 November 2018
Average hours:	38
Weekly base:	\$1,940.15
Average penalties:	\$520.45
PIAWE:	\$2,460.60
80% x \$2,460.60	\$1,968.48

We **enclose** a document from the Respondent in which the above figures were calculated."

7. On 30 June 2020, the Commission issued the following Directions and Notations to the parties:

“Directions

1. The applicant is to lodge and serve by 7 July 2020 submissions in response to the respondent’s submissions, undated, but received by the Commission on 26 June 2020.
2. The respondent is to lodge and serve by 14 July 2020 any further submissions on which it wishes to rely.

Notations

- A. Reference is made to the applicant’s submissions dated 15 June 2020 and the respondent’s submissions referred to at [1] above.
- B. In [2] of the applicant’s submissions which includes part of an email dated 1 June 2020, there appears to be a typographical error in the first and third of the quoted paragraphs. The figure of \$2,406.50 in each of those paragraphs should be **\$2,460.50**.
- C. Eighty per cent of that figure is \$1,968.40.
- D. Notwithstanding that error, the applicant’s calculations set out in the sixth paragraph of the quoted email appear to be correct when, in accordance with s 82A of the *Workers Compensation Act 1987*, indexation of 80% of the pre-injury average weekly earnings (PIAWE) figure, \$1,968.40, is taken into account.
- E. The respondent’s submissions set out the calculation of PIAWE of \$2,460.60 and 80% thereof, \$1,968.48. The submissions then set out the total of \$135,825.12 to which it submits that the applicant is entitled, calculated to 24 June 2020, at \$1,968.48 per week.
- F. Based on the calculations referred to in [D] above the applicant’s claimed entitlement to 1 June 2020 is \$131,787.37. When this is brought forward a further 3.3 weeks to 24 June 2020 to coincide with the respondent’s calculations to that date, a further \$6,672.63 is added, to bring the total to \$138,460.00.
- G. The parties are asked to address these Notations in further submissions

Brett Batchelor
Arbitrator”

8. On 6 July 2020, the applicant lodged with the Commission further written submissions of that date (the applicant’s further submissions) which are set out in full as follows:

- “1. The applicant agrees with Notation B in the Workers’ Compensation Commission Notations of 30 June 2020. That is, the amount in the applicant’s submissions dated 15 June 2020 (referencing the email of 1 June 2020) should be \$2,460.50 (not \$2,406.50).
2. The only difference between the applicant’s and respondent’s calculation of weekly benefits is that the respondent has not indexed the pre-injury average weekly earnings figure as required by section 82A of the *Workers Compensation Act 1987*.

3. As such, the applicant submits that the correct calculation of weekly benefits as at 24 June 2020 is as set out in Notation F in the Workers' Compensation Commission Notations of 30 June 2020."

9. No further submissions have been received from the respondent.

ISSUES FOR DETERMINATION

10. The parties agree that the only issue remaining in dispute is the correct quantification of weekly benefits to which the applicant is entitled from 26 February 2019 to date and continuing

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. The parties were informed of my intention to determine the dispute without holding a further conciliation conference or arbitration hearing.

EVIDENCE

Documentary evidence

12. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute and attached documents;
 - (b) Reply and attached documents (lodged with a Form 2C – Application to Admit Late Documents dated 31 March 2020);
 - (c) Amended Reply (Form 2A – Reply to Application to Resolve a Dispute, undated) and attached documents;
 - (d) the applicant's submissions;
 - (e) the respondent's submissions, and
 - (f) the applicant's further submissions.

FINDINGS AND REASONS

13. Having regard to the contents of the applicant's submissions and the respondent's submissions set out in [3] and [6] above, it is clear that apart from a ten cent discrepancy, there is no issue between the applicant and respondent as to the applicant's pre-injury average weekly earnings. This translates to an eight cent discrepancy in 80% in the respective figures.
14. Section 82A of the 1987 Act provides for indexation of the amount of a weekly payment to a worker in accordance with the consumer price index (All Groups Index) for Sydney issued by the Australian Statistician (**CPI**). The applicant applied this indexation in his calculation of his entitlement to weekly benefits from 26 February 2019 as set out in the email dated 1 June 2020 set out in [3] above. The respondent did not apply the **CPI** indexation required by s 82A of the 1987 Act to its calculations. This failure to apply indexation is referred to in Notation [D] issued to the parties on 30 June 2020, referred to in [7], above and adopted by the applicant in his further submissions dated 6 July 2020, set out at [8] above.

15. The applicant's calculation of his entitlement to weekly benefits from 26 February 2019 is correct.
16. The applicant is accordingly to an award in his favour pursuant to s 37 of the 1987 Act as follows:
 - (a) \$1,968.40 per week for the period from 26 February 2019 to 31 March 2019;
 - (b) \$1,989.07 per week for the period from 1 April 2019 to 30 September 2019;
 - (c) \$2,001.21 per week for the period from 1 October 2019 to 31 March 2020, and
 - (d) \$2,022.01 per week for the period from 1 April 2020 to date and continuing.

SUMMARY

17. The applicant's PIAWE are \$2,460.50.
18. The respondent is to pay the applicant weekly benefits from 26 February 2019 to date and continuing as set out in [16] above.