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RECOMMENDATION FOLLOWING AN APPLICATION FOR REVIEW OF THE INSURER'S WORK CAPACITY DECISION PURSUANT TO SECTION 44BB(1)(c) OF THE *WORKERS COMPENSATION ACT* 1987.

SUMMARY:

a. **The work capacity decision and the consequent internal review decision are both set aside.**

b. **The insurer is to make a new work capacity decision in accordance with the legislation which includes the salary sacrificed superannuation contributions of the applicant as part of his base rate of pay.**

Introduction and background

1. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 07 July 2016. Specifically, the Insurer informed the applicant that his PIAWE had been calculated to be $1,669.08. This determination constitutes a "work capacity decision" in accordance with section 43(1)(d).

2. The applicant requested an internal review on 29 November 2016 (i.e. considerably more than 30 days after being advised of the original decision) and on 29 December 2016 the internal reviewer came to the conclusion that the original decision-maker had made an error and changed the PIAWE amount to the lesser figure of $1,400.00. The difference between the two figures was said to be occasioned by the treatment of "reportable" employer superannuation contributions.

3. The applicant sought merit review by the Authority. The application was received by the Authority on the same date that the internal review was issued, namely 29 December 2016. The Authority issued findings and recommendations on 7 February 2017. The only finding made was this:

> 2. The amount of [the applicant's] pre-injury average weekly earnings (PIAWE) is $1,400.00.

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4. The Authority made no consequent recommendation.
5. An application was subsequently made to this Office for procedural review, received on 27 February 2016. I am satisfied that the application has been made within time and in the proper form.

Submissions by the applicant

6. Section 44BB(1)(c) of the *Workers Compensation Act* 1987 (1987 Act) states that this review is *"only of the insurer's procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer."*

7. The applicant made the following submission:

    - Exclusion of my salary sacrifice which have formed part of my wages, ongoing without change since 1994, and they have been excluded from my PIAWE calculations. Employer has paid SGC and my sacrifice separately since 1994 and are noted explicitly on super statements … as separate transactions and a complete deposit of "employer contributions."

Submissions by the Insurer

8. The Insurer made no submissions in reply.

Decision

9. The original decision had added superannuation payments of $10,800 to the annual salary of $75,992 to come to a combined total of $86,792 which, when divided by 52, left a weekly figure of $1,669.08. The immediate problem is that $10,800 exceeds the Superannuation Guarantee Contribution (SGC) rate of 9.5% by more than $3,500 ($75,992 x 0.095 = $7,219.24). This would be explicable by the applicant's assertion that since 1994 he has salary sacrificed a significant part of his weekly income to superannuation. Such additional amounts cannot be disregarded when calculating PIAWE,

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since they are amounts immediately payable to the worker, but for his direction to the employer otherwise. They are not the same as payments mandated by the SGC which are exempt from PIAWE calculation by virtue of section 44E(2).

10. Section 44E(2) is in the following terms:

> *(2) A reference to ordinary earnings does not include a reference to any* ***employer*** *superannuation contribution.*

11. Of course a salary sacrificed contribution is made at the election of the **employee**, not the employer. This distinction appears to have eluded the Insurer and the merit reviewer.

12. While the failure to distinguish between salary sacrificed superannuation payments and compulsory contributions from the employer was an immediate and identifiable problem with the calculation of PIAWE in the course of both the work capacity decision and the internal review, there were other anomalies. For instance $1,400 x 52 = $72,800, not $75,992. Both figures are said to exclude superannuation altogether, but they are significantly different.

13. The Insurer seems to have relied on different wage records, covering a different period, when conducting the internal review. Those records seem to be the same ones relied upon in the course of merit review.

14. In the course of the merit review the Authority made the following observations:

> 45. Regardless of what might have transpired with respect to [the applicant's] employer, whether or not there has been an error with MYOB and any pay rise which may have come into effect, an arrangement with the employer to salary sacrifice to superannuation is considered[1] an "employer superannuation contribution" and section 44E(2) of the 1987 Act does not include any reference to "employer superannuation contributions" in a worker's "ordinary earnings."

[1] The temptation is to enquire: "Considered by whom?"

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> 46. Section 44E(2) of the 1987 Act does not distinguish between superannuation guarantee employer contributions and salary sacrificed employer superannuation contributions. It is only concerned with "any employer superannuation contribution." [The applicant's] salary sacrifice to superannuation is an employer superannuation contribution. This is confirmed by [the applicant's] payment summaries which expressly indicate the salary sacrificed amount to superannuation as reportable "Employer Superannuation Contribution."
>
> 47. While I acknowledge [the applicant's] submissions, any "salary sacrifice" into superannuation is considered[2] an "employer superannuation contribution" and therefore exempt from inclusion in the calculation of "ordinary earnings" and ultimately PIAWE under section 44C(1)(a) of the 1987 Act.

15. Given the Authority's tenuous grasp of the legislation, betrayed by what appears above, it would be churlish to criticise the insurer for making the same silly mistake. Or it would be, had not ***icare*** [the home of the workers compensation nominal insurer] produced a handy guide to the calculation of PIAWE in what is called a ***PIAWE handbook***. In this admittedly slim volume, a few straight-forward propositions are set out which are in no way ambiguous. On page 30 the following appears:

> A salary sacrificed amount is not a "separately identifiable amount" within the meaning of s44G(1)(f), if that amount would otherwise have been included in a workers base rate of pay had it not been salary sacrificed. It would therefore not be a base rate of pay exclusion.
>
> Salary sacrificed superannuation contributions do not fall within any of the four (4) items specified in section 44F(1) of the 1987 Act. However, the amount would be considered a non-pecuniary benefit as described under section 44F(2) of the 1987 Act because it is the amount the employer is required to deal with in accordance with the worker's instruction.

[2] See note 1.

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16. On the very next page of the same *PIAWE handbook* a hypothetical example is set out, which I repeat here for the benefit of both the Insurer and the applicant:

> Example – Salary sacrificed superannuation
>
> Genevieve[3] earns $104,000 per year (her base rate of pay is $50 per hour for a 40 hour week). She chose to salary sacrifice $200 per week into her superannuation fund – in addition to the contributions made by her employer. This arrangement falls under s44F(2), as this is an amount under Genevieve's terms of employment she has requested her employer to deal with on her behalf (for the performance of work by Genevieve).
>
> Salary sacrificed super contributions are not subject to fringe benefits tax. The amount that is reasonably payable must therefore be used. In this case that is $200 per week.
>
> Genevieve is not paid any amount that is defined as a base rate of pay exclusion in accordance with s44G(1). ***In her case the $200 of salary sacrificed superannuation is included in her base rate of pay***, and should not be included again as a non-pecuniary benefit.
>
> If Genevieve did receive an amount which would be considered a base rate of pay exclusion as defined in s44G(1), these amounts would be excluded from her ordinary earnings and cannot be included as a non-pecuniary benefit as defined in s44F(2).
>
> In many cases salary sacrificed amounts are considered non-pecuniary benefits,[4] however in the last example Genevieve's salary sacrificed superannuation would not be considered a non-pecuniary benefit. It is therefore critical to examine the arrangements entered into between the worker and their

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[3] Not the name of the applicant in this case.
[4] An example might be a novated car lease or a school fees payment.

employer to ensure that the benefits and the amounts associated with them are treated correctly.[5]

17. It is abundantly clear that both the Insurer and the Authority calculated the PIAWE in this case on the false assumption that the applicant's salary sacrificed superannuation contributions should be disregarded by virtue of section 44E(2). This is an error of law and a procedural error which has real consequences for the applicant.

Finding

18. I find that the Insurer has made a decision based on a false premise occasioned by a misunderstanding of the legislation. This is a procedural error which invalidates the work capacity decision.

RECOMMENDATION

19. The work capacity decision and the consequent internal review decision are both set aside.

20. The insurer is to make a new work capacity decision in accordance with the legislation which includes the salary sacrificed superannuation contributions of the applicant as part of his base rate of pay.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
29 March 2017

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[5] *PIAWE handbook* p 31.