



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 application is dismissed.

Introduction and background

1. The applicant suffered injury in the course of his employment as a Yard Locomotive Driver on 22 December 2015. The insurer accepted liability and made weekly payments for all relevant periods.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 23 May 2017. The decision resulted in a variation of PIAWE, made by virtue of applying section 44G(e). Since the applicant had received more than 52 weeks of payments, the PIAWE would no longer include any allowance, whether for overtime or shift work, previously paid. The original PIAWE was \$1,155.53, made up of \$874.88 for ordinary hours and \$280.65 for "overtime." As a result, the applicant's PIAWE was recalculated to be \$874.88, since the "overtime" payments were no longer relevant.
3. Following internal review on 22 June 2017, the insurer maintained the original decision.
4. The applicant sought Merit Review from the Authority by way of application received on 11 July 2017. The Authority made Findings and Recommendations dated 16 August 2017. The Authority concurred with the insurer's view, albeit they varied the description of the \$280.65 per week from "overtime" to "perhaps best described as a shift allowance, rather than overtime." Nothing much turns on this, since the precise wording in section 44G(e) is "overtime or shift allowance." It follows that (by whatever name it is called) the sum of \$280.65 is properly excluded from the calculation of PIAWE after the first 52 weeks.



5. The applicant applied to this office for procedural review by way of application dated 11 October 2017, received that day electronically. Given that the merit review was dated 16 August 2017, this is well outside the usual timeframe. However, the applicant asserts that he only received a copy of the Merit Review in the mail on 10 October 2017, since he lives in a remote part of rural New South Wales. The insurer took no issue with this assertion, therefore I am satisfied that the application has been made within time and in the proper form.
6. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the relevant Guidelines.

Submissions by the applicant

7. Section 44(1) (c) of the 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.”*
8. The applicant is of the view that his contract of employment designates any hours up to 12 per day as “ordinary” hours, although he acknowledges that he is paid a higher rate for any hours worked greater than 8 in any particular day. Subsidiary to this, he says as follows:
 - He asked for his timesheets to be included in merit review, since they would show he worked ordinary hours and not overtime, but they were not provided by the employer.
 - He is a casual worker and all hours up to 38 hours per week are therefore “ordinary” hours, regardless of agreed rates of pay.
 - He disagrees with the conclusion reached by the Authority, although in doing so he quotes paragraph 48.
9. In response I might quote three paragraphs from the Authority’s well-reasoned recommendation:

17. ... [the applicant’s] solicitor advised that he was not in a position to furnish the Authority with a copy of the timesheets as previously advised and that ***in any event the timesheets were not essential to the review.*** [emphasis added]



47. The only issue is whether [the applicant's] payments of 'overtime' can be included in his PIAWE after the first 52 weeks of payment. [The applicant] agrees that if this 'overtime' is not included then his PIAWE is \$874.88 per week.

48. I have found that [the applicant's] payments, perhaps best characterised as a shift allowance rather than overtime, cannot be included in his PIAWE. On that basis, I have arrived at the same decision as the Insurer and make no recommendations.

Submissions by the Insurer

10. The Insurer sent an email to this office dated 18 October 2017. It advised that it had "no further submissions to make."
11. It is on this basis that I found at paragraph 5 *supra* that the application for procedural review had been made within time, due to belated postal receipt of the merit review.

Decision

12. The only relevant issue is the inclusion or exclusion from the applicant's PIAWE of an amount of \$280.65 per week. Even the applicant concedes that \$280.65 is the correct amount and that it is more properly styled a shift allowance than overtime.
13. Section 44G(1) is in the following terms:

44G Definition applying to pre-injury average weekly earnings and current weekly earnings—base rate of pay

- (1) In relation to pre-injury average weekly earnings and current weekly earnings, a reference to a base rate of pay is a reference to the rate of pay payable to a worker for his or her ordinary hours of work but **does not include any of the following amounts** (referred to in this Division as base rate of pay exclusions):
 - (a) incentive based payments or bonuses,
 - (b) loadings,
 - (c) monetary allowances,
 - (d) piece rates or commissions,
 - (e) **overtime or shift allowances,**



- (f) any separately identifiable amount not referred to in paragraphs (a) to (e).

14. Section 44C(1) is worded as follows:

44C 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).***

15. It follows that any overtime **or** shift allowance used in the calculation of PIAWE cannot be included after the first 52 weeks of payments. In the present case, while the Insurer has styled the extra payments as 'overtime' the authority has preferred the description 'shift allowance.' It is clear from a reading of section 44G(e) that the amount of \$280.65 ought to be excluded from the post 52 week PIAWE on the basis that it must be one or the other, and both are excluded by the act.

16. While the Insurer may well have erred in characterizing the additional payments as overtime, the error was corrected in the course of merit review and the result remains the same.

17. I can identify no procedural errors.

Finding

18. I find that the Work Capacity Decision was validly made.

RECOMMENDATION

19. The application is dismissed.



Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

A handwritten signature in blue ink, appearing to read "Wayne Cooper", with a long horizontal flourish extending to the right.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
9 November 2017