

State Insurance Regulatory Authority
Workers Compensation
Merit Review Service

FINDINGS AND RECOMMENDATIONS ON MERIT REVIEW BY THE AUTHORITY

Worker:

Insurer:

Date of Review:

Date of Injury:

Claim Number:

Our Reference:

FINDINGS ON REVIEW

1. The following are findings made by the State Insurance Regulatory Authority (the Authority) on review and are to be the basis for the Insurer's work capacity decision.
2. The Worker's pre-injury average weekly earnings (PIAWE) are to be calculated under the definition in section 44C(1) of the *Workers Compensation Act 1987* (the 1987 Act).
3. The Worker's current weekly earnings are to be calculated on a week to week basis, if required.
4. The Worker is able to earn \$554.10 in suitable employment.

RECOMMENDATION BASED ON FINDINGS

5. The following recommendation made by the Authority is binding on the Insurer and must be given effect to by the Insurer in accordance with section 44BB(3)(g) of the 1987 Act.
6. The Insurer is to determine the Worker's entitlement to weekly payments of compensation in accordance with the above findings. The Insurer is to include a determination on whether indexation applies under Division 6A of the 1987 Act.

BACKGROUND

7. The Worker injured both arms and the 5th digit on his right hand in the course of his pre-injury duties as an Electrical Specialist for employer 1.
8. His employment at Employer 1 was terminated.
9. Under the Job Cover Placement Program (JCPP), the Worker obtained paid employment at Employer 2 as a Laundry Worker where he worked for 12 months.
10. Following the JCPP, the Worker obtained employment at employer 2 as a casual laundry Worker and remains in this employment to date.

11. The Insurer made a work capacity decision. This decision resulted in reducing the Worker's weekly payments to \$262.05 under section 38(7) of the 1987 Act.
12. The Worker applied for an internal review, which was conducted by the Insurer. The outcome of the internal review decision was slightly different to the original decision and reduced the Worker's weekly payments to \$262.09.
13. The application for merit review was received by the Authority. The application has been made within 30 days, as is required under section 44BB(3)(a) of the 1987 Act. The application has been lodged in the form approved by the Authority.

LEGISLATION AND GUIDELINES

14. The legislative framework governing work capacity decisions and reviews is contained in the:
 - *Workers Compensation Act 1987* (the 1987 Act);
 - *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act);
 - *Workers Compensation Regulation 2010* (the Regulation);
 - *Guidelines for work capacity decision Internal Reviews by Insurers and Merit Reviews by the Authority* applicable from 11 October 2013 (the Review Guidelines); and the
 - *WorkCover Work Capacity Guidelines* as amended (the Work Capacity Guidelines).
15. Section 43 of the 1987 Act describes a "work capacity decision".
16. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of the Insurer by the Authority.

INFORMATION CONSIDERED

17. The information that I have considered in making this decision is the information attached to the application for merit review and the Insurer's reply and any other information that has been supplied by the parties, which I am satisfied has been exchanged between them.

SUBMISSIONS

18. The Worker provides 18 pages of submissions in the application for review. His submissions may be summarised as follows:
 - The role of Laundry Assistant does not constitute suitable employment in the open labour market.
 - His current weekly earnings should be calculated using his base rate of pay as provided under section 44G of the 1987 Act.
 - The determination of his PIawe should be based on section 44C(3) and not section 44C(1) of the 1987 Act.
 - Indexation should apply to his weekly payments under section 82A of the 1987 Act.
19. In reply, the Insurer does not provide any specific submissions in response to the application for review however state that it relies on the reasons provided in the work capacity decision and internal review decision.

REASONS

Nature of merit review

20. This matter involves a merit review of the work capacity decision of the Insurer in accordance with section 44BB(1)(b) of the 1987 Act. The review is not a review of the Insurer's procedures in making the work capacity decision and/or internal review decision. The review requires that I consider all of the information before me substantively on its merits and make findings and recommendations that in light of the information before me, are most correct and preferable.
21. I note that there is no dispute between the parties that the Worker has capacity to work up to 30 hours per week with a 10kg lifting restriction. The Worker now submits that the employment option as a Laundry Assistant does not constitute suitable employment. However as this dispute was not the subject of the Insurer's internal review, I do not have jurisdiction to make any findings in this regard in the merit review because a merit review of a decision cannot be conducted "until the dispute has been the subject of internal review by the insurer" under section 44BB(1)(b) of the 1987 Act.

Current weekly earnings

22. The Worker submits that his hourly base rate of pay is \$18.47 and not the \$23.09 as determined by the Insurer. I have a letter from employer 2 titled 'Conditional Offer of Employment' which states that the higher rate (i.e. \$23.09) "includes 25% casual and holiday loading". Such loadings, in my view, are expressly excluded from the Worker's base rate of pay under section 44G(b) of the 1987 Act. I therefore accept the Worker's submission that his current hourly base rate of pay is \$18.47 and this is consistent with the definition of "base rate of pay" in section 44G of the 1987 Act.
23. Should the Worker receive amounts paid as overtime or shift allowances in respect of a particular week, these should be factored into his current weekly earnings as provided in section 441 of the 1987 Act.
24. The Worker's payslips indicate that his current weekly earnings vary from week to week depending on the number of hours worked. I note that in one of the Worker's more recent payslips he worked 36 hours. The Insurer should therefore, if required, calculate the Worker's current weekly earnings on a week to week basis in accordance with my above findings.

Ability to earn in suitable employment

25. It is agreed that the Worker has the capacity to work up to 30 hours per week with restrictions in suitable employment as a Laundry Assistant at employer 2. In recent payslips he has worked at least 30 hours per week. I therefore find that the Worker's ability to earn in suitable employment is \$18.47 per hour x 30 hours per week = \$554.10 per week.

Pre-injury average weekly earnings

26. The Worker submits that the determination of his PIAWE should be based on section 44C(3) and not section 44C(1) of the 1987 Act.
27. It was accepted by the parties that the Worker was not a full time worker immediately before the injury. Section 44C(3)(a) is therefore satisfied.
28. I note that the Worker has provided detailed calculations regarding the number of weeks he was employed part time (32 hours per week) and full time (38 hours per week) in the 78 weeks immediately before the injury. I have before me 52 weeks of payslips before the injury and these appear to indicate that the Worker worked 30 weeks on part time hours

in the period immediately before the injury and, before that, worked full time hours. This is consistent with the timing of the employer's letter which advised of a reduction to the Worker's working hours. I also note the Insurer has not provided me with any submissions to dispute the Worker's position. I am therefore satisfied that section 44C(3)(c) is met.

29. The dispute concerns whether at the time of the injury, the Worker was seeking full time employment.
30. In the circumstances of the Worker, it is my view that the answer is no. I acknowledge the Worker's submissions that it was not of his own volition that he sought to decrease his working hours shortly before his injury. I also acknowledge that he was continuously employed for some 14 years as a full time worker until he received notification from his employer, that his normal working hours would be reduced due to a "drop in orders and the current environment".
31. However, to satisfy subsection (3)(b) of section 44C, the Worker needs to be seeking full time employment at the time of the injury (my emphasis). The information before me indicates that he accepted a reduction in his hours but did not seek out full time employment, whether it be internally, externally or in another full time position. I sympathise with the Worker in that his pre- injury role appeared to require a specialised skillset; the downturn was industry wide and other full time jobs could not match his pre-injury rate of pay. However there is no information before me to indicate that the Worker was seeking full time employment at the time of the injury which is a clear requirement in the legislation.
32. I therefore find that the Worker does not satisfy section 44C(3)(b) of the definition.
33. Accordingly, the calculation of the Worker's PIAWE is to be calculated in accordance with section 44C(l) of the 1987 Act. Given that the Worker does not disagree with the Insurer's calculation of his PIAWE figure under section 44C(l) of the Act, it is not necessary for me to make any finding in relation to his PIAWE. His PIAWE therefore stands at \$1,066.27 per week in the first 52 weeks, then \$1,005.04 thereafter.
34. The issue of indexation may need to be applied to the Worker's PIAWE in the calculation of his weekly payments. The issue was not dealt with in the Insurer's original work capacity decision or in the internal review decision. Instead it appears some questions were raised by the Worker in an email to the Insurer and responded to via a return email. I will make a recommendation that the Insurer address this issue in their work capacity decision.

Merit Review Service
Delegate of the State Insurance Regulatory Authority

