



***** This decision was the subject of a procedural review. The WIRO arrived at a different conclusion.**

FINDINGS AND RECOMMENDATIONS ON MERIT REVIEW BY THE AUTHORITY

Worker:

Insurer:

Date of Review:

Date of Injury:

Claim Number:

Our Reference:

FINDING ON REVIEW

1. The following is a finding made by the State Insurance Regulatory Authority (the Authority) on review.
2. The amount of the Worker's pre-injury average weekly earnings (PIAWE) is \$1,400.00.

RECOMMENDATION BASED ON FINDING

3. The Authority may make binding recommendation to the Insurer on the basis of its findings on review in accordance with section 44BB(3)(e) of the Workers Compensation Act 1987 (the 1987 Act).
4. For the reasons provided below, the Authority makes no recommendation.

BACKGROUND

5. The Insurer made a work capacity decision, determining the Worker's PIAWE.
6. The Insurer undertook an internal review in this matter and made a decision.
7. The application for merit review was received by the Authority. The application has been made within 30 days after the Worker received notice of the internal review, 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

8. 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 2016* (the Regulation).
9. Section 43 of the 1987 Act describes a "work capacity decision".
10. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of the Insurer, by the Authority.

DOCUMENTS CONSIDERED

11. The documents I have considered for this review are the Worker's application for merit review and the Insurer's reply form, the documents listed in and attached to those forms, and the further information provided to the Authority and exchanged between the parties.

SUBMISSIONS

12. In the application for merit review, the Worker in summary submits:

- His PIAWE was wrong twice. The third time, the Insurer used his Group Certificate to validate his wages and salary sacrifice to be \$86,799.00 and changed his PIAWE to \$1,669.08. This was still incorrect as the Insurer based that on only 3 months of the previous year and not 9 months of the current year.
- In the second review, he outlined all this and sent the current Group Certificate which showed \$75,691.00 plus \$20,733.00 salary sacrifice, thus showing he earned a total wage of \$96,429.00.
- His last payslip also validates his wages being a total of \$100,000.00 a year plus salary sacrifice, but he pro-rated everything explicitly. He showed this on the PIAWE form.
- He asks how it is possible that decisions to pay \$1,400.00 a week results in him losing his salary sacrifice he makes from his wages and get nothing.
- This means that he received less pay and his work still deducted his salary sacrifice. He can't sacrifice \$1,026.15 a pay if he is not receiving it according to the PIAWE calculations.
- He is tired of stating that MYOB omits the salary sacrifice in its calculations of the hourly rate, so it is not mathematically possible to earn \$72,000.00 a year when he is paid a further \$27,200.00 in super from his wages.
- On 29 December 2016, the Insurer advised \$1,400.00 when previously it was \$1,669.08.
- The Insurer has mistreated him and he is a mess for it. He needs to visit the Premier about the farce he is in. He is sick and tired of not being believed.

13. In reply, the Insurer submits:

- The Worker reported that as a result of workplace issues, he has a psychological injury. Liability in relation to the Worker's injury is disputed.
- The Worker separately asked for a review of his PIAWE rate. The case manager issued a letter determining the Worker's PIAWE. The Worker subsequently lodged a request for internal review.
- While the Worker has referred to his annual payment summary (APS) as evidence of a difference in earnings, the period covered by the APS is not the same as the 52 weeks prior to his injury as required by section 44D of the 1987 Act.
- Both the Worker's PIAWE form and the payslips provided indicate that the Worker worked for 38 hours per week and that he earned \$36.8421 per hour.
- The Worker asserts that this was his base rate only however the pay records do not show that the Worker was paid further sums in addition to the hours of work and rate shown.
- According to the payslips provided, per week, the Worker earned \$1,400.00 (rounded) and as a result, it was determined that the Worker's PIAWE is \$1,400.00.

REASONS

Nature of merit review

14. 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.
15. 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.
16. The Worker makes numerous submissions with respect to the actions, processes and procedures of the Insurer, not only in making the work capacity decision, but in the management of his claim in general. These issues cannot be addressed at merit review.
17. I am required to make the most correct and preferable finding after conducting a review of the Insurer's work capacity decision.
18. The Worker also makes numerous submissions with respect to the actions of his pre-injury employer. These issues also cannot be addressed at merit review.

Pre-injury average weekly earnings (PIAWE)

19. Section 44C of the 1987 Act of the 1987 Act defines PIAWE as:
 - (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). [...]*
20. In order to calculate the Worker's PIAWE, section 44C(1) of the 1987 Act requires that I calculate the average of the Worker's ordinary earnings during the relevant period (excluding any week that the Worker did not work and was not on paid leave), expressed as a weekly sum.

Relevant period

21. Section 44D of the 1987 Act defines the relevant period:
 - (1) *Subject to this section, a reference to the **relevant period** in relation to pre-injury average weekly earnings of a worker is a reference to:*
 - (a) *in the case of a worker who has been continuously employed by the same employer for the period of 52 weeks immediately before the injury, that period of 52 weeks, or*
 - (b) *in the case of a worker who has been continuously employed by the same employer for less than 52 weeks immediately before the injury, the period of continuous employment by that employer.*
22. The Worker commenced employment in 1994. I am satisfied that the Worker was continuously employed by the same employer for the period of 52 weeks immediately before the injury. This is supported by the payslips currently before me.
23. I therefore find that the relevant period is 52 weeks immediately before the date of injury in accordance with section 44D(1)(a) of the 1987 Act.

Ordinary earnings

24. Section 44E of the 1987 Act defines ordinary earnings:

- (1) *Subject to this section, in relation to pre-injury average weekly earnings, the **ordinary earnings** of a worker in relation to a week during the relevant period are:*
 - (a) *if the worker's base rate of pay is calculated on the basis of ordinary hours worked, the sum of the following amounts:*
 - (i) *the worker's earnings calculated at that rate for ordinary hours in that week during which the worker worked or was on paid leave,*
 - (ii) *amounts paid or payable as piece rates or commissions in respect of that week,*
 - (iii) *the monetary value of non-pecuniary benefits provided in respect of that week, or*
 - (b) *in any other case, the sum of the following amounts:*
 - (i) *the actual earnings paid or payable to the worker in respect of that week,*
 - (ii) *amounts paid or payable as piece rates or commissions in respect of that week,*
 - (iii) *the monetary value of non-pecuniary benefits provided in respect of that week.*
- (2) *A reference to ordinary earnings does not include a reference to any employer superannuation contribution.*

25. I have before me a Payroll Advice from the employer. This document indicates that the Worker's "base rate of pay" is calculated on the basis of "ordinary hours of work" for the purposes of section 44E(1)(a)(i) of the 1987 Act.

26. There is no information before me to support that the Worker received any piece rates or commissions or non-pecuniary benefits that would be relevant for section 44E(1)(a)(ii) or (iii) of the 1987 Act respectively.

Base rate of pay

27. Section 44G of the 1987 Act defines 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).*

28. The Worker's payslips indicate that his hourly rate is \$36.842. This hourly rate remains unchanged throughout the "relevant period".

29. There is no information before me to indicate that the Worker was subject to any of the amounts as described in (a) – (f) above.

30. Therefore, the Worker's "base rate of pay" is \$36.842 per hour in accordance with section 44G(1) of the 1987 Act.

Ordinary hours of work

31. Ordinary hours of work is defined in section 44H of the 1987 Act:
- (1) *In relation to pre-injury average weekly earnings and current weekly earnings, the **ordinary hours of work**:*
 - (a) *in the case of a worker to whom a fair work instrument applies are:*
 - (i) *if the ordinary hours of work in relation to a week are agreed or determined in accordance with a fair work instrument between the worker and the employer—those hours, or*
 - (ii) *in any other case, the worker's average weekly hours (excluding any week during which the worker did not actually work and was not on paid leave) during the relevant period, or*
 - (b) *in the case of a worker to whom a fair work instrument does not apply:*
 - (i) *if the ordinary hours of work are agreed between the worker and the employer, those hours, or*
 - (ii) *in any other case, the worker's average weekly hours (excluding any week during which the worker did not actually work and was not on paid leave) during the relevant period.*
32. I have before me the Award from the Fair Work Ombudsman.
33. The submissions before me indicate that an award did not apply to the Worker's employment however the Worker himself considers that the Award is relevant.
34. I place more weight on the Worker's payslips, rather than the Award that may or may not apply.
35. Throughout the "relevant period" the hours the Worker worked per fortnight did not alter at any stage. The Worker consistently worked 76 hours per fortnight (38 hours per week). The Worker appeared to take paid leave for various reasons throughout this period however each fortnight always totalled 76 hours.
36. In my view, section 44H(1)(b)(i) of the 1987 Act applies to the Worker's "ordinary hours of work" as a fair work instrument does not apply, but the hours are agreed between the Worker and the employer.
37. I therefore find that the Worker's "ordinary hours of work" are 38 per week.

Finding on ordinary earnings

38. As found above, the Worker's "base rate of pay" is \$36.842 per hour and his "ordinary hours of work" are 38 hours per week.
39. Therefore, in accordance with section 44E(1)(a)(i) of the 1987 Act, the Worker's "ordinary earnings" are \$1,400.00 (\$36.842 per hour x 38 hours per week).

Superannuation

40. The point of contention with respect to the Worker's application for merit review is his "salary sacrifice".
41. The Worker's payslips revealed an amount of \$266.00 as "Superannuation Guarantee" and a further amount of \$400.00, increasing to \$1,046.15 as "Salary Sacrifice" from 18 November 2015.
42. Essentially, The Worker submits that he received a pay rise, which he elected to "salary sacrifice" into his superannuation fund. The Worker further submits that his payslips do not accurately reflect his annual salary and that MYOB has not adjusted for the pay rise accordingly.
43. Section 44E(2) of the 1987 Act explicitly states that "a reference to ordinary earnings does not include a reference to any employer superannuation contribution."

44. The Worker has provided PAYG payment summaries in support of his submissions. The payment summary for the year ending 30 June 2016 indicate reportable “employer superannuation contributions” in the amount of \$20,738.
45. Regardless of what may have transpired with respect to the Worker’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 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”.
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 Worker’s salary sacrifice to superannuation is an employer superannuation contribution. This is confirmed by the Worker’s payment summaries which expressly indicate the salary sacrificed amounts to superannuation as reportable “Employer Superannuation Contributions”.
47. While I acknowledge the Worker’s submissions, any “salary sacrifice” into superannuation is considered 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.

Findings on PIAWE

48. There is no information before me to indicate that the Worker received any amounts for shift allowances that would be relevant to the calculation of his PIAWE under section 44C(1)(b) of the 1987 Act.
49. I therefore find that the Worker’s PIAWE is \$1,400.00 pursuant to section 44C(1) of the 1987 Act.
50. As I have arrived at the same conclusion as the Insurer, that being, the amount of the Worker’s PIAWE is \$1,400.00, it is not necessary that I make a recommendation to the Insurer.

**Merit Review Service
Delegate of the State Insurance Regulatory Authority**