



# State Insurance Regulatory Authority

Workers Compensation

Merit Review Service

## FINDINGS AND RECOMMENDATIONS ON MERIT REVIEW BY THE AUTHORITY

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**Worker:**

**Insurer:**

**Date of Review:**

**Date of Injury:**

**Claim Number:**

**Our Reference:**

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### 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 for the period after the first 52 weeks for which weekly payments are payable is \$1,005.04.
3. That amount is subject to indexation under Division 6A of Part 3 of the *Workers Compensation Act* (the 1987 Act).

### RECOMMENDATION BASED ON FINDINGS

4. 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.
5. The Insurer is to determine the Worker's entitlement to weekly payments of compensation in accordance with my findings.

### BACKGROUND

6. The Worker suffered an injury to both arms and the 5<sup>th</sup> digit on his right hand whilst employed as an electrical transformer winder and assembler. His employment was terminated on 17 December 2013.
7. The Worker is currently working as a casual laundry worker.
8. The Insurer made a work capacity decision in which it determined the Worker's pre-injury average weekly earnings (PIAWE) at \$1,005.04 pursuant to section 43(1)(d). The Insurer also determined that indexation of this amount did not take effect pursuant to section 82A(3). This decision was provided to the Worker.
9. The Insurer undertook an internal review in this matter and made a decision, sent to the Worker by post. That decision determined there was a "significant procedural error" with the issuing of the work capacity decision, and "the decision is set aside pending a further assessment in accordance with the Guidelines".

10. The application for merit review was received by the Authority.
11. 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**

12. 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), and
  - *Workers Compensation Regulation 2016* (the Regulation).
13. Section 43 of the 1987 Act describes a “work capacity decision”.
14. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of the Insurer, by the Authority.

## **DOCUMENTS CONSIDERED**

15. The documents I have considered are those listed in, and attached to, the application and the Insurer’s reply together with the further documentation and submissions received from the Worker and the Insurer.
16. I am satisfied that both parties have had the opportunity to respond to the other party’s submissions and that the information provided has been exchanged between the parties.

## **SUBMISSIONS**

17. In the application for merit review, the Worker has made a number of lengthy submissions and they can be summarised as:
  - The Insurer failed to consider section 44C entirely in reviewing PIAWE – it only considered section 44C(1) and not section 44C(3).
  - The Insurer refuses to acknowledge base rate of pay being applicable to current weekly earnings only applicable to PIAWE.
  - The Insurer refused to accept that section 82A is applicable to the calculations of weekly entitlements.
  - He has no disagreement as to the calculations of PIAWE under section 44C(1). The Insurer has not dealt with the rest of section 44C. Section 44C(2) does not apply, but section 44C(3) has the potential to be the correct calculation for his PIAWE.
  - He had been employed for almost 15 years before the injury he was made a part time worker working 4 days per week for the 22 weeks immediately before the injury.
  - He was made a part-time worker. He had received an agreement from his employer that he would be returned to full-time employment at the time of going into part-time status and had sought confirmation of this. The workplace had returned to full-time employment in February 2014. This should qualify him under section 44C(3)(b) of the 1987 Act.

- The Insurer’s interpretation under subsection 82A(3) has no bearing at all to that subsection. The interpretation by the Insurer requires an increase in pay to the injured worker by the pre-injury employer after the injury date before indexation of PIAWE under section 82A can apply. He sees no reference under subsection 82A(3) that refers to such a requirement.
- Submissions to SIRA states that section 82A is to be applied in all circumstances from the relevant review date to weekly payments of compensation.
- He refers to a Workers Compensation Commission decision in *Edwards v Southern IML Pathology* [2015] NSWCC 1 and a number of WIRO decisions regarding section 82A.
- The Insurer has misinterpreted sections 44G, 44H and 44I in defining “E” in section 35.
- The Insurer’s internal review team has not conducted a work capacity review as required but has attempted to conduct a procedural review.

18. In reply, the Insurer submits:

- There is no information provided which indicates that the previous determinations are in error with regard to the calculation of both the Worker’s PIAWE and his earnings.
- WIRO issued recommendations that set aside the work capacity decision on the basis that fair notice of the assessment was not provided. As it falls outside the ambit of their review, WIRO made no findings with regard to the actual calculation of the Worker’s PIAWE or earnings – the decision was set aside on a procedural basis only.
- Noting that a fair notice of the current decision was not provided, it was determined that due to the procedural error the case manager was to recommence the process of issuing a work capacity decision in relation to the Worker’s PIAWE. The Worker has disagreed, noting that he believes the basis upon which his PIAWE was calculated is incorrect, notwithstanding the previous determinations.

19. The Worker provided additional information and submissions, stating that he wished a review of indexation under section 82A and the determination of the component of “E” in the application of section 35 of the 1987 Act.

20. The Worker provided additional submissions regarding the calculation of his “current earnings base rate” and the application of section 82A of the 1987 Act.

## **REASONS**

### **Nature of merit review**

21. This matter involves a merit review of the work capacity decision of an insurer in accordance with section 44BB(1)(b) of the 1987 Act. The review is not a review of an 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 that, in light of the information before me, are most correct and preferable.

22. Based on the above submissions, I am of the view that the Worker has sought a merit review of the following work capacity decision:

- (a) a decision about the amount of his pre-injury average weekly earnings; and
- (b) a decision about if, and to what extent, indexation should be applied to the amount of his weekly payments of compensation (section 43(1)(f) of the 1987 Act).

23. The Insurer has made previous work capacity decisions which were subject to internal review and then merit review by the Authority. Further, the Workers Compensation Independent Review Officer made a recommendation.
24. Pursuant to section 44BB(1)(b) an injured worker may refer a work capacity decision of an insurer for review by the Authority, but not until the dispute has been the subject of internal review by the insurer. The only work capacity decisions referred to the Authority are those contained in the work capacity decision which was subject of the internal review. Those decisions are:
  - (a) The calculation of the Worker's PIAWE at \$1,005.04 pursuant to section 43(1)(d); and
  - (b) Whether this amount should be varied to index the Worker's weekly payments of compensation pursuant to section 43(1)(f).
25. Although the Worker has made submissions in relation to the calculation of his current weekly earnings, that calculation was not a decision subject to a work capacity decision and therefore cannot be considered as part of this merit review by the Authority.
26. The Insurer has stated in the internal review that "the decision is set aside pending further assessment". Upon completion of a further assessment and any subsequent work capacity decisions, the Worker is able to seek a review of any such work capacity decisions in accordance with the legislation.
27. I agree with the Worker's submissions that the decisions in the work notice are before the Authority for review.

#### **PIAWE**

28. The Worker has stated that he has no disagreement with the determination of his PIAWE pursuant to section 44C(1) of the 1987 Act. He seeks a review of the determination pursuant to section 44C(3), in particular subsection (b) being:

"If a worker:

  - (b) at the time of the injury was seeking full time employment, ...

...

**pre-injury average weekly earnings**, in relation to that worker means the sum of:

  - (d) the average of a worker's ordinary earnings while employed during the period of 78 weeks immediately before the injury (excluding any week during which the worker did not actually work and was not on paid leave) (**the qualifying period**), whether or not the employer is the same employer as at the time of the injury expressed as a weekly sum, and
  - (e) any overtime or 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)."
29. I note the Worker has made submissions on this point in the previous two applications for merit review. In this application he submits that he had requested to be returned to full-time employment if the employer returned to full-time employment.
30. It is my view that the Worker accepted a reduction in hours and requested to be returned to full-time hours if the company should return to those hours in the future. To satisfy the requirement in section 44(C)(3)(b), the Worker needed to be seeking full-time employment at the time of injury. Although the Worker had asked to be returned to full-time hours if that were to happen sometime in the future, in my view that is not seeking full-time employment at the time of the injury.

31. As stated in the decision of the Merit Review Service, the Macquarie Dictionary defines "seeking" as "To go in search" or "to try to find by searching or endeavour".
32. The Worker was not going "in search" of full-time employment, nor was he "try[ing] to find by search or endeavour" full-time employment. He was waiting for his employer's business to increase in the hope that he would be returned to full-time hours with his employer. That the employer may return to full-time employment was uncertain and according to the employer, did not occur.
33. Before me is an email from the employer to the Insurer. In that email, the employer states:

"If the Worker would have stayed the following would have applied:-

From the Worker's termination date to Jan 2015 there would have been no pay rises since the business was not doing well.

From end of Jan 2015 we moved the operations to Sydney so the job was not available after that time."
34. Although the Worker submits that the employer returned normal operations in February 2015 that is not established by the information before me. In fact, the employer states that the business continued to not do well and from the end of January 2015, the Worker's job was no longer available.
35. Based on the above information, I am not satisfied that the Worker satisfies the requirements of section 44C(3)(b) of the 1987 Act to have his PIAWE assessed in accordance with sections 44C(3)(d) and (e).
36. I therefore find the Worker's PIAWE to be \$1,005.04 after the first 52 weeks of weekly payments pursuant to section 44C(1) of the 1987 Act.

#### **Section 82A of the 1987 Act**

37. The Worker submits that section 82A(1) should be applied and his amount of PIAWE should be subject to indexation.
38. The Insurer has applied section 82A(3) and stated in the work capacity decision:

"We have reviewed your indexation and your pre injury employed [sic, employer] has stated in an email that f [sic, if] it was not for your injury you would be paid at the same rate due to the down turn in business. Under section 82A(3) we believe you are not entitled to any indexation with regards your wage rate."
39. I must read section 82A as a whole. Section 82A(3) states:

"A variation of an amount of a worker's pre-injury average weekly earnings under this section does not take effect to the extent (if any) to which it increases that amount to more than 100% of the worker's ordinary earnings (calculated in accordance with Division 2) expressed as a weekly sum to which the worker would be entitled if he or she were employed in the same position or positions (if it or they can be identified) as he or she was employed in immediately before the injury, being the position or positions on the basis of which the calculation of the worker's pre-injury average weekly earnings was made."
40. I have read the submissions and note that they are submissions in relation to a submission paper published by SIRA.

41. In relation to the matter of *Edwards v Southern IML Pathology*, there was no indication in the circumstances set out in the Arbitrator's determination, that section 82A(3) was applied or discussed.
42. In relation to the submissions regarding WIRO determinations, there is no information that those determinations considered whether section 82A(3) may apply.
43. Section 82A(3) states that a variation of PIAWE under "**this section does not take effect**" in the circumstances set out in the section. Therefore, consideration has to be given to section 82A(3) prior to applying section 82A(1).
44. I note from the decision of the Authority, that the Worker's employment terms were governed by the Award. Further, base rate of pay was calculated on the basis of ordinary hours worked.
45. The employer's email states the Worker would not have received a payrise following the downturn. However, as the Worker was covered by the Award, any payrises determined in that Award would have been payable to the Worker.
46. The Worker's employment with his pre-injury employer was terminated in 2013. He states that employees returned to full-time hours in February 2015. There is no other information before me which indicates that employees returned to full-time hours. However, even if I accept that the Worker's hours may not have increased due to the downturn in the industry, I consider that his pay rate would have increased in accordance with increases in the Award. According to the Award and the Instruments varying the Award, wage rates and allowances for workers covered by the Award have regularly increased since the date of injury.
47. Therefore, as the Worker's pay rate would have increased under the Award, section 82A(3) does not apply as any variation under section 82A(1) would not have the effect of increasing the amount to more than 100% of the worker's ordinary earnings.
48. I find that the Worker's PIAWE is \$1,005.04 subject to indexation under Division 6A of Part 3 of the 1987 Act.
49. The variation of weekly payments as set out in the *Workers Compensation (Indexation of Amounts) Order 2013* which are apply are:

1 April 2015	1.0075
1 October 2015	1.0140
1 April 2016	1.0055
1 October 2016	1.0037
50. The Insurer is to calculate the Worker's entitlement to weekly payments of compensation in accordance with the findings above.

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