



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.
2. The Worker has a present inability arising from an injury such that she is not able to return to work in her pre-injury employment.
3. The Worker is able to return to work in suitable employment.
4. The Worker has current work capacity.
5. The Worker is able to earn \$288.00 per week in suitable employment.
6. The amount of The Worker’s pre-injury average weekly earnings (“PIAWE”) is \$1,086.54.

RECOMMENDATION BASED ON FINDINGS

7. 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 *Workers Compensation Act 1987* (“the 1987 Act”).
8. In accordance with section 37(3) of the 1987 Act, the Worker’s entitlement to weekly payments of compensation since 26 September 2016 (subject to any notice period required under section 54 of the 1987 Act) is \$581.23 (subject to indexation pursuant to division 6A of part 3 of the 1987 Act).

BACKGROUND

9. The Worker sustained an injury to her right shoulder in the course of her employment as a meat processor.
10. The Worker underwent surgery and returned to work on light duties, working until her employment was terminated. With the exception of a work trial, she has not returned to work to date.
11. The Worker has been in receipt of weekly payments of compensation from the Insurer.

12. The Insurer made a number of work capacity decisions, determining that the Worker had capacity to work 40 hours per week, that work as a receptionist/administrative assistant and cashier constitute suitable employment for her, that she has the ability to earn \$960.00 per week and reducing her entitlement to weekly payments of compensation to nil under section 37 of the 1987 Act.
13. The Worker applied for internal review of the Insurer's decisions. The Insurer conducted an internal review and made similar decisions, resulting in the same outcome. The Insurer noted that the PIAWE figure noted on the decision was an error and that the correct PIAWE, as determined previously, was \$914.78.
14. The Worker made an application for merit review by the Authority. The application was received. 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

15. 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).
16. Section 43 of the 1987 Act describes a "work capacity decision".
17. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of the Insurer, by the Authority.

DOCUMENTS CONSIDERED

18. The documents I have considered in this review are those listed in, and attached to, the application for merit review, the Insurer's reply and any further information provided by the parties.
19. 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

20. In the application for merit review, the Worker makes a number of submissions in respect to her condition deteriorating and her certified capacity for work recently being downgraded to 4 hours per day, 3 days per week. She submits that further surgery may be required. She also makes submissions in relation to information from the Insurer and various medical reports. She notes the difficulties she experienced in a work trial she undertook and explains why she was unable to undertake a position and seek employment outside of her local area due to the difficulties she has with driving. The Worker also makes a number of submissions in relation to how her injury has affected her marriage and life and the household chores she is no longer able to undertake.
21. The Worker also makes a number of further similar submissions in subsequent emails to the Authority. In her email, she confirms that she is happy to try receptionist/administrative assistant work however disputes the Insurer's decision that she is able to work 40 hours per week. She

reiterates that her nominated treating doctor states that she is only fit to work 12 hours per week and she would find it very difficult to get work for those hours. She also does not agree with the Insurer's decision that she can earn \$960.00 per week given that she only has the capacity to work 12 hours per week.

22. In the reply to the Worker's application for merit review and subsequent emails, the Insurer note that they are seeking clarification from the Worker's nominated treating doctor in relation to the downgrade in certified capacity and will forward the information to the Authority once it has been received. The Insurer also responds to a number of the Worker's submissions in relation to the medical information.

REASONS

Nature of merit review

23. This matter involves a merit review of the Insurer's work capacity decision in accordance with section 44BB(1)(b) of the 1987 Act.
24. The review is not a review of the Insurer's processes in making the work capacity decision and/or the 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.

Current work capacity and suitable employment

25. The Worker sustained an injury to her right shoulder while placing bagged meat on a belt. She was working as a meat processor at the time.
26. Following her injury, the Worker was placed on light duties. She underwent surgery to her shoulder and was subsequently treated with hydro dilatation. She continued to work light duties until her employment was terminated.
27. With the exception of a 3 week work trial undertaken, the Worker has not returned to work to date.
28. There are a number of reports from the Worker's treating specialist before me. In the most recent report, the treating specialist seeks approval for an injection. In the report prior, she notes:

The Worker is not progressing as I would expect, and I think that there is a little bit of a complex web of issues going on that are not overly related to primarily shoulder issues, but also low level drug dependence, pain tolerance and hypersensitisation and issues at work regarding transitioning that may be causing some resistance.
29. There are also reports from orthopaedic surgeons before me. These reports are however predominately related to a dispute in relation to whole person impairment and do not provide information which I have found to be relevant to assessing the Worker's current work capacity.
30. The Worker underwent an x-ray and ultrasound of her right shoulder. A report states that the "findings suggest subacromial bursitis with anterior impingement producing pain".

31. A further radiology report indicates that the Worker underwent an ultrasound guided right subacromial bursa injection.
32. The Worker was reviewed by a Physiotherapist. The Physiotherapist prepared a report and a subsequent addendum report in which he was asked to comment on the Worker's work capacity. He reported that the Worker had a limited ability to perform repetitive movements with her right arm and a lifting capacity up to 500 grams for short periods of time with that arm. He opined that other activities that would need to be restricted would be prolonged cervical movements into flexion or rotation. In respect to hours of work, he states:
- In view of the duration of hours tolerated I would believe that this may vary depending on her pain levels and pain state at time which would certainly impact on her ability to sustain seated or standing postures. Regular change in position would certainly be needed.
33. There are also a number of physiotherapy reports from the Worker's regular physiotherapist. In his most recent report, he states:
- The Worker has a limited work capacity with her right arm. The Worker can not perform any repetitive reaching away from her body greater than 30 degrees of flexion or abduction. The Worker can really only lift the weight of her own arm, anything greater than 1kg will increase her symptoms. In addition the Worker will also be aggravated by sustained and repetitive cervical spine movements. The Worker would benefit from duties that involve regular change of position and posture.
34. An Injury Management Consultant conducted a file review of some of the Worker's medical information including radiology reports and prepared a report. The Injury Management Consultant did not examine the Worker in person. It appears he was asked to comment on a recent "downgrade" in her medical certificates from full-time hours to 12 hours per week. He provided the following opinion:
- At this point, I can see no reason why the worker should be certified for less than full hours. At the very least she should return to the previous full time suitable duties that she had previously...
- It is noted that the worker's downgrade occurred as an acute event soon after a work capacity decision was being made. In the absence of any other factors, one can only surmise that this has been a contributing factor to her downgrade as such is unlikely to be due to a change in underlying capacity. The comment has been made within the bounds of a file review and is of a provisional nature. For more definitive assessment of capacity, Stage III IMC would be required.
35. There are WorkCover NSW certificates of capacity before me. They are on the main completed by the Worker's current nominated treating doctor (NTD). The Worker is consistently certified as having capacity to work 8 hours per day, 5 days per week on all of the certificates except the most recent certificate.
36. In the most recent certificate, the Worker is certified as having capacity to work 4 hours per day, 3 days per week. Her physical capabilities remain the same as the previous certificates, they are:
- Lifting/carrying capacity: <5kg above shoulder height
 - Driving ability: Increased pain after driving > 15mins
37. The NTD makes the following comment on the certificate:
- Getting worse, increasing pain, poor sleep, reduced shoulder/neck function over recent months.
38. There are also a number of referrals from the NTD referring the Worker to different doctors late last year. The latest is to an Orthopaedic Surgeon. The NTD notes that the Physiotherapist had recently reviewed the Worker and recommended him as someone who may consider conducting further surgery on the Worker.

39. There are no reports from the doctors that the Worker had been referred to late last year before me.
40. There is a divergence of opinion in the above information in relation to the hours of work that the Worker currently has the capacity to work per week. The Physiotherapist opines that the number of hours the Worker can tolerate may vary depending on her pain levels and state at different times. It appears that he is of the view that the Worker may not be able to sustain full-time hours on a consistent basis. The NTD's most recent certificate states that the Worker's condition and function deteriorated and her capacity for work had reduced to 12 hours per week. However, following his review the Injury Management Consultant was of the view that there was no reason why the Worker did not continue to have the capacity to work full-time.
41. The Insurer indicated in its reply and a subsequent email that it was seeking clarification from the Worker's nominated treating doctor in relation to the downgrade in certified capacity and that any information received would be forthcoming to the Authority. The Authority has not received this information to date.
42. Upon review of the above information, while I attribute weight to the Injury Management Consultant's report, I prefer the opinion of the NTD given that he physically reviewed the Worker. The Injury Management Consultant noted himself that his comments were made within the bounds of a file review and were of a provisional nature, that a stage III consultation (physical examination) would be required for a definitive assessment.
43. On the information before me, I find that the Worker currently has the capacity to work 4 hours per day, 3 days per week within the physical capabilities and recommendations outlined by the Physiotherapist, the regular physiotherapist and the NTD.
44. In order to determine whether the Worker has an entitlement to weekly payments of compensation I am required to determine whether she has "current work capacity".
45. Section 32A of the 1987 Act defines "current work capacity" and "no current work capacity".
- "Current work capacity" is defined as:
- Current work capacity**, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment.
- "No current work capacity" is defined as:
- No current work capacity**, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to work, either in the worker's pre-injury employment or in suitable employment.
46. There is no dispute between the parties in respect to the Worker being unable to return to her pre-injury employment as a meat processor. On this basis, and having regard to the nature of that role and the Worker's current physical capabilities, I am satisfied the Worker has a present inability arising from an injury such that she is not able to return to her pre-injury employment.
47. To determine whether the Worker has current work capacity, I am required to consider whether she is able to return to work in "suitable employment". Suitable employment is defined in section 32A of the 1987 Act as:
- employment in work for which the worker is currently suited:*
- (a) *having regard to:*
- (i) *the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and*
- (ii) *the worker's age, education, skills and work experience, and*

- (iii) *any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and*
 - (iv) *any occupational rehabilitation services that are being, or have been, provided to or for the worker, and*
 - (v) *such other matters as the WorkCover Guidelines may specify, and*
- (b) *regardless of:*
- (i) *whether the work or the employment is available, and*
 - (ii) *whether the work or the employment is of a type or nature that is generally available in the employment market, and*
 - (iii) *the nature of the worker's pre-injury employment, and*
 - (iv) *the worker's place of residence.*
48. The Insurer determined in both the original work capacity decisions and at internal review, that the role of receptionist/administrative assistant constitutes suitable employment for her. The Worker confirmed in emails that she does not dispute this decision however as she only has the capacity to work 12 hours per week, she will find it very difficult to find a job that can offer those hours.
49. The Worker also makes a number of submissions in relation to living in a small country town with limited jobs. She submits that she would have to drive long distances to seek employment, which she is unable to do as driving more than 10 to 15 minutes increases her pain. I acknowledge these submissions however note that suitable employment is determined regardless of whether the employment is available and a worker's place of residence, based on the above definition. Given that the actual role of receptionist/administrative assistant does not involve driving duties, I am satisfied that the role remains suitable employment in this respect.
50. In relation to the concerns raised by the Worker regarding the role being suited to her incapacity, in terms of her current ability to work 12 hours per week, I note a Labour Market Review report by a rehabilitation provider addressed this matter with three employers advertising for positions in this role. All three employers reportedly advised that working 4 hours per day, 3 days per week was a possibility if it could be worked in with business demands and arrangements with other staff.
51. I am satisfied on the information before me that work as a receptionist/administrative assistant constitutes suitable employment for the Worker within the definition under section 32A of the 1987 Act.
52. I find that the Worker has a present inability arising from an injury such that she is not able to return to work in her pre-injury employment but is able to return to work in suitable employment. I find that the Worker has current work capacity in accordance with the definition in section 32A of the 1987 Act.

Entitlement periods for ongoing weekly payments

53. The following provisions of the 1987 Act provide the basis for determination and calculation of a worker's weekly payments entitlement:
- a. Weekly payments in the first 13 weeks are to be determined in accordance with section 36 of the 1987 Act ("the first entitlement period")
 - b. Weekly payments in weeks 14–130 are to be determined in accordance with section 37 of the 1987 Act ("the second entitlement period"); and

- c. Weekly payments after the second entitlement period (after week 130) are to be determined in accordance with subsections 38(6) or (7), but only if the special requirements for continuation of weekly payments after the second entitlement period are met in accordance with section 38 of the 1987 Act .
54. The Insurer indicates in their reply to the application for merit review that the Worker had received 93 weeks of weekly payments. I am therefore satisfied that at the date of this review, the Worker has received between 14 and 130 weeks of weekly payments.
55. I find that the Worker’s entitlement to weekly payments of compensation currently falls in the second entitlement period and is to be calculated in accordance with section 37(3) of the 1987 Act, as follows:
- (3) *The weekly payment of compensation to which an injured worker who has current work capacity and has returned to work for less than 15 hours per week (or who has not returned to work) is entitled during the second entitlement period is to be at the rate of:*
- (a) $(AWE \times 80\%) - (E + D)$, or
- (b) $MAX - (E + D)$,
- whichever is the lesser.*

Pre-injury Average Weekly Earnings

56. In order to determine “AWE” for the purposes of the formulas provided by section 37 of the 1987 Act, the Worker’s pre-injury average weekly earnings (“PIAWE”) must be calculated. The Insurer has determined the Worker’s PIAWE to be \$914.78. In her application for merit review, the Worker indicated that she disputed the Insurer’s calculation of PIAWE and referred this decision to the Authority for review.
57. PIAWE is defined by section 44C of the 1987 Act as follows:
- (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).*
58. In order to calculate the Worker’s PIAWE, section 44C(1)(a) of the 1987 Act requires that I calculate the average of the Worker’s “ordinary earnings” during the “relevant period” (excluding any week during which she did not actually work and was not on paid leave) expressed as a weekly sum.
59. The “relevant period” is defined by section 44D of the 1987 Act as follows:
- (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.*

....

- (3) *If, during the period of 52 weeks immediately before the injury, a worker:*
- (a) *is promoted, or*
 - (b) *is appointed to a different position,*
- (otherwise than on a temporary basis) and, as a result, the worker's ordinary earnings are increased, the relevant period in relation to the worker begins on the day on which the promotion or appointment takes effect.*
60. Payslips before me indicate that the Worker was continuously employed by the Employer for over 52 weeks immediately before her injury.
61. The Worker confirmed in an email to the Authority that during the 52 weeks immediately before her injury, the Worker was not employed by another employer, did not receive any promotions, was not proposed or aware of any upcoming promotions and did not voluntarily reduce her hours of work.
62. I find that the "relevant period" is 52 weeks immediately before the injury.
63. "Ordinary earnings" are defined by section 44E of the 1987 Act as follows:
- (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.*
64. Section 44E(1) of the 1987 Act requires that the Worker's "ordinary earnings" be calculated at the "base rate of pay" for "ordinary hours of work" in any week during which she worked or was on paid leave.
65. I have the Worker's payslips for all of the 52 weeks immediately before her injury before me. Upon review of the payslips, I am satisfied that the Worker worked or was on paid leave in all of the 52 weeks in the relevant period. Accordingly, I find that the Worker's "ordinary earnings" should be averaged over the 52 weeks of the relevant period.
66. "Base rate of pay" is defined by section 44G of the 1987 Act as follows:
- (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).

67. The Worker's pay slips indicate that her hourly rate of pay in the relevant period was:
- \$27.3051 period 1,
 - \$28.3974 period 2, and
 - \$27.0453 period 3.
68. The Worker's payslips indicate that she at times received a higher rate of pay to her hourly rate of pay and additional amounts throughout the relevant period. Those amounts are classified on her payslip as:
- "O/T 1.5"
 - "O/T 2.0"
 - "REHAB"
 - "R.D.O"
 - "RDO ACC"
 - "MERCER"
 - "MEAL"
 - "CANTEEN"
 - "AMIEU"
69. Section 44G(1) of the 1987 Act, outlined above, defines "base rate of pay" to be exclusive of loadings, monetary allowances, overtime or shift allowances and any other separately identifiable amount.
70. I consider that the amounts that the Worker received under "O/T 1.5" and "O/T 2.0" are captured as "loadings" under section 44G(1)(b); the amount received for "Higher Duties Allo" is captured under "overtime or shift allowances" under section 44G(1)(e); the amount received for "MERCER", "MEAL", "CANTEEN" and "AMIEU" are captured under "monetary allowances" under section 44G(1)(c); and the amounts received for "REHAB", "R.D.O" and "RDO ACC" is captured as "any separately identifiable amount" under section 44G(1)(f) of the 1987 Act.
71. Accordingly, the above additional amounts that the Worker received to her hourly rate of pay are to be excluded from the calculation of her "base rate of pay".
72. I find that the Worker's "base rate of pay" was \$27.3051 for period 1, \$28.3974 for period 2 and \$27.0453 for period 3.
73. "Ordinary hours of work" are defined in section 44H of the 1987 Act as:
- 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.*

74. I have a copy of the applicable industrial instrument at the time of the Worker's injury before me, the *fair work instrument*.
75. Following a number of requests to the parties for any employment contracts the Worker may have been employed under, no written agreements were provided to the Authority. It would appear that the Worker did not have a written employment contract. The fair work instrument does not specify hours of work however does make reference to 'individual flexibility agreements'. The parties have also not provided a copy of such an agreement however I have before me an email from a representative of the Employer to the Insurer in which the representative advises that the Worker was paid on the basis of an "38 hourly rate".
76. On the information currently before me, I am satisfied that the Worker's "ordinary hours of work" are agreed or determined, in accordance with a fair work instrument, to be 38 hours per week.
77. Pursuant to section 44H(a)(i) of the 1987 Act, I find that the Worker's "ordinary hours of work" are 38 hours per week and that her base rate of pay is calculated on the basis of these ordinary hours.
78. The Worker's payslips indicate that she did not receive any piece rates, commissions or non-pecuniary benefits in the relevant period that would be relevant to the calculation of her "ordinary earnings" under section 44E(1) of the 1987 Act.
79. In accordance with section 44E(1)(a)(i) of the 1987 Act, I find that the Worker's "ordinary earnings" in relation to a week during the relevant period was:
- \$1,037.5938 (38 hours x \$27.3051) period 1 (8 weeks),
 - \$1,079.086 (38 hours x \$28.3974) period 2 (37 weeks), and
 - \$1,027.7214 (38 hours x \$27.0453) period 3 (7 weeks).
80. In order to calculate the Worker's average ordinary earnings for the relevant period in accordance with section 44C(1)(a) of the 1987 Act, I must divide the total of the Worker's "ordinary earnings" in the relevant period by 52. The Worker's total "ordinary earnings" in the relevant period was \$56,500.07 [$\$8,300.75 (\$1,037.5938 \times 8 \text{ weeks}) + \$41,005.27 (\$1,079.086 \times 37 \text{ weeks}) + \$7,194.05 (\$1,027.7214 \times 7 \text{ weeks})$].
81. The Worker's average ordinary earnings for the relevant period in accordance with section 44C(1)(a) of the 1987 Act is therefore \$1,086.54 per week ($\$56,500.07/52$).
82. I note that Section 44C(1)(b) of the 1987 Act provides:
- An overtime and shift allowance payment is permitted to be included in the calculation of pre-injury average weekly earnings (but only for the purposes of the calculation of weekly payments payable in the first 52 weeks for which weekly payments are payable).
83. As noted above, the Worker's pay slips indicate that she received amounts for overtime and shift allowances in the relevant period. The provision above however stipulates that overtime and shift allowance payments are only included in the calculation of PIAWE in the first 52 weeks for which weekly payments are payable.

84. The Insurer's reply states that the Worker had been paid 93 weeks of weekly payments. At the time of the Insurer's decision about the Worker's PIAWE, the Worker had been in receipt of over 52 weeks of weekly payments. Overtime and shift allowances are therefore not permitted to be included in the calculation of the Worker's PIAWE.
85. I find that the Worker's PIAWE is \$1,086.54 in accordance with section 44C(1) of the 1987 Act.

Calculation of entitlement

86. For the purposes of calculating the Worker's entitlements under the formula provided by section 37(3) of the 1987 Act, above, I note that "E" is described in section 35 of the 1987 Act as:

E means the amount to be taken into account as the worker's earnings after the injury, calculated as whichever of the following is the greater amount:

- (a) the amount the worker is able to earn in suitable employment,
- (b) the workers current weekly earnings.

87. I have found above that work as a receptionist/administrative assistant constitutes suitable employment for the Worker. The Insurer determined that the Worker has the ability to earn \$24.00 per hour and \$960.00 per week in this role based on information provided in a Labour Market Review report. I note that the weekly rate was based on a 40 hour week. The Worker does not dispute the hourly rate applied by the Insurer however submits that she does not have the capacity to earn \$960.00 per week as she is only able to work 12 hours per week.
88. In light of my finding that the Worker has the capacity to work 12 hours per week, I find that her ability to earn in suitable employment is \$288.00 (\$24.00 x 12 hours).
89. "D" is the amount of any non-pecuniary benefits which appears to be nil in this instance.
90. "MAX" means the maximum weekly compensation amount, which is referred to in section 34(1) of the 1987 Act and is currently \$2,058.10 (indexed as at 1 October 2016).
91. Applying the formula in section 37(3)(a) of the 1987 Act, the Worker's entitlement is calculated as follows:
- $$\begin{aligned} & (\text{AWE} \times 80\%) - (\text{E} + \text{D}) \\ & (\$1,086.54 \times 80\%) - (\$288.00 + \$0.00) \\ & = \$869.23 - \$288.00 \\ & = \$581.23 \end{aligned}$$
92. Applying the formula in section 37(3)(b) of the 1987 Act, the Worker's entitlement is calculated as follows:
- $$\begin{aligned} & \text{MAX} - (\text{E} + \text{D}) \\ & = \$2,058.10 - (\$288.00 + \$0.00) \\ & = \$1770.10 \end{aligned}$$
93. Section 37(3) of the 1987 Act requires the lesser amount of (a) and (b) to be determined as the worker's entitlement under this section. In this instance, it is \$0.00.

94. I find that the Worker's entitlement to weekly payments of compensation from 26 September 2016 is \$581.23.

Merit Review Service
Delegate of the State Insurance Regulatory Authority