



State Insurance Regulatory Authority

Workers Compensation
Merit Review Service

FINDINGS AND RECOMMENDATIONS ON MERIT REVIEW BY THE AUTHORITY

Worker:

Insurer:

Date of Decision:

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 first review date after the date on which the worker became entitled to weekly payments of compensation is 1 October 2009.
3. In accordance with section 82A of the *Workers Compensation Act 1987* (the 1987 Act), the worker's pre-injury average weekly earnings (PIAWE) as indexed at 1 April 2016 is \$980.

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 calculate the worker's weekly payments of compensation in accordance with my findings above.

BACKGROUND

6. In April 2016 the Insurer made a series of work capacity decisions in relation to the worker. These decisions included the determination that the worker's PIAWE were not subject to indexation prior to 1 April 2013.
7. The worker applied for an internal review of the Insurer's decision in relation to indexation of his PIAWE. The Insurer did not conduct an internal review of the original work capacity decision.
8. The worker submitted an application for merit review of the Insurer's decision.
9. I am satisfied that the application for review by the Authority has been made in circumstances where the Insurer has failed to conduct an internal review and notify the worker of the decision on the internal review within 30 days after the application for internal review was made. Accordingly I am satisfied that the Authority may review the matters referred in accordance with section 44BB(3)(b) of the 1987 Act.

LEGISLATION AND GUIDELINES

10. 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).

11. Section 43 of the 1987 Act describes a “work capacity decision”.

12. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of the Insurer, by the Authority.

DOCUMENTS CONSIDERED

13. The documents I have considered are those listed in, and attached to, the application and the Insurer’s reply and any other information provided by the parties since the application for merit review, which I am satisfied has been exchanged between the parties.

SUBMISSIONS

14. In the application for merit review, the legal representative for the worker submits:

- A dispute exists between the parties in relation to the indexation of the PIAWE (and ultimately with AWE). The parameters of the dispute were agreed in April 2016, which is ultimately the date of the work capacity decision.
 - The dispute is only in relation to indexation.
- An application for internal review of the work capacity decision was sent to the Insurer in May 2016. The application was acknowledged but no determination has been made.
- Indexation should be applied as follows:

Date	Indexation
1/12/2009	1.0127
1/06/2010	1.0115
1/12/2010	1.0258
1/06/2011	1.006
1/04/2013	1.0179
1/10/2013	1.0078

1/04/2014	1.0184
1/10/2014	1.0095
1/04/2015	1.0075
1/10/2015	1.014
1/04/2016	1.0055

- Pursuant to section 43(1)(d) of the 1987 Act a decision about the amount of an injured worker’s pre-injury average weekly earnings or current weekly earnings is a work capacity decision.
- The worker suffered an injury in the course of his employment with his pre-injury employer in 2009. There is no dispute about liability.
- There is also no dispute that the worker is entitled to weekly payments of compensation agreed to commence in September 2015 and continuing.
- The worker’s position is that the formula applicable under section 82A of the 1987 Act can be used for the indexation of weekly compensation retrospectively to adequately provide for movement/increases in earnings and appropriately compensate an injured worker.
- There is nothing in the transitional provisions or the legislation that the applicant is aware of that stops this from occurring.
- The worker also submits that a failure to index retrospectively creates a substantial injustice to him.
- The Insurer’s position is, essentially, that this indexation cannot occur prior to the commencement of section 82A.
- As a decision in relation to the request for internal review has not been received, merit review is now sought.

15. In reply, the Insurer submits:

- In July 2016, the worker lodged a “work capacity – application for merit review by the Authority”.
- Section 82A of the 1987 Act commenced on 1 October 2012, the Insurer then transcribes this section of the Act.
- Section 82A of the 1987 Act requires the insurer/employer to vary a worker’s entitlement to weekly payments by indexing their “pre-injury average weekly earnings” (PIAWE) on each “review date” (1 April and 1 October in each year) in accordance with changes to the consumer price index (CPI).
- If (as at the review date) a worker’s indexed PIAWE is more than what their ordinary earnings would have been if they had not been injured, then their PIAWE must not be indexed.
- PIAWE is defined at section 44C of the 1987 Act. It has been used to determine a worker’s entitlement to weekly payments of compensation since 1 October 2012.
- It does not dispute that:

- i. Pursuant to section 43(1)(d) of the 1987 Act, a decision about an injured worker's PIAWE/current weekly earnings is a work capacity decision.
 - ii. The worker suffered an injury in the course of his employment with the Employer in 2009.
 - iii. The worker is entitled to weekly payments of compensation agreed to commence in September 2015 and continuing.
- It does dispute the worker's submission that section 82A of the 1987 Act can be used to index a worker's PIAWE retrospectively, prior to 1 April 2013.
- Indexation of PIAWE cannot occur prior to 1 April 2013 (the first review date).
- Section 82A of the 1987 Act only applies to the indexation of PIAWE (or AWE as the worker submits). It does not apply to the indexation of any other figure.
- They extract the words of section 82A(1) of the 1987 Act.
- "Review date" is defined as "1 April and 1 October in each year" in accordance with section 82A(3).
- Section 82A(4) is extracted. The Minister satisfies this requirement by publishing a Workers Compensation (weekly payments indexation) Order at or around each review date.
- These orders are summarised at page 16 of the Workers Compensation Benefits Guide (July 2016) (the Benefits Guide).
- The Benefits Guide notes:
 - "With the introduction of section 82A to the 1987 Act made by the Workers Compensation Amendment Act 2012, a worker's pre-injury average weekly earnings (within the meaning of Division 2) will be adjusted on 1 April and 1 October of each year based on movements in the consumer price index (all groups index for Sydney) published by the Australian Bureau of Statistics"*
- The table presented in the guide, setting out the number that equates to the factor B/C is reproduced.
- The first review date given in the table is 1 April 2013. There are no review dates before this.
- If section 82A was intended to index PIAWE before 1 April 2013, then the Benefits Guide would have given values for B/C dates before 1 April 2013.
- If section 82A intended to index PIAWE before 1 April 2013 then the Minister would have published an order giving the value of B/C for any relevant review date before 1 April 2013.
- In 2012, a number of amendments were made to the 1987 Act. These amendments included the introduction of PIAWE, which was used to calculate a worker's entitlement to weekly payments of compensation.
- The amendments also introduced the "transitional amount". This was the deemed PIAWE for worker's who had been in receipt of weekly payments immediately before 1 October 2012.
- The transitional amount commenced on 1 October 2012 and is indexed twice per year. Page 20 of the Benefits Guide details the applicable transitional amount for each half year. The first applicable period is "1 October 2012 to 31 March 2013".

- There is no suggestion that the transitional amount should be indexed retrospectively.
- This is because the transitional amount was not used to assess a worker's entitlement to weekly payments of compensation until 1 October 2012.
- Accordingly it would be inconsistent with the 1987 Act to index PIAWE before 1 April 2013 (the first review date).
- It does not accept that there has been a substantial injustice to the worker through its reading of section 82A of the 1987 Act.
- Further, and in the alternative, any attempt to remedy any injustice is inconsistent with the 1987 Act and any orders published by the Minister.
- By way of example, the transitional amount was deemed to be the PIAWE for workers who were in receipt of weekly payments of compensation immediately before 1 October 2012.
- The transitional amount applied indiscriminately to workers that met this criteria, even if the transitional amount was lower than their PIAWE.
- The transitional amount also hugely benefited workers whose PIAWE was significantly lower than this figure (e.g. part time and casual workers).
- While this may have been unjust to a cohort of workers it has still been accepted that the transitional amount will apply for all workers that received weekly payments immediately before 1 October 2012.
- There has been no push to amend the 1987 Act to make an exception for existing recipients that were receiving more than the transitional amount as this is inconsistent with the 1987 Act.
- The worker's submission that there is a substantial injustice to him does not justify a reading of section 82A of the 1987 Act that is inconsistent with the 1987 Act and orders published by the Minister.
- It disputes the indexation rates proposed by the worker prior to 1 April 2013.
- Any decision made by the Authority should be consistent with the decisions already made by the Insurer.

16. The worker's legal representative made the following further submissions on his behalf, received by the Authority in July 2016:

- The dispute between the worker and the Insurer is whether indexation should be applied to the worker's PIAWE from the first adjustment date after the date of injury or from 1 April 2013.
- The Insurer submits that section 82A of the 1987 Act does not have retrospective effect because of the absence of indexed figures in the benefits guide before 1 April 2013.
- The worker accepts that the figures detailed in the Benefits Guide start from 1 April 2013. What is relevant is not the figures detailed in the Benefits Guide but the application of the formula detailed in section 82A of the 1987 Act.
- The worker has the formula under section 82A of the 1987 Act to calculate the indexation rates prior to 1 April 2013.

- They reference Schedule 6, Part 19H, Clause 3 of the 1987 Act and state that in applying Clause 3(1), it is clear that the amendments operate retrospectively and as such apply to the worker's claim.
- The calculation of PIAWE is not compensation paid or payable but a method for calculating compensation paid or payable and therefore Clause 2 does not apply.
- Alternatively the worker submits that he would be entitled to indexation in accordance with section 79 of the 1987 Act until the commencement of the 2012 amendments to the 1987 Act and section 82A thereafter.
- Applying section 79 of the 1987 Act to the post 2012 amendment concept of PIAWE is illogical when section 82A is available and arose from the same instrument as PIAWE.
- They note that the Insurer refers to the similarities of the transitional rate at paragraphs 22 – 30 and 33 – 37. The transitional rate is the method of transitioning existing recipients for weekly compensation and the only similarity it has to the current matter is that it is adjusted as at 1 April and 1 October. It has no bearing, application or relevance otherwise to this matter.

REASONS

Nature of merit review

17. 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.
18. 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.

Indexation of PIAWE

19. The Insurer has made a work capacity decision that indexation is only to be applied to PIAWE from the first review date after amendments were made to the 1987 Act, specifically the amendments that introduced section 82A, for the purposes of indexation of PIAWE.
20. The Insurer determined that the first review date for indexation is 1 April 2013.
21. It is this decision of the Insurer that the worker has referred for review by the Authority.
22. Section 82A of the 1987 Act provides for indexation of PIAWE is as follows:

(1) The amount of a weekly payment to a worker under Division 2 in respect of an injury is to be varied on each review date after the day on which the worker became entitled to weekly payments in respect of that injury, by varying the amount of the worker's pre-injury average weekly earnings for the purposes of the calculation of the amount of the weekly payment in accordance with the formula:

$$A \times \frac{B}{C} \text{ where:}$$

A is the amount of the worker's pre-injury average weekly earnings within the meaning of Division 2 or, if that amount has been varied in accordance with this section, that amount as last so varied.

B is:

(a) the CPI for the December quarter immediately prior to the review date when the review date is 1 April, or

(b) the CPI for the June quarter immediately prior to the review date when the review date is 1 October.

C is:

(a) the CPI for the June quarter immediately prior to the review date when the review date is 1 April, or

(b) the CPI for the December quarter immediately prior to the review date when the review date is 1 October.

(2) In this section:

CPI means the consumer price index (All Groups Index) for Sydney issued by the Australian Statistician.

review date means 1 April and 1 October in each year.

(3) 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.

(4) The Minister is, on or before each review date, to notify, by order published on the NSW legislation website, the number that equates to the factor $\frac{B}{C}$ for the purposes of the variation required for that review date under this section.

(5) A notification published on the NSW legislation website after a review date for the purposes of the variation required for that review date under this section has effect as if published before that review date.

Decision of the NSW Workers Compensation Commission

23. Arbitrator William Dalley of the NSW Workers Compensation Commission, considered the issue of indexation of PIAWE in the matter of *Edwards v Southern IML Pathology* [2015] NSWWC 1.
24. I am not bound by the decision of Arbitrator Dalley on this issue. However, I have found his reasoning in the matter persuasive and have his reasons below.
25. Arbitrator Dalley referred to the reasons of the President, Judge Keating in *In Cram Fluid Power Pty Ltd v Green* [2014] NSWWC 84. Justice Keating said:
"[76] The correct approach is to interpret statutory provisions so that they are 'consistent with the language and purpose of all the provisions of the statute' (Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; 194 CLR 355 at [69]). Whilst it is permissible to give effect to the purpose of a provision, that purpose must be derived from what the legislation says and not from any assumption about the desired or desirable reach or operation of the relevant provisions: Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross [2012] HCA 56 (per French CJ and Hayne J at [26]). The task remains the construction of the words the legislature has enacted (Taylor v The Owners-Strata Plan No 11564 [2014] HCA 9 (at [39])), and it is not permissible to add words to achieve what is perceived to be the desired outcome."
26. Workers compensation legislation is generally accepted as being beneficial (*J Odling Shopfitting International Pty Ltd v Kalijnac* (1993) NSWLR 632). Beneficial legislation is to be construed beneficially giving the fullest relief that the fair meaning of its language will allow. (*Bull v Attorney General (NSW)* (1913) 17 CLR 370 384; *Starkey v SA* [2011] ASCFC 164; *Simos v Repatriation Commission* [2013] FCA 607 AT [41]).
27. Section 82A(1) refers to variation of the worker's PIAWE "on each review date after the day on which the worker became entitled to weekly payments in respect of that injury". Arbitrator Dalley noted that the words of the Act do not place any limitation on the commencement date.
28. Section 82A(1) directs indexation, in accordance with a clearly defined formula. Arbitrator Dalley observed that the value of the variables 'B' and 'C' are readily ascertainable.

29. The value to be assigned to 'B' in the formula is determined by reference to the CPI figure for the December quarter immediately prior to the review date when the review date is 1 April and the CPI figure for the June quarter immediately prior to the review date when the review date is 1 October.
30. The value to be assigned to 'C' in the formula is determined by reference to the CPI figure for the June quarter immediately prior to the review date on 1 April and the CPI figure for the December quarter immediately prior to the review date on 1 October.
31. Limiting indexation to the value of 'A' only on and after 1 April 2013 has the effect of adding words to the section.
32. Arbitrator Dalley found that to apply indexation from the first review date, following the date of injury appears to be in accordance with the beneficial nature of the legislation. It is also consistent with the plain words of section 82A(1).

Reasons

33. As I mentioned previously, I have found the reasons of Arbitrator Dalley to be persuasive. I am satisfied that the 1987 Act is beneficial legislation and that it is to be construed giving the fullest relief that the fair meaning of its language will allow.
34. Consistent with the reasons given by Arbitrator Dalley, I am also satisfied that limiting indexation of the value of 'A' under section 82A(1) would have the effect of adding words to that section of the Act.
35. There is no reference given in section 82A of the 1987 Act to a review date following the 2012 amendments to Division 2 of the 1987 Act. On the contrary, section 82A(1) of the 1987 Act refers to "each review date after the day on which the worker became entitled to weekly payments in respect of that injury". The worker became entitled to weekly payments of compensation in 2009.
36. Section 82A(2) defines "review date" as "1 April and 1 October in *each year*" (emphasis added). To find that the first review date is the first review date after the commencement of the 2012 amendments to the 1987 Act, would have the effect of adding words to this section.
37. I have considered the Insurer's submission that the absence of a published value for B/C prior to 1 April 2013 is evidence that the first review date is 1 April 2013. I have not found this argument to be persuasive. The values published by the Minister and the dates for which those values have been published cannot have the effect of altering the meaning of the words used in section 82A(1) and (2) of the 1987 Act.
38. I consider that, when read together, sections 82A(1) and (2) of the 1987 Act have the effect that the PIAWE of a worker who is not an existing recipient of weekly payments of compensation, is to be indexed from the first review date after the day on which the worker became entitled to weekly payments of compensation.
39. I am satisfied that the first review date is the first of either 1 April or 1 October following the date on which the worker became entitled to weekly payments of compensation.
40. I find that the worker's PIAWE is to be indexed from the first review date after the day on which he became entitled to weekly payments in respect of his injury. I consider that this date is 1 October 2009.

Calculation of PIAWE with indexation

41. In the application for internal review by the Insurer, the worker's legal representative has set out the values that he considers to be B/C for the purpose of section 82A(1) for the review dates since the worker's date of injury. The legal representative has applied these values to the worker's PIAWE to determine the indexed PIAWE at each review date.

42. I note that the representative has used the dates 1 December and 1 June as the review dates for the years 2009 to 2011. This is incorrect. The representative has also omitted indexation in 2012.

43. The table below sets out the indexation of the worker's PIAWE in accordance with section 82A(1) and (2) of the 1987 Act.

Review Date	B All Groups CPI (Sydney)	C All Groups CPI (Sydney)	Number that equates to the factor B/C
1 October 2009	92.9	92.4	1.0054
1 April 2010	94.3	92.9	1.0151
1 October 2010	95.8	94.3	1.0159
1 April 2011	96.7	95.8	1.0094
1 October 2011	99.2	96.7	1.0259
1 April 2012	99.8	99.2	1.0060
1 October 2012	100.5	99.8	1.0070
1 April 2013	As published by the Minister on NSW legislation web site.		1.0179
1 October 2013			1.0078
1 April 2014			1.0184
1 October 2014			1.0095
1 April 2015			1.0075
1 October 2015			1.0140
1 April 2016			1.0055

44. I therefore find that the worker's PIAWE as indexed at 1 April 2016 is \$980.

MERIT REVIEW SERVICE

DELEGATE OF THE STATE INSURANCE REGULATORY AUTHORITY