



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 amount of the Worker’s pre-injury average weekly earnings (“PIAWE”) for the first 52 weeks for which weekly payments are payable is \$934.99 (subject to indexation). The amount of the Worker’s PIAWE after the first 52 weeks for which weekly payments are payable is \$850.00 (subject to indexation).

RECOMMENDATIONS BASED ON FINDINGS

3. The following recommendations made by the Authority are 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”).
4. The Insurer is to determine the Worker’s entitlement to weekly payments of compensation in accordance with the above finding from 30 May 2017.
5. The Insurer is to pay the Worker the difference between the amount of compensation he was paid and the amount of compensation he should have been paid (subject to any notice period required under section 54 of the 1987 Act) based on the above finding.

BACKGROUND

6. The Worker sustained an injury in the course of his employment with the Employer.
7. The Worker has been in receipt of weekly payments of compensation from the Insurer.
8. The Insurer made a work capacity decision in respect to the amount of the Worker’s PIAWE, determining it at \$743.66.
9. The Worker applied for internal review of the Insurer’s decision. The Insurer conducted an internal review and determined the Worker’s PIAWE to be \$833.60.
10. The Worker made an application for merit review 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

11. 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).
12. Section 43 of the 1987 Act describes a “work capacity decision”.
13. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of the Insurer, by the Authority.

SUBMISSIONS

14. In the application for merit review, the Worker makes the following submissions:
 - He commenced working at the Employer as a carpenter. His employer agreed to pay him \$1,500.00 gross per week in wages.
 - He got injured during the course of employment. He was paid \$2,025.99 “cash in hand” by his employer for 9 days of work.
 - He wants the work capacity decision to be reviewed on the basis of comparable earnings of fellow carpenters at the Employer. He wants to receive a weekly pay of \$1,500.00 gross per week as offered by his employer at the commencement of his employment with the Employer.
15. In reply, the Insurer makes the following submissions:
 - The Worker’s PIAWE should be calculated pursuant to section 44C(2).
 - The Worker was employed as an assistant and is therefore classified at Level 1, noted on page 2 of the Award pay guide. The hourly rate in this classification is \$20.84 per hour.
 - Therefore the PIAWE should be calculated as follows:
 $40 \text{ ordinary hours of work per week} \times \text{hourly rate of } \$20.84 = \$833.60$
16. The Authority sent an email to the parties clarifying and requesting further information in relation to the Worker’s hours of work and earnings with the Employer. The Authority noted that it was understood that the Worker was paid “cash in hand” however requested any evidence that he may have in support of his submission that he was paid \$2,025.99 for the 9 days of work he performed i.e bank statements.
17. The Worker’s legal representatives responded, providing the following information:
 - The Worker’s hours of work were Monday to Friday from 7am to 3pm and Saturday 7am to 1pm. It was agreed that the Worker would be paid a full work day on Saturday even though he worked 6 hours as opposed to 8 hours. The Worker earned \$225.00 each day he worked and does not know what the hourly rate of pay was. A calculation of the daily rate divided by 8 hours provides an hourly rate of \$28.12.
 - The Insurer is currently making payment in the 1st entitlement period of \$706.48 which equates to approximately \$100 per day and is far less than the \$160 - \$180 the Worker’s employers estimated. Therefore it is submitted that the Award is incorrectly applied and does not reflect the Worker’s correct PIAWE.

- The Worker was paid in cash for the 9 days of work he performed. Prior to the injury, the Worker understood from the Employer that he would start providing the Worker with pay slips and would collect PAYG withholding amounts from payments made to the Worker in the future.

18. In a further email the Worker's legal representatives submitted:

- "With respect to Point 2, there has been an administrative error in the initial Application for Review attached.

The Worker was paid \$2,250.00 for the 9 days of work he performed and not \$2,025.00. It appears there has been an administrative error on our part. The Worker earned \$250.00 each day he worked and does not know what the hourly rate of pay was. A calculation of the daily rate divided by 8 hours provides an hourly rate of \$31.25".

19. The Insurer responded to the Authority's request for information, as follows:

- The Insurer is unable to confirm the Worker's hours of work, rate of pay and earnings for Saturday as the Insurer does not have these details.

DOCUMENTS CONSIDERED

20. 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.
21. 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.

REASONS

Nature of merit review

22. This matter involves a merit review of the Insurer's work capacity decision in accordance with section 44BB(1)(b) of the 1987 Act.
23. 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.

Pre-injury Average Weekly Earnings

24. The information before me indicates that the Worker commenced employment with the Employer on 4 May 2017 and sustained his injury soon thereafter.
25. In respect of determining the Worker's PIAWE, **section 44C(2) of the 1987 Act** provides:

If a worker has been continuously employed by the same employer for less than 4 weeks before the injury, pre-injury average weekly earnings, in relation to that worker, may be calculated having regard to:

- the average of the worker's ordinary earnings that the worker could reasonably have been expected to have earned in that employment, but for the injury, during the period of 52 weeks after the injury expressed as a weekly sum, and*
- 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).*

26. 'Ordinary earnings', referred to above under section 44C(2)(a) of the 1987 Act is defined under **section 44E of the 1987 Act** as:
- (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.
27. The information before me indicates that the Worker had worked 9 days at the time of his injury. He was therefore a worker who had been continuously employed by the same employer for less than 4 weeks before the injury. In order to determine the Worker's PIAWE under section 44C(2) of the 1987 Act, I am required to determine his ordinary earnings.
28. I do not have any payslips or pay information before me in relation to the Worker's employment with the Employer. The information before me indicates that he was paid "cash in hand" and is yet to receive a pay slip in relation to the days he worked before his injury.
29. Two factual investigation reports were prepared. Statements were obtained from a number of people including the Worker and the Employer's Director. The reports and statements are focused on liability for the Worker's injury however do provide the following information relevant to the Worker's earnings and hours of work:
- "His working hours were generally 7.00am to 3.00pm, Monday to Friday and some work on Saturdays" (page 2 of the factual investigation report 1).
 - "The worker was employed as a scaffolder on a full time basis...The worker outlined that his hours of work were generally 8hrs per day from 7.00am to 3.00pm, Monday to Friday, with occasional weekend work on Saturdays" (page 5 of the factual investigation report 1).
 - "The employer advised that to date he has been unable to obtain employment records for [sic] his accountant" (page 3 of the factual investigation report 2).
 - "The Worker commenced work for my company on 2nd May, 2017. He was employed on a casual basis as a carpenter assistant" (page 2 of the statement of the Employer's Director).
30. The Insurer at page 4 of its internal review notes:
- "In telephone discussions with the employer on 14 July 2017, the Insurer were verbally advised that there are no payslips in respect to your pay or period of employment. As an assistant, it was stated that you were likely to earn \$160-\$180 per day in respect of an 8 hour day".
31. When determining the Worker's ordinary earnings, I am satisfied based on the above information and the submissions made by the parties that the Worker's base rate of pay was calculated on the basis of ordinary hours worked, in accordance with section 44E(1)(a) of the 1987 Act.

32. There is conflicting information before me in relation to the nature of the Worker's employment. The Employer's Director advises in his statement that the Worker was employed on a casual basis however the factual investigation report 1 states that the Worker was employed on a full time basis.
33. In the absence of an employment contract or other employment information it is difficult to determine the nature of the Worker's employment. On the information that is available however, particularly the information in relation to the Worker's hours of work being set at Monday to Friday for 8 hours per day "and some work on Saturdays", which indicates that the Worker's hours of work were agreed and were not on a casual basis, I accept the Worker was employed on a full time basis and did some overtime work on Saturdays.
34. '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.*
35. In respect to the Worker's 'ordinary hours of work', there is no information to indicate that a fair work instrument was applicable to his employment. the Worker's 'ordinary hours of work' therefore falls under section 44H(b)(i) as a fair work instrument does not apply and the Worker's hours of work were agreed between him and his employer (Monday to Friday, 8 hours per day and some work on Saturdays).
36. Given that it was agreed that the Worker would work Monday to Friday, 8 hours per day and some work on Saturdays, I am satisfied the Worker's ordinary hours were 40 hours per week (5 days x 8 hours) with some overtime on Saturdays.
37. I find the Worker's 'ordinary hours of work' to be 40 hours per week.
38. When determining the Worker's 'ordinary earnings' under section 44E(1) of the 1987 Act, I am required to multiply his ordinary hours of work by his base of rate of pay to determine his earnings in the weeks that he worked or was on paid leave.
39. '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).*
40. There is conflicting information before me in relation to the Worker's rate of pay for his ordinary hours of work.

41. The latest information from the Worker's legal representatives advises that the Worker was paid \$2,250.00 for the 9 days of work he performed, earning \$250.00 per day. This equates to \$31.25 per hour. This is consistent with the initial submissions made that the Worker was to receive \$1,500.00 gross per week.
42. As outlined above, the Insurer notes in its internal review that the "employer" had advised that as an assistant, the Worker was likely to earn \$160.00 - \$180.00 per day in respect of an 8 hour day. Taking the median of \$160.00 - \$180.00 (\$170.00), the Worker's hourly rate of pay would therefore have been approximately \$21.25 ($\$170.00 \div 8$ hours).
43. The Insurer did not use the information from the Employer when determining the Worker's PIAWE. The Insurer applied the Award and the rate of \$20.84 relating to an assistant under 'All other Level 1'.
44. It is not clear why the Insurer did not use the rate advised by the Employer. I do note however that the rate used by the Insurer is close to that advised by the Employer. These rates are however significantly less than the rate of \$31.25 the Worker submits he earned per hour.
45. In the absence of any payslips or pay information and with the above conflicting information it is difficult to determine what the Worker's hourly rate of pay was.
46. However, considering the information before me in relation to the Worker's employment history I consider the lower rate advised by the Employer to be a more reasonable reflection of what the Worker earned per hour. The statement of the Worker outlines his employment history. He was a police officer before migrating to Australia in 2013. He then worked for two companies doing formwork in late 2016 before his pre-injury role with the Employer. The Worker therefore does not have much experience or training in construction.
47. Having regard to the Worker's young age of 32 and his limited work experience in construction, I consider it more likely that his rate of pay for his ordinary hours of work was closer to the lower rate advised by the Employer than that advised by the Worker. In coming to this finding I have also considered the rates outlined in the Award which provides rates between \$24 to \$26 as the ordinary rate for employees at the highest level (Level 9).
48. There is no information to indicate that the Worker received any additional amounts to his rate of pay for his ordinary hours of work that would be required to be excluded under section 44G(1)(a)-(f).
49. I find \$21.25 to be the Worker's 'base rate of pay'.
50. Multiplying the Worker's ordinary hours of work (40 hours) by his base rate of pay (\$21.25 per hour), results in a weekly rate of \$850.00. There is no information before me to indicate that the Worker received or would have received any piece rates, commissions or non-pecuniary benefits that should be included in the calculation of his 'ordinary earnings'.
51. I find \$850.00 to be the Worker's 'ordinary earnings'.
52. On the information before me, I find \$850.00 to be the amount the Worker could reasonably have been expected to have earned in that employment, but for the injury, during the period of 52 weeks after the injury expressed as a weekly sum in accordance with section 44C(2)(a) of the 1987 Act.

Overtime and shift allowances

53. The Worker injured himself on a Saturday and counting 9 days back to 4 May 2017 (commencement of employment) indicates he also worked on the previous Saturday.
54. The Insurer did not incorporate any payments for overtime and shift allowances under section 44C(2)(b) of the 1987 Act when determining the Worker's PIAWE. It calculated the Worker's PIAWE based on 40 ordinary hours of work and no overtime or shift allowances for the work he was required to perform on Saturdays.

55. The information before me confirms that the Worker was required to do "...some work on Saturdays" or "...occasional weekend work on Saturdays" (page 5 of the factual investigation report 1) further to his Monday to Friday 7am to 3pm hours. Given that I have found above that the Worker's employment was of a full time nature, I am satisfied that the additional hours he worked on Saturdays was overtime.
56. The above is consistent with the submissions made by the Worker's legal representatives that "it was agreed that the Worker would be paid a full work day on Saturday even though he worked 6 hours as opposed to 8 hours" (7am to 1pm). The Worker therefore received a higher rate of pay for the hours he worked on Saturdays, approximately \$28.33 ($\$170.00 \div 6$), indicating that these hours were overtime.
57. I am satisfied that overtime is permitted to be included in the calculation of the Worker's PIAWE in the first 52 weeks for which weekly payments are payable pursuant to section 44C(2)(b) of the 1987 Act.
58. In response to questions from the Authority and the information from the Worker's legal representatives, the Insurer advised in their email that they are unable to confirm the Worker's hours of work, rate of pay and earnings for the two Saturdays.
59. On the information before me, I accept that the Worker was required to work some Saturdays from 7am to 1pm and he would receive the same rate of pay as a full day's work, which equates to approximately \$28.33 per hour.
60. It is difficult to determine how many Saturdays the Worker would reasonably have worked if he had not sustained his injury. The factual investigation report indicates it would have been "some"/"occasional" Saturdays. The Worker worked both Saturdays in the 9 days he was employed before his injury.
61. With the minimal information before me, I consider it likely the Worker would have worked approximately 50% of the Saturdays for the weeks he was employed had he not sustained his injury. This equates to 3 hours of overtime per week at the rate of \$28.33.
62. I find the amount of \$84.99 to be the amount of overtime that is permitted to be included in the Worker's PIAWE in the first 52 weeks for which weekly payments are payable pursuant to section 44C(2)(b) of the 1987 Act.

Finding on PIAWE

63. I find that the Worker's PIAWE for the first 52 weeks for which weekly payments are payable is \$934.99 ($\$850.00 + \84.99). I find that the Worker's PIAWE after the first 52 weeks for which weekly payments are payable is \$850.00.
64. I note that the amount of the Worker's PIAWE, as calculated above, should be varied by the Insurer on each review date after he became entitled to weekly payments in respect of the injury, in accordance with the indexation provisions under section 82A of the 1987 Act.

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