



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:

FINDING ON REVIEW

1. The following finding is made by the State Insurance Regulatory Authority (the Authority) on review.
2. In accordance with section 44C(2) of the *Workers Compensation Act 1987* (the 1987 Act), the amount of the Worker's pre-injury average weekly earnings (PIAWE) is \$357.12.

RECOMMENDATION BASED ON FINDING

3. Under section 44BB(3)(e) of the 1987 Act the Authority may make binding recommendations to an insurer based on the findings of its review.
4. The Authority does not make a recommendation for the reasons below.

BACKGROUND

5. The Worker sustained an injury to his right shoulder whilst employed with the Employer, on a date which was the first day of his employment.
6. The Insurer accepted liability for the injury and made a work capacity decision, determining the Worker's PIAWE as \$357.12.
7. The Insurer determined the Worker's entitlement to weekly payments of compensation under section 37 of the 1987 Act and notified him of the change in his weekly payments of compensation. The Insurer in calculating the Worker's entitlement to weekly payments of compensation relied on its earlier PIAWE determination of \$357.12.
8. The Worker referred the Insurer's determination of his PIAWE for internal review. The Insurer issued the internal review decision, affirming its decision that the Worker's PIAWE is \$357.12 in accordance with section 44C(2) of the 1987 Act.
9. The Insurer in determining the Worker's PIAWE relies on section 44C(2) of the 1987 Act. The Insurer finds that the Worker was continuously employed by the same employer for less than 4 weeks before the injury as he was injured on his first day of his employment. The Insurer notes that the Worker's employer confirmed that there was no contract of employment and that his employment was not on the assumption of ongoing work.

10. In determining the Worker's ordinary earnings, the Insurer states that "due to limited information" reliance has been placed on the "Calculating PIAWE Form" provided by the Employer. The PIAWE Form indicates that the Worker was employed on a casual basis, worked 8 hours at \$25.60 per hour and earned \$204.80 in ordinary earnings. Additionally the Employer also confirmed that there was no expectation that the Worker was going to be offered ongoing employment. In calculating the Worker's PIAWE the Insurer also took into account his earnings in overtime, which was reported by the Employer to be \$153.32.
11. The Insurer made a finding that in accordance with section 44C(2) of the 1987 Act, the Worker's ordinary earnings and overtime payment as provided by the Employer are his ordinary earnings that he could reasonably have been expected to have earned in his employment, but for the injury, during the period of 52 weeks after the injury. Accordingly, the Insurer affirmed its decision that the Worker's PIAWE is \$357.12.
12. The Worker's legal representative made an application for merit review of the Insurer's internal review decision. The Authority accepted the Worker's application for merit review pursuant to section 44BB(3)(b) of the 1987 Act.

LEGISLATION

13. 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);
14. Section 43 of the 1987 Act describes a "work capacity decision".
15. Section 4488 of the 1987 Act provides for merit review of a work capacity decision of the Insurer, by the Authority.

DOCUMENTS CONSIDERED

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

SUBMISSIONS

17. In the application for merit review, the Worker's legal representative submits that the Insurer has determined the Worker's "PIAWE pursuant to section 43(1)(d) of the *Workers Compensation Act 1987* (the Act), applying section 44C(2) of the Act". It is submitted that given the circumstances the Worker's PIAWE should be calculated pursuant to section 44C(3) of the 1987 Act.
18. In providing a chronology of the Worker's employment history prior to injury, it is submitted that the period between 4 November 2015 and 14 June 2016 requires closer consideration. During this period the Worker was not a full time worker and he was "according to his statement seeking full time employment". He was registered with 2 employment agencies. "There is no evidence to the contrary".
19. It is submitted that "if immediately before the injury the worker was not a full time worker, but at the time of injury had been seeking full time employment and had been, in the previous 78

weeks, predominantly a full time worker, the PIAWE is calculated as the average ordinary earnings with all employers over that 78 week period, but not including periods when the worker did not work or was not on paid leave".

20. It is noted that the Worker was "predominantly a full time worker between 1 July 2014 and 3 November 2015 and over such period averaged \$1,066 per week". Given that section 44C(3)(d) of the 1987 Act excludes any week during which the Worker did not actually work and was not on paid leave, the correct PIAWE is the amount of \$1,066 and not the amount as calculated by the Insurer.
21. In reply, the Insurer in responding to above submissions, state that the Worker was predominantly a full time worker between 1 July 2014 and 3 November 2015. However, this timeframe is not "immediately before the injury" as required under section 44C(3) of the 1987 Act but over 7 months prior to the Worker's date of injury.
22. Further in absence of any evidence in the form of resume, application letters, confirmation of receipt of application letters which could demonstrate that the Worker was job seeking, the Insurer is unable to determine whether or not the Worker meets the requirements stipulated in section 44C(3)(a),(b) and (c) of the 1987 Act. Therefore, the Insurer relied on section 44C(2) of the 1987 Act to determine the Worker's PIAWE.
23. The Insurer makes submissions around how the Worker's PIAWE is calculated as \$357.12 under section 44C(2) of the 1987 Act and indicates that the Employer confirmed that the Worker's hourly rate of pay of \$25.60 would have been the same as at 1 October 2016 and as such his PIAWE did not require indexation under section 82A of the 1987 Act.

REASONS

Nature of merit review

24. 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.
25. 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 that, in light of the information before me, are most correct and preferable.

Pre-injury average weekly earnings

26. PIAWE is defined by section 44C of the 1987 Act. Section 44C(1) of the 1987 Act provides that:
 - (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).*
27. However, in relation to a worker who has been continuously employed by the same employer for less than 4 weeks before the Injury, section 44C(2) of the Act provides that:

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:

- (a) 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*
- (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).*

28. Further the definition of PIAWE under section 44C(3) of the 1987 Act is as follows :

If a worker:

- (a) was not a full time worker immediately before the injury, and*
- (b) at the time of the injury was seeking full time employment, and*
- (c) had been predominantly a full time worker during the period of 78 weeks immediately before the injury,*

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

- (d) the average of the 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 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).*

- 29. The Worker's legal representative submits that his PIAWE should be determined pursuant to section 44C(3) of the 1987 Act. For a worker's PIAWE to be determined pursuant to section 44C(3) of the 1987 Act, sections 44C(3)(a)-(c) must be satisfied.
- 30. On the information before me, it is accepted fact by the parties that the Worker was not a full time worker immediately before the injury. The information supports that the Worker was in fact not employed between 4 November and 14 June 2016. On that basis I accept that the Worker satisfies the requirement as provided in section 44C(3)(a) of the 1987 Act.
- 31. However, on the information before me, I am not satisfied that the Worker at the time of injury was seeking full time employment as required under section 44C(3)(b) of the 1987 Act. I acknowledge the Worker's submissions that he was and that there is no information to the contrary. However, there must be adequate information to support that he was seeking full time employment at the time of injury. The Worker's statement, without further supporting information, does not persuade me that he was.
- 32. The Worker states that he was registered with 2 employment agencies. However, he has not provided the Authority or the Insurer with information to support his claim that he was actively seeking full time employment. No information in the form job applications, confirmation of job applications or job logs have been provided to support the Worker's submissions that he was seeking full time employment at the time of injury.
- 33. Further, I am also not satisfied that the Worker was predominantly a full time worker during the period of 78 weeks immediately before injury. The information before me indicates that the Worker was not in full time employment from 4 November 2015 to 14 June 2016. That is a period of almost 32 weeks immediately before the injury during which the Worker was not employed in any capacity. Given the lengthy and constant period of unemployment immediately prior to injury, I am not satisfied that the Worker meets the requirement under section 44C(3)(c) of the 1987 Act.

34. Accordingly, I do not accept the Worker's submission that his PIAWE should be calculated pursuant to section 44C(3) of the 1987 Act.
35. Section 44C(2) of the 1987 Act is a discretionary provision which may be applied in determining a worker's PIAWE in circumstances where the worker sustains an injury during a period of less than 4 weeks of continuous employment with his or her employer.
36. In absence of information such as a contract of employment with the Employer or an award under which the Worker was employed at the time of injury and given that the Worker was injured on his first day of his employment, I am of the view that section 44C(2) of the 1987 Act is the appropriate provision to apply in determining the Worker's PIAWE.
37. The Insurer in relying on information provided by the Employer in the "PIAWE Form" which provides that the Worker worked 8 hours, with an hourly rate of \$25.60 and was paid overtime in the amount of \$152.32, determined his PIAWE as \$357.12 and concluded that this is the amount that the Worker could reasonably have been expected to have earned, but for the injury, during the period of 52 weeks after the injury.
38. The Worker's legal representative confirmed that the Worker's employment with the Employer was on a casual basis and that there is no contract of employment, Awards or fair work instruments under which he was employed.
39. Given that the Worker was employed on a casual basis, the Insurer's submissions that the Employer confirmed that there was no expectation of ongoing employment and in absence of any further information with regards to the Worker's employment status, I am not satisfied that the Worker could reasonably have been expected to earn more than the PIAWE figure as determined by the Insurer. On the information before me, I am of the view that the Worker's PIAWE is appropriately determined under section 44C(2) of the 1987 Act.

Merit Review Service

Delegate of the Authority