



FINDINGS AND RECOMMENDATIONS ON MERIT REVIEW BY THE AUTHORITY

Worker:

Insurer:

Date of Review:

Date of Injury:

Claim Number:

Our Reference:

FINDINGS

1. The Worker's pre-injury average weekly earnings (PIAWE) for the first 52 weeks of weekly payments is \$346.31.
2. The Worker's PIAWE for weekly payments after the first 52 weeks of weekly payments is \$283.55.

RECOMMENDATIONS

3. The Insurer is to calculate weekly payments of compensation payable to the Worker in line with the above findings.
4. This recommendation is binding on the Insurer and must be given effect to by the Insurer under section 44BB(3)(g) of the 1987 Act.

BACKGROUND

5. The Insurer notified the Worker that it had decided her PIAWE was \$366.83. This is important because the amount of the Worker's weekly payment of compensation is based on her PIAWE.
6. The Worker applied for an internal review of the Insurer's decision. The Insurer decided on internal review that the Worker's PIAWE was:
 - \$305.86 for the first 52 weeks of weekly payments that are payable.
 - \$287 (as indexed and rounded) after 52 weeks of weekly payments have been payable.
7. The application for merit review was received by the Authority. It was made within time and in the approved form.

LEGISLATION

8. The legislative framework for 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)

9. Section 43 of the 1987 Act describes a "work capacity decision".
10. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of an insurer by the Authority.

DOCUMENTS CONSIDERED

11. The documents considered for this review are: the application for merit review and the Insurer's reply form, the documents listed in and attached to those forms, and any further information provided to the Authority and exchanged between the Worker and the Insurer.

SUBMISSIONS

12. The Worker submits that the Insurer appears to rely on an assurance from her employer and has ignored her actual earnings which were previously provided by way of pay slips and PAYG payment summaries.
13. In reply, the Insurer has set out its reasons and calculations with reference to the legislation for what it considers to be the amount of the Worker's PIAWE.

REASONS

Merit review

14. This is a merit review of the Insurer's decision about the amount of the Worker's PIAWE. The Authority has considered all of the available information on its merit and made findings that it considers are most correct and preferable.
15. The Authority has found that the Worker's PIAWE is less than what the Insurer originally decided. This is because more specific information about the Worker's PIAWE has come to light since the original decision. There are now detailed pay slips for the Worker's 52 weeks of employment immediately before the injury. This has led to a more accurate finding about the Worker's PIAWE. The detailed reasons for the findings are set out below.

Pre-injury average weekly earnings

16. The Worker's PIAWE is determined under section 44C(1) of the 1987 Act:

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).

17. A finding on the amount of PIAWE first requires findings about the "relevant period" and "ordinary earnings".

Relevant period

18. The "relevant period" is defined in this case under section 44D(1)(a) of the 1987 Act:

(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

19. Pay slips from the Employer confirm a period of continuous employment from 29 November 2014 to 27 November 2015 (52 weeks).
20. The relevant period is the Worker's continuous period of employment by the Employer for the period of 52 weeks immediately before the injury.

Ordinary earnings

21. The Worker's pay slips for her weeks of employment do not perfectly align with 52 calendar weeks immediately before the injury (30 November 2014 to 28 November 2015). However, I consider that the pay slips give the most detailed and reliable indication of the "average of the worker's ordinary earnings during the relevant period".
22. The Worker has referred to her PAYG payment summary for the financial year ending 30 June 2015 in support of her application for merit review. It gives a total figure for the Worker's earnings from 30 August 2014 to 30 June 2015. That is significantly misaligned with the relevant period. I prefer the Worker's pay slips which are more closely aligned to the relevant period and give more detail about the Worker's earnings.
23. The Worker's pay slips show that her base rate of pay was calculated on the basis of ordinary hours worked. Her "ordinary earnings" are therefore determined under section 44E(1)(a) of the 1987 Act:
 - (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
 - ...
 - (2) A reference to ordinary earnings does not include a reference to any employer superannuation contribution.

24. This requires findings about the Worker's "base rate of pay" and "ordinary hours of work".

Base rate of pay

25. "Base rate of pay" is defined by section 44G of the 1987 Act:
 - (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).
26. From 29 November 2014 to 10 July 2015, the Worker's pay slips show that she was paid \$18.02 for each ordinary hour of work. From 11 July 2015, the pay slips show that the Worker was paid \$18.47 for each ordinary hour of work.
27. During the relevant period, the Worker occasionally received holiday leave loading and frequently worked weekends and late shifts which had higher rates of pay. These are excluded from the base rate of pay under section 44G(b) "loadings" and (e) "shift allowances".
28. I find that the Worker's base rate of pay was \$18.02 per hour from 29 November 2014 to 10 July 2015 and then \$18.47 per hour from 11 July 2015 to the end of the relevant period.

Ordinary hours of work

29. Section 44H of the 1987 Act defines "ordinary hours of work":

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) *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.*

30. In an email to the Insurer, the managing director of the Employer confirmed that the Worker was employed as a part-time Food and Beverage Attendant Grade 2 under the Registered and Licensed Clubs Award 2010 (the Award). However, the Worker's ordinary hours of work in relation to a week were not agreed or determined in accordance with the Award between her and her employer. Rather, her weekly hours of work were varied during the relevant period. In this case, section 44H(a)(ii) applies.

31. The Worker's average weekly hours (excluding any week during which she did not actually work and was not on paid leave) during the relevant period is set out below:

Week ending	Hours	Week ending	Hours
5 December 2014	18.25	5 June 2015	14.75
12 December 2014	23	12 June 2015	15
19 December 2014	26.5	19 June 2015	26.5
26 December 2014	17.25	26 June 2015	Excluded
2 January 2015	10.25	3 July 2015	25.5

9 January 2015	10.75	10 July 2015	15
16 January 2015	11.25	17 July 2015	20.25
23 January 2015	19.5	24 July 2015	18
30 January 2015	11.5	31 July 2015	18
6 February 2015	10.5	7 August 2015	18
13 February 2015	14	14 August 2015	20.5
20 February 2015	14	21 August 2015	29
27 February 2015	8	28 August 2015	Excluded
6 March 2015	8.5	4 September 2015	22
13 March 2015	8	11 September 2015	14.25
20 March 2015	8	18 September 2015	10.75
27 March 2015	Excluded	25 September 2015	24.75
3 April 2015	11	2 October 2015	17.5
10 April 2015	11.25	9 October 2015	13.75
17 April 2015	12.5	16 October 2015	Excluded
24 April 2015	8.25	23 October 2015	14
1 May 2015	8	30 October 2015	Excluded
8 May 2015	13.5	6 November 2015	Excluded
15 May 2015	22.5	13 November 2015	16.25
22 May 2015	12	20 November 2015	14
29 May 2015	11.5	27 November 2015	20
AVERAGE is 717.50 hours / 46 weeks = 15.6 hours			

32. The weeks ending 27 March 2015, 26 June 2015, 28 August 2015, 16 October 2015, 30 October 2015 and 6 November 2015 were excluded because the Worker did not work and was not on paid leave in those weeks.
33. I find the Worker's ordinary hours of work to be 15.6.

Average of ordinary earnings expressed as a weekly sum

34. The first part of PIAWE under section 44C(1)(a) of the 1987 Act is 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.
35. The Worker's ordinary earnings are her earnings calculated at the base rate of pay for ordinary hours in the weeks during which she worked or was on paid leave under section 44E(1)(a)(i). There are no amounts applicable in this case for piece rates or commissions or non-pecuniary benefits under section 44E(1)(a)(ii) and (iii).
36. The average of the Worker's ordinary earnings during the relevant period expressed as a weekly sum equals:

$$\begin{aligned}
& ((\$18.02 \times 15.6 \text{ hours} \times 30 \text{ weeks}) + (\$18.47 \times 15.6 \text{ hours} \times 16 \text{ weeks})) / 46 \text{ weeks} \\
& = ((\$8,433.36) + (\$4,610.11)) / 46 \text{ weeks} \\
& = \$13,043.47 / 46 \text{ weeks} \\
& = \$283.55
\end{aligned}$$

37. The Insurer submits in its reply form that the amount under section 44C(1)(a) is \$283.98. The Insurer's calculation involved more averaging and rounding. My approach involved less averaging and less rounding and is therefore more accurate.
38. To illustrate, the sum of the Insurer's rounded figures for each category of hour as stated in its reply is 5.55 + 3.43 + 1.71 + 4.93 = 15.62. When that is multiplied by 46 weeks it gives a total of 718.52 hours (15.62 x 46). However, the sum of the Worker's weekly hours during the relevant period as recorded on the pay slips only gives a total of 717.50 hours. The Insurer's approach credits The Worker an extra 1.02 hours that were not in fact part of her average weekly hours during the relevant period.

Overtime and shift allowances

39. The second part of PIAWE under section 44C(1)(b) of the 1987 Act is any overtime and shift allowance payments that are permitted to be included (but only for calculating weekly payments payable in the first 52 weeks for which weekly payments are payable).

40. Section 44C(5) of the 1987 Act states:

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) if:

(a) the worker worked paid overtime or carried out work that attracted a shift allowance during the relevant period, and

(b) the worker would, but for the worker's injury, have been likely, at any time during that 52 week period, to have worked paid overtime or carried out work that attracted a shift allowance.

41. The Worker's pay slips confirm that she carried out work on weekends and late shifts that attracted a shift allowance during the relevant period. Given the frequency with which this occurred during the relevant period, I accept that the Worker would, but for the injury, have been likely, at any time during the first 52 weeks for which weekly payments are payable to have worked paid overtime or carried out work that attracted a shift allowance.
42. I find that the shift allowances that the Worker was paid during the relevant period are permitted to be included in her PIAWE for the first 52 weeks for which weekly payments are payable.
43. Section 44C(6) of the 1987 Act states:

The amount of an overtime and shift allowance payment that is permitted to be included is to be calculated in accordance with the following formula:

$$\frac{A}{B}$$

where:

A is the total amount paid or payable to the worker for paid overtime and shift allowances in respect of the relevant period.

B is the number of weeks during the relevant period during which the worker worked or was on paid annual leave.

44. The table below sets out the amount paid to the Worker for overtime and shift allowances during the relevant period. The figures below reflect only the overtime or shift allowance component, that is the amount payable in excess of the base rate of pay:

Week ending	Saturday	Sunday	Late	Sum
5 December 2014	\$31.54	-	-	\$31.54
12 December 2014	\$29.28	-	-	\$29.28
19 December 2014	\$67.58	-	-	\$67.58
26 December 2014	\$67.58	-	-	\$67.58
2 January 2015	\$31.54	-	-	\$31.54
9 January 2015	\$31.54	\$54.04	-	\$85.58
16 January 2015	-	\$40.53	-	\$40.53
23 January 2015	\$38.29	\$91.19	\$11.27	\$140.76
30 January 2015	\$31.54	\$54.04	\$4.90	\$90.48
6 February 2015	-	-	\$14.21	\$14.21
13 February 2015	\$36.04	-	-	\$36.04
20 February 2015	-	-	-	-
27 February 2015	\$36.04	-	\$5.88	\$41.92
6 March 2015	-	-	\$12.74	\$12.74
13 March 2015	-	-	\$11.76	\$11.76
20 March 2015	\$33.79	-	\$6.37	\$40.16
27 March 2015	Excluded			
3 April 2015	\$45.05	\$40.53	\$3.92	\$89.50
10 April 2015	-	-	\$11.76	\$11.76
17 April 2015	\$27.03	-	\$9.31	\$36.34
24 April 2015	-	-	\$12.25	\$12.25
1 May 2015	-	-	\$10.29	\$10.29
8 May 2015	\$33.79	\$40.53	\$9.31	\$83.63
15 May 2015	\$45.05	\$97.95	\$14.21	\$157.21
22 May 2015	-	-	\$16.66	\$16.66
29 May 2015	\$38.29	-	\$9.31	\$47.60
5 June 2015	\$38.29	\$43.91	\$8.82	\$91.02
12 June 2015	\$27.03	\$40.53	\$8.82	\$76.38
19 June 2015	\$40.55	\$121.59	\$19.60	\$181.74
26 June 2015	Excluded			
3 July 2015	\$38.29	\$108.08	\$13.23	\$159.60

10 July 2015	\$40.55	\$87.82	\$5.88	\$134.24
17 July 2015	\$87.78	-	\$14.09	\$101.87
24 July 2015	-	-	-	\$0.00
31 July 2015	-	-	\$7.25	\$7.25
7 August 2015	\$30.03	-	\$17.31	\$47.34
14 August 2015	\$41.58	-	\$13.28	\$54.86
21 August 2015	\$46.20	-	\$20.13	\$66.33
28 August 2015	Excluded			
4 September 2015	\$46.20	\$48.48	\$14.89	\$109.57
11 September 2015	\$43.89	\$69.25	\$4.83	\$117.97
18 September 2015	\$48.51	-	\$7.25	\$55.76
25 September 2015	\$73.92	\$58.86	\$10.47	\$143.25
2 October 2015	\$55.44	\$45.01	\$10.06	\$110.52
9 October 2015	\$27.72	-	\$11.67	\$39.39
16 October 2015	Excluded			
23 October 2015	-	-	\$14.49	\$14.49
30 October 2015	Excluded			
6 November 2015	Excluded			
13 November 2015	\$46.20	-	\$12.48	\$58.68
20 November 2015	\$32.34	-	\$12.08	\$44.42
27 November 2015	\$50.82	-	\$14.49	\$65.31
TOTAL				\$2,886.86
AVERAGE				\$62.76

45. There were 46 weeks in the relevant period during which the Worker worked or was on paid annual leave. The calculation is then $A/B = \$2,886.86/46 = \62.76 .
46. I find \$62.76 is the amount permitted to be included in PIAWE for the first 52 weeks for which weekly payments are payable under section 44C(1)(b).
47. The Insurer submits in its reply form that the amount for overtime and shift allowances to be included in PIAWE under section 44C(1)(b) is only \$21.88. However, the Insurer has made some obvious errors in its calculation. For example, for Saturday shift allowances it calculated " $3.43 \times \$6.72 = \10.15 ". However, the Insurer only added 3.43 and \$6.72 together to get \$10.15 rather than multiplied them. I do not accept the Insurer's calculation of \$21.88 as the amount for section 44C(1)(b).

Calculation of PIAWE

48. I find that PIAWE is calculated under section 44C(1) for the first 52 weeks of weekly payments as $\$283.55 + \$62.76 = \$346.31$.

49. I find that after 52 weeks of weekly payments have been payable, overtime and shift allowance payments are excluded from PIawe so it becomes \$283.55.
50. The Authority recommends that the Insurer calculate weekly payments of compensation payable to the Worker in line with those findings.
51. The Authority's findings on PIawe are less favourable to the Worker than the Insurer's original decision. This means that the Insurer's review decision to give effect to the Authority's recommendation will result in a reduction in the amount of weekly payments of compensation payable to the Worker. Before that reduction takes effect, the Insurer is required to give the Worker a new period of 3 months' notice from the date that she is notified of the review decision under section 44BD(1) of the 1987 Act.

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