



Workplace Injury Commission

CORRECTED DETERMINATION AND REASONS FOR DETERMINATION

CITATION: [2024] VWIC 5

ARBITRATION REFERENCE NUMBER xx/xxxx

PARTIES

WORKER [Worker's name] (The Worker)

WORKSAFE AGENT [Agent's name] (The Agent)

EMPLOYER [Employer's name] (The Employer)

ARBITRATION OFFICER Katie Valentine

DATES OF HEARINGS 4 April 2024 and 22 May 2024

DATE OF CORRECTED INTERIM DETERMINATION ~~12 June 2024~~ 26 June 2024

This corrected determination and reasons for determination are issued under the slip rule which enables the correction of accidental omissions; see *L Shaddock & Associates Pty Ltd v Parramatta City Council* (No 2) (1982) 151 CLR 590.

In the reasons for determination I do not consider "leave loading" as an allowance in the assessment of PIAWE; this is clearly excluded under the WIRC Act and the omission of the word 'not' in paragraph 86 was an error. Paragraphs 86 and 101 are amended to reflect this. This Corrected Interim Determination and Corrected Statement of Reasons replaces the previously issued Interim determination and Statement of reasons issued on 12 June 2024.

DETERMINATION

1. I determine that the Agent's decision dated 11 October 2023 under review is varied.
2. I determine that the Worker is entitled to pre-injury average weekly earnings (PIAWE) calculated in accordance with this determination

3. Under section 3011 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) (WIRC Act) I direct the Agent to re-calculate the Worker's PIAWE in accordance with the
4. WIRC Act and this determination and provide detailed calculations to the Workplace Injury Commission (WIC) by 26 June 2024.
5. The Worker will be given the opportunity to respond before the arbitration continues to a final determination.
6. I certify that each party is bound by this result.

COSTS

7. As the decision of the Authorised Agent is varied, I award the Worker's costs as fixed under section 301W of the WIRC Act to be paid by the Agent.
8. If the parties cannot agree on the monetary amount of costs that are payable, a party may submit a *Request for Costs Decision* form to WIC within 30 days of this determination

CORRECTED REASONS FOR DETERMINATION

DISPUTE REFERRED FOR ARBITRATION

1. This arbitration is about whether the Agent correctly calculated the Worker's pre-injury average weekly earnings (PIAWE) for an accepted claim for compensation.
2. Prior to the injury, the Worker had been working 38 hours per week for the Employer (the First Employer) since 14 October 2016.
3. The Worker was also employed by [name of Second Employer] (the Second Employer), working part-time, between 18 and 38 hours per week.
4. The parties agree the Worker's date of injury is 3 November 2022 and the Worker ceased work with the First Employer on 7 February 2023.
5. On 17 February 2023, the Worker lodged a claim for compensation.
6. On 18 February 2023, the Worker ceased work with the Second Employer.
7. On 21 February 2023, the Agent accepted the claim.
8. On 23 February 2023, the Agent calculated the Worker's PIAWE as \$1,820.
9. The Worker lodged an application for conciliation disputing this calculation and on 8 May 2023, a Conciliation Officer issued a genuine dispute certificate.
10. The Worker lodged a referral for arbitration and on 19 September 2023, WIC issued a determination cited as [2024] VWIC 2. The issue in that dispute was whether the Worker's earnings from work with the Second Employer should be taken into account when calculating the Worker's PIAWE. The determination ordered the Agent to re-calculate the Worker's PIAWE to include earnings from work with both the First and Second Employers, in accordance with Item 7 of Schedule 2 of the WIRC Act.
11. On 11 October 2023, the Agent issued a decision that the Worker's PIAWE was \$2,593, to be paid from 7 February 2023.
12. The Worker lodged an application for conciliation to dispute this calculation and on 14 March 2024, a Conciliation Officer issued a genuine dispute certificate.
13. On 15 March 2024, the Worker lodged a referral for arbitration.
14. On 4 April 2024, an initial hearing was held by video conference, attended by the Worker and a representative from the Agent. The Worker gave affirmed evidence. On 22 May 2024, a further hearing was held by video conference attended by the same people. The Worker again gave affirmed evidence.
15. In making this determination, I have considered all the material included in the Arbitration Book (pages 1-226), Schedule B of the Arbitration Book (pages 227-502); and the evidence
16. and submissions presented at the arbitration hearings. The relevant evidence is discussed below.

ISSUES

17. The relevant legislation in this matter is the WIRC Act.
18. The issues to be considered in this dispute are:
 - When does the relevant period commence?
 - Which weeks in the 52 weeks prior to the Worker's injury should be included in the relevant period?
 - What is the Worker's PIAWE?

CONSIDERATION OF ISSUES

Burden and standard of proof

19. The Worker must show that, on the balance of probabilities, he has an entitlement to compensation; see *Small v Maffra Waste Disposal* [2021] VMC 017. Further, in *Pobke v Ninth Rischell Pty Ltd* [2015] VMC 23 at [90], Magistrate Wright found that the worker bore the '... onus as to the issue of recalculation of PIAWE having regard to the fact that he seeks to alter the situation as it was determined initially.'

When does the relevant period commence?

20. The parties agree on the following:
 - a. The Worker's date of injury is 3 November 2022, and he ceased work with the First Employer on 7 February 2023.
 - b. The Worker had been employed for more than 52 weeks with both the First Employer and the Second Employer and that therefore, the relevant period is 52 weeks before the injury.
21. The parties were asked to confirm whether they considered the relevant period to be from 4 November 2021 to 2 November 2022. The Worker agrees it is. The Agent submits the relevant period is from 4 November 2021 to 30 October 2022, 'in line with the payslips and covers a 52 week period.'
22. Subsection 154(1)(a) of the WIRC Act states that the 'relevant period' is a reference to:

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.
23. Having regard to subsection 154(1)(a), and the fact that there is no dispute between the parties that the date of injury is 3 November 2022, I find that the relevant period is from 4 November 2021 until 2 November 2022, which is 52 weeks immediately prior to the date of injury of 3 November 2022.

Which weeks in the 52 weeks prior to the Worker's injury should be included in the 'relevant period'?

24. Section 153(1)(a) of the WIRC Act states that any week during which the Worker did not actually work and was not on paid leave or was on paid leave at a rate less than the base rate of pay is excluded from the 52 week relevant period.
25. In the relevant period, the Worker had weeks in which:
- a. He actually worked for both employers;
 - b. He was on paid leave with both employers;
 - c. He was on unpaid leave with both employers;
 - d. He was on unpaid leave with the First Employer and actually worked for the Second Employer;
 - e. He was on paid leave with the First Employer and unpaid leave with the Second Employer, or vice versa; and
 - f. He had both days of paid leave and unpaid leave with the First Employer; and unpaid leave with the Second Employer.
26. The parties do not agree on which weeks should be included in the relevant period. I therefore need to determine whether certain weeks within the relevant period are excluded under subsection 153(1) for the purposes of calculating the Worker's PIAWE.

Worker's submissions

27. The Worker submits that the only weeks that should be included in the relevant period are those when he was on paid leave or actually working at *both* the First and Second Employers. He submits these dates are between 4 November 2021 and 2 January 2022; and between 20 August 2022 and 2 November 2022.
28. The Worker's *Referral for Arbitration* form states:

Recommendation from previous Arbitration Outcome [[2023] VWIC 2] applied incorrectly.

Wages from 2nd employer taken into consideration following arbitration outcome, however "Relevant Period" changed and applied incorrectly.

Weeks not worked with 2nd employer and no income between January 2022 to February 2022 also included as "0" (no earnings) thereby reducing the PIAWE significantly. Only in receipt of paid leave entitlements with PIE [pre-injury employer] between Jan 2022 to Feb 2022, but no earnings from 2nd employer.

...

Section 153 to be applied correctly. Did not work with both employers between January 2022 to August 2022. Relevant periods to be considered from DOI 03/11/2022 are 4/11/2021 to 02/01/2022 and 20/08/2022 to 3/11/2022 following my return from extended leave.

29. He also submits:
- a. Subsection 153(1)(a) does not say how work with two employers should be treated.
 - b. The Worker did not actually work from January 2022 to August 2022.

c. The Worker's interpretation of subsection 153(1)(a) is therefore:

... given I did not work between the period of 03 January 2022 to 19 August 2022 and I was also on "unpaid leave" during that period, I believe this should NOT be included in the PIAWE calculation as this is not a true reflection of my normal work schedule/wages. As a result, despite having paid leave entitlements from [the First Employer] between the period of 03 January 2022 to 18 February 2022, the entire period should be treated as "period of exclusion" from the relevant period and should NOT be included in the calculation of PIAWE for both employers.

Agent's submissions

30. The Agent submits:

a. The period that the Worker was on unpaid leave from the Second Employer is not excluded because he was in receipt of paid leave from the First Employer, not at a rate less than the base rate of pay. It submits (unedited):

The Pre-injury payroll from 17.01.22 to 20.02.22, indicates the worker has not worked but was on paid leave as annual leave and sick leave, however, even though the worker has not worked during the period, he was paid the equivalent amount of his hourly rate by the number of hours he was on leave.

Therefore, those weeks are not excluded from the relevant period. Only when the worker took unpaid leave and did not get paid from both emps, the periods are excluded.

b. The Worker falls within Schedule 2 Item 7, therefore the relevant period is for all weeks where he worked for either both or one employer.

31. During the course of the dispute, the Agent amended its PIAWE calculation. It separated the Worker's actual wages for each employer and then divided the Worker's actual pay for each employer by the relevant weeks worked for one or both employers. The Agent then applied a 'partial weeks' calculation method¹ as set out in Part 3.1.1.1 of the WorkSafe Claims Manual (Claims Manual). It combined the earnings from both employers, resulting in a PIAWE of \$2,628; an increase of \$35 per week.

32. After the second hearing, the Agent provided a further PIAWE calculation including the earnings from the First Employer under subsection 158(1)(a)(i)² to take into account the relevant industrial award; increasing the Worker's PIAWE to \$2,631.52.

Any week during which the Worker did not actually work

33. Subsection 153(1) states that the Worker's PIAWE is calculated in respect of a relevant period by calculating the sum of:

¹ Part 3.1.1 of the Claims Manual states 'Any week where the worker did not work and was on unpaid leave or was on paid leave at a rate less than the base rate of pay is to be excluded at the partial equivalent rather than the full week... The week in which the worker suffers their claimed injury may be considered a partial week or a full week. If the worker's ordinary earnings are calculated on the basis of actual earnings rather than a base rate of pay and ordinary hours worked, the number of weeks should not be rounded up in taking the average of the worker's weekly earnings and should be calculated including the fraction of the week.'

² The Agent calculated the ordinary hours of work (38 hours per week) using the Worker's the ordinary hours of work as set out in the contract between the Worker and the First Employer.

- (a) the average of the worker's ordinary earnings during the relevant period (excluding from that period any week during which the worker did not actually work and—
(i) was not on paid leave; or
(ii) was on paid leave at a rate less than the base rate of pay)—
expressed as a weekly sum; and
(b) the worker's earnings enhancement (if any) in the relevant enhancement period.

34. In order for any weeks to be excluded from the relevant period, subsection 153(1)(a) states it must be 'any week during which the worker did not actually work'.
35. Following subsection 153(5)³, this section must be interpreted in accordance with Column 3 of Item 7 of Schedule 2 which states that PIAWE is to be calculated 'with reference to earnings from work with all the employers'.
36. On its plain meaning, I consider 'any week during which the Worker did not actually work' means a week in which the Worker did not do any actual work at all with either Employer.
37. Having regard to the payslips with both Employers, and the Worker's submissions and oral evidence, I am satisfied that the Worker did not actually work from 3 January 2022 to 19 August 2022 (the 'not working' period).
38. Noting that section 153 must be read in conjunction with Item 7 of Schedule 2, it is therefore only in the 'not working' period that I must consider whether any weeks should be excluded from the relevant period by reference to one employer or 'all the employers'. It also follows that any weeks outside of the 'not working period' (i.e., 4 November 2021 to 2 January 2022 and 20 August 2022 to 2 November 2022) must be *included* in the relevant period to calculate the PIAWE under subsection 153(1).

When does a week commence?

39. Given these findings, I need to determine when the week commences for the Worker in order to determine which weeks are excluded from the relevant period.
40. The Worker says the First Employer had a pay period commencing Saturday to Friday and the Second Employer had a pay period from Monday to Sunday.
41. The Agent submits a 'WorkSafe week' is from Saturday to Friday. It refers to Part 1.5.3.1 of the Claims Manual:

A Worksafe week commences on a Saturday. An extract from the claims manual is below for your reference. Whilst this refers to direct payees it is more widely applied across the scheme. As advised in the hearing this is also applied to both the 13 and 52 week reductions which occur on a Saturday.

1.5.3.1 Remittance processing details

...

Payments for workers are processed daily. However, where weekly compensation payments are paid directly to the worker and they are up to date, these are processed based on a Saturday to Friday week.

³ Subsection 153(5) states: 'In relation to a worker of a class referred to in column 2 of an Item in Schedule 2, pre-injury average weekly earnings means the amount determined in accordance with column 3 of that Item, expressed as a weekly sum.'

42. I note this part of the Claims Manual is not publicly available and the excerpt the Agent provided states it is used for internal processing of payments only. I do not consider this to be a policy that assists with interpreting subsection 154(1)(a) as it is not relevant to the definition of 'relevant period', nor is it available to the public to be used to interpret this section.
43. Subsection 154(1)(a) states that the relevant period is the 52 weeks 'immediately before the injury'. As the Worker was injured on Thursday 3 November 2022, the 52 weeks 'immediately before the injury' commence on Thursday 4 November 2021. Therefore, I find for the purposes of calculating which weeks are excluded from the relevant period in this dispute, a week is from Thursday to Wednesday.

The Worker did not actually work and was not on paid leave

44. Section 153(1) allows for the exclusion of a week from the relevant period if the Worker:
- was not on paid leave or
 - was on paid leave at less than his base rate of pay.
45. Those criteria are additional to the requirement that the Worker 'did not actually work' (see above).
46. The Worker submits that in subsection 153(1) the phrase 'any week during which the worker did not actually work and ...was not on paid leave', should be interpreted to mean that any period in which he was on unpaid leave with *any* employer should be excluded from the relevant period. Therefore, if in a week he was concurrently on paid leave with one employer and unpaid leave with the other, those weeks should be excluded.
47. The Agent submits that those weeks are not excluded from the relevant period. However, at the first hearing, the Agent agreed that this part of the legislation is 'open to interpretation'.
48. In interpreting subsection 153(1), Column 3 of Item 7 in Schedule 2 of the WIRC Act directs me to calculate the PIAWE 'with reference to earnings from work with all the employers'. I must therefore consider whether to exclude from the relevant period any week during which the Worker did not actually work and was not on paid leave 'with reference to earnings from work with all the employers'.
49. I consider the provision is unclear when taking into account earnings from two employers. Where two constructions of workers compensation legislation are possible, that which is favourable to a worker should be preferred; see Fullagar J in *Wilson v Wilson's Tile Works Pty Ltd* (1960) 104 CLR 328 at 335, applied by Newton and Norris JJ in *Dodd v Executive Air Services Pty Ltd* [1975] VR 668 at 679 and 682. Therefore, I consider any ambiguity in subsection 153(1) is to be construed in the Worker's favour, subject to section 35 of the *Interpretation of Legislation Act 1984* (Vic) (Interpretation Act). This section requires the adoption of a construction which promotes the 'purpose or underlying object' of an Act.
50. Section 10 of the WIRC Act sets out the purpose of the legislation.

Objectives of Act

The objectives of this Act are to—

...

(d) ensure appropriate compensation and provisional payments under this Act or the Accident Compensation Act 1985 is paid to injured workers in the most socially and economically appropriate manner, as expeditiously as possible; and

...

51. Subsection 35(b) of the Interpretation Act also states that in interpreting a provision of an Act, consideration may be given to any relevant documents, including explanatory memoranda or other documents laid before or otherwise presented to any House of the Parliament. I have therefore considered the Second Reading Speech on 17 October 2013 at page 3232 (Hansard, Victorian Legislative Council) that amended subsection 153(1)(a) to its present form and states:

There are a small number of minor changes to clarify benefit provisions and to address anomalies. These include a change to the pre-injury average weekly earnings provisions to ensure that workers who take leave at less than their full rate of pay prior to being injured have their PIAWE calculated based on their normal rate of pay.

52. In *Milenkovski v. Logical Staffing Solutions Group Pty Ltd* [2010] VMC 41, which involved a dispute over the inclusion in the relevant period of weeks when a casual worker was overseas and not being paid, Magistrate Lauritsen stated:

"Average weekly earnings" are meant to reflect a weekly average of the earnings of the worker when working or paid when not. ... If the legislative purpose is to reflect his actual wage then the inclusion of the non-work related period will not achieve that purpose. It results in an average weekly wage less than that he earned when working.

53. Given the ambiguity in the provision, the fact that the WIRC Act is beneficial legislation, and having regard to the objects of that Act, I find that a construction in favour of the Worker is to be preferred. The WIRC Act includes an objective to ensure that appropriate compensation is paid to injured workers in the most socially and economically appropriate manner. I have therefore considered the purpose of parliament amending subsection 153(1)(a), to ensure a Worker's PIAWE is calculated based on their normal rate of pay.

54. I consider that in a week when the Worker was not actually working and on a combination of paid and unpaid leave with two employers, he was being paid less than the base rate of pay 'with reference to earnings from work with all the employers' as Item 7 of Schedule 2 directs. To include periods of concurrent paid and unpaid leave in the relevant period would result in PIAWE which is not in keeping with the objectives of the WIRC Act and the parliamentary intention of the amendment.

55. In addition, when the Worker was concurrently on paid leave with one employer and unpaid leave with the other, he was paid less than his base rate of pay with both employers combined; see subsection 153(1)(a)(ii).

56. I therefore find that the relevant period should exclude any weeks in which the Worker did not actually work or was on paid leave at less than his base rate of pay having regard to earnings from both employers.

57. The payslips show and I find that the Worker did not actually work and was on either unpaid leave or a combination of paid and unpaid leave with both employers in the weeks commencing on a Thursday from 6 January 2022 to 17 August 2022. I therefore exclude those weeks from the relevant period.

What is the Worker's PIAWE?

Definition of PIAWE

58. To calculate the Worker's PIAWE, I must again consider the definition in subsection 153(1):

- (a) the average of the worker's ordinary earnings during the relevant period (excluding from that period any week during which the worker did not actually work and—
 - (i) was not on paid leave; or*
 - (ii) was on paid leave at a rate less than the base rate of pay)—*expressed as a weekly sum; and*
- (b) the worker's earnings enhancement (if any) in the relevant enhancement period.*

59. The ordinary earnings of the Worker will be dealt with below. It is contextually useful to first address the sub-definitions that lead to ordinary earnings in a logical sequence.

Ordinary hours of work

60. Section 158 relevantly defines ordinary hours of work:

158 Definition applying to pre-injury average weekly earnings and current weekly earnings—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 an industrial award applies are—
 - (i) if the ordinary hours of work in relation to a week are agreed or determined in accordance with an industrial award between the worker and the employer, those hours; or*
 - (ii) in any other case, the worker's average weekly hours during the relevant period (excluding from that period any week during which the worker did not actually work and was not on paid leave at the base rate of pay); or ...**

Ordinary hours of work with the First Employer

61. The Worker has provided an employment contract and '[First Employer] Enterprise Agreement 2022' that specifies that as a full-time employee, ordinary hours of work are 38 hours per week. This is mirrored in the Community, Home Care and Disability Services Industry Award 2010 (SCHADS Award) that the employment contract states applies. In accordance with subsection 158(a)(i), as the ordinary hours of work in relation to a week are agreed or determined in accordance with an industrial award between the Worker and the First Employer, I find that the Worker's 'ordinary hours of work' are 38 hours per week.

Ordinary hours of work with the Second Employer

62. In relation to the Second Employer, although the employment contract states that the SCHADS Award also applies to the Worker's employment, the agreed ordinary hours of work are not clear:

- a. The Worker submits he worked 41 hours per week.
- b. The employment contract states that the Worker was employed part time to work 40 hours per week, but that these hours may be subject to variation as agreed between the Worker and the Employer, in writing, from time to time.

- c. The Worker's payslips show variable hours over the relevant period of approximately 18-38 hours per week.
63. At the second hearing, the Worker submitted that:
- a. There was some occasional fluctuation in hours due to sickness or shift swaps, but his roster was set at Friday 12pm-10pm, Saturday 5pm, sleepover to 9am Sunday, Sunday 6pm, sleepover to 9am Monday.
 - b. On Saturday and Sunday he worked from the start of the shift (5 or 6pm) to 11pm and then slept over, and worked from 7am to 9am; being inactive between 11pm and 7am.
 - c. The Employer communicated his roster to him four weeks in advance.
64. The SCHADS Award states that the ordinary hours of work for each employee will be communicated to employees.
65. Even though an industrial award applies to the employment with the Second Employer, and the employment contract states he was employed for 40 hours per week, I consider the ordinary hours of work in relation to a week were not agreed or determined in accordance with the award. The payslips show that the number of hours the Worker worked were variable, although he always worked the same shifts on Fridays, Saturdays and Sundays. I therefore consider and find that section 158(a)(ii) applies to the Worker's ordinary hours of work with the Second Employer. The Worker's ordinary hours of work are therefore the Worker's average weekly hours during the weeks that are included in the relevant period.

Base rate of pay

66. Section 156 defines 'base rate of pay' as follows:

156 Definition applying to pre-injury average weekly earnings and current weekly earnings—base rate of pay

- (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 (including any casual loadings) but does not include the following—*
- (a) incentive-based payments or bonuses;*
 - (b) loadings (excluding any casual 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).*
- (2) *In relation to pre-injury average weekly earnings and current weekly earnings, if, at the time of the injury—*
- (a) a worker's base rate of pay is prescribed by an industrial award that applies to the worker;*
and
 - (b) the worker's actual rate of pay for ordinary hours is higher than that rate of pay—*
the worker's actual rate of pay is to be taken to be the worker's base rate of pay.

Base rate of pay with the First Employer

67. Subsection 156(2) provides that if the Worker's actual rate of pay for ordinary hours is higher than that in the SCHADS Award, the higher rate of pay is to be taken as the Worker's base rate of pay.
68. The SCHADS Award does not express wages as an hourly rate, but as a weekly amount. It is also unclear which position or level of employment applies to the Worker's role of Community Mental Health Practitioner which is not identified in the SCHADS Award.
69. I find that it is not possible to determine the hourly rate payable by the SCHADS Award. Having regard to subsection 156(2), which provides that the Worker should be paid the higher rate of either the amount specified in the SCHADS Award or his actual rate, I therefore find that the Worker's 'base rate of pay' with the First Employer is the Worker's actual rate of pay.
70. The Worker's employment contract states that the Worker was being paid an 'hourly rate', (in the payslips a 'normal amount') of \$34.90 per hour at the start of the relevant period, which increased to \$36.50 per hour from 9 July 2022 until the end of the relevant period. I therefore find that the Worker's base rate of pay was \$34.90 per hour at the start of the relevant period, and \$36.50 per hour from 9 July 2022 to the end of the relevant period.

Base rate of pay with the Second Employer

71. The employment contract with the Second Employer specifies the Worker's 'weekday daytime rate' (in the Payrate table appended to the employment contract, the 'ordinary hourly rate') of \$33 per hour. The Payrate table states that the hourly rate varied for afternoon shift, nightshift, Saturday, Sunday and public holidays. The Worker was also paid \$135 for each sleepover.
72. The SCHADS Award also does not describe the Worker's position described in the employment contract with the Second Employer as a Disability Support Worker. However, it states that shift allowances and penalty rates are payable for work done during the above shifts. The Worker was employed Fridays to Sundays and received higher rates of pay for working those hours.
73. At the second hearing, the Worker submitted that the base rate was \$33 per hour, the Sunday rate should have been \$66 per hour, and the Saturday rate should have been \$49.50 per hour. However, he consistently had difficulty being paid his entitlements from the Second Employer.
74. The Agent submits 'shift and overtime allowances form part of the Worker's earnings however a "sleepover allowance" is excluded.'
75. In order to determine the base rate of pay, I also need to first determine whether the Worker was entitled to allowances (as an 'earnings enhancement' under section 157) and what payments constitute allowances.

What is the earnings enhancement and earnings enhancement period?

76. Section 157 provides for an earnings enhancement where a worker has been paid certain allowances. Section 157 states:

157 Definitions applying to pre-injury average weekly earnings—earnings enhancement and enhancement period

*In relation to pre-injury average weekly earnings—**earnings enhancement**, in relation to a worker who—*

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

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

means the amount calculated in accordance with the formula—

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 at the base rate of pay;

enhancement period means—

(a) in relation to compensation in the form of weekly payments to the worker under section 161 or 162, the first 52 weeks in respect of which such compensation is paid or payable to the worker; or ...

Are overtime or shift allowances included in the Worker's PIAWE?

77. Subsection 157(b) provides that overtime or shift allowances are included in the PIAWE if a worker worked paid overtime or shift work that attracted that allowance during the relevant period and, it is likely that but for the injury, the worker would have worked paid overtime or shift allowance at any time in the 52 weeks after the injury.

78. In relation to the First Employer, the Worker was paid both overtime and shift allowances during the relevant period. In relation to the Second Employer, the Worker was paid shift allowances during the relevant period.

79. I am satisfied that the consistent pattern of work shown by the Worker's employment contracts and payslips with both the First and Second Employers, show that the Worker would continue to have been paid shift allowance and overtime but for the injury in the 52 weeks after the injury. Therefore, I find that overtime and shift allowances are included in the Worker's PIAWE.

What payments constitute allowances?

80. Subsections 156(1)(a) - (f) set out the payments that do not form part of the base rate of pay, including 'loadings', 'overtime or shift allowances' or 'any separately identifiable amount'.

81. The Worker's payslips with the First Employer show the Worker was paid a 'normal amount' (the normal amount) at \$34.90 per hour or \$36.50 per hour, weekends at twice the normal amount, leave loading, 'overtime' at 2.5 times the normal amount and 'afternoon shift' at 12.5% of the normal amount.
82. The Worker's payslips with the Second Employer state that the Worker was paid the following hourly rates: Weekday daytime rate (in the Payrate table, the 'ordinary hourly rate') - \$33, afternoon shift rate - \$36.30, night shift (Monday to Friday) rate - \$37.95, Saturday rate - \$46.20, Sunday rate - \$63.77, public holiday rate - \$72.50 and a sleepover rate - \$135 (for each sleepover).
83. Subsection 153(1) provides that the PIAWE includes the average of the Worker's ordinary earnings and the Worker's earnings enhancement, for the enhancement period (the first 52 weeks of compensation paid or payable).
84. Section 3 of the WIRC Act defines the term 'shift allowance' to mean 'an allowance or loading paid or payable for shift work or working on public holidays, Saturdays or Sundays.'
85. The Worker was paid an ordinary rate with each employer; with the First Employer the normal amount and the Second Employer a 'normal amount' or 'ordinary hourly rate'.
86. Part 3.1.5.4 of the Claims Manual provides that there are two main types of shift allowances:
- *shift allowances paid for each hour of the shift that is worked. This type of shift allowance may be referred to as a penalty rate, and*
 - *shift allowances paid per rostered shift or period of duty for which the shift allowance applies.*
87. The WIRC Act therefore separates a base rate of pay from overtime, or shift allowances, including penalty rates. I therefore find that the Worker's base rate of pay with the First Employer was \$34.90 per hour at the start of the relevant period, which increased to \$36.50 per hour from 9 July 2022 to the end of the relevant period. The Worker's base rate of pay with the Second Employer was \$33 per hour. Any amounts over this for afternoon, evening, Saturday, Sunday or public holiday shifts constitute allowances. I also find that leave loading is not an allowance.

Sleepover payment

88. The Worker was paid \$135 each time he slept over during his shift at the Second Employer, which occurred on a regular basis, as his weekly Saturday and Sunday shifts include a sleepover (the sleepover payment).
89. The Worker submits:
- ...the sleepover allowance is a flat rate of \$135. The sleepover period is 'inactive' and I am not required to work. In case there are active hours due to unforeseen circumstances, the sleepover allowance covers the first full hour of being active. Subsequent hours of being active are paid on an hourly rate of \$37.95 depending on the number of hours I am active for. This is paid in addition to the sleepover allowance of \$135. Having said that, during my time at [the Second Employer] I never had any active hours and was only paid the sleepover allowance rate of \$135.*
90. The Agent submits:

...shift and overtime allowances form part of the worker's earnings however a "sleepover allowance" is excluded. There is no personal exertion and the worker is not performing duties. NB – in the event a worker is required to perform work during the sleepover period then the duration of those duties will be paid at the appropriate rate. This period is sometimes notes as a recall allowance.

91. The sleepover payment is described in the SCHADS Award as a 'sleepover allowance of 4.9% of the standard rate for each night on which they sleep over.' It notes that where a worker is required to work during the sleepover period they will be paid a minimum of one hour at the prescribed overtime rate.
92. Neither the legislation nor the Claims Manual provides specifically for the sleepover payment. Part 3.1.5.4 of the Claims Manual states (unedited):

Other payments & allowances that are not a shift allowances

There are many other allowances that workers may receive that are unrelated to the particular spread of the hours of employment.

Most of these other allowances are to either:

- reimburse workers for expenses they have incurred in the course of their employment*
- compensate workers for duties or environments that are considered unpleasant.*

These allowances are not for the timing of the shift and so are not shift allowances.

93. I consider a sleepover allowance is associated with the timing of the shift, given that it occurs overnight. As with other allowances associated with the timing of the shift, it is separate from 'personal exertion' and I do not accept the Agent's submission in this regard. The fact that the Worker has an entitlement to further pay if required to work during the sleepover does not detract from this either. The allowance's purpose is to compensate due to the fact that the Worker is sleeping away from home, and could be called on to work. There is no provision that excludes such a payment. I therefore find that the sleepover payment is an allowance.

Ordinary earnings

94. Section 155(1) states:

*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—

(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 at the base rate of pay; and

...

(b) if paragraph (a) does not apply, the actual earnings (other than an amount of a kind referred to in section 156(1)(a), (b), (c), (e) or (f)) paid or payable to the worker in respect of that week—

and include—

(c) any other amount (other than an amount of a kind referred to in section 156(1)(a), (b), (c), (e) or (f)) for the performance of work by the worker, that, under the worker's terms of employment, the employer is required to apply or deal with on behalf of the worker in accordance with the worker's instructions, in respect of that week; ...

Ordinary earnings with the First and Second Employers

95. I have found that for both the First and Second Employers, the Worker's base rate of pay is not calculated on the basis of ordinary hours worked. Therefore, subsection 155(1)(b) applies and I find that the Worker's ordinary earnings are the actual earnings, not including the loadings and allowances referred to above in respect of a week.

How is the Worker's PIAWE to be calculated?

96. In the 'not working' period (3 January to 19 August 2022), the Worker had weeks of unpaid leave with both employers, or a combination of paid and unpaid leave with both employers.

97. Only the weeks (from Thursday to Wednesday) in which the Worker was actually working or on paid leave at least equal to his base rate of pay with both the First and Second Employers are included in the relevant period.

98. The Worker did not actually work and was on either unpaid leave or a combination of paid and unpaid leave with both employers in the weeks commencing on a Thursday from 6 January to 17 August 2022.

99. In order to determine the average of the Worker's ordinary earnings during the relevant period under subsection 153(1)(a), the Agent must therefore calculate the average with 20 weeks in the relevant period; being 9 weeks from 4 November 2021 to 5 January 2022, and 11 weeks from 18 August to 2 November 2022.

100. I also find that the Agent must include the Worker's earnings enhancement in the form of the allowances described above in the relevant enhancement period. In respect of section 157, A is the total amount paid or payable to the Worker for paid overtime and shift allowances in respect of the relevant period (i.e., 52 weeks) and B is the 20 weeks referred to in the preceding paragraph.

101. The Worker's PIAWE is to be determined by the Agent, taking into account the findings in this partial determination.

102. The Agent is to calculate the Worker's PIAWE with the following findings:

	First Employer	Second Employer
Relevant period	4 November 2021 to 2 November 2022	4 November 2021 to 2 November 2022
Weeks included in relevant period	4 November 2021 to 5 January 2022, and 18 August to 2 November 2022	4 November 2021 to 5 January 2022, and 18 August to 2 November 2022
Week commences	Thursday to Wednesday	Thursday to Wednesday

Ordinary hours of work (per week)	38	The Worker's average weekly hours during the weeks included in the relevant period
Base rate of pay (per hour)	\$34.90 from 4 November 2021 to 8 July 2022 and \$36.50 from 9 July to 2 November 2022	\$33.00
Allowances	Overtime, afternoon shift allowance, leave loading , weekend (amounts over base rate of pay)	Afternoon shift, nightshift, Saturday, Sunday, public holiday (amounts over \$33 per hour) and sleepover \$135
Ordinary earnings	Actual earnings	Actual earnings

DETERMINATION

- 103. I determine that the Agent's decision dated 11 October 2023 under review is varied.
- 104. I determine that the Worker is entitled to pre-injury average weekly earnings (PIAWE) calculated in accordance with this determination.
- 105. Under section 3011 of the WIRC Act I direct the Agent to re-calculate the Worker's PIAWE in accordance with the WIRC Act and this determination and provide detailed calculations to WIC by 26 June 2024.
- 106. The Worker will be given the opportunity to respond before the arbitration continues to a final determination.
- 107. I certify that each party is bound by this result.

COSTS

- 108. As the decision of the Authorised Agent is varied, I award the Worker's costs as fixed under section 301W of the WIRC Act to be paid by the Agent.
- 109. If the parties cannot agree on the monetary amount of costs that are payable, a party may submit a Request for Costs Decision form to WIC within 30 days of this determination.

[signed]

.....

Katie Valentine
Arbitration Officer

FINAL DETERMINATION AND REASONS FOR DETERMINATION

CITATION: [2024] VWIC 5

ARBITRATION REFERENCE NUMBER xx/xxxx

PARTIES

WORKER [Worker's name] (The Worker)

WORKSAFE AGENT [Agent's name] (The Agent)

EMPLOYER [Employer's name] (The Employer)

ARBITRATION OFFICER Katie Valentine

DATES OF HEARINGS 4 April 2024 and 22 May 2024

DATE OF FINAL DETERMINATION 16 July 2024

DETERMINATION

1. I determine that the Agent's decision dated 11 October 2023 under review is varied.
2. I determine that the Worker is entitled to pre-injury average weekly earnings (PIAWE) of \$2,848, which includes shift allowances of \$835, subject to the statutory maximum imposed by the *Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)* (the WIRC Act).
3. The Agent is directed to pay the Worker his entitlements and any outstanding amounts in accordance with this determination and the WIRC Act.

This determination comes into effect immediately. I certify that each party is bound by this result.

COSTS

4. As the decision of the Authorised Agent is varied, I award the Worker's costs as fixed under section 301W of the WIRC Act to be paid by the Agent
5. If the parties cannot agree on the monetary amount of costs that are payable, a party may submit a Request for Costs Decision form to WIC within 30 days of this determination.

REASONS FOR DETERMINATION

DISPUTE REFERRED TO ARBITRATION

1. This arbitration is about whether the Agent correctly calculated the Worker's pre-injury average weekly earnings (PIAWE) for an accepted claim for compensation.
2. The background, evidence, submissions and findings as to how the PIAWE is to be calculated is set out in the corrected interim determination [2024] VWIC 5 issued on 26 June 2024.
3. On 26 June 2024, the Agent provided its revised PIAWE calculations. It calculated the Worker's PIAWE to be \$2846.61, rounded to \$2846.00.
4. On 27 June 2024, the Worker was invited to review these calculations and respond. I considered no further hearing was required and on 2 July 2024 I notified the parties that the hearing was now concluded and I would be issuing a final determination within 14 days.
5. The Worker also requested that I determine the outstanding top up payments and any applicable indexation. I informed the parties that this is outside the jurisdiction of this dispute; my task is solely to determine the Worker's PIAWE. The Agent will calculate and pay any outstanding amounts or indexation in accordance with this determination and the WIRC Act.
6. On 9 July 2024, I requested further information from the Worker about the hours and overtime worked in the pay periods 30 October 2021 to 12 November 2021, and 29 October 2022 to 11 November 2022. The Worker responded on the same day. The response was exchanged with the Agent who was invited to respond.
7. On 9 July 2024, the Agent requested a further hearing. I did not agree to this request as I consider the only information required to issue the final determination was provided by the Worker on 9 July 2024 and the Agent was provided an opportunity to respond to this information. The Agent did not respond to the further information provided by the Worker. When reviewing the Agent's request I had regard to WIC's legislative duty under section 281A of the WIRC Act to be 'fair, economical, informal and quick', balanced with ensuring procedural fairness and facilitating a timely, fair and final resolution of the dispute.

ISSUES

8. The only issue to be considered is the calculation of the Worker's PIAWE.

CONSIDERATION OF ISSUES

What is the Worker's PIAWE?

Worker's Submissions

9. The Worker's submissions are:
 - a. That he wishes to clarify whether the Agent's inclusion of the week 3-9 January 2022 for the Second Employer is correct. He submits:

Given this is outside the weeks within the relevant period (beyond 05/01/2022) and there is no income for this period, I am unsure if this should be included. On the other hand, the pay period 25/12/2021 to 07/01/2022 from PIE [the First Employer] has Sick/Personal Leave for the days 04/01/2022, 05/01/2022 and 06/01/2022 even though it stretches beyond the relevant period weeks (beyond 05/01/2022) and its inclusion is justified.

If this is indeed correctly included and calculated, I am happy with the calculations.

10. In relation to the payslips between 30 October 2021 and 12 November 2021, and 29 October 2022 and 11 November 2022, he worked 31 October 2021 to 4 November 2021 and 7 to 10 November 2021, 30 October 2022 to 3 November 2022 and 6 to 10 November 2022. 11 November 2021 was a rostered day off.

Considerations

11. The Agent has provided detailed calculations of the PIAWE, largely complying with the findings in my interim determination. However, there are some corrections to be made.
12. I have determined that the weeks to be included in the relevant period are 4 November 2021 to 5 January 2022 and 18 August to 2 November 2022.
13. In relation to the First Employer:
- a. The Agent wrongly included earnings from 30 October 2021 to 3 November 2021. Those earnings have been subtracted from the calculations.
 - b. The Agent included earnings to 7 January 2022; whereas it should not have included those after 5 January 2022. Earnings included for 6 and 7 January 2022 have been subtracted from the calculations.
 - c. The Agent did not include earnings at the end of the relevant period, from 29 October 2022 to 2 November 2022. Those earnings have been added to the calculations.
14. In relation to the Second Employer:
- a. The Agent's calculations are until 2 January 2022, which correctly takes into account that the Worker was on unpaid leave from 3 to 5 January 2022.
 - b. The Worker's earnings on 30 and 31 October 2021 were included when they were not part of the relevant period. These were subtracted from the calculations.
 - c. The Agent did not include earnings at the end of the relevant period from 31 October 2022 to 2 November 2022. Those earnings have been added to the calculations.

Conclusions

15. Taking these considerations into account, I find that the Worker's:
- a. ordinary earnings for both employers are \$2,012.99, (rounded to the closest dollar) to \$2,013.
 - b. shift allowances are \$834.86, rounded to \$835. He has no overtime in the weeks included in the relevant period.
 - c. PIAWE is amended to \$2,847.85, rounded to \$2,848.

16. There is a statutory maximum that applies to the Worker's PIAWE as set out in sections 161-163 of the WIRC Act; which is twice the State average weekly earnings. From 1 July 2022, the statutory maximum was \$2,590. From 1 July 2023, the statutory maximum PIAWE is \$2,660 per week. From 1 July 2024, the statutory maximum PIAWE is \$2,800.

DETERMINATION

- 17. I determine that the Agent's decision dated 11 October 2023 under review is varied.
- 18. I determine that the Worker is entitled to pre-injury average weekly earnings (PIAWE) of \$2,848, which includes shift allowances of \$835, subject to the statutory maximum imposed by the WIRC Act.
- 19. The Agent is directed to pay the Worker his entitlements and any outstanding amounts in accordance with this determination and the WIRC Act.
- 20. This determination comes into effect immediately. I certify that each party is bound by this result.

COSTS

- 21. As the decision of the Authorised Agent is varied, I award the Worker's costs as fixed under section 301W of the WIRC Act to be paid by the Agent.
- 22. If the parties cannot agree on the monetary amount of costs that are payable, a party may submit a Request for Costs Decision form to WIC within 30 days of this determination.

[signed]

.....

Katie Valentine
Arbitration Officer