



Workplace Injury Commission

DETERMINATION AND REASONS FOR DETERMINATION

CITATION: [2024] VWIC 6

ARBITRATION REFERENCE NUMBER 24/4123

PARTIES

WORKER [Worker's name] (The Worker)

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

EMPLOYER [Employer's name] (The Employer)

ARBITRATION OFFICER Katie Valentine

DATE OF HEARING 28 May 2024

DATE OF DETERMINATION 26 June 2024

DETERMINATION

1. I determine that the Agent's decision dated 7 September 2023 is varied. This means that the dispute is in favour of the Worker.
2. I determine that the date of injury is the claim lodgement date of 5 August 2023 in accordance with section 215 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) (the Act), and the relevant period for the purpose of calculating the Worker's pre-injury average weekly earnings (PIAWE) is the 52 weeks immediately preceding that date.
3. I direct that the Agent recalculate the Worker's PIAWE in accordance with the preceding paragraph and the Act.
4. This determination comes into effect immediately. I certify that each party is bound by this result.

COSTS

5. As the decision of the Agent is varied, I award the Worker's costs as fixed under section 301W of the Act to be paid by the Agent.

6. If the parties cannot agree on the monetary amount of costs that are payable, a party may submit a *Request for a 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 determined the Worker's date of injury and the relevant period for the purpose of calculating his pre-injury average weekly earnings (PIAWE).
2. The Worker is 30 years old, employed as a[n] [emergency services worker] since 2016.
3. On 5 August 2023, the Worker lodged a claim for compensation for a left hip injury that occurred over the course of his employment. The claim was accepted, and on 7 September 2023 the Agent issued a letter accepting liability for medical and like expenses, with a date of injury of 5 December 2022.
4. The Worker continued working until 19 November 2023 whereupon he ceased work to have surgery on his left hip. The Agent paid him weekly payments whilst off work, and the PIAWE was calculated based on his earnings in the 52 weeks prior to 5 December 2022.
5. The Worker lodged an application for conciliation to appeal the decision dated 7 September 2023 and on 28 March 2024, a Conciliation Officer issued a Genuine Dispute Certificate.
6. On 24 April 2024, the Worker lodged a referral for arbitration.
7. On 28 May 2024, the Worker, the Worker's assistant and the Agent's representative attended a hearing by video conference at which the Worker gave sworn oral evidence.
8. In making this determination, I have considered all the material included in the Arbitration Book (pages 1-35), and Schedule B of the Arbitration Book (pages 36-130), and the evidence and submissions presented at the arbitration hearing.

ISSUES

9. The issues to be considered in this dispute are:
 - a. What is the Worker's date of injury?
 - b. What is the relevant period for the calculation of the Worker's PIAWE?
 - c. What is the Worker's PIAWE?

PRELIMINARY MATTERS

10. After the hearing, the parties provided further documents and submissions. I requested the parties make a formal request in writing if they wished to have a further hearing in person. No request was made and on 20 June 2024, I confirmed that the hearing process was concluded and that I would make a determination 'on the papers'.
11. Thereafter, on 20 June 2024, the Agent notified WIC that it had issued a notice of the same date, amending the date of injury to 5 August 2023. It requested that WIC dismiss the dispute on the basis that it considers the dispute is resolved.

12. WIC sought the Worker's views who stated that they did not consider the dispute resolved and requested that the dispute be determined.
13. Section 301N of the Act enables WIC to dismiss a dispute without making a determination-
 - (a) if a party to the dispute is no longer able to participate in the arbitration; or
 - (b) for any other appropriate reason.
14. Paragraph 22 of the WIC *Adjournments, Dismissals and Referrals for Further Conciliation Policy* provides a non-exhaustive list of reasons why WIC may consider it appropriate to dismiss a dispute, which include the following:
 - the Worker cannot participate in arbitration,
 - the parties have reached agreement,
 - the Worker wishes to withdraw from arbitration,
 - the dispute has been overturned by the Workers Compensation Independent Review Service (WCIRS),
 - the parties consent to the dismissal,
 - a claim is misconceived,
 - a claim is fraudulent or vexatious or the dispute amounts to an abuse of process, such as where the Worker has commenced court proceedings for the same dispute, or
 - the dispute has already been determined by arbitration or a court.
15. I decide not to dismiss the dispute from arbitration because:
 - a. The substantive dispute before me is not entirely resolved by the Agent's alteration of the date of injury.
 - b. Whilst the notice of decision dated 7 September 2023 referred to in the outcome certificate from conciliation refers to medical and like expenses, it is clear from the parties' submissions, both in writing and at the hearing, that the dispute concerns the Worker's PIAWE, a sub-part of which is the date of injury. The claim was accepted for medical and like expenses on 7 September 2023. Subsequently, the Worker ceased work on 19 November 2023 and claimed weekly payments; submitting a certificate of capacity stating he was unfit for work from 19 November 2023 to 2 December 2023. This is confirmed by the Agent's notice dated 20 June 2024 that is an 'amended acceptance letter for your claim for weekly payments and the reasonable cost of medical and like expenses and this decision letter should be read in conjunction with the acceptance letter of 07/09/23.'
 - c. The issues in relation to PIAWE that are still not determined are the relevant period and the amount of the Worker's PIAWE. I will therefore continue to determine the dispute to ensure all issues in the dispute are determined, to ensure certainty and finality for the parties.
 - d. WIC does not establish binding precedents with its determinations; section 301Y of the Act provides that the WIC determination is final and binding in the present dispute.

CONSIDERATION OF ISSUES

Burden and standard of proof

16. The Worker must show that, on the balance of probabilities, they have an entitlement to compensation; see *Small v Maffra Waste Disposal* [2021] VMC 017.

What is the Worker's date of injury?

Worker's submissions

17. The Worker submits that his date of injury is 5 August 2023 on the basis that:
- He first took time off work for left hip surgery and recovery in November 2023.
 - The Agent does not dispute that the injury was sustained by gradual process over time.
 - At the time he lodged the claim he was working. Therefore, the date he lodged the claim must be the earliest possible date of injury in accordance with s 215(2).
 - Noting that his claim is not for any sequelae injuries, *Quigg v Northend Carpentry* [2017] VMC 13 supports that the deeming provisions apply to gradual process injuries.
 - In sworn oral evidence, he stated that the first time he discussed his injury with the Employer was when he lodged the claim on 5 August 2023.
18. The Worker submits that the relevant period for calculation of his PIAWE ended 5 August 2023, not 5 December 2022.

Agent's submissions

19. The Agent submitted:

...the medical evidence actually supports the date of injury being earlier than 5/12/22. Noting that there was an MRI to the left hip dated 20/8/2019 showing a tear and a surgeon report dated 7/2/22 noting pain presentation in the left hip.

For statutory benefits matters my understanding is the date of injury for TTCOE injuries is usually taken by assessing; when the injury was first noticed, when the injury was first reported, when medical treatment was first sought and the ceased work date. The earliest of these dates is normally taken to be the 'date of injury'.

20. The Agent submitted:

Section 154(1) expressly defines the relevant period as "52 weeks immediately before the injury" and not the date of incapacity.

...

Grech v Orica was a serious injury case concerned with the gradual process causation. The issue of PIAWE under the Act was not part of the dispute and did not require the Court of Appeal's determination.

...

[Magistrate Wright found in] Quigg v Northend Carpentry (MCV, G13376478, 14/6/17) that for the purposes of PIAWE for the pension the date of injury was in 2001 when the injury became known, rather than when the worker became incapacitated years later.

Similarly, in *Mitchell & Ors v G-Force Recruitment Pty Ltd* [2023] VCC 1389 Judge Purcell ...held that the date of injury for the purposes of calculating PIAWE could be no later than last day of employment.

21. In relation to section 215, the Agent submitted:

The intention and reasoning of Section 215(2) is to capture those workers who may have a frank date of injury but then continue to work and lodge an impairment benefit claim at a point in the future. It is not uncommon for this to be some years in the future, and a worker would be disadvantaged if the impairment benefit was to be apportioned back to the date of injury rather than the date the claim was lodged.

22. Noting that it agreed to alter the date of injury to 5 August 2023, the Agent's submissions maintained that section 215 relates only to impairment benefits claims.

Considerations

23. The relevant law in this dispute is section 215 of the Act as follows:

215 Injuries by gradual process other than industrial deafness

(1) For the purposes of determining the worker's entitlement to compensation under this Part, subject to subsections (2) and (3), if a worker sustains an injury, other than industrial deafness, that occurs by way of gradual process over time, the injury is deemed to have been sustained on the last day on which the worker was—

(a) performing duties; or

(b) exposed to conditions—

by reason of which the injury was due to the nature of the worker's employment or arose out of or in the course of the worker's employment.

(2) For the purposes of determining the worker's entitlement to compensation under this Part, subject to subsection (3), if a worker sustains an injury, other than industrial deafness, that occurs by way of gradual process over time and on the day on which the worker gives, serves or lodges a claim for compensation in respect of the injury, the worker is still—

(a) performing duties; or

(b) exposed to conditions—

by reason of which the injury is due to the nature of the worker's employment or arises out of or in the course of employment, the injury is deemed to have been sustained on that day.

...

24. The parties agree and I find from the evidence that the Worker:

- a. developed a gradual process injury over time to his left hip,
- b. lodged a claim for compensation for the left hip on 5 August 2023, and
- c. continued to perform his usual work duties and was exposed to the same conditions that led to the injury, until he ceased work for surgery on 19 November 2023.
- d. was initially certified unfit for all duties from 19 November to 2 December 2023, which created an entitlement to weekly payments.

25. Part 5 of the Act includes section 215 and the provisions relating to PIAWE in sections 153-158. Subsection 215(2) makes it clear that for a gradual process injury over time, where a

worker is still working in the same conditions, the date of injury is deemed to be the date the claim was lodged.

26. There is no ambiguity in this section that requires me to consider the case law submitted by the parties; none of which relates specifically to the interpretation of section 215 of the Act.

27. I therefore find that the Worker's date of injury is 5 August 2023.

What is the relevant period for the calculation of the Worker's PIAWE?

28. The Worker submits that the 52 weeks immediately before the injury is the period 5 August 2022 to 5 August 2023.

29. In the alternative, the Worker submits that the relevant period for the purposes of PIAWE is 19 November 2022 to 19 November 2023.

Considerations

30. Section 153 of the Act states that the PIAWE is calculated as the sum of the average weekly earnings during the 'relevant period.' Section 154 relevantly defines the relevant period as 'the period of 52 weeks immediately before the injury'.

31. As I have found that the date of injury was 5 August 2023, I find that the relevant period is the 52 weeks immediately prior to that date; namely 5 August 2022 to 4 August 2023.

What is the Worker's PIAWE?

32. The parties agreed at the initial hearing that the Worker's PIAWE could be calculated by the Agent with reference to the findings of the date of injury and the relevant period. I therefore direct the Agent to calculate the PIAWE in accordance with the findings in this determination and the Act.

Determination

33. I determine that the Agent's decision dated 7 September 2023 is varied. This means that the dispute is in favour of the Worker.

34. I determine that the date of injury is the claim lodgement date of 5 August 2023 in accordance with section 215 of the Act, and the relevant period for the purpose of calculating the Worker's PIAWE is the 52 weeks immediately preceding that date.

35. I direct that the Agent recalculate the Worker's PIAWE in accordance with the preceding paragraph and the Act.

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

COSTS

37. As the decision of the Agent is varied, I award the Worker's costs as fixed under section 301W of the Act to be paid by the Agent.

38. If the parties cannot agree on the monetary amount of costs that are payable, a party may submit a *Request for a Costs Decision* form to WIC within 30 days of this determination.

[signed]

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Katie Valentine
Arbitration Officer