Workplace Injury Commission

DETERMINATION AND REASONS FOR DETERMINATION

CITATION:	[2023] VWIC 2
ARBITRATION REFERENCE NUMBER:	[Number]

PARTIES

WORKER:	[Worker's name] (the Worker)
WORKSAFE AGENT/SELF-INSURER:	[Agent's name] (the Agent)
EMPLOYER:	[Employer's name](the Employer)

ARBITRATION OFFICER:	Michael Ryall
DATE(S) OF HEARING:	25 July 2023
DATE OF DETERMINATION:	19 September 2023

DETERMINATION

1. I determine that the Agent's decision dated 23 February 2023 is revoked. This means that the determination is in favour of the Worker.
2. I determine that the Agent must re-calculate the Worker's pre-injury average weekly earnings to include earnings from work with all of the Worker's employers, in accordance with Item 7 of Schedule 2 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) ('the Act').
3. I order and direct the Agent to calculate and pay the amount of compensation to which the Worker is entitled, in accordance with the Act.
4. This determination comes into effect immediately. I certify that each party is bound by this result.

COSTS

5. As this determination is in favour of the Worker, 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 Workplace Injury Commission within 30 days of this determination.

REASONS FOR DETERMINATION

DISPUTE REFERRED TO ARBITRATION

1. This dispute is about whether the earnings from all of the Worker's employers should be included in the calculation of the Worker's pre-injury average weekly earnings ('PIAWE').
2. The Worker was working for two employers in the health care sector at the time of suffering his injury. He worked at [Full-time employer's name] ('full-time employer') on a full-time basis as a Community Mental Health Practitioner and worked weekend shifts at [Second employer's name] ('second employer'), caring for a person with high needs.
3. The Worker made a claim for compensation by lodging a claim form dated 17 February 2023.
4. In his claim form, the Worker referred to suffering a psychological injury on 3 November 2022 due to alleged recurrent incidents of bullying over two years while working at the full-time employer.
5. On 21 February 2023, the Agent issued a notice accepting the Worker's claim.
6. On 23 February 2023, the Agent issued a further notice stating that it assessed the Worker's PIAWE to be $1,820, based on the earnings from his full-time employer and not his second employer ('the Agent's decision').
7. The Worker lodged an application for conciliation with the Workplace Injury Commission ('WIC') disputing the Agent's decision and a Genuine Dispute Outcome Certificate was issued by a Conciliation Officer on 8 May 2023.
8. The Worker subsequently lodged a referral for arbitration with WIC dated 12 May 2023 regarding the Agent's decision.
9. The Worker had also applied to the Workers Compensation Independent Review Service ('WCIRS') and between 7 June 2023 and 10 July 2023, the arbitration was adjourned while the Agent's decision was being reviewed by WCIRS. WCIRS provided its decision dated 7 July 2023, which affirmed the Agent's decision.
10. An initial hearing was held by video conference on 25 July 2023, attended by the Worker and [Agent's name], representing the Agent and the full-time employer. At the hearing, the Worker gave oral evidence after making an affirmation.
11. There were further documents and submissions provided by the parties after the hearing and both parties requested that a determination be made 'on the papers', rather than have a further oral hearing. On 5 September 2023, I confirmed that the hearing process was concluded and that I would make my determination without having a further oral hearing.
12. In making this determination, I have considered all the material included in the Arbitration Book (pages 1-171), and Schedule B of the Arbitration Book (pages 172-293), and the evidence and submissions presented at the arbitration hearing. The relevant evidence and submissions are discussed below.

Agreed Facts

13. The parties agreed that:

    a. The Worker sustained a mental injury while working for the full-time employer, which he stated on his claim form arose on 3 November 2022;

    b. The employment with the full-time employer was for 38 hours per week or more;

    c. The Worker ceased work with his full-time employer on 7 February 2023 because of his mental injury;

    d. The Worker's claim for compensation was accepted by the Agent and weekly payments and treatment expenses have been paid;

    e. The PIAWE at the Worker's full-time employer alone were $1,820, including $460 in average shift allowances;

    f. The Worker also worked at the second employer, when he sustained his injury with the full-time employer.

ISSUES

14. The relevant legislation in this matter is the *Workplace Injury Rehabilitation and Compensation Act 2013* ('the Act').

15. The issues to be determined in this dispute are as follows:

    a. Should the earnings from the Worker's full-time employer or both of the Worker's employers be included in the calculation of the Worker's PIAWE?

    b. In considering the first question, I need to determine if the Worker's injury resulted in an incapacity to work for one employer or both of his employers.

CONSIDERATION OF ISSUES

Burden and Standard of Proof

16. The case law requires the Worker to prove that, on the balance of probabilities, he is entitled to have his PIAWE calculated in an alternative manner to that calculated by the Agent.

Should the earnings from the Worker's full-time employer or both of the Worker's employers be included in the calculation of the Worker's PIAWE?

Relevant Legislation

17. Sections 153 to 159 of the Act deal with the calculation of a worker's PIAWE. 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.

18. On the basis that the Worker was employed by more than one employer, Items 2 to 8 of Schedule 2 are applicable. The Agent submitted that the Worker's PIAWE amount ought to be determined in accordance with Item 3 of Schedule 2. The Worker submitted that Item 7 of Schedule 2 should be applicable. Items 3 and 7 of Schedule 2 state:

Item	***Class of worker at time of injury***	***Calculation of PIAWE***
3	*Worker employed by 2 or more employers who works for one of those employers for at least the prescribed number of hours each week and to whom no industrial award is applicable.*	*The worker's pre-injury average weekly earnings are to be calculated in accordance with Division 1 of Part 5 with reference to the work for the employer for whom the worker works for at least the prescribed number of hours.*
7	*Worker employed by 2 or more employers who sustains an injury that results in an incapacity to work for one or more of those employers but not for all those employers.*	*The worker's pre-injury average weekly earnings are to be calculated in accordance with Division 1 of Part 5 with reference to earnings from work with all the employers.*

19. The distinguishing feature between Items 3 and 7 is the class of the worker at time of injury. Item 7 requires an assessment of whether a worker's injury results in an incapacity to work for at least one employer but not for all employers.

The Agent's submissions on the law

20. By email dated 8 August 2023, the Agent made a lengthy submission on the law and why it says that Item 7 should not be interpreted to allow the earnings from the Worker's second employer to be included in his PIAWE, which I summarise as follows:

    a. Item 7 is ambiguous, inconsistent and conflicts with other Items in Schedule 2, a drafting oversight and 'visibly flawed'.

    b. Item 7 sets 'an upper bound to the data from which PIAWE will be calculated' and the words 'with reference to' do not mandate the inclusion of earnings from all employers. In particular, the Agent submitted that 'item 7 establishes the data set and item 3 then serves to establish what is or isn't included'. I interpret the Agent's submission as saying that Item 3 limits Item 7 and caps the PIAWE to the amount calculated under Item 3.

    c. Applying the PIAWE calculation in Item 7 creates an 'infinite loop' in the legislation – requiring the reader to continually refer between Schedule 2 and Division 1 of Part 5.

    d. There would be 'absurd consequences' if earnings from all employers were used in the PIAWE calculation. The Agent essentially submitted that it would be absurd if the Act allowed a worker to have a higher PIAWE if they had two jobs and sustained

a minor injury (and was able to work one job and not the other), compared to the PIAWE of a catastrophically injured worker who could not work at all.

21. I do not accept the Agent's submissions for the following reasons:

    i. The apparent inconsistency between Item 7 and Items 2 to 6 is there for a sound reason and is therefore not an oversight or a flaw – the calculation in Item 7 acknowledges the impact of a worker's current weekly earnings on the amount of weekly payments payable if they are not incapacitated for work at all employers and they continue to work. Even though the inclusion of earnings from all employers increases a worker's PIAWE, the Act also reduces the amount of weekly payments payable after their injury by taking into account their current weekly earnings. If earnings from some employers were not included in their PIAWE and they continued to work, it has the potential to disadvantage the worker and their weekly payments may reduce to $0. This is an outcome which is inconsistent with the beneficial aspects of the Act and inconsistent with section 10 of the Act that compensation must be paid in a socially and economically appropriate manner.

    ii. The Agent's interpretation would render Item 7 redundant and ignores the clear and plain language of Item 7 that the PIAWE be calculated with reference to earnings from work with all employers if the criteria for that class of worker are met.

    iii. The Act does not state that Item 7 merely creates the data set and the other Items in Schedule 2 then limit what is and is not included in PIAWE. There is nothing in the Act which states or suggests that there is a two stage assessment process when considering the items in Schedule 2. Further, Item 7 does not limit the PIAWE figure in any way to exclude earnings from employers if a worker worked more than 38 hours per week.

    iv. The Agent's argument of an 'infinite loop' could be said to also apply to Item 3. Any interpretation of the legislation that results in an 'infinite loop' to assess PIAWE should be avoided if an alternative interpretation exists, which I consider does exist. The so-called 'infinite loop' can be avoided by simply utilising the remaining rules in Division 1 of Part 5 to calculate PIAWE at each employer and combining them.

22. The Worker provided a response to the Agent's submissions on the interpretation of Item 7, which did not assist me in interpreting Schedule 2. Where the submission referred to the Agent's position on Items 3 and 7 at conciliation, I have not taken them into account, noting communications at conciliation are not admissible in arbitration.

23. For the reasons outlined, I am of the view that there is a clear legislative purpose for Item 7 and it is a stand-alone method of calculating PIAWE in particular circumstances. The question for arbitration is whether the criteria in Item 7 apply to the Worker's circumstances.

Did the Worker's injury result in an incapacity to work for one employer or both of his employers?

24. There are three parts to determining this issue:

    a. What does an 'incapacity to work' mean?

b. What is the relevant time to assess the Worker's incapacity to work?

c. At the relevant time, did the Worker's injury result in an incapacity to work for one employer or both of his employers?

What does an 'incapacity to work' mean?

25. The phrase 'incapacity to work' means an inability to perform some or all of the usual (pre-injury) duties and hours of a role at an employer due to an injury. I agree with the Agent's submission that a worker ceasing work, (or continuing work), does not of itself determine whether they have an incapacity to work at a particular employer - they may continue to work with a partial incapacity. They may also cease work even though they have no incapacity or a partial incapacity to work.

What is the relevant time to assess the Worker's incapacity to work?

26. A worker's incapacity to work could commence at different times at different employers and could fluctuate. I therefore need to decide the relevant time for me to refer to when assessing whether the Worker's injury resulted in an incapacity to work for one or both of his employers.

27. The heading in the second column in Schedule 2 refers to the class of worker 'at time of injury'. However, I find that the first date of incapacity is the appropriate time at which to assess whether the Worker's injury resulted in an incapacity to work at one or both of his employers, because:

    i. PIAWE have always been calculated by reference to the worker's earnings at the time of development of incapacitating symptoms (See *Grech v Orica Australia P/L & Anor* [2006] VSCA 172 at para 74).

    ii. Weekly payments are payable on and from first date of incapacity.

    iii. I have concluded that the purpose of Item 7 is to offset the impact of a worker's current weekly earnings on the amount of weekly payments payable, when they have an incapacity to work for one but not all employers, and they continue to work. Consistent with that conclusion, the relevant time to assess the Worker's incapacity to work is the first time his injury results in an incapacity to work.

At the first date of incapacity, did the Worker's injury result in an incapacity to work for one employer or both of his employers?

28. In order to determine this question, I need to make a finding about the first date the Worker had an incapacity to work. I find that the Worker's mental injury first resulted in an incapacity to work on 7 February 2023, because:

    i. The first date of incapacity mentioned in any Certificate of Capacity is 7 February 2023;

    ii. The parties agreed that the Worker ceased work at his full-time employer on 7 February 2023 because of his mental injury;

    iii. There is no evidence that the Worker ceased work at the second employer prior to 7 February because of his mental injury;

iv. The Agent's decision and further notice dated 24 May 2023 state that weekly payments were to be made payable from 7 February 2023;

v. The Worker gave oral evidence that on 7 February 2023 he hit a 'tipping point' and at that time, the severity of the injury had finally struck and he stopped work at the full-time employer;

vi. The Mental Health Care Plan completed by [GP's name] (GP) on 2 February 2023 and the Worker's oral evidence confirmed that the Worker consulted his GP with mental health symptoms and was struggling to work prior to 7 February 2023, yet there is no evidence that the GP considered the Worker to have an incapacity to work at either employer prior to 7 February 2023.

29. The remaining issue for me to determine is whether the Worker's injury also resulted in any incapacity to work at his second employer on 7 February 2023.

30. The Worker's oral evidence and report by [Psychologist's name], (treating Psychologist), dated 20 July 2023, detail how the work at the two employers differed. As there was no contradictory evidence presented, I accept that the nature of the work at the full-time employer and second employer was different, so it is possible to have an incapacity to work at the full-time employer but not the second employer.

31. There was contradictory evidence about whether the Worker continued to work at the second employer after 7 February 2023:

    a. The WCIRS decision notes that the Worker advised the WCIRS Review Officer in a phone call that he ceased work at the second employer on 7 February 2023, at the same time as the full-time employer.

    b. On the Certificate of Capacity dated 14 February 2023, covering the period 14 February 2023 to 14 March 2023, the Worker ticked a box indicating that he had not worked since the last Certificate of Capacity was provided (although I note other evidence confirming that there was no Certificate of Capacity provided before 14 February 2023).

    c. The payslips from the second employer and bank statements confirm that the Worker was paid for working shifts at the second employer until 19 February 2023. I note that the payslip for the period from 13 to 19 February 2023 indicated the Worker worked a weekend shift and 16 hours in evening shifts that week, when according to the bulk of his payslips from 22 August 2022, the Worker ordinarily worked 6 hours in evening shifts.

    d. The Worker gave varying accounts in his oral evidence and written submissions about when he ceased at the second employer, but all were consistent with him continuing to work after 7 February 2023. The Worker also gave oral evidence that when he took the call from the WCIRS Review Officer, he was probably confused when he told her he ceased work at the two employers at the same time.

32. I accept the Worker's oral evidence and submissions that he continued to work at the second employer after 7 February 2023 and that he gave incorrect information to the WCIRS Review Officer because:

i. the Worker's evidence is confirmed by the payslips of the second employer and his bank statements; and

ii. the second employer and the Worker's bank are independent of the parties and the documents were not created for the purpose of his claim.

Treating Health Practitioner Evidence

33. The evidence of the GP regarding the Worker's incapacity to work on and after 7 February 2023 is as follows:

    a. Three Certificates of Capacity, all dated 14 February 2023, certified the Worker to have no capacity for employment at various periods starting from 7 February 2023.

    b. Two reports of the GP, dated 22 and 23 August 2023. The GP stated he was made aware of the Worker's employment with the second employer on 17 March 2023, by which time the Worker had ceased employment with both employers. The GP also stated the Certificate of Capacity for the period from 7 February 2023 was issued on 17 March 2023.

34. While I note that the Certificate of Capacity for the period from 7 February 2023 certifies the Worker to have no capacity for employment, I give it little weight when deciding if the Worker had an incapacity to work at his second employer. This is because the certification is inconsistent with the fact the Worker continued working after 7 February 2023, thereby demonstrating some capacity to work. As I have placed little weight on the GP's evidence, I do not consider it necessary to make any further findings in relation to the other evidence and submissions regarding:

    a. the provision and timing of the Certificates of Capacity;

    b. the various requests from the full-time employer and the Agent for the Worker to obtain further or re-issued Certificates of Capacity; or

    c. when the Worker advised his GP that he had a second employer.

35. In his report dated 20 July 2023, the treating Psychologist referred to the significant impact of the injury on the Worker's second employment and that the Worker's injury was taking away the income from the second employer. I don't accept that the treating Psychologist's opinion is about the Worker's incapacity to work at the second employer as at 7 February 2023, because:

    i. the treating Psychologist does not specify when the Worker's injury resulted in an incapacity to work for the second employer; and

    ii. according to the uncontested submission of the Worker, the first date he consulted the treating Psychologist was 21 February 2023.

36. The Agent did not make any submissions regarding the medical evidence of the Worker's incapacity to work with the second employer, except for raising concerns in the hearing that the Worker ticked the box on a Certificate of Capacity indicating that he had not worked since the last Certificate of Capacity was provided. As discussed above, there is clear evidence that the Worker had in fact worked for the second employer, so I place little weight on this evidence when assessing the Worker's incapacity to work.

The Worker's Evidence

37. I note the Worker's lengthy written submissions, which I summarise as follows:

    a. He was not incapacitated for his second employer when he ceased work with his full-time employer, noting the differences in the two roles.

    b. He felt he had capacity to work with the second employer until 18 February 2023. On this date:

        i. he realised that 'due to the manifestation of the injury and nature of work involved with the client' at the second employer, he noticed he was working under 'great duress'; and

        ii. he could see the changes in his functioning and he decided to stop working with the second employer as he felt he was putting himself at risk and that he no longer had the capacity to work with either employer.

    c. He realised how injured he really was and how the injury affected his second employment 'after' he tried the four sleep-over shifts at the second employer between 7 and 18 February 2023.

38. The Worker's oral evidence was in essence that:

    a. He continued doing his usual hours and usual duties at his second employer after he stopped working at the full-time employer.

    b. After he stopped working at the full-time employer, he continued to work at the second employer while experiencing a range of psychological symptoms.

    c. Those symptoms have been impacting his capacity to work with the second employer and the particular client at the second employer, and impacting his capacity to keep himself and the client safe. So, at a point in time (he did not clearly specify which point in time), he had decided that it was not safe for him to be at the second employer and as a result, he decided to stop working with the second employer.

39. Taking into account the Worker's evidence, I find that on 7 February 2023, the Worker had no incapacity to work for his second employer because:

    i. There is no evidence to contradict the Worker's evidence that he worked his usual duties and usual hours at the second employer from 7 February 2023. This is consistent with him having no incapacity to work and demonstrating a full capacity to work.

    ii. The payslip for the period from 13 to 19 February 2023 indicated the Worker worked extra hours in evening shifts that week, compared to the bulk of his payslips from 22 August 2022, which is consistent with him having no incapacity to work.

    iii. While the Worker was somewhat uncertain in his oral evidence about when the injury impacted his capacity to work at the second employer and when he decided it was not safe for him to be there, I found his written submissions on this issue to be clear - he identified that on 18 February 2023 that he could see the changes in his functioning which resulted in his decision to stop work at the second employer. I

consider this to be consistent with his incapacity to work at the second employer arising after 7 February 2023.

40. Based on the findings above, I determine that the Worker had an incapacity to work at the full-time employer but not the second employer as at 7 February 2023.

Conclusion

41. As I have found that the Worker was employed by 2 or more employers and that his injury resulted in an incapacity to work for one but not both of his employers at the relevant time, I find that the Worker meets the criteria for the class of worker in Item 7 of Schedule 2.

DETERMINATION

42. I determine that the Agent's decision dated 23 February 2023 is revoked. This means that the determination is in favour of the Worker.
43. I determine that the Agent must re-calculate the Worker's pre-injury average weekly earnings to include earnings from work with all of the Worker's employers, in accordance with Item 7 of Schedule 2 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) ('the Act').
44. I order and direct the Agent to calculate and pay the amount of compensation to which the Worker is entitled, in accordance with the Act.
45. This determination comes into effect immediately. I certify that each party is bound by this result.

COSTS

46. As this determination is in favour of the Worker, I award the Worker's costs as fixed under section 301W of the Act to be paid by the Agent.
47. 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 Workplace Injury Commission within 30 days of this determination.

[Signed]

……

Michael Ryall

Arbitration Officer